

MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT
OF THE
ATTORNEY GENERAL

For the Years
1967 through 1972

FACTS:

Financial information concerning the Maine Institution for the Blind indicates that it does not receive a major portion of its current annual receipts from public sources. In fiscal year 1968, for example, of total receipts of \$44,437.16, the only receipts from current public sources were: \$356.07 from donations and miscellaneous receipts, and \$3,041.50 appropriated by the State Legislature. In more than twenty-five years no fund-raising effort has been made by the institution other than the mailing of letters to lawyers and clergymen concerning the inclusion of the institution in the wills of clients and parishioners.

QUESTION:

Must the Maine Institution for the Blind pay minimum wages to its employees under the provisions of 26 M.R.S.A. §661, et seq?

ANSWER:

Yes.

REASON:

26 M.R.S.A. § 663, subsection 3, E, exempts a public-supported nonprofit organization from payment of minimum wages to its employees. To entitle an organization to such exemption it must show that the major portion of its current annual receipts is derived from public sources. This, the Maine Institution for the Blind has not shown. It is, therefore, not a public-supported nonprofit organization entitled to the above exemption.

LEON V. WALKER, JR.
Assistant Attorney General

January 9, 1969
Sales Tax Division

To: John Singer, Director

Subject: Sales Tax Assessments Upon a Suspended Maine Corporation

SYLLABUS:

A corporate taxpayer must be assessed, for sales and use tax purposes, as a corporation even though the sales and use tax liability accrued after its corporate charter was suspended pursuant to 36 M.R.S.A. § 2406.

FACTS:

The taxpayer has been registered as a corporate seller with the Sales Tax Division since March 2, 1966. It has filed Federal Income Tax returns as a corporation for the fiscal years ending June 30, 1967 and June 30, 1968. The personal property tax for 1968 on stock in trade was assessed against an individual who is the major stockholder,

not against the corporation.

The corporation was formed and its certificate filed with the Secretary of State on December 31, 1963. The Secretary of State suspended its charter on December 2, 1965 for having failed to pay its annual franchise tax. According to the records of the Secretary of State this corporation's certificate remains suspended.

QUESTION:

Should the taxpayer, for purposes of formal sales and use tax assessments, be assessed as a corporation even though the Secretary of State has suspended the corporate charter pursuant to 36 M.R.S.A. § 2406?

ANSWER:

The taxpayer should be assessed as a corporation.

REASONS:

Pursuant to 36 M.R.S.A. § 2405 the charter of a Maine corporation may be forfeited by a judicial proceeding instituted in the Superior Court by the Attorney General. The Secretary of State is an administrative officer who, pursuant to 36 M.R.S.A. § 2406, is empowered to suspend a corporate charter for nonpayment of franchise tax fees. He has no power to forfeit the charter. The North Dakota Supreme Court in *Farmer's State Bank v. Brown* 204 N. W. 273 (1925), stated at page 677:

"An examination of the statutes of this State and of the authorities with reference to the requirement of an annual license or filing fee, and the effect of nonpayment of the same, convinces us that under these statutes the general rule is applicable, and, where the State has not forfeited the charter for nonuser or breach of condition, through action brought in the courts, the corporate existence of a defaulting corporation cannot be collaterally questioned."

The statutes referred to by the North Dakota court are similar to those of Maine.

The Wisconsin Supreme Court in *West Park Realty Co. v. Porth* 212 N. W. 651, also faced a factual and statutory situation similar to the one presently before us. The Court stated at page 653:

"The Secretary of State is a mere ministerial officer . . . It therefore becomes apparent that, when the Legislature authorized the secretary of state to declare a forfeiture, it merely intended that such declaration should operate as a cause for forfeiture, which could be enforced in a proper action brought by the Attorney General or by any private party in the name of the State, under the provision of 286.36 of the Statute."

The nonpayment of corporate franchise taxes does not affect the creation and existence of a corporation. However, failure to pay these franchise taxes can be a ground for forfeiture proceedings by the Attorney General under 36 M.R.S.A. § 2405.

"Under other statutes, however, the corporation comes into existence as soon as proper articles of association or a proper certificate of incorporation or charter is filed in the office or offices designated in the statute . . . and the organization is completed afterward, the statutory provisions as to organization, or as to filing a certificate of organization, being conditions subsequent, a failure to comply with which does not affect the corporate existence unless it is directly attacked in a proceeding by the state." 18 C.J.S. Corporations § 63, page 448.

Finally, because a charter suspended under § 2406 may be revived by payment of all franchise taxes and expenses of advertising, and because a corporation continues to be liable for annual franchise taxes even though its charter has been suspended, it follows that the corporation continues to be liable for the reference assessment. The Court in *West Park Realty Co. v. Porth*, supra, at page 652 stated:

“Subdivision 7 of § 180.08 authorizes the secretary of state to rescind the forfeiture on the payment of a penalty of \$25 and the filing of the affidavit required by said section. This in itself indicates that it was the legislative intent, not that the corporation had forfeited its franchises and charter, but that it might still be recognized as a valid operating legal entity upon compliance with certain conditions.”

WENDELL R. DAVIDSON
Assistant Attorney General

January 10, 1969
Soil and Water

Charles L. Boothby, Executive Secretary

Delegation of vote by Supervisors of Soil and Water Conservation District to private persons.

SYLLABUS:

A Supervisor of a Soil and Water Conservation District cannot delegate his authority to vote.

FACTS:

In your memorandum under date of December 18, 1968 submitted to this Office it is stated that several Soil and Water Conservation Districts have asked individuals to sit in on the deliberations of the Boards of Supervisors. These are usually individuals with special interests in some phase of the soil and water conservation program. Occasionally, to complete a quorum for a meeting, these individuals are allowed to vote on official District business.

QUESTION:

Can elected or appointed public officials such as Supervisors of Soil and Water Conservation Districts delegate their official voting powers to private individuals on a temporary basis?

ANSWER:

No.

REASONING:

It is a basic rule of the law of agency that an officer, particularly a public officer, may delegate the performance of ministerial duties to others but that said officials may