

No. 477

**CORPORATIONS—FOREIGN CORPORATIONS—
MERGER OF CORPORATIONS—SECRETARY OF
STATE**

Held: When a parent corporation absorbs its subsidiary corporation by merger, the subsidiary corporation ceases to exist; and such a merged foreign corporation—which has filed its charter or articles of incorporation with the Secretary of State under the provisions of Section 145.1, Revised Codes of Montana, 1935—must pay fees based on the proportion of its capital stock employed in the State of Montana (Sections 145.1 through 145.4, Revised Codes of Montana, 1935) without receiving credit for like fees paid by the subsidiary corporation before its extinction.

September 2, 1942.

Mr. Sam W. Mitchell
Secretary of State
State Capitol
Helena, Montana

Dear Mr. Mitchell:

You have presented the following factual situation to this office for an opinion:

A corporation, subsidiary of B corporation, came into Montana in 1927; it agreed to pay fees upon the proportion of its capital stock then or thereafter to be employed in the state; it paid fees totaling \$593.50. When it closed business in Montana at the end of October, 1941, A corporation submitted a report showing the additional proportion of capital employed to that date. A had already paid \$593.50, as mentioned above, and the new report showed an additional \$43.99 due.

B corporation—the parent which had not been in Montana—tendered its qualification papers October 23, 1941, and paid the minimum fee of \$50.00 with the understanding additional fees, based on the increased proportion of capital stock employed in this state, would be paid when due. Meanwhile B corporation absorbed its subsidiary, A corporation, by a merger under the laws of the State of Delaware.

From the date of the merger only B corporation did business in the State of Montana. B's report as now submitted shows an additional fee of \$672.32 due; and B corporation has asked the office of the Secretary of State to give it credit for the \$593.50 paid by A corporation. Should such credit be given?

Section 145.1 through 145.4, Revised Codes of Montana, 1935, provide:

"145.1 Fee for filing articles of incorporation of foreign corporations. That every foreign corporation required by law to file in the office of the secretary of state a certified copy of its charter or articles of incorporation shall pay to the secretary of state for the filing thereof as follows:

"Upon the proportion of its capital stock then or thereafter to be represented by its property and business in Montana at the rate of one dollar (\$1.00) per thousand dollars (\$1,000.00) for the first one hundred thousand dollars (\$100,000.00); at the rate of eighty cents (80c) per thousand dollars (\$1,000.00) for any additional from one hundred thousand dollars (\$100,000.00) to two hundred fifty thousand dollars (\$250,000.00); at the rate of sixty cents (60c) per thousand dollars (\$1,000.00) for any additional from two hundred fifty thousand (\$250,000.00) to five hundred thousand dollars (\$500,000.00); at the rate of forty cents (40c) per thousand dollars (\$1,000.00) for any additional five hundred thousand dollars (\$500,000.00) to one million dollars (\$1,000,000.00); and at the rate of twenty cents (20c) per thousand dollars (\$1,000.00) for any additional over one million dollars (\$1,000,000.00), provided, however, that no fee for filing shall be less than fifty dollars (\$50.00)."

"145.2 Report of capital stock and assets. Every foreign corporation which is required by law to file in the office of the secretary of state a certified copy of its charter or articles of incorporation shall annually and between the first days of January and March of each year file in said office a report verified by the oath of its president, vice-president, or secretary, stating the proportion of its capital stock represented in the state of Montana by its property located and business transacted therein during the preceding year."

"145.3 Determination of proportion of capital stock employed in state. In determining the proportion of capital stock employed in this state the same shall be computed by taking the gross business in

dollars of the corporation in the state for the preceding year and adding the same to the full value in dollars of the property of the corporation located in the state and by taking the total gross business in dollars of the corporation, both within and without the state for the preceding year, and adding thereto the full value in dollars of the entire property of the corporation both within and without the state and by then dividing the total value in dollars of the business and property in the state by the total value in dollars of all the business and property of the corporation, the quotient thus obtained to be taken as the percentage of the capital stock represented by the business and property within the state. The secretary of state may demand as a condition to the filing of such report a statement verified by the president, vice-president or secretary of such foreign corporation, showing in detail the information required for the making of the calculation aforesaid, which statement when so demanded shall be attached to and filed with such report."

"145.4 Additional filing fee required on showing of report, when. Whenever such report shall show a greater proportion of capital stock of such foreign corporation represented by its property and business in Montana than that upon which the fee for filing the charter or articles of incorporation was based, such foreign corporation at the time of filing such report, shall pay such additional fee as it would have been required to pay for filing if such fee had been calculated on the basis of the proportion of the capital stock represented by its business and property in Montana as shown by such report."

It should be noted the above quoted statutes governing the payment of fees by foreign corporations are plain, clear and unambiguous. The Legislative Assembly of this state has outlined the method to be followed with decided clarity and direction. There has been no mention of a merged corporation's being granted any special consideration and, in fact, it is definitely designated "every foreign corporation required by law to file . . . a certified copy of its charter or articles of incorporation shall pay . . ."

The Secretary of State is an officer charged with important and significant duties; but he must look for his authority in law before he acts in any particular manner with relation to his prescribed duties. The instant case is no exception. No authority to do the act here requested is granted to the Secretary of State by the statutes of Montana.

I have examined the law carefully to determine the status of a merging corporation. The two terms—"consolidation" and "merger"—are often loosely used interchangeably; but they are scarcely the same in legal effect. Consolidation brings into being a new corporation and effects the termination of the old corporations which united. Merger, however, is actually the absorption of one corporation by another.

"The combining of corporations may result in three possible conditions or situations. First, a coalescence or union of the two corporations, neither being extinguished; second, an extinction of one corporation and its absorption by the other; third, a vital succession or the extinction of both original corporations and the creation of a new one.

"The last is, strictly speaking, a consolidation; the second, a merger; and the first falls within the technical definition of neither a consolidation nor a merger. It results generally where one company merely purchases or leases the property of another corporation, or obtains control of a majority of its stock, without any intent to merge or consolidate the corporations." (Emphasis Mine.)

Volume 15, Fletcher Cyclopedia Corporations, Chapter 61, No. 7075.

"The merger of two or more corporations is neither a sale nor a liquidation of corporate properties, but a consolidation of properties,

powers and facilities of constituent companies, **forming a new corporate entity.** Merger is a method of incorporation by two or more companies into a single corporate body. While the constituent companies are deemed dissolved, their powers and privileges, to the extent authorized by the merger contract or the law, are vested in the merger company as a new corporation. This entity is distinct from that of its constituents, but it draws its life from the act of consolidation." (Emphasis Mine.)

Buist's Estate, (Pas. 1929), 147 Atl. 606, 607. Berks County Trust Company v. Kotzen, (Pas. 1937) 192 Atl. 638, 639.

"... The essence of a merger is the absorption by one corporation of the properties and franchises of another, whose stock it has acquired, whereupon the merged corporation ceases to exist and the merging corporation alone survives. . ." (Emphasis Mine.)

Ables Realty Corporation v. Commissioner of Internal Revenue, (C. C. A. 2nd Cir. 1934) 71 Fed. (2nd) 150, 151.

"... In the case of merger the one (corporation) is absorbed by the other and when we come to apply the true test as to whether, under a given statement of facts, there has been a merger, it becomes necessary to ascertain whether the existence of one of the corporations, as such, has been preserved, and the other has ceased to exist. . ."

Lee v. Atlantic Coastwide Railroad Company (C. C., S. C. 1906) 150 Fed. 775, 787.

Under the laws of the State of Montana the Secretary of State had recognized the rights of both A and B corporations to enter this state and conduct business after they had complied with the requirements of this state's law. The law and the Secretary of State have correctly thought of these two corporations as separate and distinct entities even though one corporation was a subsidiary of the other. When the subsidiary was absorbed into the parent corporation by merger, it is true that a new corporation was created—but undeniably the parent corporation was expanded, and the subsidiary ceased to exist. To hold otherwise would be impracticable and would effect an avoidance of the laws of this state.

It is therefore my opinion that, when a parent corporation absorbs its subsidiary corporation by merger, the subsidiary corporation ceases to exist; and such a merged foreign corporation—which has filed its charter or articles of incorporation with the Secretary of State under the provisions of Section 145.1, Revised Codes of Montana, 1935—must pay fees based on the proportion of its capital stock employed in the State of Montana (Sections 145.1 through 145.4, Revised Codes of Montana, 1935) without receiving credit for like fees paid by the subsidiary corporation before its extinction.

Sincerely yours,

R. V. BOTTOMLY
Attorney General