Opinion No. 37-1650

May 25, 1937

BY: FRANK H. PATTON, Attorney General

TO: Corporation Commission Franchise Tax Department Santa Fe, New Mexico. Attention: Mr. Don R. Casados

*{*102}* This is to acknowledge receipt of your letters of May 18 inquiring as to the liability of the Owl Drug Company, a domestic corporation, and Standard Stations, Inc., a Delaware corporation, for payment of franchise tax for the year 1937, pursuant to the provisions of Chapter 116 of the Laws of 1935.

The Owl Drug Company, according to your letter and information contained in your files, by corporate resolution dated December 5, 1936, ceased operations as a corporation and determined to transfer and did transfer all of its assets and liabilities to its stockholders. A formal application for dissolution was filed with the Corporation Commission on April 12, 1937. The Standard Stations Inc., was dissolved in the State of Delaware on December 31, 1936, and thereafter did not engage in active business in the State of New Mexico.

As there has been considerable difficulty in determining the liability of corporations for the franchise tax where they are not engaged in active commercial enterprise, we feel it advisable to reiterate two principles to be considered when passing upon the application of the act.

First, the fee imposed for a given year is an excise tax for the privilege of engaging in business during that year. The tax is measured by the amount of outstanding capital stock, property and **business done the preceding year.** In other words, the tax for 1936 is not assessed in 1937; the 1937 tax is merely measured in part by the amount of business done in 1936.

Second, the tax is not imposed upon the right or privilege of corporate existence, but rather upon the actual exercise of the corporate franchise. This matter was discussed at length in Opinion No. 1501 (January 8, 1937).

The mere fact that the Owl Drug Company was authorized to do business during the year 1937 would not justify the imposition of the tax. It would also be necessary that this *{*103}* corporation or its representatives in some way exercised the corporate franchise. In other words, that they engaged in business in some manner. What constitutes engaging in, or doing business, is a disputed question. Courts adopting the strict construction have variously held the following activities constituted doing business: Maintaining an office, making records and keeping books (Carlos Ruggles Lumber Co. vs. Comm., 261 Mass. 450, 158 N. E. 899); assignment of assets to foreign corporation (Fore River Shipbuilding Corp. vs. Comm., 284 Mass. 137, 142 N. E. 812); ownership of

property which was designed for future use in the business (Arkansas Coal Co. vs. State, 149 Ark. 28, 231 S. W. 184); holding stockholders' meetings (Springfield Finish Co. vs. Commonwealth, 242 Mass. 37, 136 N. E. 250). The courts adopting the liberal rule have held that actual business enterprise is necessary to justify the imposition of the tax (61 C. J. 257, 258, Sec. 246 (4) Note 17).

In view of the conflict of authority, this office has been inclined to favor your department by following the rule announced in the cases adopting the strict construction. However, even assuming that the courts adopting the strict construction are correct and that such doctrine would be followed by our Supreme Court, we fail to find anything either in your letters or in the information received from the files of your office which would justify the imposition of the tax upon either of the corporations inquired about. In the case of the Owl Drug Company, the files indicate that, looking to the future dissolution of the corporation, the assets and liabilities of the same were turned over to the stockholders. It does not appear that they were continuing the business of this corporation, but only taking the necessary steps to effect dissolution and close the business. We do not think that activities relative to closing its affairs would place a given corporation in the category of doing business. See Hurd vs. Myer, 259 Mich. 190, 242 N. W. 882. Of course, if the stockholders were actually continuing business of the corporation, a different question would be presented. In such a case we think liability for the tax would clearly exist.

We believe that the question of the liability of Standard Stations, Inc., is disposed of on the basis of the foregoing statements. According to the information imparted to us, it was dissolved and ceased doing business on December 31, 1936. If such was the case, and it was merely closing its affairs and not engaged in corporate activity, we feel that it is not liable for the tax in question.

In closing, we wish to reiterate that the criterion in cases of this kind is corporate activity of some kind and not whether the corporation had a legal or recognized existence in this state; that while under the strict construction which we have determined to follow, actual commercial activity is not necessary, nevertheless the corporation should not be considered as doing business, if after a formal effort at dissolution, it is merely taking the necessary steps to terminate its existence.

Trusting this disposes of your inquiries, I am

By: RICHARD E. MANSON,

Asst. Atty. Gen.