



PRICE DANIEL  
ATTORNEY GENERAL

# THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

June 18, 1948

*Overruled opinion  
Book 355 Page 952  
4-30-34 to W.W. Heath  
Opinion No. 2961 3-27-35*

Hon. C. H. Cavness  
State Auditor  
Austin, Texas

Opinion No. V-611

Re: The inclusion of bonds,  
notes, and debentures  
originally maturing a  
year or more from date  
of issue, but now past  
due, in determining tax-  
able capital for franchise  
tax purposes.

Dear Mr. Cavness:

You have requested our opinion as to which of two divergent opinions by former Attorneys General would govern in determining the amount of notes, bonds, or debentures, which originally became due and matured one year or more from date of issue but which are still outstanding and unpaid, to be considered as taxable capital for franchise tax purposes under the provisions of Article 7084, Revised Civil Statutes, as amended.

The part of Article 7084, Revised Civil Statutes, 1925, as amended by Acts 1930, 41st Legislature, 5th C.S., page 220, Chapter 68, Sec. 2, pertinent to this opinion is as follows:

"Except as herein provided, every domestic and foreign corporation heretofore or hereafter chartered or authorized to do business in Texas, shall, on or before May 1st of each year, pay in advance to the Secretary of State a franchise tax for the year following, based upon that proportion of the outstanding capital stock, surplus and undivided profits, plus the amount of outstanding bonds, notes and debentures, other than those maturing in less than a year from date of issue,

The opinion of Hon. James V. Allred, Attorney General, addressed to Hon. W. W. Heath, Secretary of State, Austin, Texas, approved April 30, 1934, referred to in your request, contains the following question:

"3. Shall bonds, notes and debentures which originally matured one year or more from date of issue and

have since matured and are now past due on the books of the corporation be considered a part of taxable capital within the meaning of Article 7084?"

The answer thereto is as follows:

"It is our opinion that such bonds, notes and debentures that originally matured one year or more from date of issue and have matured and are past due at the time the corporate books are closed for the fiscal year, should not be considered in measuring the franchise tax due by a corporation."

On March 27, 1935, the Hon. William McCraw, Attorney General of Texas, delivered an opinion to the Hon. Gerald C. Mann, Secretary of State, in answer to the following question:

"Shall bonds, notes and debentures which originally matured one year or more from date of issue and have since matured and are now past due on the books of the corporation, be considered a part of the taxable capital within the meaning of Article 7084?"

After referring to the opinion addressed to the Hon. W. W. Heath, under date of April 30, 1934, supra, and stating that a "divergent view" to that opinion must be registered, the then Attorney General made the following holding:

"Therefore, it is our opinion and you are so advised, that notes, bonds, and debentures originally maturing one year or more from date of issue, but past due, should be considered as taxable capital of a corporation for franchise tax purposes."

You request advice as to which of the two foregoing opinions shall govern in determining the amount of notes, bonds, and debentures subject to franchise tax by corporations.

The Office of the Secretary of State advises that it has consistently followed the opinion rendered by the Hon. William McCraw, dated March 27, 1935, from the time it was received by that office up to the effective date of Article VIII, Sec. 1, Chap. 184, Acts 47th Leg., 1941, p. 269, which materially changed the verbiage of that part of Article 7084 above quoted. Since such change there has been no question but that such outstanding and unpaid sums are considered as taxable capital for franchise tax purposes.

The holding contained in the opinion of the Hon. William McCraw, Attorney General, approved March 27, 1935, in limited confer-

ence, is in accord with the plain and unmistakable phraseology of the statute as evidenced by the intention of the Legislature in its enactment. Although the opinion of the Hon. William McCraw did not specifically overrule the opinion rendered by the Hon. James V. Allred, dated April 30, 1934, nevertheless, the language therein contained is conclusive that such was the intention of the Attorney General in rendering the opinion approved March 27, 1935; and it is the opinion of this Department that the holding in the opinion of the Attorney General dated March 27, 1935, is correct.

The departmental construction of the Secretary of State based upon the opinion of the Attorney General approved March 27, 1935, having been consistently followed for a period of more than thirteen years, and the Legislature having met many times since the rendition of the opinion, the following rule enunciated by the Supreme Court of Texas in the case of *Isbell vs. Gulf Union Oil Company*, 209 S.W. (2d) 762, would govern:

"While the Legislature has met many times since Article 7092 was construed as above indicated, it has not undertaken to change the statute so as to alter the construction which had been given it. If the Legislature did not approve the construction which had been given the statute, it could have easily amended the law. This was not done. This Court does not feel justified to hold now that the Secretary of State was in error in the construction of this statute."

You are therefore advised that notes, bonds, and debentures originally maturing one year or more from date of issue, but now past due, should be considered as taxable capital for franchise tax purposes under the provisions of Article 7084, Revised Civil Statutes.

#### SUMMARY

Notes, bonds, and debentures originally maturing one year or more from date of issue but since matured and past due on the books of the corporation are part of the taxable capital within the meaning of Art. 7084, R.C.S. of Texas, 1925, as amended by Acts 1930, 41st Leg., 5th C.S., p. 220, Ch. 68, Sec. 2. *Isbell v. Gulf Union Oil Co.*, 209 S.W. (2d) 762; Attorney General's opinion addressed to Hon. W. W. Heath, Secretary of State, dated April 30, 1934, overruled; Attorney General's opinion addressed to Hon. Gerald C. Mann, Secretary of State, dated March 27, 1935, approved.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By

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APPROVED

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CKR/JCP