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ATTORNEY GENERAL OPINION NO. 80- 39

The Honorable Jack H. Brier
Secretary of State
Second Floor, State Capitol
Topeka, Kansas 66612

Re: Corporations--Filings, Reports, Fees,
Franchise Taxes--Forfeiture of Articles
of Incorporation for Failure to File
Report or Pay Taxes

Synopsis: The Secretary of State's notice to a domestic corporation under K.S.A. 1979 Supp. 17-7510(a), advising it that failure to file its annual report and pay its franchise taxes within ninety days of the time established by law therefor, is not a condition precedent to forfeiture of such corporation's articles of incorporation for failure to comply with these statutory requirements. Such forfeiture occurs by operation of law, and the Secretary of State is not vested with any authority to affect such occurrence.

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Dear Secretary Brier:

You have sought our interpretation of K.S.A. 1979 Supp. 17-7510, which provides for the forfeiture of a domestic corporation's articles of incorporation for failure to file its annual franchise taxes. Subsection (a) of this statute states:

"In addition to any other penalties, the failure of any domestic corporation to file the annual report in accordance with the provisions of this act or to pay the annual taxes herein provided for within ninety (90) days of the time for filing and paying the same shall work the forfeiture of the articles of incorporation of such domestic corporation. Within sixty (60) days after the date such annual report and taxes are due, the secretary of state, by mail, shall notify any corporation that has failed to submit such report and taxes when due that its articles of incorporation shall be forfeited unless the annual report is filed and the taxes thereon are paid within ninety (90) days from the date such report and taxes were due. Any corporation that fails to submit such report and taxes within such time shall forfeit its articles of incorporation, and the secretary of state shall notify the attorney general that the articles of incorporation of such corporation have been forfeited." (Emphasis added.)

With regard to the above-quoted statutory provisions, you have asked specifically whether the notice required of the Secretary of State "is a condition precedent before a corporation can be cancelled or whether the failure of a corporation to file the annual report and pay the annual franchise taxes within ninety (90) days of the time for filing shall work a forfeiture of the articles of incorporation of such corporation even though no timely notice was sent by our office."

In our judgment, the emphasized portions of 17-7510(a) quoted above clearly indicate that, irrespective of whether the Secretary of State sends or fails to send the required notice, the failure of a domestic corporation to pay its annual franchise taxes when the same are due "shall work the forfeiture of the articles of incorporation of such domestic corporation." Thus, such forfeiture occurs by operation of law. No act is required by the Secretary of State to accomplish such forfeiture.

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The only acts required of the Secretary of State by 17-7510(a) are ministerial and advisory in nature only, i.e., the notice required to be sent a domestic corporation that has failed to file its annual report and to pay its franchise taxes at the appointed time is for the sole purpose of advising such corporation that failure to file the report and pay such taxes within ninety days of such due date will result in forfeiture of its articles of incorporation, and in the event such corporation fails to comply with these requirements, the Secretary of State is thereafter required to advise the Attorney General that such corporation's articles of incorporation have been forfeited. Neither of these acts have any effect upon the forfeiture of a corporation's articles of incorporation.

It is within this context that we have considered the problem created when it is discovered that, "through an oversight," the notice required by 17-7510(a) to be sent a domestic corporation that has not filed its annual report or made timely payment of its taxes has not been sent within the time prescribed. You advise that in such instances you notify such corporation by mail that, unless the report is filed and the taxes are paid within thirty days from the date of the notice, it will forfeit its articles of incorporation.

We find no authority for such action, and we have concluded that the notification sent by your office subsequent to the time when 17-7510(a) provides that a corporation's articles of incorporation are forfeited can in no way alter such forfeiture, regardless whether the corporation to which such notice is sent complies with its provisions. To conclude otherwise would either require a finding that such notice is a condition precedent to forfeiture of a domestic corporation's articles of incorporation, or that the Secretary of State is vested with discretionary authority to "cancel" a corporation. As previously noted, it is our judgment that neither of such findings can be made. Forfeiture of a domestic corporation's articles of incorporation occurs by operation of law under 17-7510(a); that statute vests no authority in the Secretary of State to affect such occurrence, and the duties imposed on the Secretary of State are ministerial only.

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Although not directly pertinent to your inquiry, it should be noted that there are several other statutes which mitigate the seemingly harsh consequences of 17-7510(a). For example, the Kansas General Corporation Code contains the following provisions:

"(a) Any corporation may procure an extension, restoration, renewal or revival of its articles of incorporation, if a domestic corporation, or its authority to engage in business, if a foreign corporation, together with all the rights, franchises, privileges and immunities and subject to all of its duties, debts and liabilities which had been secured or imposed by its original articles of incorporation, and all amendments thereto, or by its authority to engage in business, as the case may be, in the following instances:

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"(2) At any time, where the corporation's articles of incorporation, if a domestic corporation, or the authority to engage in business, if a foreign corporation, has become inoperative by law for non-payment of taxes" K.S.A. 17-7002(a)(2).

Subsection (f) of this same statute provides that "[a]ny corporation seeking to renew or revive its articles of incorporation . . . shall pay to the secretary of state an amount equal to all fees and taxes and any penalties thereon due." Where the domestic corporation whose articles of incorporation are forfeited under 17-7510(a) is one organized for profit, such penalties would be computed pursuant to K.S.A. 1979 Supp. 17-7509. Such penalty is in an amount equal to "one hundred dollars (\$100), and an additional penalty of five dollars (\$5) per day for each day's omission after the time . . . for filing such report and paying such tax." However, 17-7509 also contains the following provision:

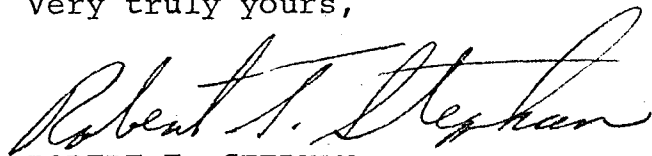
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"Any corporation shall have the right to be heard by the secretary of state upon the matter of determination of the amount of taxes or penalties due under the provisions of this act. For good cause shown, the secretary of state may remit or waive all or any part of any penalties due under this act."

Therefore, a domestic corporation whose articles of incorporation are forfeited under 17-7510(a) can not only regain its corporate existence, but for good cause shown, in the judgment of the Secretary of State, can obtain a waiver or remission of all or part of any penalties due.

In summary, for the reasons stated above, it is our opinion that the Secretary of State's notice to a domestic corporation under K.S.A. 1979 Supp. 17-7510(a), advising it that failure to file its annual report and pay its franchise taxes within ninety days of the time established by law therefor, is not a condition precedent to forfeiture of such corporation's articles of incorporation for failure to comply with these statutory requirements. Such forfeiture occurs by operation of law, and the Secretary of State is not vested with any authority to affect such occurrence.

Very truly yours,



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RTS:WRA:gk