

Opinion No. 45-4733

June 6, 1945

BY: C. C. McCULLOH, Attorney General

TO: Mr. Don R. Casados, Commissioner State Corporation Commission Santa Fe, New Mexico

{*83} Replying to your recent request for an opinion on the question of the {*84} procedure necessary for the reduction of capital stock of corporations for franchise tax purposes under Chapter 79, Section 30 of the Laws of 1905, being section 54-220 of the N.M. 1941 Compilation.

The question of reduction or decrease of capital stock by various methods, such as holding issued stock of a corporation purchased by it, cancelled by liquidation, sometimes called treasury stock, and other methods of retiring or reducing outstanding stock coming within your request for an opinion.

Inasmuch as the statute in question has not been before our Supreme Court for construction, it has been necessary to refer to the construction placed upon the above section by the Court of Errors and Appeals, State of New Jersey, Section 54-220, having been copied in whole from a New Jersey Corporation Law and enacted by the Legislature of this state under Chapter 79, Section 30, Laws of 1905.

In the case of State v. Bank of Magdalena, 33 N.M. 473, at Page 477, it is stated:

"Our general incorporation laws were taken from New Jersey. State vs. First State Bank of Las Cruces, 22 N.M. 661, 167 P. 3, L. R. A. 1919A, 394. * * *"

"In adopting the statutes of another state the construction placed upon the statutes by the courts of another state is also adopted. Bremen Min. & Mill. Co. v. Bremen, 13 N.M. 111, 79 P. 1133."

In the case of Knickerbocker Imp. Co. v. Board of Assessors, 74 N. J. L. 583, 65 Atl. 913, 9 L. R. A. (NS) 855, 46 Vroom 590, it is stated:

"The prosecutor could not avoid its liability to the state to pay a franchise tax based upon the stock issue of \$ 500,000 by corporate in-buying of its own stock.

"Stock once issued is and remains outstanding until retired and canceled by the method provided by statute for the retirement and cancellation of capital stock: and the words **"retirement"** and **"cancellation,"** wherever used in the Franchise Tax act or in the amendment of that act in the laws of 1906, to which we have been referred (Pamph. L., p. 31), must be interpreted to mean permanent retirement and actual cancellation by the method and in full compliance with the provisions of the statute.

"The original assessment by the state board of assessors was lawfully made and should be affirmed, and the judgment of the Supreme Court should be reversed." (Unanimous Opinion.)

The above case has been one of the leading cases cited by the Courts of the United States, and has been carried through the A. L. R. Annotations. See 89 A. L. R. 858, at Page 861.

In checking the latest Supplemental Decisions in the A. L. R. Blue Book, the only New Jersey case which is cited, in addition to the above case of Knickerbocker Imp. Co. v. Board of Assessors, supra, is the case of Van Keuren & Son v. Martin, 18 N. J. Misc. 581, 15 Atl. (2d) 278, wherein it is stated:

"Under statute concerning rate of franchise taxes on corporations, franchise taxes are computed upon capital stock issued and outstanding, and a reduction of such stock not made in conformity with statute and accompanied by the filing of a certificate of reduction with secretary of state will not operate to reduce amount of tax payable."

In view of the above authorities, it is my opinion that the provisions of the above statute must be followed by corporations in order to claim { *85 } a reduction in capital stock for franchise tax purposes.

By THOS. C. McCARTY,

Asst. Atty. General