1976 S.C. Op. Atty. Gen. 165 (S.C.A.G.), 1976 S.C. Op. Atty. Gen. No. 4341, 1976 WL 22960

Office of the Attorney General

State of South Carolina
Opinion No. 4341
April 29, 1976

It is the apparent intention of the General Assembly to have South Carolina adopt the construction set forth in the regulations and rulings of the Internal Revenue Service as the same relate to Sections 65–275 and 65–277 of the South Carolina Code of Laws.

***1** Director
Income Tax Division
South Carolina Tax Commission

You have presented the following question:

Under the provisions of Sections 65–275 and 65–277, is a parent corporation precluded from claiming a deduction for a bad debt or a loss for worthless stock of a subsidiary when an insolvent subsidiary is merged with the parent?

We are informed that a certain South Carolina corporation, numerous subsidiary corporations, and a subsidiary of one of the subsidiary corporations have filed a plan of merger under Section 12–20.5 of Chapter 1.10 of the South Carolina Business Corporation Act of 1962, and this transaction raises the question here presented. We are furnished with a copy of the Articles of Merger and Plan of Merger.

In response to a request of the corporation, the Internal Revenue Service issued a ruling on the transaction. It ruled in regard to the merger of the solvent subsidiaries into the parent that the provisions of Section 332 of the Internal Revenue Code, relating to complete liquidation of subsidiaries, was applicable, therefore no gain or loss would be recognized to the parent. Further, under Section 336 of the Code the subsidiaries would not recognize gain or loss. The basis to the parent under Section 334 would be the same as the subsidiaries' basis.

In regard to the subsidiary's subsidiary, the provisions of Section 368(a)(1)(A) were held to be applicable and no gain or loss would be recognized to the parent of either subsidiary.

In regard to the insolvent subsidiaries it was ruled that neither Section 332 nor Section 368 was applicable. Apparently this ruling is predicated on the finding that after satisfaction of corporate liabilities the shares were worthless. Revenue Rulings 70–489, 1970, 2 C. B. 53 and 59–296, 1959, 2 C. B. 87 were cited by the Service in the ruling.

Section 65–275 of the South Carolina Code of Laws provides that gain or loss shall not be recognized upon the receipt by a taxpayer of stock or securities issued in connection with a corporate reorganization as defined in Section 368 of the Internal Revenue Code. In 1970 the General Assembly amended this section to update references to the Internal Revenue Code as it had previously amended the section in 1963, 1964, 1965, 1967 and 1969. Similar provisions to Section 65–275 are found in Part III of Chapter 1 of subtitle A of the Revenue Code.

Section 65–277 of the South Carolina Code of Laws provides that upon the final distribution to a taxpayer of the assets of a corporation, gain or loss shall be taxed as a sale by the taxpayer of his shares and securities in the corporation; however, provides that gain or loss shall not be recognized upon the receipt by a parent corporation of property of certain qualifying subsidiary corporations distributed in a complete liquidation of the subsidiary. The first part of this section

is similar to Section 331, found in Part II of Chapter I of subtitle A of Title 26 of the Internal Revenue Code in that it provides that liquidation shall be treated as the sale by the taxpayer of shares and securities. The exception in 65–277 is similar to Section 332 of the Internal Revenue Code in that it defers gain or loss recognition in a complete liquidation of a qualifying subsidiary. Basis of the property transferred in transactions qualifying for nonrecognition of gain or loss is the same as the basis of the transferor.

***2** These sections of the South Carolina Code of Laws, although not as explicitly written as the Revenue Code sections, provide similar taxing theory to corporate reorganizations. Section 368 of the Revenue Code is adopted by reference. The updating of this section to conform South Carolina law to the current Internal Revenue Code reference indicates an intention of the General Assembly to have South Carolina law follow the federal law, regulations and rulings currently in effect. Several of the updating amendments to Section 65–275 have been made when the federal law has not been substantially changed. This further provides the intention of the General Assembly to have South Carolina adopt the construction set forth in the regulations and rulings and case opinions. In the case of *Fulgham v. Bleakley*, 177 S. C. 286, 181 S. E. 30, and *Fuller v. South Carolina Tax Commission*, 128 S. C. 14, 121 S. E. 478, it was stated that in absence of express intention to the contrary there is a presumption that a subsequently enacted statute is intended to be understood and applied in accordance with the interpretation given to the adopted statute. In other cases the Court has stated that great weight must be given to the interpretation of statutes of other states where the South Carolina statute is fashioned after the other state's law. *Hines v. Hendricks Canning Co.*, 263 S. C. 399, 211 S. E. 2d 220; *Nolan v. Hendricks Canning Co.*, 263 S. C. 399, 211 S. E. 2d 220; *Nolan v. Daley*, 222 S. C. 407, 73 S. E. 2d 449.

It is our opinion, therefore, that the courts would allow the current regulations and rulings of the Internal Revenue into evidence and coupled with the specific ruling of the Service in this specific case, we doubt that a conclusion inconsistent with the ruling of the Revenue Service could be sustained. In reaching this conclusion we are not giving our approval to or challenging the published rulings of the Revenue Service or their application to this transaction.

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