

1531.

CORPORATION "FOR PROFIT"—ARTICLES CANCELED FOR FAILURE TO MAKE ANNUAL REPORT AND PAY FRANCHISE TAX—FILING OF AMENDMENT TO ARTICLES FOR CHANGE TO "NOT FOR PROFIT" PRIOR TO REINSTATEMENT DENIED.

*SYLLABUS:*

*After the articles of a corporation organized nominally as a corporation for profit have been canceled under Section 5509, General Code, such corporation may not, prior to reinstatement as provided in Section 5511, General Code, amend its articles so as to change from a corporation for profit to a corporation not for profit.*

COLUMBUS, OHIO, February 17, 1930.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your letter of recent dates is as follows:

"Under date of March 6, 1929, under Opinion No. 158 you were kind enough to give me your opinion that under certain conditions a corporation whose articles purport to be those of a corporation for profit may amend its articles to eliminate contradictory statements and set forth that it is in fact a corporation not for profit.

I understand that an amendment is about to be submitted by a corporation 'for profit' amending to change to 'not for profit'. I also understand that the case is one falling within the limitations mentioned by your opinion referred to above. However, in the case of such corporation, I find that its articles were canceled some years ago on order of the State Tax Commission, evidently on failure to make annual reports and pay annual franchise taxes. Will it be necessary for the corporation in question to make up the back reports to the Tax Commission and pay the back franchise taxes which would have been assessed against it together with penalties and also to reinstate itself in this office by the payment of reinstatement fee provided by statute, before its amendment making the technical change from 'profit' to 'not for profit' can be filed?"

Section 5509, General Code, 113 O. L. 705, 706, provides that if a corporation organized under the laws of this state for profit fails or neglects to make a report or return or to pay a tax or fee when required by law so to do for ninety days after the time prescribed by law for so doing, the Tax Commission shall certify such fact to the Secretary of State, whereupon the Secretary of State shall cancel the articles of incorporation of any such corporation. This section further provides that after such cancellation "all the powers, privileges and franchises conferred upon such corporations, by such articles of incorporation \* \* shall cease and determine, subject to the provisions of Section 8623-80 of the General Code." Section 8623-80 relates to proceedings for voluntary dissolution.

Section 5511, General Code, 113 O. L. 706, provides as follows:

"Any corporation whose articles of incorporation or license certificate to do or transact business in this state, has expired or has been cancelled or revoked by the secretary of state, as provided by law for failure to make any report or return or to pay any tax or fee, upon payment to the secretary of state of any additional license fees and penalties required to be paid to him, and upon the filing, with the secretary of state, of a certificate from the tax

commission that it has complied with all the requirements of law as to franchise or exercise tax reports and paid all taxes, fees or penalties due thereon for each and every year of its delinquency, and upon the payment to the secretary of state of an additional penalty of ten cents for each share of its authorized shares, such penalty not to exceed one hundred dollars nor be less than ten dollars in any case, shall be reinstated and again entitled to exercise its rights, privileges and franchises in this state, and the secretary of state shall cancel the entry of cancellation or expiration theretofore made by him and shall issue his certificate entitling such corporation to exercise its rights, privileges and franchises; provided, however, that if the reinstatement be not made within two years from the date of the cancellation of its articles of incorporation or date of the cancellation or expiration of its license to do business, and it appears that articles of incorporation or license certificate shall have been issued to a corporation of the same or similar name, the applicant for reinstatement shall be required by the secretary of state as a condition prerequisite to such reinstatement, to amend its charter by changing its name. Such certificate may be recorded in the recorder's office of any county in this state for which recording the recorder shall charge and receive a fee of one dollar."

You state that the corporation in question is such as was under consideration in Opinion No. 158, the syllabus of which is as follows:

"When articles of a corporation have been filed in the office of the secretary of state, purporting to be a corporation for profit, but which contain a purpose clause which clearly sets forth a purpose which is not only evidently that of a corporation not for profit, but which precludes the exercise of any purpose for profit and which corporation has, pursuant to such organization, acted solely as a corporation not for profit, its articles may be amended to eliminate such contradictory statements and set forth that it is, in fact, a corporation not for profit."

There is no statement in this opinion to the effect that during the time such corporation is nominally a corporation for profit, and so designated by its articles on file in your office, it should be considered as other than a corporation for profit. The opinion merely goes to the right to amend under certain circumstances. One of the purposes of such amendment might conceivably be to avoid the necessity in the future of paying taxes and fees such as are required to be paid by corporations for profit. The opinion does not hold that taxes need not be paid by corporations which are, though erroneously, incorporated as corporations for profit.

The question then becomes whether or not any corporation organized as a corporation for profit under the laws of Ohio may amend its articles of incorporation after such articles have been canceled by the Secretary of State as provided in Section 5509, General Code, and before reinstatement as provided in Section 5511, General Code.

In the case of *Eversman vs. Shipman Co.*, 115 O. S. 269, it was held that after such cancellation and before reinstatement, certain transactions of a corporation resulting in mechanics' liens being filed, were not void and such liens were valid and entitled to payment prior to the claims of general creditors existing before such cancellation. In this case, the Supreme Court construed Sections 5509 to 5513, inclusive, General Code, as in pari materia and held that the action of the Secretary of State under Section 5509, as then in force and effect, did not ipso facto terminate all power and authority of a corporation, so that all of its acts thereafter until reinstatement would be absolutely void and of no effect. After referring to the power of the Secretary of State as to the forfeiture of corporate franchises, the opinion, by Chief Justice Marshall, at p. 277, holds:

"It is not necessary in the instant case to determine whether the Legislature might confer upon the secretary of state the power to terminate the powers, privileges, and franchises of a corporation. It is sufficient to say that, when all these sections are construed together, the legislative intent is evident, and it becomes clear that it was not intended to confer that power upon the secretary of state further than to facilitate the filing of reports and the collection of fees and taxes."

The question presented in your communication must be distinguished from that which was before the Supreme Court in the Eversman case, supra, since the authority to file a certificate of amendment is a special privilege conferred by the Legislature and should not be considered in the same category as the authority to enter into customary business transactions within the scope of the purpose of the corporation under its franchise. In taking the position that a corporation may not amend its articles as set forth in your letter under these circumstances, I believe I am construing Section 5509 in accordance with the construction placed thereon by the Supreme Court in that, after cancellation of the articles of a corporation as provided therein, the powers and privileges of a corporation are terminated by the Secretary of State "to facilitate the filing of reports and the collection of fees and taxes." The reference in Section 5509, in its present form, to Section 8623-80 further strengthens this construction because Section 8623-80 now provides that after cancellation a corporation "shall cease to carry on its business and shall be without authority so to do."

Section 5511, supra, has provided one specific amendment that may be filed by a corporation after cancellation and before reinstatement, viz., an amendment changing the name of such corporation in the event articles have been issued to another corporation of the same or a similar name as therein specified. There is no provision for the filing of any other amendment of the articles of incorporation after cancellation.

In view of the foregoing, it follows that the corporation in question must be reinstated as provided in Section 5511, supra, before the desired certificate of amendment may be filed.

Respectfully,  
 GILBERT BETTMAN,  
 Attorney General.

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1532.

TOWNSHIP TRUSTEES—PER DIEM COMPENSATION FOR ATTENDING CONFERENCES WITH OTHER BOARDS OF TRUSTEES CONCERNING UNIFORM SYSTEMS OF ROADS, CEMETERIES AND POOR RELIEF.

*SYLLABUS:*

*In the absence of an apparent abuse of discretion or evidence of bad faith in a particular case, it cannot be said as a matter of law, that it is unlawful for township trustees, after determining the need and propriety of a conference with the trustees of other townships for the purpose of discussing matters pertaining to the duties of township trustees in carrying out their powers with respect to highways, cemeteries and poor relief, to credit themselves with the time expended in attending such a meeting as*