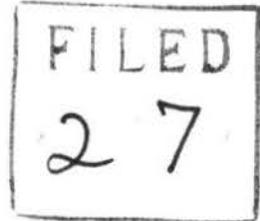


CORPORATIONS: Not liable for franchise tax while charter is
forfeit for failure to make reports.

December 15, 1945



Hon. Clarence Evans, Chairman
State Tax Commission
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion under
date of October 5, 1945, as follows:

"Will you kindly furnish the State Tax Com-
mission an opinion on the following question?

"Is a corporation, whose charter was for-
feited January 1, 1941 and reinstated in
1944, liable for a corporation franchise
tax for the years 1941, 1942 and 1943, dur-
ing which time their charter was not in
good standing?

* * * * *

"We also direct your attention to a new sec-
tion No. 5125A, Laws of 1943, page 409 and
410. The latter portion of the first para-
graph leads us to conclude that perhaps lia-
bility would exist.

"This opinion is requested by reason of the
fact that a certain corporation, whose char-
ter had been forfeited and in later years
reinstated, now seeks a dissolution. No re-
ports were filed and no assessments made for
the years that the charter was not in good
standing and a difference of opinion now
exists concerning the payment of corporation
franchise tax during those years before dis-
solution can be effected."

Section 5113, R. S. Mo. 1939, which was in effect at the time of the forfeiture of the charter of the corporation described in your request, imposes a franchise tax on all corporations organized under the laws of this state or doing business in this state, based on the par value of its outstanding capital stock and surplus, in the case of domestic corporations, and on the par value of the capital stock and surplus employed in business in this state, in the case of foreign corporations.

Section 5115, R. S. Mo. 1939, requires that a report be made by each corporation on or before the 1st day of March in each year, containing information upon which the State Tax Commission or State Board of Equalization may determine the amount of franchise tax due and payable. The tax must be assessed on or before the 20th day of March, and becomes due May 15th, as provided by Section 5115, R. S. Mo. 1939. The latter section also provides that the franchise tax is paid for the calendar year, that is, the year beginning January 1st and ending December 31st following.

Since the forfeiture of the charter referred to in your request, Section 5113, R. S. Mo 1939, was amended by Laws of 1943, page 407, and Section 5115, R. S. Mo. 1939, was amended by Laws of 1943, page 409. In addition, the Legislature enacted "The General and Business Corporation Act of Missouri," found in Laws of 1943, page 410, and as a part of said act made further provision for an annual franchise tax in Section 135, found in Laws of 1943, page 475. This section is almost identical with Section 5113 as amended. However, "The General and Business Corporation Act" does not apply to certain corporations. These laws had no bearing on the forfeiture of the charter of the corporation in question, and mention is made of these amendments only to avoid confusion. The new act was, however, in effect at the time of the rescission of the forfeiture, as set out in your request.

The franchise tax has been defined in many cases as a tax on a right or privilege. In *Missouri Athletic Ass'n. v. Delk Inv. Corp.*, 20 S. W. (2d) 51, we find the following definitions, l. c. 55:

"The tax is not a property tax, but an excise levied upon the privilege of transacting

business in this state as a corporation.
State v. Tax Commission, 282 Mo. 213, 221
S. W. 721.'

* * * * *

"Properly speaking, a franchise tax is one imposed only on these rights or privileges, and either consisting of a more or less arbitrary sum or measured, without appraisal, by the amount of nominal capital stock; and a tax of this character is not to be regarded as a property tax. * * *'

"It is a tax upon the doing of business with the advantages which inhere in the peculiarities, of corporate or joint stock organizations.'

* * * * *

"The tax is laid upon the privileges which exist in the conducting of a business with the advantages which inhere in the corporate capacity of those taxed. * * * It is this distinctive privilege which is the subject of taxation.'"

The effect of the forfeiture by the Secretary of State of the charter of a corporation under Section 5091, R. S. Mo. 1939, is described in Watkins v. Mayer, 103 S.W. (2d) 566, l. c. 569:

"It is difficult to read the provisions of the statute without arriving at the conclusion that it was the intention of the Legislature that the act of the secretary of state should operate as a dissolution of the corporation, leaving it without corporate existence or corporate rights, privileges, franchises, or powers, subject only to the right of rescission and reinstatements, upon the application and showing required by section 4621, R. S. 1929 (Mo. St. Ann. sec. 4621, p. 2050).
* * *'

"As we pointed out in Nudelman v. Thimbles, Inc., 225 Mo. App. 553, 40 S. W. (2d) 475, 478, under section 4561, Rev. St. of Mo. 1929 (Mo.

St. Ann. sec. 4561, p. 2007), upon dissolution of a corporation, and under section 4622, Rev. St. of Mo. 1929 (Mo. St. Ann. sec. 4622, p. 2051), upon forfeiture of the certificate or license of a corporation by the secretary of state under the provisions of section 4619, Rev. St. of Mo. 1929 (Mo. St. Ann. sec. 4619, p. 2049), the officers and directors of the defunct corporation become statutory trustees and as such its legal representatives. * * *

If, therefore, the Secretary of State properly carried out the provisions of Section 5091, R. S. Mo. 1939, the corporation referred to in your request had no franchise under the laws of this state after its dissolution by the Secretary of State. Care should be exercised to see that the corporation concerned was properly notified, as required by statute, of the forfeiture of its charter, as it was held in Woodward Hardware Co. v. Fisher, 269 Mo. 271, that such notice was necessary to properly effect the forfeiture.

The effect of rescission of the forfeiture, as provided in Section 120 of "The General and Business Corporation Act of Missouri," page 472. Laws of 1943, has been discussed by the Supreme Court of California in Ransome-Crummey Co. v. Superior Court for Santa Clara County, 205 Pac. 446, where a similar provision in the California Code was under discussion. We find the following in the decision of the Supreme Court, l.c. 448:

"Furthermore, we are of the opinion that the subsequent revival of the corporate rights, powers, and privileges did not have the effect of validating the acts attempted during the period of suspension. The revival is not made retroactive by the statute. The suspension of the rights, powers, and privileges is a disability imposed on a corporation as a penalty, and it would tend to deprive the statute of its force and encourage a corporation in default to postpone payment of its taxes indefinitely, if it were held that, by subsequent payment of the delinquent taxes, all the benefits of the attempted acts denied to the corporation could be secured."

Following the authority set out above, which we believe to be sound, a rescission is not retroactive, and the corporation involved in your question was possessed of no privilege, under the laws of this state, on which a tax was due for the years elapsing between the forfeiture of its charter and its reinstatement as provided by statute.

Section 5125a, Laws of 1943, page 409, referred to in your request, is as follows:

"No corporation organized under the laws of this state shall, after March 20th, in any year, be permitted to dissolve by filing the affidavit prescribed in Sections 5037 and 5102 R. S. Mo. 1939, or by any other method provided by law, unless it shall be shown to the Secretary of State or other officer having jurisdiction over such dissolution, that it has filed the reports called for in Sections 5113 to 5125 R. S. Mo. 1939, and shall have paid to the State Treasurer any tax due upon said report. When the dissolution is to be effected by a proceeding in court, as provided for in Section 5037 R. S. Mo. 1939, or as provided in any other law, said judgment of dissolution shall be conditioned upon and shall require the annual franchise tax report to be made and the tax to be paid before the same is effective.

"No corporation, not organized under the laws of this state and engaged in business in the state shall, after March 20th, in any year, be permitted to retire from this state by filing the affidavit to that effect with the Secretary of State as provided in Section 5102 R. S. Mo. 1939, or by any other method provided by law, unless it shall be shown to the Secretary of State or other officer having jurisdiction over such retirement, that it has filed the reports called for in Section 5113 to 5125 R. S. Mo. 1939, and shall have paid to the State Treasurer any tax due upon said report."(Emphasis ours.)

In view of the holding in the Ransome-Crummey Company case, quoted supra, we believe that there was no obligation

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imposed by law upon the corporation to file reports while its franchise was not legally in existence, and that the reports contemplated in the above statute are those required only during the corporate existence, when a franchise is in full force and effect. Therefore, a corporation should be permitted to dissolve as set out in Section 5125a, supra, if the reports called for in Sections 5113 to 5125, R. S. Mo. 1939, had been properly filed during the period when the corporation was in possession of a valid franchise. The period during which the franchise was suspended by action of the Secretary of State should not be included in this computation,

In your request you have directed our attention particularly to the second sentence of the first paragraph of Section 5125a, quoted above. We do not believe that portion of the statute applies where a forfeiture is effected by action of the Secretary of State alone, and invite your attention to the words which we have underlined, which restrict the application of that sentence to instances in which dissolution is effected by a proceeding in court.

CONCLUSION

In view of the above, it is our conclusion that a corporation whose franchise was revoked by the Secretary of State on January 1, 1941, under Section 5091, R. S. Mo. 1939, and whose franchise was reinstated in 1944, under "The General and Business Corporation Act of Missouri," enacted in 1943, is not liable for a franchise tax for the years 1941, 1942, and 1943. It is our further opinion that a corporation seeking a voluntary dissolution after recissions of forfeiture is not chargeable with franchise taxes, and is not obliged to file reports, for the period during which its franchise was forfeit by proper order of the Secretary of State.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
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