

Opinion No. 66-75

June 15, 1966

BY: OPINION OF BOSTON E. WITT, Attorney General Myles E. Flint, Assistant Attorney General

TO: Mr. Barney Cruz, Jr., Director, Corporation Department, State Corporation Commission, State Capitol Building, Santa Fe, New Mexico

QUESTION

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How and under what Section should fees be computed when a foreign corporation having only no-par value stock files an amendment to its certificate of incorporation increasing the number of shares of authorized capital stock?

CONCLUSION

See analysis.

OPINION

{*94} ANALYSIS

In order to determine the fees which should be paid for an amendment to a certificate of incorporation, reference should be made to Sec. 51-12-1, N.M.S.A., 1953 Comp. That Section, insofar as pertinent, provides:

"51-12-1. Fees of corporation commission. -- A. On filing any certificate or other paper relative to corporations, domestic or foreign, including domestic insurance companies, but not including foreign insurance companies, in the office of the state corporation commission, the following fees and taxes shall be paid:

(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);

(5) Increase of capital stock of foreign corporations, the same fees for the amount of the total increase as above specified for original admission to do business in this state, and in no case less than twenty dollars (\$ 20.00); Provided, however, that in no event shall the fees for any or all increases of capital stock of foreign corporations, exceed the sum of five thousand dollars (\$ 5,000);

(7) Change of name, change of nature of business, amended certificate of incorporation, other than those increasing capital stock, decrease of capital stock, increase or decrease of par value or number of shares, for both domestic and foreign corporations, twenty dollars (\$ 20.00); . . .".

From the above, it is apparent that a foreign corporation seeking to qualify in this State is required to pay fees which are identical to those of a domestic corporation operating within the State. That fee is determined on the basis of \$ 0.10 for each \$ 1,000 of capital stock authorized. In instances where the Commission is concerned with fees to be paid by a corporation having no par value stock, the Commission is permitted to establish an arbitrary figure of \$ 100 per share to be the value of the stock of the corporation for the purpose of determining fees, Sec. 51-4-9, N.M.S.A., 1953 Comp., A. G. Opinion No. 60-2.

The question with which we are concerned arises only in a situation where the corporation having no par value stock seeks to amend its certificate {95} of incorporation so as to increase the amount of its capital stock after it has been formed or initially qualified to do business within the State. In such cases, confusion arises as to whether Section 51-12-1(5) or (7) would be applicable in computing the fee to be paid by the filing corporation. As can be seen from the quote above, Section 51-12-1(5) is concerned solely with the method of computing fees for increasing capital stock of a corporation. Section 51-12-1(7) has a more diverse application.

It is clear from a reading of our statutes that insofar as possible, fees for corporations having no par value stock should be computed in the same manner as for those having par value stock. The statutes are clear when questions concerning the latter type of corporations are raised.

For purposes of demonstration, we would recite the following examples:

(A) A corporation files its articles of incorporation in which it is shown that the company is authorized to issue 25,000 shares of stock having a par value of \$ 100 per share. Its total authorized capital stock is \$ 2,500,000, and the fee is \$ 250.00 when computed under Section 51-12-1(4)

(B) A corporation subsequently files an amendment to its articles of incorporation in which it announces its intent to increase its capital stock from 25,000 to 50,000 shares having a par value of \$ 100 per share. Its total authorized capital stock is \$ 5,000,000, and the fee for the amendment when computed under Section 51-12-1(5) would be an additional \$ 250.00.

(C) A corporation, in lieu of (B) above, by amendment increases the number of shares of stock from 25,000 to 50,000 shares of stock but reduces the par value per share from \$ 100 to \$ 50. By such amendment it has increased the number of shares and decreased its par value but has not increased the capital stock. Therefore, the filing fee for the amendment is determined under Section 51-12-1(7), *supra*, which covers

amendments to articles of incorporation other than those "increasing capital stock". The fee for this amendment would be \$ 20.00. It is important to note here that it is apparent on the face of the document that there has been no increase in the capital stock.

Basically, the above methods should be used in computing fees for similar filings by foreign corporations having no par value stock. In practice, the Act should be applied as follows:

(A) A corporation files its articles of incorporation in which it is shown that the company is authorized to issue 25,000 shares of stock having no par value. Pursuant to Sec. 51-4-12, N.M.S.A., 1953 Comp., unless actual value is shown, the Commission computes its fee on the assumption the stock is worth \$ 100 per share. On such a basis, the fee to be collected pursuant to Sec. 51-12-1(5), *supra*, would be \$ 250.

(B) A corporation files its articles of incorporation in which it is shown that the company is authorized to issue 50,000 shares of stock having no par value. The Commission, without other information, would assume the stock is worth \$ 100 per share and would collect a fee of \$ 250, pursuant to Sec. 51-12-1(5), *supra*.

(C) A corporation, in lieu of (B) above, by amendment increases the number of shares of stock from 25,000 to 50,000. The amendment further states that two (2) shares of the newly authorized stock will be issued for each of the outstanding and presently authorized stock and further that there will be no increase in the stated capital. What fee should be assessed in this case?

Section 51-4-12, N.M.S.A., 1953 Comp., in pertinent part provides as follows:

"54-4-12. Computation of value for purposes of fees, taxes or other statutory provisions. -- For the purpose of computing any incorporation or other statutory {⁹⁶} fee; or, any tax or taxes, the determination of which is based on the par value of shares of stock, and for the purpose of any statutory provision limiting the relation between indebtedness and capital stock, each share of stock without nominal or par value issued under the provisions of this act (51-4-1 to 51-4-13) shall be considered the equivalent to a share having a nominal or par value of one hundred dollars (\$ 100); or, the actual value of such stock or any other basis may be adopted which will justly carry out the provisions of the statutes of this state; . . .".

Under this provision, it is our opinion that for the purpose of determining fees to be collected under our statutes, no par value stock shall be valued at \$ 100 unless or except when the actual value of such stock or some other **basis** is shown to the Commission. This would be consistent with the handling of par value stock. There, when a fee is computed, the Commission has before it a specific number of shares having a specific stated value per share. Those two figures are necessary to compute the fees.

Under the fact situation set forth in (C) above, information necessary to make a computation is not available. The only figure available is the number of shares. There is no information provided which presents the value of each share of stock. Therefore, under such fact situation, the fee should be computed using \$ 100 par value figure supplied by Sec. 51-4-12 and, pursuant to Section 51-12-1(5), N.M.S.A., 1953 Comp. the fee for the filing should be \$ 250.

The conclusion that specific information as to value is required and may be obtained by the Commission in determining fees is supported by the last sentence of Sec. 51-4-12, N.M.S.A., 1953 Comp. That sentence indicates that the Commission may conduct a thorough examination to determine the value of capital stock and need not accept the statements of the corporation as to the value of the stock.

Insofar as this opinion conflicts with Attorney General's Opinion No. 4805, issued on October 15, 1945, the latter opinion is overruled.

In order to avoid an unduly harsh application of the statutes, it might be provident to advise companies of the law pertaining to filings concerned with no par value stock. Then, if the evidence of the true value of the shares is produced, it would be possible to accurately ascertain the proper fees without confusion.