

Mr. John J. Holmes
 State Auditor
 State Capitol
 Helena, Montana

Dear Mr. Holmes:

You have requested my opinion concerning the payment of the fees fixed by sub-section d. of Section 4050, Revised Codes of Montana, 1935, by a foreign corporation the shares of which corporation are sold by brokers in the State of Montana.

You state in your letter that the corporation which has raised the question has few, if any, assets in the State of Montana.

Sub-section d. of Section 4050, Revised Codes of Montana, 1935, provides in part:

The following fees shall be paid to the investment commissioner:

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- d. For the credit of the general fund, each investment company, domestic or foreign, licensed under this act, and selling the class of securities as defined in section 4027, shall pay to the investment commissioner on or before the first day of July, each year, a fee based upon the total assets of such investment company, as shown by its last annual statement and upon the following rates:
 . . . "

It is to be noted from the above that the fee to be paid is fixed by the total assets of the investment company and is not limited to its assets within the State of Montana.

Our Supreme Court in the case of J. I. Case T. M. Co. vs. Stewart, 60 Mont. 380, 199 Pac. 909, considered a statute which required the Secretary of State to collect a graduated fee for the filing of certificates of incorporation based upon the entire capital stock. The Court held the statute invalid as to foreign corporation and made the following observation:

"A statute which imposes the tax upon the total capital stock when only a portion thereof is represent-

Opinion No. 154

Corporations, Foreign

Held: That sub-section d. of Section 4050 R.C.M., 1935, which fixes an annual fee based upon the total assets of an investment company is invalid in so far as it applies to a foreign corporation which has property outside of Montana, as to such property without the State.

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ed by the property and business of the corporation in the state imposing taxes is invalid. If the corporation is engaged in interstate commerce in whole or in part, such a statute contravenes the commerce clause of the federal Constitution; and such a statute is violative of the due process clause of the Fourteenth Amendment, whether the corporation is engaged in interstate or intrastate commerce. A statute may escape condemnation if it imposes the tax only upon the proportion of the total capital stock represented by the property and business in the state imposing the tax, or if it provides a reasonable maximum charge to be imposed without reference to the total capital stock."

It is apparent from the above quoted, the rule is settled that this state cannot tax property of a foreign corporation lying without the state. In Chicago R. R. Co. vs. Harmon, 89 Mont. 1, 295 Pac. 762, the court approved the above quoted case and held that a state cannot "seek to tax property lying without the state" of a foreign corporation.

In view of the provisions of Section 11, Article XV, of the State Constitution, that no foreign corporation shall have or enjoy, within this state, any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of this state, domestic corporations may be taxed only on property within this state.

It is therefore my opinion that subsection d. of Section 4050, Revised Codes of Montana, 1935, which fixes an annual fee based upon the total assets of an investment company is invalid in so far as it applies to a foreign corporation which has property outside of Montana, as to such property without the state.

Sincerely yours,
R. V. BOTTOMLY
Attorney General