Reconstruction Finance Corporation—Regional Agricultural Credit Corporation—Corporation License Taxes—Corporations—Secretary of State—Filing Fees.

Regional agricultural credit corporation authorized to be created by the Reconstruction Finance Corporation will not, when doing business in Montana, be subject to the payment of corporation license taxes even though it be incorporated under the laws of the state of Delaware; neither will the corporation be subject to the provisions of chapter 169, laws of 1931, relating to the payment of fees to the secretary of state.

Mr. W. E. Harmon, September 13, 1932.
Secretary of State,
Helena, Montana.

My dear Mr. Harmon:

I have your letter in which you enclose a communication received by

you from the Reconstruction Finance Corporation in which it inquires if a regional agricultural credit corporation authorized to be created by the Reconstruction Finance Corporation by the terms of the Emergency Relief and Construction act of 1932 would be subject to the corporation license taxes provided for in section 2296 R.C.M. 1921, if the said regional agricultural credit corporation is incorporated under the laws of the state of Delaware and does business in the state of Montana.

The provision of the act authorizing the Reconstruction Finance Corporation to create regional agricultural credit associations is as follows:

> "The Reconstruction Finance Corporation is further authorized to create in any of the twelve Federal land bank districts where it may deem the same to be desirable a regional agricultural credit corporation with a paid up capital of not less than $3,000,000 to be subscribed for by the Reconstruction Finance Corporation and paid for out of the unexpended balance of the amounts allocated and made available to the Secretary of Agriculture under section 2 of the Reconstruction Finance Corporation act. Such corporations shall be managed by officers and agents to be appointed by the Reconstruction Finance Corporation under such rules and regulations as its board of directors may prescribe. Such corporations are hereby authorized and empowered to make loans or advances to farmers and stockmen, the proceeds of which are to be used for an agricultural purpose (including crop production), or for the raising, breeding fattening or marketing of livestock, to charge such rates of interest or discount thereon as in their judgment are fair and equitable, subject to the approval of the Reconstruction Finance Corporation, and to rediscount with the Reconstruction Finance Corporation and the various Federal reserve banks and Federal intermediate credit banks any paper that they acquire which is eligible for such purpose. All expenses incurred in connection with the operation of such corporation shall be supervised and paid by the Reconstruction Finance Corporation under such rules and regulations as its board of directors may prescribe."

In considering the relation of these credit corporations, when formed, to the United States government there is not presented a case where corporations are subsidized by the United States government nor where, by contract, they render services for the government. It is, rather, a case where the corporation is incorporated by the Reconstruction Finance Corporation, a federal corporation created by the federal laws to perform certain services, to carry out certain policies of the government, the entire capital of the credit corporation being owned by said Finance Corporation, the affairs of the credit corporation being managed by officers and agents appointed by the Finance Corporation, and the sole business to be done by the credit corporation is that of carrying out the policy of the United States to make loans to farmers and stockmen for agricultural and livestock purposes. The regional agricultural credit corporation will be but the means that has been selected by congress for

the purpose of carrying out the federal law with respect to these loans which are to be made to farmers and stockmen. The entire business to be conducted by the corporation is limited by the act authorizing its creation.

The Reconstruction Finance Corporation act specifically provides that the Reconstruction Finance Corporation is exempt from taxation as follows:

> "The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality or local taxing authority; except that any real property of the corporation shall be subject to State, Territorial, county, municipal or local taxation to the same extent according to its value as other real property is taxed."

Nothing is said in the federal law concerning the taxation of the regional agricultural credit corporations. In determining whether the credit corporations are subject to state taxation consideration must be given not only to their corporate form but the relation they bear to the United States government, the business to be done by them, and whether they are so closely related to the Reconstruction Finance Corporation as to be deemed subject to exemption under the provision relating to the Finance Corporation.

The scheme of the United States government availing itself of the services of corporations incorporated either under federal or state laws for the purpose of executing the policies of the government is not new. By the act of July 9,1918, 40 Stat. 845, 888, the Director of Aircraft Production was authorized to form one or more corporations under the laws of any state for the purchase, production, manufacture and sale of aircraft, or equipment or materials therefor, and to own and operate railroads in connection therewith.

In pursuance of this authority the United States Spruce Production Corporation was organized under the laws of the State of Washington. All of the stock of the corporation, with the exception of seven shares held by the trustees of the corporation, was subscribed for by the United States and the trustees' shares were controlled by the United States. An effort was made by Clallam county, Washington, to tax the property of the corporation but the Supreme Court of the United States held that the corporation, under the circumstances mentioned above, was organized by the United States as an instrumentality for carrying on the war in which it was then engaged and that it was used solely as a means to that end; that the incorporation and the formal erection of a new personality—the corporate character—was only for the convenience of the United States to carry out its ends and therefore the property of the corporation could not be taxed.

> Clallam County vs. United States and United States Spruce Production Corp., 263 U. S. 341;
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> King County, Wash. vs. United States Shipping Board Emergency Fleet Corp., 282 Fed. 950;

U. S. vs. Coghlan, 261 Fed. 425.

The relation of the United States to the regional agricultural credit corporations is similar to that borne by the United States to the Spruce Corporation above mentioned. In both instances the corporations were authorized to be formed by an act of congress. In the one case the corporation was formed under state laws and in the other case they will be.

When the credit corporations are incorporated under the laws of the state of Delaware, and the terms of the act of congress have been complied with, the entire capital will be owned or controlled by the Reconstruction Finance Corporation, a federal corporation created for the purpose of putting into effect certain governmental policies, and the business to be transacted by the credit corporations will consist entirely of effectuating those policies as was true in the case of the Spruce Corporation. I can see no possibility for differentiating between these two corporations as to their relation to the United States government and under the authority of the Spruce Corporation case it is my opinion that the credit corporations would not be subject to taxation by the states.

While the Spruce Corporation case involved the taxation of physical property the question here involved is the imposition of corporation license taxes. The tax imposed by section 2296, R.C.M. 1921 is an excise upon the corporation for the privilege of doing business as such within the state of Montana. (Equitable Life Assurance Co. vs. Hart, 55 Mont. 76, 173 Pac. 1062). The states are prohibited from taxing the means or instrumentalities employed by the United States to carry into execution the powers vested in the general government and these means or instrumentalities include corporations when so employed. (McCulloch vs. Maryland, 4 Wheat. 316; Clallam County vs. U. S., et al, supra).

The license tax is imposed against the corporation and is measured by its net income. It would, therefore, be a taxation of the means adopted by congress in this instance to carry on the business authorized by congress to be done in the act creating the credit corporation. The theory upon which a state is forbidden to tax the United States government, or any of its property, or the means employed by it for executing its powers is that the power to tax is the power to destroy, and that if the state is permitted to levy taxes against the United States, its property, or any of its instrumentalities employed for the purpose of executing its undertakings, it would lie within the power of the state to seriously injure or even destroy the power of the federal government to function by simply resorting to burdensome or excessive taxation. If the state could impose a license tax upon the credit corporation it would lie within its power to make the tax so burdensome that the corporation would succumb and thus would be destroyed the means by which the government has undertaken to administer that part of the federal act relating to loans to be made to farmers and stockmen.

The Supreme Court of the United States has held that it does not lie within the power of a state to subject a federal instrumentality to an occupation or privilege tax. (Choctaw, Oklahoma and Gulf R. R. Co. vs. Harrison, 235 U. S. 292).

In addition to what has been said above, it is my opinion that these credit corporations, when formed, will be so closely related to the Reconstruction Finance Corporation that they should be considered as exempted from the imposition of the license tax under the clause exempting the Reconstruction Finance Corporation from taxation. In effect, the Reconstruction Finance Corporation will simply be discharging duties imposed upon it by the federal law through the means of these credit corporations.

The Emergency Relief and Construction Act provides that all of the expenses incurred in the operation of the credit corporations shall be supervised and paid by the Reconstruction Finance Corporation, and that corporation having control of the entire capital stock of the credit corporations, and having the power to appoint their officers and agents, it is apparent that the Finance Corporation will in effect transact the business by means of the credit corporations. In such a case the law will look back of the bare corporate character and ascertain who is the real, rather than the nominal, party who is being taxed which in this case would be the Reconstruction Finance Corporation. The excise, if levied against the credit corporations, would have to be paid out of their property or by the Finance Corporation. If paid by the former, inasmuch as all of their capital stock is owned by the Finance Corporation, it is apparent that in reality the Finance Corporation would have to bear the burden of paying these excises because it is, by virtue of its entire stock ownership, the equitable owner of the property of the credit corporations; yet the act creating the Finance Corporation expressly provides that its capital, reserves, surplus, income and franchise, is exempt from taxation by the states.

If the tax is considered as an expense of the credit corporations the federal law requires all expenses to be paid by the Finance Corporation so that this tax would have to be paid by it; yet the federal law also provides that the Finance Corporation is exempt from the taxation. If the taxes are properly considered as an expense these provisions of the federal law would seem to forbid the states from placing any expense upon the credit corporations by the imposition of taxes for by virtue of the federal law the tax would have to be borne by the Finance Corporation if properly leviable, notwithstanding that law forbids the states to burden that corporation with taxes.

Certainly if the Finance Corporation had itself done the business directly which is going to be done through the credit corporations under its supervision and control the exemption clause would forbid the state from in any manner taxing the Finance Corporation. The fact that the business will be done through another corporation wholly owned and controlled by it instead of directly by the Finance Corporation does not, in my opinion, sufficiently separate the Finance Corporation from the tax so as to escape the force and effect of the exemption contained in the Reconstruction Finance Corporation Act.

For the reasons above mentioned it is my opinion that the state would not be authorized to subject the credit corporation doing business

in Montana to the imposition of the corporation license taxes mentioned in section 2296, R.C.M. 1921.

The Reconstruction Finance Corporation also inquires if the credit corporations would be subject to the provisions of chapter 169, laws of 1931. This chapter provides that all foreign corporations must, at the time they present for filing a certified copy of their charter, pay an amount which graduates according to the proportion of the capital stock represented by property and business transacted in Montana; for the filing of annual reports showing these proportions and for the payment of additional sums when the reports show an increased proportion of the property and business transacted in the state.

The right of a state to regulate or exclude foreign corporations from doing business within its boundaries is subject to exceptions or qualifications which have been stated by the United States Supreme Court, as follows:

> "One of these qualifications is that the state cannot exclude from its limits a corporation engaged in interstate or foreign commerce. * * *" The other limitation on the power of the state is where the corporation is in the employ of the Federal Government * * *." (Horn Silver Mining Company vs. N. Y., 143 U. S. 305).

The supreme court of Montana quotes with approval from volume 14A of Corpus Juris at page 1248 the same rule as follows:

> "Only two exceptions or qualifications have been attached to the power of a state to exclude foreign corporations from coming into the state and doing business there. One of these qualifications is that the state cannot exclude from its limits a corporation engaged in interstate or foreign commerce * * * the other when the corporation is an agency or instrumentality in the employment of the federal government." (Chicago & Milwaukee R. R. Co. vs. Harmon, 89 Mont. 1, 295 Pac. 762).

The rule applies whether the corporation is created by an act of congress or under the laws of a state.

> Hooper vs. California, 155 U. S. 648;
> Stockton vs. Baltimore & N. Y. R. R., 32 Fed. 9 (quoted with approval in Horn Silver Min. Co. vs. N. Y., supra);
> Telephone Company vs. Texas, 105 U. S. 460.

In Pembina Mining Co. vs. Pennsylvania, 125 U. S. 181, the supreme court said:

> "* * * and undoubtedly a corporation of one state, employed in the business of the general government may do such business in other states without obtaining a license from them."

The general rule as stated in Corpus Juris is:

> "So every corporation of any state in the employ of the United States has the right to exercise the necessary corporate powers and to transact the business requisite to discharge the duties of that employment in every other state in the Union

> without permission granted, or conditions imposed by the latter. As to its nongovernmental business, however, a corporation in the employ of the general government is subject to state reglations, and the property of such a corporation is subject to state taxation." (14A C. J., 1256).

Other laws of Montana provide that a foreign corporation is forbidden to engage in business in this state until it has filed a certified copy of its charter in the office of the secretary of state and has otherwise qualified to do business as the state commands. Under said chapter 169 of the laws of 1931 the payment of the sums mentioned therein is required as a condition precedent to its right to file a certified copy of its articles. Said chapter also provides that should the corporation fail to file its annual reports or pay any amount subsequently found to be due the state that such failure shall forfeit the corporation's right to do busines in this state.

It is apparent that if the credit corporations were subjected to the provisions of these laws they would be forbidden to perform the governmental services required by the federal law unless they complied with the statute. Under the authorities above cited a corporation has the right to transact the governmental business in the state free from any restrictions or burdens imposed by the state, and even against prohibitions of the state law. It follows that the credit corporations cannot be held to be subject to the terms of said chapter 169 of the laws of 1931, and especially in view of the fact that the corporations, as hereinbefore stated, are solely controlled by the Reconstruction Finance Corporation, a federal corporation, and their sole purpose is to afford the means by which the federal government and its agency, the Reconstruction Finance Corporation, will carry into effect the policy of the government as expressed in the federal statute providing for the creation of the credit corporations.

Very truly yours,

L. A. FOOT,

Attorney General.