Opinion No. 65-63

April 19, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Wayne C. Wolf, Assistant Attorney General

TO: Barney Cruz, State Corporation Commission, State Capitol Building, Santa Fe, New Mexico

QUESTION

STATEMENT OF FACTS

A Delaware corporation surviving the merger with two of its subsidiaries, an Ohio corporation and a Pennsylvania corporation, now desires to qualify to do business in New Mexico. The Pennsylvania corporation had already qualified to do business in New Mexico.

QUESTION

In computing the statutory fees for qualification, should the Corporation Commission give credit to the Delaware corporation for the authorized capital of its subsidiary which has previously been subjected to qualification fees?

CONCLUSION

No.

OPINION

*{*106}* ANALYSIS

Section 51-12-1 (4) New Mexico Statutes Annotated, 1953 Compilation, sets the fees for qualification of foreign corporations by the following language:

"(4) Every foreign corporation, when it obtains from the state corporation commission a certificate of authority to do business in this state, shall pay a fee of ten cents $ .10) for each one thousand dollars ($ 1,000) of the total amount of capital stock authorized, but in no case less than twenty-five dollars ($ 25.00);"

This section by itself indicates that each unqualified foreign corporation shall pay the statutory fee. Unless other sections of the corporation law require credit be given to the surviving corporation, it must stand as any other foreign corporation seeking qualification.

We are aware that the merging corporations have argued that the survivor is entitled to credit for the amount of fees chargeable against the authorized capital stock of the foreign corporation that has already qualified to do business in New Mexico.

*{*107}* The argument is that foreign corporations are governed by the laws applicable to domestic corporations insofar as the same may be applied to foreign corporations and that the merging corporations therefore carry to the survivor all rights and privileges which the merging corporations held including the right to do business in the state to the extent that such right has been the subject of qualification fees.

The first step in the argument posed by the merging corporations is that the laws governing domestic corporations apply, insofar as possible, to foreign corporations. This argument rests upon Section 51-10-1, New Mexico Statutes Annotated, 1953 Compilation which reads, insofar as applicable as follows:

"Foreign corporations doing business in this state shall be subject to the provisions of this article so far as the same can be applied to foreign corporations. . . ."

The words "this article" first appeared in the 1915 code and in part referred to what is now Section 51-11-4 New Mexico Statutes Annotated, 1953 Compilation. A reference to this section brings us to the second step in the argument advanced by the merging corporations. In pertinent part this section says:

"51-11-4. RIGHTS AND PROPERTY VEST IN CONSOLIDATED CORPORATION -- LIABILITIES CONTINUE. -- Upon the consummation of said act of merger or consolidation, all and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due on whatever accounts, as well for stock subscriptions as all other things in action or belonging to each of such corporations, shall be vested in the consolidated corporation; and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the consolidated corporation as they were of the several and respective former corporations, and the title to any real estate, whether by deed or otherwise, under the laws of this state, vested in either of such corporations, shall not revert or be in any way impaired by reason of this article: . . . ."

This second step in the argument raises the problem of whether or not credit for fees payable on authorized stock is given to the surviving corporations by the clause "all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the consolidated corporation as they were of the several and respective former corporations, ..."

Although a strained interpretation results, we acknowledge that an argument can be made to include the qualification fees and resulting benefits within the meaning of the word "privileges" Thus, these benefits to the merging corporation could, under such interpretation, accrue to the surviving corporation.

Section 51-10-1, N.M.S.A., 1953 Compilation however states that foreign corporations are subject to Section 51-11-4 only insofar as that section may be applied to them. That section and other sections of Article 11 of Chapter 51 relating to the merger of corporations specifically mention the merger of domestic corporations and the merger of foreign corporations with domestic corporations. The State of New Mexico, however, has no contact with foreign corporations sufficient to govern their merger. Corporations are strictly statutory creatures and unless a foreign corporation desires to do business in New Mexico this state cannot govern its existence. New Mexico, however, may *{*108}* grant or deny the privilege to do business in this state.

This factual situation can be illustrated by reference to domestic corporations. The incorporation of a domestic corporation is similar to the qualification of a foreign corporation. If domestic corporations merge so as to create a completely new corporation than that new corporation must pay the fees for original incorporation. The same reasoning applies to foreign corporations in that New Mexico is not concerned with fees for the merger but merely with qualifying the survivor corporation to do business in the state. If the survivor has already qualified then, upon merger, credit may be given to it for qualification fees paid by the merging foreign corporations.

Therefore, it is our conclusion that the Corporation Commission would collect only qualification fees for the merger transaction described in the statement of facts. In addition, credit should not be given for the authorized capital of the merging corporation.