Opinion No. 53-5667

February 12, 1953

BY: RICHARD H. ROBINSON, Attorney General

TO: State Corporation Commission State of New Mexico Santa Fe, New Mexico. Attention: Corporation Division

*{*58}* This is in reply to your request for an opinion of this office upon the question as to whether corporations authorized to do business in the State of New Mexico should be required to pay fees for increases in their issued capital stock under Section 54-1001 (5), New Mexico Statutes Annotated, 1941 Compilation, as amended; Laws of 1905, Ch. 79, Sec. 119; Laws of 1917, Ch. 112, Sec. 7; Laws of 1921, Ch. 29, Sec. 1; and Laws of 1929, Ch. 198, Sec. 1.

The provisions of this Act require that upon an increase in the capital stock of a foreign corporation, the same fees for the amount of the total increase as specified for original admission to do business in the State shall be paid by foreign corporations, provided however, that in no event shall such fees exceed the sum of $ 2,000. There has been much litigation in the Supreme Court of the United States and the several States upon the question of whether such a requirement is an unconstitutional burden upon interstate commerce. In this respect, a late decision, STATE ex rel TEXAS COMPANY vs. KOONTZ, cited in Sup. Ct. Nev., 240 P. 2d 525, summarizes to a great extent the historical litigation in the United States Supreme Court upon whether such a fee requirement is an unlawful burden upon interstate commerce. The distinction in the cases appears to be that in states where a foreign corporation authorized to do business therein had been properly certified prior to the enactment of a subsequent law requiring an additional fee for increased capitalization, that such a subsequent law could not disfranchise the corporation and such a fee was an unconstitutional burden. In the KOONTZ case, the Court clearly distinguishes the type of tax upon a corporation wherein the corporation, upon admittance to the State to do business, was admitted with knowledge of the laws of the State in existence at that time and was therefore subject to the laws of the State at that time. In CUDAHY PACKING CO. vs. HINKLE, 49 Sup. Ct. 204, 278, U.S. 46, 73 L. Ed. 454, the Supreme Court of the United States upheld the doctrine of LOONEY vs. CRANE, previously decided in the Supreme Court, 245 U.S. 178, 38 Sup. Ct. 85, 62 L. Ed. 230, and over-ruled BALTIC MINING CO. v. MASSACHUSETTS, 268 U.S. 203, 56 Sup. Ct. 477, 69 L. Ed. 916. In this respect, your attention is directed to the KOONTZ case (supra) and CHICAGO CORPORATION v. SHEPARD 248 S.W. 2d 261, wherein the State Courts upheld such a fee and text, 51 Am. Jur. 730, which discusses prior decisions and summarizes the law to date.

It is the opinion of this office that the laws of the State of New Mexico require payment of this fee and until such laws have been invalidated by a clear and concise ruling by a controlling court of record neither the State Corporation Commission nor the Attorney General can attack them as unconstitutional. If the corporation *{*59}* in question desires

to overturn the law, it may, of course, pay the tax under protest and proceed in our courts to clarify the law.

It is the opinion of this office that Section 54-1001, subparagraphs (1) and (2), New Mexico Statutes Annotated, 1941 Compilation, as amended, contemplates that a foreign corporation increasing its authorized capital stock into a higher fee bracket should be given credit for prior payment, or payments, made under this section of the law in arriving at the net sum due from the corporation. (Example: prior capital $ 14,000,000.00, fee $ 750.00; new capital $ 22,000,000.00, fee $ 1,000.00 less credit $ 750.00; balance due -- $ 250.00.)

We trust that this opinion is of some assistance to you in the handling of this matter.

By: William J. Torrington

Assist. Attorney General