

## Opinion No. 46-4934

July 31, 1946

**BY:** C. C. McCULLOH, Attorney General

**TO:** Mr. Geo. W. Armijo, Chairman State Corporation Commission Santa Fe, New Mexico

{\*258} You have forwarded to this office a letter from Holman & Pfiester, Inc., of Hobbs, New Mexico, which presents a question on whether that corporation must pay to the State of New Mexico franchise taxes, beginning with March, 1946.

From the letter it appears that Holman & Pfiester, Inc. began in March, 1946 to erect a frozen food locker plant and sales room in Hobbs. Due to a shortage of materials, these buildings have not been completed. It also appears that the corporation has not begun the sale of any merchandise, storage space, or any services incident thereto. Authorized capital stock of the corporation is \$ 50,000.00, of which \$ 17,600.00 has been subscribed and paid in.

{\*259} Whether or not this corporation must pay the franchise tax, beginning with March, 1946, depends upon whether, under the facts presented, the corporation is, and has been, since March, 1946, "for profit engaged in any business in the State of New Mexico."

There is a difference of opinion in the various courts as to what constitutes "engaging in or doing business," and each decision naturally must rest upon the particular facts in each case.

The Corporation Commission, in arriving at a conclusion would consider the nature of the business, the object or purpose for which incorporated, and acts done by the corporation in carrying out that purpose. In addition, it would seem necessary that the corporation, in some way, exercise its corporate franchise before it becomes liable for franchise taxes.

The Supreme Court of New Mexico, in the case of State ex rel State Corporation Commission v. Old Abe Co., 43 N.M. 367, in construing Sections 1 and 2, Chapter 116 of the Laws of 1935 (Sections 54-1201 and 54-1202 of the 1941 Compilation), held that the statute imposing an annual tax on domestic corporations for profit "engaged in any business" in the State, is a tax upon the privilege of engaging in business in the State, **and is payable when a corporation having such a privilege exercises it by engaging in business.**

The Court also held, in the same case, that a corporation which does only those things which are necessary to retain its property intact, and to maintain its corporate existence,

is not "engaged in any business in the state," so as to be liable for payment of the franchise taxes.

The main purpose for which Holman & Pfiester, Inc. was incorporated appears to be to maintain and operate a storage plant, to process and store foods, to sell and rent storage compartments, and to acquire and sell household domestic appliances.

There is also stated, as part of the purpose of incorporation, "to acquire, own, mortgage, pledge, sell, assign and transfer \* \* \* real and personal property of any kind." Although this corporation is erecting buildings, yet it is clear that the buildings are being erected to be used as a storage plant and sales room, and not for the purpose of being sold. In other words, this corporation intends primarily to engage in a frozen food service, and not in the construction and sale of locker plants.

Considering these facts, and the current law on the question, I believe that Holman & Pfiester, Inc. are not liable for franchise taxes to the State Corporation Commission until it opens its plant to the public for the sale of services, merchandise, or storage space.

By WM. R. FEDERICI,

Asst. Atty. General