

VOLUME NO. 40

OPINION NO. 42

CORPORATIONS - Eligibility of Subchapter S shareholder for tuition offset;

PARENT - Eligibility of Subchapter S shareholder for tuition offset;

SHAREHOLDER - Eligibility of Subchapter S shareholder for tuition offset;

TUITION OFFSET - Eligibility of Subchapter S shareholder for;

MONTANA CODE ANNOTATED - Sections 1-2-106, 20-5-303, 20-5-305, 35-1-510(1), 40-6-102, 41-5-103(9).

HELD: A shareholder in a closed, or family, type Subchapter S corporation is not eligible to claim tuition offset under section 20-5-303, MCA, when the corporation is the taxpayer responsible for the district and county property taxes referred to in that section.

16 March 1984

Ed Argenbright, Superintendent  
Office of Public Instruction  
Room 106, State Capitol  
Helena MT 59620

Dear Mr. Argenbright:

You have requested my opinion concerning the following question:

Whether a stockholder in a "family type" Subchapter S corporation is entitled to a tuition waiver for individual tuition for elementary pupils where a particular stockholder's portion of the corporation's tax exceeds the rate of tuition determined under section 20-5-305, MCA, in district and county property taxes during the immediately preceding school fiscal year for the benefit and support of the district in which a child will attend school.

Section 20-5-303, MCA, provides in part that, when a child attends public elementary school outside the school district of his residence, tuition will be assessed but that it "shall be reduced by the amount the parent of the child paid in district and county property taxes during the immediately preceding school fiscal year for the benefit and support of the district in which the child will attend school." The issue presented is whether district and county property tax payments by a closely-held or family corporation constitute payments by a "parent" for tuition offset purposes under section 20-5-303, MCA.

The term "parent" is not defined in sections 20-5-301 to 314, MCA. "Parent" is commonly defined as "a father or mother ... [and] is sometimes used popularly and in statutes to include persons standing in loco parentis other than the natural parent." Webster's New International Dictionary 1776 (2d ed. 1941). See also §§ 40-6-102, 41-5-103(9), MCA. The Legislature in enacting section 20-5-303, MCA, is presumed to have used nontechnical terms contained therein in their ordinary and usual meanings. See, e.g., § 1-2-106, MCA; Jones v. Judge, 176 Mont. 251, 254, 577 P.2d 846, 848 (1978); Montana Power Co. v. Cremer, 182 Mont. 277, 279-80, 596 P.2d 483, 484 (1979). Therefore, no plausible argument

can be made that the term "parent," as used in section 20-5-303, MCA, includes a closely-held or family corporation.

Section 20-5-303, MCA, would logically extend to property tax payments made by a parent's agent on behalf of the parent. However, it is well established that "[a] corporation has a real individuality ... and is in law an entity separate and distinct from its stockholders." Noble v. Farmers Union Trading Co., 123 Mont. 518, 523, 216 P.2d 925, 927 (1950); Wortman v. Griff, 39 St. Rptr. 1916, 1920, 651 P.2d 998, 1001 (1982). This general rule applies equally to corporations with many shareholders and to those, commonly known as closed corporations, in which ownership and management are substantially identical. Thisted v. Tower Management Corp., 147 Mont. 1, 14, 409 P.2d 813, 820 (1966); see generally Flemmer v. Ming, 37 St. Rptr. 1916, 1919-20, 621 P.2d 1038, 1042 (1980); accord Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653, 662 (1982); Grayson v. Nordic Construction Company, Inc., 92 Wash. 2d 548, 599 P.2d 1271, 1274 (1979).

Further, while the corporate identity, or veil, may be pierced to assess liability directly against shareholders on either an "agency" or an "alter ego" theory, the circumstances attendant to going behind the "corporate cloak" must establish it "is [being] utilized as a subterfuge to defeat public convenience, to justify wrong, or to perpetrate fraud." Monarch Fire Insurance Company v. Holmes, 113 Mont. 303, 307-08, 124 P.2d 994, 996 (1942); see generally Comment, Piercing the Corporate Veil in Montana, 44 Mont. L. Rev. 91 (1983). The mere fact that a corporation is closely held does not warrant piercing the corporate veil. Flemmer v. Ming, supra; accord Team Central, Inc. v. Teamco, Inc., 271 N.W.2d 914, 923 (Iowa 1978); Amfac Foods, Inc. v. International Systems & Controls Corporation, 294 Or. 94, 654 P.2d 1092, 1100 (1982); Sampson v. Hunt, 233 Kan. 572, 665 P.2d 743, 751 (1983). Shareholders are, therefore, generally not liable for corporate debts. § 35-1-510(1), MCA. Consequently, no basis exists for finding agency status for tuition offset purposes under section 20-5-303, MCA, merely because a student's parent has vested property ownership in a closely-held corporation which makes school district and county property tax payments.

Election by a corporation of Subchapter S, or "small business corporation," status under the Internal Revenue Code, 26 U.S.C. § 1372, does not alter the above analysis. That status, while significantly impacting on income tax responsibilities normally applicable to corporations, does not merge the separate legal identities of the corporation and its shareholders. See D. L. Crumbley & P. M. Davis, Organizing, Operating and Terminating Subchapter S Corporations--Law, Taxation and Accounting § 12.6 (rev. ed. 1980); I. Grant, Subchapter S Taxation § 2.1 (2d ed. 1983). Most important, the property on which district and county taxes are assessed is owned by the corporation, and the taxpayer as to that property is the corporation and not its shareholders.

Lastly, "one who accepts the benefits of a corporation must also accept the burdens that flow from the use of a corporate structure.... [T]he corporate form may not be ignored merely because a stockholder could obtain a personal benefit from another form...." Lyon v. Barrett, 89 N.J. 294, 445 A.2d 1153, 1156 (1982) (citations omitted); see also State v. Barreiro, 432 So. 2d 138, 140 (Fla. Ct. App. 1983). A shareholder in a closely-held corporation accordingly must bear any disadvantages resulting from corporate status. One disadvantage associated with incorporation in Montana is the unavailability of tuition offset under section 20-5-303, MCA, when the taxpayer, for property tax purposes, is a corporation and not the child's parent.

THEREFORE, IT IS MY OPINION:

A shareholder in a closed, or family, type Subchapter S corporation is not eligible to claim tuition offset under section 20-5-303, MCA, when the corporation is the taxpayer responsible for the district and county property taxes referred to in that section.

Very truly yours,

MIKE GREELY  
Attorney General