

Opinion No. 39-3061

March 23, 1939

BY: FILO M. SEDILLO, Attorney General

TO: Hon. J. O. Gallegos, Commissioner of Revenue, Santa Fe, New Mexico. Attention: G. S. Carter, Director School Tax Division

{*25} I have carefully examined the Articles of Incorporation and amendments thereto of the "Brownmoor at Santa Fe, Inc.," which you enclose with your request for an opinion as to the liability of said corporation to the Emergency School Tax.

The amendments to the Articles of Incorporation strike out certain provisions authorizing issuance of capital stock and the payment of dividends thereon, and governing the dissolution of the corporation and the division of the assets of the corporation upon such dissolution, and insert in lieu thereof the following:

"This corporation shall be a non-profit corporation."

The main object of the corporation is stated to be "to establish and carry on at Santa Fe, New Mexico, a school for girls," etc. The amendment is no doubt an effort to change the character of the corporation so as to bring it within the provisions of Section 32-506, et seq, 1929 Compilation, as a corporation not organized for profit, and the claim for exemption is based upon Subsection (a) of Section 212 of Chapter 73, Laws of 1935, as amended, (141-1716, 1938 Supplement), which exempts:

"All sales or services made or performed by societies and other organizations {*26} not organized or operated for gain or profit."

It will be observed that despite the amendment above referred to, the corporation is still authorized by the last paragraph of Article III of the Articles of Incorporation to transact other business in connection with the school conducted by it. That paragraph reads:

"In general, but in connection with the foregoing, the Company may carry on any other business, whether educational or otherwise, and have and exercise all the powers conferred by the laws of New Mexico upon corporations formed under the Act herein referred to as the General Corporation Act, being hereby expressly provided that the foregoing enumeration of specific powers shall not be held to limit or restrict in any manner the general powers of the Company which now or hereafter may be authorized by law, including any and all other powers which a co-partnership or natural person could have or exercise."

Article VII further provides that the Board of Directors may "fix the times for the declaration and payment of dividends," and that "the corporation may use and apply its surplus earnings or **accumulated profits** to the purchase or acquisition of property" and

that such property shall not "be considered as profits for the purpose of declaration or payment of dividends, **unless otherwise determined by a majority of the Board of Directors.**"

All tax exemptions are to be strictly construed in favor of the State, and the burden is upon the taxpayer to show clearly that it comes within the exemption. Subsection (a) of Section 212 above quoted grants an exemption to societies and other organizations which are neither organized nor operated for gain or profit. The declaration in the amendment to the effect that the corporation is a non-profit corporation is not sufficient. As pointed out above, other provisions of the Articles of Incorporation indicate that though payment of dividends need not be made, its operations may be for profit or gain. In fact those provisions, in my opinion, do contemplate the making of profit, and there is nothing to show where that profit will go. Under those circumstances I can not say that such a corporation is not organized for profit.

However, even assuming that the Articles of Incorporation were in strict compliance with the provisions of Sections 32-506, et seq, and constituted a corporation not organized for profit, it is my opinion that before such a corporation would be entitled to the exemption it would have to show to the satisfaction of your department that it was not operating for profit. Both things must be shown: that the corporation was not organized for profit and that it is not operated for profit.

It is my opinion that the Legislature by said Subsection (a) of Section 212, had in mind the state's policy of exempting, in a measure, religious, benevolent and eleemosynary organizations only. *Farmers Oil Co. vs. State Tax Commission*, 41 N.M. 693. As indicated in the above case, cooperatives and other like corporations designated by the statutes as non-profit organizations, do not come within the provisions of that exemption. Likewise corporations founding schools with a view to profit, gain or advantage of any kind to the corporation or its incorporators, do not come within the exemption. Only benevolent or religious organizations conducting the schools solely for the benefit of the public and without any financial profit to themselves come within the exemption provided by Subsection (a) of Section 212 of the Emergency School Tax Act.

By: A. M. FERNANDEZ,

Asst. Atty. Gen.