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FILE NO. 82-056

BUSINESS ORGANIZATIONS:
Additional Franchise Tax -
Basis for Computation

Honorable Jim Edgar
Illinois Secretary of State
Springfield, Illinois 62756

Dear Secretary Edgar:

I have your letter wherein you ask four questions regarding the computation of additional franchise taxes under section 139 of The Business Corporation Act (Ill. Rev. Stat. 1981, ch. 32, par. 157.139). The facts are as follows: In May, 1980, a foreign corporation authorized to do business in Illinois filed its annual report in which it elected to pay its franchise taxes based upon the sum of its entire stated capital and paid-in surplus (hereafter "the 100% basis"). In February,

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Honorable Jim Edgar - 2.

1981, the corporation issued additional shares resulting in an increase in stated capital and paid-in surplus. On June 1, 1981, your office assessed and billed the corporation for additional franchise taxes owing on its February 1981, issuance of additional shares. That assessment was made on the 100% basis formula in accordance with the corporation's May, 1980 election of that basis.

On June 11, 1981, the corporation submitted an annual report in which it elected to change its franchise tax basis from the 100% basis to the in-State-out-of-State proportionate basis (hereafter "the proportionate basis"). Due to irregularities not material to this opinion, this report was returned to the corporation for correction and resubmission. (See Ill. Rev. Stat. 1981, ch. 32, par. 157.116.) Your office then adjusted the corporation's annual franchise taxes in accordance with the newly elected proportionate basis. On June 29, 1981, your office received and filed the annual report in which the proportionate basis election was made.

Your first question is whether, under the facts given, the additional franchise taxes due on the February, 1981 issuance of additional shares should be calculated on the previously used 100% basis or the newly elected proportionate basis. It is my opinion that, under the relevant statute, the latter basis must be used in these circumstances.

Honorable Jim Edgar - 3.

Section 139 of The Business Corporation Act (Ill. Rev. Stat. 1981, ch. 32, par. 157.139) sets forth the basis for computation of franchise taxes payable by foreign corporations. In pertinent part, it provides as follows:

" * * *

The basis for an additional franchise tax payable by a corporation * * * shall be the increased amount represented in this State, determined in accordance with the provisions of this Section, of the sum of its stated capital and paid-in surplus as disclosed by any report of issuance of additional shares, or of an increase in stated capital or paid-in surplus * * *.

* * *

The amount represented in this State of the sum of the stated capital and paid-in surplus of a foreign corporation shall be determined in the same manner as provided in this Act with respect to license fees of foreign corporations, except as follows:

* * *

(b) If the corporation fails to file its annual report in any year within the time prescribed by this Act, the proportion of the sum of its stated capital and paid-in surplus represented in this State shall be deemed to be the sum of its entire stated capital and paid-in surplus, unless its annual report is thereafter filed and its franchise taxes are thereafter adjusted by the Secretary of State in accordance with the provisions of this Act, in which case the proportion shall likewise be adjusted to the same proportion that would have prevailed if the corporation had filed its annual report within the time prescribed by this Act.

* * *

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(Emphasis added.)

Honorable Jim Edgar - 4.

Section 139(b) of the Act applies to a corporation which has failed to file its annual report in any year within the time prescribed therefor. It provides for the retroactive adjustment of additional franchise taxes based on a subsequently filed annual report.

In this case, the foreign corporation failed to file its annual report on or before the last day of February, the date on which such report was due (see Ill. Rev. Stat. 1979, ch. 32, par. 157.116). It did file its annual report on June 29, 1981 and, according to the facts given, its annual franchise taxes were adjusted to reflect the newly elected basis. Hence, as required by section 139(b) of the Act, the proportion of the sum of the corporation's stated capital and paid-in surplus used in determining the amount represented in this State of the sum of its stated capital and paid-in surplus must likewise be adjusted as if the corporation had timely filed its annual report.

For this reason, it is my opinion that, under the provisions of section 139(b) of the Act, the newly elected proportionate basis must be used in assessing the additional franchise taxes owing on the February 1981, issuance of additional shares.

You also ask whether there are any "serious constitutional problems" in using a 100% basis for the assessment of

Honorable Jim Edgar - 5.

additional franchise taxes while using a proportionate basis for the assessment of annual franchise taxes, where the 100% basis for the additional franchise taxes is applied to a period of time which includes the time period after which the corporation had elected to use a proportionate basis for its annual franchise taxes. With regard to the assessment of additional franchise taxes on shares issued prior to the election, the issue raised by your second question need not be addressed since it is my opinion that the proportionate basis must be used in computing both the additional franchise taxes and the annual franchise taxes of the corporation in question. In addition, your question appears to assume that the basis for additional franchise taxes would be fixed for a period of seventeen months, i.e., from February 1981, until July 1982, notwithstanding the corporation's election in its 1981 annual report to be taxed on a proportionate basis. Yet, section 139(a) of the Act requires that the basis for the assessment of future additional franchise taxes be changed once the corporation elects to do so in an annual report for a subsequent year. (Ill. Rev. Stat. 1979, ch. 32, par. 139(a).) Thus, the basis will not necessarily be fixed for the time period after which the corporation has properly made its election pursuant to the statute. So long as the statute is followed, no constitutional infirmities will arise. See United States Borax and

Honorable Jim Edgar - 6.

Chemical Corp. v. Carpentier (1958), 14 Ill. 2d 111; Allstate Enterprises Stock Fund, Inc. v. Lewis (1976), 36 Ill. App. 3d 154.

You also inquire whether, by operation of section 139(b) of the Act, the election made in the corporation's post-February 28 annual report is applicable to shares issued prior to February 28. As explained above, in response to your first question, once the corporation's franchise taxes are adjusted by the Secretary of State, in accordance with the Act, to reflect the election made in an annual report filed subsequent to February 28, the proportion used to determine its additional franchise taxes must also be adjusted as required by section 139(b). The answer to this question is therefore yes.

I cannot respond to your final question on section 100 of The Business Corporation Act (Ill. Rev. Stat. 1981, ch. 32, par. 157.100) because that question is posed in hypothetical terms.

Very truly yours,


ATTORNEY GENERAL