4254 Library

The State of South Carolina

Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE 803-734-3660

September 24, 1990

The Honorable John T. Campbell
Secretary of State of South Carolina
P. O. Box 11350
Columbia, South Carolina 29211

Dear Secretary Campbell:

I am in receipt of your letter of September 10, 1990 regarding the Oconee Omni Corporation (Oconee). Based upon that letter, and upon several telephone conversations with your office, it appears that you are confronted with the following set of facts: Pursuant to the provisions of 1976 S. C. CODE Ann., Section 33-14-210, your office administratively dissolved Oconee because of that corporation's failure to pay franchise taxes and to deliver its annual report to the S. C. Tax Commission. Within the two year period during which Oconee may apply for reinstatement pursuant to the provisions of Section 33-14-220, CODE, your office permitted an individual, not connected with Oconee, to reserve the name Oconee Omni Corporation, pursuant to the provisions of Section 33-4-102, CODE. Oconee now seeks to apply for reinstatement. The two-year reinstatement period prescribed by Section 33-14-220, CODE, still has not expired.

With these facts in mind, you ask in your letter whether Oconee may apply for reinstatement as provided in Section 33-14-220, "inasmuch as its name is not available." You also ask whether Oconee can "apply for reinstatement and simultaneously file an amendment changing to a name that is available." Implicit in both of your questions, although you did not mention it in your letter, is the issue of whether the reservation of the name was valid. For, if the reservation of the name was not valid, then the questions which you asked become moot.

Inasmuch as the two-year period has not expired, it is clear that Oconee may apply for reinstatement as provided in Section 33-14-220. Therefore, the principal issue to be addressed is whether Oconee may apply for reinstatement under the name "Oconee" or must

it now adopt some other name. More specifically stated, the issue is whether a corporation, which has been administratively dissolved but is still eligible to apply for reinstatement, can lose its right to its corporate name during the "period of repose" prior to its actual reinstatement.

The formulation of a response to this inquiry requires an examination and construction of the statutes which govern the process of administrative dissolution and reinstatement. The primary purpose of statutory construction is to ascertain and give effect to the intent of the Legislature. State v. Carrigan, 284 S.C. 610, 328 S.E.2d 119, S. C. App. (1985).

An abbreviated history of the statutes governing dissolution and reinstatement shows that the 1976 S. C. CODE OF LAWS, Ann., with amendments through and including the 1986 legislative session, contained the following pertinent provisions:

"Section 33-21-110. Dissolution by administrative action.

....

(e) Upon the filing date of the declaration of dissolution, the existence of the corporation shall cease, except for the purpose of suit, other proceedings and appropriate action by and against shareholders, directors and officers."

"Section 33-21-120. Reinstatement of corporation dissolved by administrative action.

(a) At any time within five (5) years after the date of the declaration of dissolution by forfeiture, one or more persons who were directors of the corporation as of that date may execute, verify and deliver for filing as provided by Section 33-1-40 to 33-1-60 an application for reinstatement of the corporation....

(b) As of the filing date of the application, the corporate existence shall be deemed to have continued without interruption from the date of dissolution. If the name of the corporation has, during such period, been assumed or reserved or registered by any other person or corporation, the reinstated corporation shall not engage in any business until it has amended its articles of incorporation to change its name."

"Section 33-21-220. Survival of remedy after dissolution; liquidating trustees.

(a) Except as provided in Section 33-21-180, the dissolution of a corporation....(4) by forfeiture of its charter, shall not take away or impair any remedy available to or against such corporation....for any right or claim existing, or any liability

incurred. Any such action or proceeding by or against the corporation may be prosecuted by the corporation in its corporate name..."

In 1988, Title 33 of the 1976 CODE, Ann., was recodified by Act No. 444. This recodification resulted in the following relevant provisions:

"Section 33-14-210. Procedure for and effect of administrative dissolution.

(d) A corporation dissolved administratively continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs under Section 33-14-105 and notify claimants under Section 33-14-106 and 33-14-107."

"Section 33-14-220. Reinstatement following administrative dissolution.

(a) A corporation dissolved administratively under Section 33-14-210 may apply to the Secretary of State for reinstatement within two years after the effective date of dissolution.

(b) The application must:....(3) state that the corporation's name satisfies the requirements of Section 33-4-101....

(c) When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on business as if the administrative dissolution had never occurred."

"Section 33-14-105. Effect of dissolution.

(a) A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs....

(c) Dissolution of a corporation does not:....(5) prevent commencement of a proceeding by or against the corporation in its corporate name...."

It is apparent that, under the provisions of the old Section 33-21-120(b), a corporation, dissolved administratively, could lose its right to its corporate name. In contemplation of such a circumstance, that statute required the corporation to amend its articles to change its name if its old name had been assumed, reserved or registered by another party.

As stated earlier, Act No. 444 of 1988 effected a

recodification of Section 33-21-120 and other provisions pertinent to this discussion. With the revisions to the statutes accomplished by that recodification remaining in effect, the analysis must now focus on whether the differences between the "pre" and "post" recodification statutes are significant enough to warrant the conclusion that the legislature no longer intends that an administratively dissolved corporation can lose its right to its name. We begin this analysis with the proposition of law, well-recognized in this State, that consolidated or revised statutes are construed to have the same meaning as the original statutes or sections unless the language of the consolidated or revised version plainly requires a change of construction conforming to the intent of the legislature. State v. Conally, 227 S.C. 507, 88 S.E.2d. 591,(1955); S. C. Electric and Gas Co. v. Public Service Commission, 272 S.C. 316, 251 S.E.2d. 753, (1979).

A comparison of the statutes reveals several substantial revisions. For example, a corporation now has only sixty days, rather than ninety, to remove the default which has subjected it to administrative dissolution.[1] In addition, a dissolved corporation now must apply for reinstatement within two years after the date of dissolution, rather than five.[2]

However, on the critical issue of a dissolved corporation's right to its name when applying for reinstatement, the revisions appear to be considerably less significant. Under the provisions of both statutes, the corporate existence is not extinguished by dissolution;[3] the corporation is simply restricted to the business of winding up its affairs. Further, under both statutes, a dissolved corporation may sue and be sued in its corporate name.[4] In addition, it remains the law that the reinstatement of a corporation relates back to the date of administrative dissolution and the corporation may resume business as if the administrative dissolution had never occurred.[5]

Noticeably, the language of the old Section 33-21-120(b), requiring a dissolved corporation to amend its articles to change its name, has been removed. However, that language has been replaced by the language of Section 33-14-220(a)(3), which provides that the name of a corporation applying for reinstatement "must satisfy the requirements of Section 33-4-101". A principal requirement of Section 33-4-101 is that a corporation's chosen name must be "distinguishable upon the records of the Secretary of State" or, stated simply, "available."

Implicit in the language of Section 33-14-220(a)(3) is continued legislative recognition of the fact that a dissolved corporation's name is subject to reservation, assumption or registration by another party. Also implicit is the requirement that a dissolved corporation, whose name has been reserved, assumed

or registered, must change its name to one that is available if it is to be eligible for reinstatement. Since an administratively dissolved corporation is not considered to be extinguished, it does not have to "re-incorporate" under a new name. Of necessity, an administratively dissolved corporation has to amend its articles to change its name to one that is available in order to apply for reinstatement. Such an interpretation of Section 33-14-220(a)(3) finds support in the rule of construction which holds that "that which is necessarily implied in a statute, in order to make the terms used have effect, according to their nature and ordinary meaning, is as much a part of it as if it had been declared in express terms." Ney v. State Workmen's Compensation Commissioner., 297 S.E.2d. 212, (1982); Gaffney v. Mallory, 186 S.C. 337, 195 S.E. 840, (1983).

Therefore, it appears that the legislature, by its recodification of the statutes, did not intend to effect any substantial change in the process of reinstatement following administrative dissolution. While the phraseology in the "pre" and "post" recodification statutes is different, the import is the same. "In the codification of a statute, as opposed to amendment, changes in phraseology or omission or addition of words do not necessarily require a change in construction of the original act. The rule favoring the construction borne by the original statute or sections is applied, even though in the course of revision or consolidation, the language may have been somewhat changed. The revised or consolidated statute will be construed as bearing the same meaning as the original statute or section unless the language of the revision or consolidation plainly requires a change of construction to conform to the manifest intent of the legislature." S. C. Electric and Gas Co. v. Public Service Commission, supra, at p. 756.

It does not appear that the revisions reflected in the language of Section 33-14-220, read in the context of the entire statutory scheme, "plainly require a change of construction to conform to the manifest intent of the legislature." Accordingly, we conclude and advise you that the law in this State remains that the name of an administratively dissolved corporation is subject to reservation, assumption or registration by another party. Further, where the administratively dissolved corporation's name has been reserved, assumed or registered by another party, "the corporation, upon applying for reinstatement, must amend its articles to change its name to one that satisfies the requirements of Section 33-4-10, CODE.[6]

Our conclusion finds sustenance in another principle of statutory construction. That is, the construction given a statute by those charged with the duty of enforcing it is entitled to the most respectful consideration and ought not to be overruled without

cogent reasons. Hadden v. S. C. Tax Commission, 183 S.C. 38, 190 S.E. 249, (1937); Welch Moving and Storage Co., Inc. v. Public Service Commission of S. C., 297 S.C. 378, 377 S.E.2d. 133, (1989).

Your office has advised that it would interpret the provisions of Section 33-14-220 in a manner consistent with the conclusion which we have reached. As is shown by the reasoning set forth hereinabove, we find no cogent reason to differ with your office's interpretation.

I trust that you will find the foregoing information to be responsive to your concerns. Please contact me if I can be of further assistance.

Very truly yours,

Wilbur E. Johnson
Assistant Attorney General

WEJ/fc

REVIEWED AND APPROVED BY:

Donald J. Zelenka
Chief Deputy Attorney General

Robert D. Cook
Executive Assistant for Opinions

1. Compare Section 33-14-210(b) with old Section 33-21-110(d).

2. Compare Section 33-14-220(a) with old Section 33-21-120(a).

3. See: Section 33-14-210(e); old Section 33-21-120(b).

4. See: Section 33-14-105(c)(5); old Section 33-21-220(a).

5. See: Section 33-14-220(c); old Section 33-21-120(b).

6. See: Official Comment annotated to Section 33-14-220.