

## Opinion No. 59-127

August 28, 1959

**BY:** HILTON A. DICKSON, JR., Attorney General

**TO:** Honorable Betty Fiorina Secretary of State Santa Fe, New Mexico

{\*195} Receipt is acknowledged of your letter of recent date in which you request an opinion and clarification of the following three questions mentioned in your letter:

1. Can certificates required in subparagraphs 7 and 8, subsection A of Section 49-9-4, N.M.S.A., 1953 Comp. (P.S.), be limited to certificates of comparison by an independent public accountant, certifying that such statements agree with amounts shown upon the ledgers of said Pioneer Savings Stamps, Inc., instead of having the short form of balance sheet of trading stamp company, "certified by an independent public accountant" before same is turned over to the Secretary of State as by the above section of the statute provided?

2. (a) Is it mandatory to use the short form balance sheet under the above mentioned section of the statute? (b) Is the approval of the bond also mandatory under subsection B, Section 49-9-4, N.M.S.A., 1953 Comp. (P.S.)?

3. Can a stamp company relieve itself of the obligation to redeem stamps by merely giving the Secretary of State at least 90 days prior written notice {\*196} of its intention to do so and concurrently mailing a copy of such notice to each retailer within the State of New Mexico which had within one year prior issued stamps of the stamp company for distribution?

In our opinion, the answers to your questions are as follows:

1. No.

2. (a) Yes.

(b) Yes.

3. No.

It is our opinion from the language of subparagraphs 7 and 8, subsection A of Section 49-9-4, N.M.S.A., 1953 Comp., (P.S.), that this section of the statute specifically provides that a short form of balance sheet of a trading stamp company has to be certified by an independent public accountant before same is turned over to the Secretary of State.

The above section of the statute does not use the words "normal certificate", nor does this section make exceptions for small organizations. The section of the statute provides clearly that the audit has to be made by an independent accountant. Further, the certificate cannot be limited to comparison of statements with amounts shown upon the ledgers of said Pioneer Saving Stamps, Inc. Since the inventories are not verified by the accountant, how can he truthfully certify to them as being true and correct?

We cannot, and will not, read into this section of the statute in question language that is not there.

The intention of the legislature is clear, concise and unambiguous. The legislative intent must be ascertained primarily from the language of the statute and when the language used is plain and unambiguous, as in this section of the statute, the legislature must be understood as meaning what is expressly declared. **State v. Thompson**, (1953), 57 N.M. 459, 260 P. 2d 370.

In answer to your second question, it is our opinion that each trading stamp company must submit a short form of balance sheet, certified by an independent accountant after a thorough audit is made and inventories are verified.

The approval of the bond is a mandatory requirement and must be done under subsection B of Section 49-9-4, N.M.S.A., 1953 Comp., (P.S.), which provides for giving of the bond, the kind of bond, amount of bond and approval of same as to form and maximum amount.

The answer to your third question is in the negative.

Section 49-9-5, N.M.S.A., 1953 Comp., (P.S.), is not intended to affect the contractual rights of the holders of stamps issued by either the trading stamp company or its contract retailers. The obligation to redeem remains even after the ninety days have elapsed. A failure to redeem after that period is a default and would constitute a breach of contract, at least as to those who receive stamps prior to the notice and as to those who were without actual knowledge of the intention of the trading stamp company to cease redemption and who were issued stamps by the retailer after he has received such notice.

To cease redemption without notice would probably constitute a fraud or false representation under Section 49-9-2 and make the stamp company liable for the fine mentioned in Section 49-9-6 of the act. Section 49-9-5, if complied with by the trading stamp company, would probably constitute a defense to this charge and thus relieve the trading stamp company of the fine provided in Section 49-9-6 of the act.

The obligation to redeem, being based on an unwritten contract between the stamp company and the rightful holder, is governed by the {\*197} statute of limitations for such unwritten contracts, which is four (4) years.

By Hilario Rubio

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