

CORPORATIONS: Determination of date of organization within the provisions of Sec. 5113, R. S. Mo. 1939, as amended, Laws of 1943, p. 406.

February 7, 1945



Honorable Jesse A. Mitchell
Chairman, State Tax Commission
Jefferson City, Missouri

Dear Sir:

Reference is made to your inquiry under date of February 1, 1945, from which we quote:

"Is a corporation incorporated December 30, 1944, to whom a certificate of authority to do business was issued January 5, 1945, liable for corporation franchise tax for the year 1945?"

"Is a corporation deemed to have been organized on the date of incorporation, or is it not to be considered organized until the certificate of authority has been issued to commence business?"

The corporate franchise tax referred to in your letter is imposed by the provisions of Section 5113, R. S. Mo. 1939, as amended, Laws of 1943, page 406. Said section contains the further proviso found on page 408:

"Provided, that no tax shall be imposed on corporations organized under the laws of this state on or after January 1, in any year, * * * for the year in which said domestic corporations were organized, * * *."

It thereupon becomes apparent that determination of the year in which the first payment of the aforesaid fran-

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chise tax will be required is dependent upon the construction to be placed upon the word "organized" as used in the statutes imposing the tax.

In 18 C. J. S., Corporations, par. 63, found on page 448, we find the following:

"'Organize,' or 'organization,' as used in reference to corporations, has a well understood meaning, which is the election of officers, providing for the subscription and payment of the capital stock, the adoption of by-laws, and such other steps as are necessary to endow the legal entity with the capacity to transact the legitimate business for which it was created."

We are of the opinion that in Missouri the legal entity is endowed with the capacity to transact its legitimate business upon the issuance of its certificate of incorporation by the Secretary of State. This view is borne out by the provisions of Section 52, found in Laws of 1943, at page 439, reading as follows:

"The corporate existence of such corporation shall date from the time of filing its articles of incorporation with the Secretary of State, * * *."

This opinion is further sustained by the case of *Sylvan Beach v. Koch*, decided by the United States Circuit Court of Appeals, Eighth Circuit, on February 25, 1944, and reported in 150 Fed. (2d) at page 852, l. c. 861, from which we quote:

"The Supreme Court of Missouri in *Boatmen's Bank v. Gillespie*, 209 Mo. 217, 108 S. W. 74, 86, said:

" * * * Moreover, whatever may be the rule in other jurisdictions, we understand the

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law in this state to be that a certificate of incorporation issued by the Secretary of State is a final determination of the corporation's right to do business as such, and that thereafter the state only, by a direct proceeding, can challenge its corporate existence or its right to do business as a corporation, even though fraud should be practiced upon the Secretary of State in obtaining the certificate. Nor, should the corporation or its incorporators fail to comply with the conditions or duties subsequent to the granting of the certificate, would that invalidate the incorporation or render the incorporators liable as partners or as individuals.'

"See, also, First National Bank of Deadwood v. Rockefeller, 195 Mo. 15, 93 S. W. 761, 767; * * * "

We might add that we have given due consideration to the provisions of Section 53, found in Laws of 1943, at page 439, governing the commencement of business by any corporation, but we are of the opinion that such provisions are "conditions subsequent" and therefore not determinative of the question presented by your inquiry. In reaching this conclusion we are giving due regard to the following proviso found in said Section 53:

"Provided, nothing herein shall be construed to prevent the corporation from organizing and getting ready to do business as contemplated in its articles of incorporation;"

which indicates that the Legislature contemplated that compliance with Section 53 would not be requisite to the actual "organization" of the corporation.

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CONCLUSION

In the premises, we therefore are of the opinion that a corporation which was incorporated on December 30, 1944, is to be considered "organized" on that date, within the provisions of Section 5113, R. S. Mo. 1939, as amended, Laws of 1943, at page 406; and that such corporation will be liable for the franchise tax imposed by said section for the year 1945.

Respectfully submitted

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APPROVED:

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