OPINION
57-199

October 9, 1957 (OPINION)

TAXATION

RE: Exemption - Moneyed Capital

This opinion is in reply to your letter of September 18, 1957, asking for my opinion on the question of what moneys and credits are subject to local assessment and taxation under that part of section 57-0208, N.D.R.C. 1943, quoted as follows:

> 57-02-08. PROPERTY EXEMPT FROM TAXATION. All property described in this section to the extent herein limited shall be exempt from taxation, that is to say:
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> 7. Moneys and credits, except moneyed capital which is so invested or used as to come into direct competition with money invested in bank stock."

You are concerned, for example, with money that is loaned out for houses by savings and loans associations, money loaned by finance companies for cars and money loaned by small loan companies for personal use.

It is necessary to consider the legislative history of the statutory exemption quoted above in order to determine its meaning. It has its source in section 2078a3 of the 1925 Supplement to the Compiled Laws of 1913. It was passed at a time when North Dakota law, section 2115, 1925 Supp., C.L. 1913, provided for assessment and taxation to stockholders of shares of stock held by them in national or state banks. Until March 4, 1923, it was the only method permitted by Congress for taxing personal property of national banks. States could not then and cannot now tax national banks except as authorized by Congress and under the conditions permitted by Congress. 84 C.J.S. 293, section 150 et seq. This permission to tax the national bank shares to stockholders included the condition "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State." Section 5219, Revised Statutes of the United States.

The amendment of March 4, 1923, Chapter 267, 42 Stat. 1499, to section 5219, added two new forms of taxing national banks and provided that:

> In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: PROVIDED, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens, not employed or engaged in the banking or investment business and representing merely

> personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section." (now appears as 12 U.S.C.A. 548(1)(b).)

In First National Bank v. Anderson (Iowa 1926), 269 U.S. 341, 347-348, 46 S. Ct. 135, 139, 70 L. Ed. 1036, the United States Supreme Court summarized its holdings in previous cases and held, page 350 of the U.S. Report, that the 1923 amendment, by which section 5219 was reenacted as quoted above, "did no more than to put into express words that which according to repeated decisions of this Court, was implied before. In Mercantile National Bank v. New York, supra, where the terms and purpose of the restriction were considered, it was distinctly held that the words 'other moneyed capital' must be taken as impliedly limited to capital employed in substantial competition with the business of national banks. In later cases that definition was accepted and given effect as if written into the restriction. It, of course, would exclude bonds, notes or other evidences of indebtedness when held merely as personal investments by individual citizens not engaged in the banking or investment business, for capital represented by this class of investments is not employed in substantial competition with the business of national banks. Thus in legal contemplation and practical effect the restriction was the same before the reenactment." The court in this case, however, did find that substantial competition between total personal investments of individual citizens of the county and the national bank existed because the pleadings were found to admit that fact.

It seems clear that the language of section 2078a3 of the 1925 Supp., C.L. 1913, exempting moneys and credits "except moneyed capital of the citizens of the State of North Dakota which is so invested or used as to come into competition with money invested in bank stock of banks doing business in this state" was written to reflect the interpretations placed by the courts on the statutory conditions provided by Congress for taxing national banks. As stated by the North Dakota Supreme Court in Ward County v. Baird, 55 N.D. 670, 677, 215 N.W. 163, 165:

> In this state the legislature has consistently recognized the limitations upon its taxing powers with respect to national banks. It has also consistently endeavored to treat state and national banks alike for purposes of taxation."

Accordingly, since the North Dakota courts have not been called upon to construe the term "moneyed capital" as used in section 57-0208(17) to determine what moneyed capital is taxable, it is appropriate to look to the construction placed by the courts on that term as it is used in the federal statute and, for the purposes of section 57-0208(17), extend the construction to competition with state banks as well as national banks.

Before determining how the courts have defined moneyed capital in competition with national banks, it should be realized that North Dakota no longer assesses and taxes to stockholders the shares of stock held by them in banks but since 1942 has imposed a tax, measured by four percent of net income, on all banks for the

privilege of doing business in the state, this form of tax on national banks having been permitted by the congressional enactment of March 25, 1926, Chapter 88, 44 Stat. 223, amending section 5219 of the Revised Statute of the United States. See 84 C.J.S. 293, section 150 and 84 C.J.S. 297, section 153. See also Crown Finance Co. v. McColgan, 144 P. 2nd. 331, 333. Whether or not the exception in section 57-0208(17) by which moneyed capital can be taxed should have been repealed by the Legislature in 1941 when it enacted the present bank tax law (Ch. 57-35, N.D.R.C. 1943) or omitted from the 1943 Code revision because of this change in the method of taxing banks, the fact remains that it was not repealed or omitted and that it is still a part of our North Dakota Code.

"Moneyed capital" is the difference between a person's debits and credits. 84 C.J.S. 303. As used in this federal statute it:

> means capital employed in the form of money, and so employed in business as to yield a profit from its use as money, and is further restricted to capital employed in substantially the same way as the capital of the national banks, that is, in making loans and discounts. . . ." 84 C.J.S. 303.
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> Competition" as used in this federal statute is used in a "commercial sense, as meaning a struggle between business rivals for the same business, and arises not from the character of the business of those who compete, but from the manner of the employment of the capital at their command, and, accordingly, a similarity of investment use must be shown. The discrimination is not material or violative of the federal statute unless it favors moneyed capital invested in actual and substantial competition with the capital invested in the shares of national banks. . . .
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> To compete with a national bank implies the performance of some banking functions performed by a national bank. Hence, moneyed capital comes 'into competition with business of national banks' within the meaning of that phrase, where a business is carried on and money is employed therein in the same manner as in the case of national banks, that is, where the money is used in similar transactions in which national banks are engaged and in the same locality. . . .
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> Competition does not mean there should be a competition as to all phases of the business of national banks, but applies as well where it exists only with respect to some particular feature or features of the business of national banks. . . . Competition in the sense intended by the federal statute is limited to the employment of moneyed capital substantially as in the loan and investment features of banking, and does not apply to competition for deposits." 84 C.J.S. 303-305.

As already indicated, the foregoing interpretations of "moneyed capital" and "competition," while made with respect to the business of national banks, must be extended to the business of state banks also for the purpose of construing section 57-0208(17) to determine whether moneyed capital is subject to assessment and taxation because it is so invested or used as to come in direct competition with that

invested in bank stock of state or national banks.

In Merchants National Bank of Glendive v. Dawson County (Mont. 1933), 19 P. 2nd. 892, it was held that money invested by members in building and loan associations was not moneyed capital in competition with the business of the national bank which brought the action. Assuming similar facts, the investments of North Dakota citizens in domestic or federal building and loan associations would not be taxable under section 57-0208(17).

In Crown Finance Corporation v. McColgan (Cal. 1943), 144 P. 2nd. 331, it was held that the corporation which purchased conditional sales contracts and accounts from neighborhood retailers with or without recourse on the retailer in case of default was in substantial competition with a national bank which (1) loaned money to patrons to buy the same kind of articles but which articles were not taken as security, or which (2) purchased conditional sales contracts from the same kind of retailers with recourse and in connection with which it maintained a reserve of twenty to forty percent as an additional guaranty of performance by the dealer. Under similar facts I believe investments by North Dakota citizens in finance companies would be taxable under section 57-0208(17).

In First National Bank v. Louisiana Tax Commission, 289 U.S. 60, 53 S. Ct. 511, 77 L. Ed. 1030, 87 A.L.R. 840, it was held that mortgage companies, insurance companies, building and loan associations and individuals who loaned money on mortgages of real estate were not in competition with a national bank which held real estate mortgages not as security for money lent on the mortgages but which probably were taken to secure preexisting liabilities or as additional security for personal loans. The same case held that small loan companies making loans not exceeding three hundred dollars which were payable out of the borrowers' salaries and for which the borrowers were charged interest at three and one-half percent per month were not in competition with the bank because the bank did not make loans of this character. Under similar facts North Dakota citizens who invested in mortgage companies, insurance companies and building and loan associations which loaned money on real estate mortgages or individuals who loaned money on real estate mortgages would not be taxable on such investments under section 57-0208(17) unless the bank in that locality made similar loans on real estate mortgages and unless the amount so invested or loaned by the individual was substantial in amount as compared to the similar loans of the bank in that locality. Similar conclusions must be made as to taxability of investments in small loan companies.

The taxation of loans made by individuals has already been discussed in the quotation from the U.S. Supreme Court case of First National Bank v. Anderson. It is conceivable, however, that an individual making many loans in a locality having a small bank which also makes the same type of loans would be in substantial competition with the bank and should therefore be assessed on the value of his loans outstanding.

It should be borne in mind that if moneyed capital is to be assessed and taxed under the exception in section 57-0208(17), it is the investment of the individual or other investor which is assessed,

that is, if a corporation or association is found to be in substantial competition with a bank, it is the investment of the individual stockholder or member in such corporation or association which is assessed rather than the amount of outstanding loans held by the corporation or association.

Whether or not moneyed capital "is so invested or used as to come into direct competition with money invested in bank stock" necessarily depends upon the facts of each case. To summarize, before moneyed capital can be assessed and taxed under the exception in section 57-0208(17), it must be established that such moneyed capital is invested or used in such a way and in such an amount that there is substantial competition with a bank in the same locality which is using or investing its capital in the same way.

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