TAXATION AND REVENUE: Liability of corporation for Missouri franchise tax in year subsequent to filing of articles of dissolution.

January 31, 1947

FILED
27

Honorable Clarence Evans, Chairman
State Tax Commission of Missouri
Jefferson City, Missouri

Dear Sir:

Reference is made to your letter of recent date, requesting an official opinion of this office, and reading, in part, as follows:

> "Will you kindly furnish the State Tax Commission an opinion on the following subject:
>
> "Is a corporation liable for corporation franchise tax after its articles of dissolution has been filed by the Secretary of State, although the certificate of dissolution is not issued until the succeeding year?"

The procedure for dissolution of corporations is found in Sections 79-83, inclusive, of an Act of the General Assembly found in Laws of 1943, pages 410-491. Section 79 provides for voluntary dissolution upon the written consent of the holders of all outstanding shares, while Section 80 provides for such dissolution upon a two-thirds majority vote of the holders of all of such shares.

Following such consent or election, as the case may be, the provisions of Section 81 become operative. This section reads, in part, as follows:

> "Said articles of dissolution, in duplicate, whether by consent of shareholders or by act of the corporation, shall be delivered to the Secretary of State. If the Secretary of State finds that such articles conform to law, he shall, when all taxes, fees and other charges have been paid as in this Act prescribed, file

> such articles keeping one copy for the permanent records and the other copy shall be returned to the corporation or its representative to be filed for record by the corporation in the office of the Recorder of Deeds in the county or city in which the registered office of the corporation in this State is located.
>
> "Upon the filing by the Secretary of State of articles of dissolution, the corporation shall cease to carry on its business, except in so far as may be necessary for the proper winding up thereof, but its corporate existence shall continue until a certificate of dissolution has been issued by the Secretary of State, or until a decree dissolving the corporation has been entered by a court of equity, as in this Act provided.
>
> * * * * * * * * * *"
>
> (Emphasis ours.)

Section 82 provides the form of the articles of liquidation to be executed upon discharge of all the outstanding debts, liabilities and obligations of the corporation, and is not pertinent to the inquiry.

Section 83 reads as follows:

> "Such articles of liquidation in duplicate shall be delivered to the Secretary of State. If the Secretary of State finds that such articles of liquidation conform to law, he shall, when all taxes, fees, and charges have been paid as in this Act prescribed, file the same keeping one copy as a permanent record. He shall thereupon issue a certificate of dissolution and a certified copy of such certificate attached to the other copy of said articles of liquidation, and deliver the same to the corporation or its representative who shall then cause the articles of liquidation and the certified copy of said certificate of dissolution attached thereto to be filed for record in the office of the Recorder of Deeds of the county or city in which the registered office of the corporation in this state is located.

> "Upon the issuance of such certificate of dissolution the existence of the corporation shall cease." (Emphasis ours.)

A reading of the entire scheme for such voluntary dissolution indicates that, upon the filing of the consent or election for dissolution, the right of the corporation to continue in business ceases immediately, although corporate existence does continue pending final winding up of the affairs of the corporation. The corporate existence does not cease until the showing has been made to the Secretary of State that all of the outstanding debts, liabilities and obligations of the corporation have been discharged or that provision for such discharge has been made.

In the premises, it becomes pertinent to determine the nature of the Missouri franchise tax. We quote from Missouri Athletic Ass'n. v. Delk Inv. Corp., 20 S.W.(2d) 51, l.c. 55, wherein the following appears:

> " * * * In State v. Pierce Petroleum Corporation (in banc) 318 Mo. loc. cit. 1027, 2 S.W.(2d) 790, 794, this court, speaking of the nature of this franchise tax said:
>
> "'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.'
>
> "This statement of the nature of a franchise tax is in accordance with the authorities generally. In 37 Cyc. p. 817, it is said:
>
> "'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 appraisement, by the amount of nominal capital stock; and a tax of this character is not to be regarded as a property tax. * * * And, it is generally held that such a tax is one on the franchise and not on the property of the corporation, although it has been held that a so-called franchise tax which is in fact a tax upon all intangible property in the cor-

> poration, including its capital, is really a property tax.'
>
> "In City of Chicago v. Chicago City Railway Co., 245 Ill. App. 473, the court said:
>
> "'A franchise tax is not a tax on the property of the corporation but, properly speaking, is imposed on the corporation for the privilege of carrying on its business and exercising the corporate franchise granted by the State (citing many authorities, including 37 Cyc. 817; State ex rel. Marquette Hotel Investment Co. v. Tax Commission, 282 Mo. 213, 221 S.W. 721), and federal excise taxes are analogous to and often referred to as of the same nature and character as the state corporation franchise tax. American Can Co. v. Emmerson, 288 Ill. 289 (123 N.E. 581).'
>
> "In the case quoted from reference was also made to Flint v. Stone Tracy Co., 220 U.S. 108, 31 S. Ct. 342, 55 L.Ed. 389, Ann. Cas. 1912B, 1312, and to utterances of the Supreme Court of the United States concerning the Corporation Tax Law of 1909 (36 Stat. 11), designated as a special excise tax, of which the Supreme Court said:
>
> "'It is a tax upon the doing of business with the advantages which inhere in the peculiarities, of corporate or joint stock organizations.'
>
> "And the court further said:
>
> "'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.'"

From the citation, it is clear that the tax is one not only upon the organization as a corporation, but also upon the right to engage in business. Adverting to the emphasized portion of Section 81, quoted supra, it is noted that the right of the cor-

poration to engage in business ceases upon the filing by the Secretary of State of the articles of dissolution. In other words, after the filing of such articles of dissolution, no corporate privileges may be exercised, and the corporate existence is continued for the sole purpose of winding up its internal affairs. Of course, should the organization in fact continue to exercise its corporate privileges after the filing of such articles of dissolution, a different situation would present itself.

It might be thought that, inasmuch as under the provisions of Section 81, quoted supra, the corporate existence is continued for the purpose of winding up the affairs of the corporation, liability for franchise tax might be incurred in the interim between the filing by the Secretary of State of the articles of dissolution and the granting of the certificate of dissolution.

We have been unable to find any decisions of the appellate courts of Missouri either determining whether or not such liability exists or determining the exact nature of corporate business carried on in winding up the affairs of the dissolved corporation. However, we think the case of Hurd v. Meyer, 242 N. W. 882, declares the proper rule with respect thereto.

Under the Michigan procedure for involuntary dissolution of corporations, a receiver is appointed to wind up the affairs of the corporation after the decree of dissolution is entered. In other words, that period during which the receiver is in charge of the affairs of the corporation and is liquidating its corporate business is quite similar to the period, under Missouri practice, between the filing of the articles of voluntary dissolution by the Secretary of State and the issuance of the certificate of dissolution by the same officer. The corporate existence, in each instance, is continued for the sole purpose of winding up the internal affairs of the corporation.

In the Michigan case mentioned, the receiver sought a mechanic's lien as a result of certain corporate business engaged in after the entry of the decree of dissolution. It was urged by the defendants that, inasmuch as such receiver had failed to report and pay the annual franchise fee under applicable statutes, the corporate franchise had been suspended, and therefore the receiver was not entitled to a mechanic's lien. In disposing of this contention, the Supreme Court of Michigan said:

"As above noted, the corporation was decreed 'dissolved' November 30, 1928, and the notice of such dissolution was promptly filed with the secretary of state. The power granted to the receiver 'to operate the business' was evidently only such as the court considered reasonably necessary to the advantageous winding up of the corporate business. The right to so continue the business for one year incident to the dissolution of the corporation is granted by statute. Comp. Laws 1929, sec. 15315. Notwithstanding such continuation of its former business, the corporate existence was terminated by the decree of November 30, 1928, and the subsequent filing of notice thereof with the secretary of state. It would be anomalous to say that notwithstanding such termination of the corporate existence, the receiver must continue to pay for the corporation the annual franchise fee. The court ordered the business continued only to enable the receiver to take the necessary steps to realize on the corporation's assets, pay its creditors, and to distribute the surplus, if any, to the stockholders. The annual franchise fee is a charge by the state made against a going corporation for the right and privilege it has of doing business in this state, and is not chargeable incident to closing up the affairs of a dissolved corporation. Jones v. Winthrop Savings Bank, 66 Me. 242; Johnson v. Johnson Bros., 108 Me. 272, 80 A. 741, Ann. Cas. 1913A, 1303; Commonwealth v. Lancaster Savings Bank, 123 Mass. 493; Greenfield Savings Bank v. Commonwealth, 211 Mass. 207, 97 N.E. 927; Mather's Sons Co.'s Case, 52 N.J. Eq. 607, 30 A. 321; State v. Bradford Savings Bank & Trust Co., 71 Vt. 234, 44 A. 349; Keeney v. Dominion Coal Co. (D.C., Ohio) 225 F. 625; State of Ohio v. Harris (C.C.A.) 229 F. 892. * * * After dissolution the receiver of the corporation obviously cannot continue to conduct its corporate business because there is no such corporation in contemplation of law; and all the subsequent acts incident to closing up its affairs are much akin to the administration of the estate of a deceased

> person and are carried on under the direction and control of the court. * * * * While engaged in closing up the affairs of the dissolved corporation, the receiver is acting as a trustee and officer of the court; and, as before stated, is not required to file the annual report or to pay the annual franchise fee. * * * (Emphasis cours.)

We believe that a similar conclusion would be reached by the Supreme Court of Missouri.

CONCLUSION

In the premises, we are of the opinion that a corporation, filing articles of voluntary dissolution in any calendar year, and thereupon ceasing to exercise the corporate privileges, is not required to file a report nor pay any Missouri corporation franchise tax in the succeeding calendar year, even though the corporate existence continues into such succeeding calendar year for the purpose of winding up the business affairs of such corporation.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR