

Opinion No. 57-287

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BY: OPINION OF FRED M. STANDLEY, Attorney General Joel B. Burr, Assistant Attorney General

TO: Alex Pacheco, Chief Clerk, Corporation Department, State Corporation Commission, Santa Fe, New Mexico

QUESTION

QUESTIONS

1. Are domestic and foreign corporations, that are in a forfeited status and that have applied for dissolution or withdrawal, required to reinstate and file delinquent reports, as required by § 51-2-36, N.M.S.A., 1953 Comp., with the State Corporation Commission and pay corresponding filing fees before the Commission can issue to said corporation a certificate of dissolution or withdrawal?
2. What are the conditions precedent to the issuing of a certificate of dissolution or withdrawal by the State Corporation Commission in regard to tax clearance and the payment of delinquent fees?

CONCLUSIONS

1. No.
2. See Opinion.

OPINION

ANALYSIS

§ 51-2-36, N.M.S.A., 1953 Comp., requires every domestic and foreign corporation doing business in this State, except organizations incorporated for religious, charitable or benevolent purposes, or those not organized for profit, to file an annual report with the State Corporation Commission. The statute further provides that upon failure to file such report, a corporation shall forfeit its right to do business in the state. The statute then provides, however, that any such corporation may be permitted to resume business upon payment to the State Corporation Commission of a reinstatement fee of \$ 5.00 and the filing of all delinquent annual reports.

§ 51-7-1, N.M.S.A., 1953 Comp., 1957 p.s., outlines the procedure to be followed by the directors and stockholders of the corporation, and also by the State Corporation

Commission in a voluntary dissolution of a corporation organized under the laws of New Mexico. This section reads as follows:

"§ 51-7-1. Voluntary dissolution by directors and stockholders - Procedure. -- Whenever in the judgment of the board of directors, it shall be deemed advisable and most for the benefit of such corporation that it should be dissolved, the board, within ten (10) days after the adoption of a resolution to that effect by a majority of the whole board at any meeting called for that purpose, of which meeting every director shall have received three (3) days' notice, shall cause a notice of the adoption of such resolution to be mailed to each stockholder residing in the United States, and also beginning within said ten (10) days cause a like notice to be published in a newspaper published in the county wherein the corporation shall have its principal office, at least four (4) weeks successively, once a week, next preceding the time appointed for the same, of a meeting of its stockholders to be held at the office of the corporation, to take action upon the resolution so adopted by the board of directors, which meeting shall be held between the hours of ten o'clock (10:00) in the forenoon and three o'clock (3:00) in the afternoon of the day so named, and which meeting may, on the day so appointed, by a consent of a majority in interest of the stockholders present, be adjourned from time to time for not less than eight (8) days at any one (1) time, of which adjourned meeting notice by advertisement in said newspaper shall be given; and if at any such meeting two-thirds in interest of all the stockholders shall consent that a dissolution shall take place and signify their consent in writing, such consent, together with a list of the names and residences of the directors and officers, certified by the president and the secretary or treasurer, shall be filed in the office of the state corporation commission, who, upon being satisfied by due proof that the requirements aforesaid have been complied with, shall issue a certificate that such consent has been filed, and the board of directors shall cause such certificate to be published two (2) weeks successively, at least once a week in a newspaper published in said county; and upon filing in the office of the state corporation commission of an affidavit that said certificate has been so published, the corporation shall be dissolved, and the board shall proceed to settle up and adjust its business and affairs; whenever all the stockholders shall consent in writing to a dissolution, no meeting, or notice thereof shall be necessary, but on filing said consent in the office of the state corporation commission, together with a certificate as to the directors, officers, etc., as hereinbefore prescribed it shall forthwith issue a certificate of dissolution, which shall be published as above provided; Provided, that no corporation organized under any law of this state shall be dissolved by its stockholders until all fees due and all taxes levied upon or assessed against such corporation under the laws of New Mexico shall have been fully paid, and an affidavit to that effect, under oath of the president and secretary or treasurer, shall have been annexed to and filed with the certificate of consent to the dissolution."

A reading of the above statute discloses no requirement that a corporation in a forfeited status need file delinquent annual reports before the State Corporation Commission may grant it a certificate of dissolution. It then logically follows that if such a corporation is not required to file delinquent annual reports as a condition to its being granted a

certificate of dissolution by the State Corporation Commission, corresponding filing fees for said reports are not due and payable.

The statute governing the withdrawal of a foreign corporation from the state is § 51-10-11, N.M.S.A., 1953 Comp., which reads as follows:

"51-10-11. Withdrawal from state-Subsequent process. -- Any foreign corporation that has paid all fees due and has otherwise complied with the laws of the state of New Mexico, may withdraw from the state by surrendering its certificate of authority and filing with the state corporation commission a certificate of the president or vice-president and secretary or assistant secretary of the corporation, to the effect that no amount of the capital stock of the corporation is represented by property located and business transacted in this state; and that it agrees that service thereafter may be had upon the corporation in any suit based upon contracts or torts or cause of action arising in the state of New Mexico during the time the corporation was authorized to transact business in this state by serving the acting chairman of the state corporation commission who for that purpose is hereby made the agent of the corporation; Provided, that in the case of foreign insurance companies the service of process shall be made upon the superintendent of insurance."

This provision is silent as to any requirement that a foreign corporation in a forfeited status need file with the State Corporation Commission delinquent annual reports before it can be issued a certificate of withdrawal. We, therefore, answer the first question in the negative.

Turning to the second question, the income tax act and the sales tax act contain provisions which make it mandatory for the State Corporation Commission to require tax clearances from the agencies administering the two acts as a condition to the issuance of a certificate of dissolution or withdrawal by the Commission. See §§ 72-14-45 -- 72-16-38, N.M.S.A., 1953 Comp.

As to the other taxes provided by law wherein no similar provision is found, the following language, found in § 51-7-1, *supra*, is helpful in determining the conditions precedent to the issuing of a certificate of dissolution or withdrawal by the State Corporation Commission in regard to tax clearance and the payment of delinquent fees:

"-- Provided, that no corporation organized under any law of this state shall be dissolved by its stockholders until all fees due and all taxes levied upon or assessed against such corporation under the laws of New Mexico shall have been fully paid, and an affidavit to that effect, under oath of the president and secretary or treasurer, shall have been annexed to and filed with the certificate of consent to the dissolution."

We interpret the above language as placing a duty on the stockholders of a corporation wishing to dissolve to insure that all fees due or taxes levied against said corporation shall have been fully paid before dissolution proceedings are completed. As assurance to the State Corporation Commission that all taxes and fees owing by the particular

corporation have been fully paid, the statute requires that such a corporation file with the State Corporation Commission an affidavit, under oath, of the president and secretary or treasurer, to the effect that all fees due and all taxes levied upon or assessed against such corporation have been fully paid.

We, therefore, hold that as to all taxes, with the exception of income tax and sales tax, the State Corporation Commission is authorized in the absence of actual knowledge of any delinquency in the payment of taxes or fees by a corporation applying for dissolution, to issue a certificate of dissolution to said corporation upon the filing of an affidavit by its president and secretary or treasurer that all taxes and fees owing by said corporation have been fully paid.

In the case of withdrawal by a foreign corporation, a reading of § 51-10-11, supra, reveals a duty on the corporation to have paid all fees due or taxes owing prior to its withdrawal from the state. Therefore, excluding sales tax and income tax, the State Corporation Commission is authorized, in the absence of actual knowledge by it of the delinquency in the payment of taxes or fees by a corporation applying for a certificate of withdrawal, to issue such a certificate upon the surrender by the corporation of its certificate of authority and the filing of a certificate of the president or vicepresident and secretary or assistant secretary of the corporation, wherein, among other things, the chairman of the Corporation Commission is designated the agent of the corporation for service of process of all claims or actions arising during the time the corporation was authorized to transact business in the state.