1980 S.C. Op. Atty. Gen. 94 (S.C.A.G.), 1980 S.C. Op. Atty. Gen. No. 80-47, 1980 WL 81930

Office of the Attorney General

State of South Carolina
Opinion No. 80-47
April 30, 1980

***1 SUBJECT: Corporations, Bank and Banking**

(1) A bank cannot vote shares of its own stock held in a fiduciary capacity.

(2) A bank may vote shares in its parent bank holding company held in a fiduciary capacity for third parties.

TO: Robert C. Cleveland
Commissioner of Banking

QUESTIONS PRESENTED:

1. Whether a bank in South Carolina which holds shares of its own stock in a fiduciary capacity may vote such shares?

2. Whether a bank in South Carolina which holds shares of its parent bank holding company stock in a fiduciary capacity may vote such shares?

CITATION OF AUTHORITIES:

Sections 33–11–120(a) and (c), 35–5–10, et seq., South Carolina Code of Laws (1976);

Graves v. Security Trust Company, 369 S.W.2d 114 (Ky., 1963);

Rogers v. First National Bank of St. George, 410 F.2d 579 (4th Cir., 1969);

State ex rel. Washington Industries, Inc. v. Shacklett, 512 S.W.2d 284 (Tenn., (1974).

DISCUSSION:

A corporate fiduciary in South Carolina is empowered to vote shares which stand of record in the fiduciary's name. Section 33–11–120(c), South Carolina Code of Laws (1976); Rogers v. First National Bank of St. George, 410 F.2d. 579 (4th Cir., 1969); see also, Section 35–5–10, et seq., South Carolina Code of Laws (1976). There have been, however, no case decisions as to whether a corporate fiduciary would be disqualified from voting when the stock held in trust is stock in the fiduciary itself or a parent corporation. Section 33–11–120(a) provides:

No corporation shall directly or indirectly vote any shares issued by it, including treasury shares, nor shall any shares so disqualified from voting be counted in determining the total number of outstanding shares at any given time.

For purposes of this opinion, it shall be assumed that nothing in the fiduciary's corporate charter or the trust agreement would prevent the fiduciary from voting such stock.

As to the first situation, the literal terms of Section 33–11–120(a) appear broad enough to disqualify the corporation in a fiduciary capacity. While a different result was reached by the court in Graves v. Security Trust Company, 369 S.W.2d 114 (Ky., 1963), the Kentucky statute is clearly distinguishable from our statute. That statute, KRS 271.135, provided:
Shares of its own capital stock belonging to the corporation shall not be voted upon directly or indirectly. (Emphasis added)

In holding that the fiduciary was not disqualified, the Kentucky Court of Appeals based its decision on the fact that the stock 'belonged' to the estate and not the fiduciary. On the other hand, the South Carolina statute does not restrict the disqualification to stock 'belonging to the corporation.' Therefore, applying the literal terms of the statute, it is the opinion of this office that a corporation cannot vote its own shares even if such shares are held in a fiduciary capacity.

***2** On the otherhand, Section 33–11–120(a) does not appear to disqualify a corporate fiduciary from voting shares of its parent company stock held in trust, since the fiduciary would not be voting shares 'issued by it.' In State ex rel. Washington Industries, Inc. v. Shacklett, 512 S.W.2d 284 (Tenn., 1974), the Supreme Court of Tennessee held that a similar Tennessee statute [1] did not disqualify a parent corporation from voting shares of stock in a subsidiary. The Court based its decision on the fact that on its face the statute did not apply since the corporation was not voting its stock in any form, as either treasury stock or as stock which it might control. The Court also rejected the argument that because the Board of Directors for both corporations were virtually identical, the subsidiary would be 'indirectly' voting its own shares if the parent corporation's shares were allowed to be voted. In this regard, the Court relied heavily on the fact that Tennessee law specifically granted corporations the right to vote shares issued by other corporations as overcoming any argument that such votes would constitute 'indirect' control.

It is likewise the opinion of this Office that Section 33–11–120(c) creates a strong presumption in favor of a corporate fiduciary being able to vote shares in a parent or subsidicary corporation. This opinion, of course, does not apply to a situation where the corporate fiduciary is holding shares of the parent or subsidiary corporation in trust for such parent or subsidiary corporation [2] or where the fiduciary might be involved in a fraudulent conspiracy. [3]

CONCLUSION:

A bank cannot vote shares of its own stock held in a fiduciary capacity, but it may vote shares of its parent bank holding company held in a fiduciary capacity for a third party.

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Senior Assistant Attorney General

Footnotes

1 T.C.A. § 48–708: A corporation for profit may not vote at any meeting any treasury shares or any other of its shares which it owns or controls, directly or indirectly, and no such shares shall be counted in determining the total number of the outstanding shares of a corporation at any given time.

2 See, 18 C.J.S., Corporations, § 548a(1) (Stock held in trust for the benefit of the corporation may not be voted)

3 See, Italo Petroleum Corp. v. Producers Oil Corp., 174 A.276 (Del., 1934)

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