



## OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN  
ATTORNEY GENERAL

Hon. M. O. Flowers  
Secretary of State  
Austin, Texas

Dear Sir:

Attention: Mr. John Vickers

Opinion No. 0-2919

Re: Whether the Secretary of State is authorized under Article 7089a to require beginner corporation to file an affidavit which would provide substantially the same information required to be compiled under Article 7089, cause the records of such corporation to be closed at a date immediately preceding May 1, and from such affidavit determine and collect the franchise tax due May 1; and related questions.

We are in receipt of your letter of November 20, 1940, in which you submit the following questions to this department for an opinion:

- (1) Is the Secretary of State authorized and empowered to act under Article 7089a and require a beginner corporation to file an affidavit, which would provide substantially the same information required to be compiled under Article 7089, and cause the records of such corporation to be closed at a date immediately preceding May 1, and from such affidavit determine and collect the franchise tax due May 1?

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(2) If the answer of the above question is "Yes", should the demand upon the corporation require the books to be closed on a definite date, or upon an indefinite date to be determined by the corporation from a standpoint of convenience and as near to May 1 as possible, which would enable them to file the report and pay the taxes on that date?

(3) If the records are to be closed at a fixed time, what date should be the closing time?

(4) If it has been decided that we do have this authority, would this Department have the further authority to audit all back franchise tax accounts and reassess franchise taxes, or would the state be estopped by this prior departmental practice?

Article 7084, Revised Civil Statutes, 1925, as amended, reads in part as follows:

"Except as herein provided, every domestic and foreign corporation heretofore or hereafter chartered or authorized to do business in Texas, shall, on or before May 1st of each year, pay in advance to the Secretary of State a franchise tax for the year following, based upon that proportion of the outstanding capital stock, . . ."

Article 7086, Revised Civil Statutes, 1925, provides in part:

"Whenever a private domestic corporation is chartered in this State, . . . such corporation shall be required to pay in advance to the Secretary of State, as its franchise tax from that time down to and including the thirtieth day of April next following, only such proportionate part

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of its annual franchise tax, as hereinabove prescribed, as the period of time between the date of filing of its articles of incorporation or the issuance of its permit to do business, as the case may be, and on the first day of May following, bears to a calendar year."

Article 7087, Revised Civil Statutes, 1925, reads as follows:

"To determine the amount of the first franchise tax payment required by this chapter of any domestic corporation which may be hereafter chartered, or of any foreign corporation which may hereafter apply for a permit to do business within this State, and also to determine the correctness of any report which is provided for in this chapter, the Secretary of State may, whenever he deems it necessary or proper to protect the interests of the State, require any one or more of the officers of such corporations to make and file in the office of the Secretary of State an affidavit setting forth fully the facts concerning the amount of the surplus and undivided profits, respectively, if any, of such domestic or foreign corporation; and until the Secretary of State shall be fully satisfied as to the amount of such surplus and undivided profits, respectively, if any, he shall not file the articles of incorporation of such proposed domestic corporation, or issue such permit, or accept such franchise tax."

Article 7089, Revised Civil Statutes, 1925, reads as follows:

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"Except as herein provided, all corporations now required to pay an annual franchise tax shall, between January 1st and March 15th of each year, make a sworn report to the Secretary of State, on blanks furnished by that officer, showing the condition of such corporation on the last day of its preceding fiscal year. . . ." (The statute here makes various provisions concerning the contents and filing of the report, and other matters.)

Article 7089a, Revised Civil Statutes, Acts 1930, 41st Legislature, 5th Called Session, page 220, Chapter 68, Section 4, reads as follows:

"The forms prescribed shall contain other information as the Secretary of State may deem advisable and he may adopt rules and regulations providing for the enforcement of the provisions hereof and may require corporations to cause such records as may be necessary in determining the amount of taxes that may be due hereunder. No tax shall be paid which may not be collected under the State and Federal Constitution."

Your letter discussing the above questions and statutes continues as follows:

"For the purposes of this opinion consider a corporation formed between January 1 and May 1. Articles 7086 and 7087 prescribe the procedure to be followed in ascertaining the correct amount of tax due from date of incorporation to May 1. Article 7089 requires all corporations to file between January 1 and March 15 of each year (which time may be extended to May 1) a franchise tax report showing the condition of such corporation on the last day of its preceding fiscal year. Obviously a corporation incorporated during the time under consideration has not had sufficient time prior to May 1 to complete a fiscal year. Article 7087, on the other

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hand, merely prescribes the procedure to be followed in determining the tax from date of incorporation down to May 1, and makes no mention of the method to be followed in ascertaining the tax due on May 1. Article 7089a provides that the Secretary of State may adopt rules and regulations providing for the enforcement of the provisions of Article 7089, and may require corporations to cause such records as may be necessary in determining the amount of taxes that may be due under Article 7084.

"As an illustration of the problem confronting this office we cite the case of a corporation incorporated February 9, 1938, with a capital of \$209,000.00, whose taxable capital was increased \$511,000.00 two days thereafter. Frequently, corporations are created for the purpose of borrowing money to prevent individual liability. On the other hand, the corporation might increase or decrease its capital stock, or be conveyed a large amount of assets which would create a large surplus between the date of incorporation and the following May 1.

"It has been a consistent practice of this office for the Charter Division to ascertain the amount of tax due at the time of incorporation, and also advise the corporation of the amount of tax due on May 1 following the date of incorporation, based upon the taxable capital disclosed by the charter.

"While this is the customary and most expedient method of handling the matter, the writer is unable to find any statutory authorization for the computation of the franchise tax due on May 1, in this manner, nor is there any specific statutory authorization for the compilation of this tax by any other means, other than the possible implication of Article 7089a."

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The Attorney General's opinion to which you refer, addressed to Hon. W. W. Heath, dated October 18, 1934, makes the following rulings:

" . . . it is the opinion of the writer that the annual report to be filed between January 1st and March 15th should show the condition of a corporation on the last day of its preceding fiscal year prior to January 1st. . . .

" . . . it is the opinion of the writer that before a domestic corporation is required to file what you term a regular report and suffer penalties therefor for failure to file said report, it must have had a complete fiscal year prior to the time in which it is required to file its annual report. In other words, it must have had a complete fiscal year prior to January 1st.

" . . . I will state that if a domestic corporation has had a complete fiscal year prior to January 1st, it is required to file its annual report between January 1st and March 15th, and the franchise tax must of necessity be based upon said report. On the other hand, if the corporation is not liable for the filing of an annual report, since it had no fiscal year, then you must compute the tax from the records in your office relating to such corporation, unless you deem other information necessary to determine the amount of tax that may be due. In such event you may require an affidavit, or may require such corporation to cause such records as you deem necessary in determining the amount of tax that may be due."

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The fact that a beginner corporation may increase its taxable capital under Article 7084, between the date of incorporation and May 1st without such increase being taxable under your departmental practice does not place it in a different position from an older corporation which increases its capital on May 2nd or between its preceding fiscal closing and May 1st. Opinion No. 0-764.

We agree with your conclusion that the statutes do not make definite provision for the procedure to be followed in ascertaining the amount of tax due in advance on the May 1st next succeeding the incorporation of a beginner corporation. This being true, the long established and consistent construction and practice of your department, which you also state is the most expedient, in the language of the Court in Clark v. Atlantic Pipe Line Co. (Tex. Civ. App., 1939, writ refused) 134 S. W. (2d) 322, "may therefore become a determining factor. Especially is this true regarding revenue measures, the administration of which is under constant observation of the legislature."

We find nothing in the statutes which would justify us in advising you to depart from the long established procedure followed by your department in computing the first tax due on May 1st. Your first question is therefore answered in the negative and it becomes unnecessary to answer the remaining questions.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By

*Cecil C. Cannon*  
Cecil C. Cannon  
Assistant

CCC:LW

APPROVED DEC 11, 1940

*Gerard C. Mann*  
ATTORNEY GENERAL OF TEXAS

