



SC TECHNICAL ADVICE MEMORANDUM #89-6

TO: Mr. William F. Bray, Director
Office Services Division

FROM: John Swearingen, Manager
Tax Policy and Procedures Department

DATE: February 15, 1989

SUBJECT: Corporation Annual Reports and License Fee
(Corporate License Fee)

REFERENCE: S.C. Code Ann. Section 12-19-20 (Law. Co-Op. Supp. 1988)
S.C. Code Ann. Section 12-19-100 (Law. Co-Op. 1976)
S.C. Code Ann. Section 12-19-110 (Law. Co-Op. Supp. 1988)
S.C. Code Ann. Section 12-7-1695 (Law. Co-Op. 1976)
S.C. Code Ann. Section 12-54-125 (Law. Co-Op. Supp. 1988)
S.C. Code Ann. Section 33-14-105 (Law. Co-Op. Supp. 1988)

AUTHORITY: S.C. Code Ann. Section 12-3-170 (Law. Co-Op. 1976)
SC Revenue Procedure #87-3

SCOPE: A Technical Advice Memorandum is a temporary document issued to an individual within the Commission, upon request, and it applies only to the specific facts or circumstances related in the request. Technical Advice Memoranda have no precedential value and are not intended for general distribution.

Questions:

1. Is the increase in the minimum license fee imposed by Sections 12-19-100 and 12-19-110 effective January 1, 1989 applicable to all returns filed after January 1, 1989 or to returns for license periods beginning on or after January 1, 1989?
2. Is the public disclosure of annual reports allowed by the amendments to Section 12-19-20 applicable to annual reports filed prior to January 1, 1989?

3. Does Section 12-54-125 allow the Commission to withdraw warrants on corporations that have been voluntarily or involuntarily dissolved by the Secretary of State and corporations that have withdrawn or had their certificate of authority revoked?

Discussion:

In the construction of statutes, there is a presumption that statutory enactments are to be considered prospective rather than retroactive in their operation unless there is a specific provision or clear legislative intent to the contrary. *Hyder v. Jones*, 271 S.C. 85, 245 S.E.2d 123 (1978); *Jefferson Standard Life Ins. Co. v. King*, 165 S.C. 219, 163 S.E. 653 (1932). A principal exception to the above stated presumption is that remedial or procedural statutes are generally held to operate retrospectively. *Howard v. Allen*, 368 F. Supp 310 (D.S.C. 1973)

1. Section 12-19-120 was amended by the Model Act to increase the minimum fee provided by Sections 12-19-100 and 12-19-120 from \$10 to \$25 effective January 1, 1989. The license fees provided by Sections 12-19-100 and 12-19-110 are paid in advance with the income return for the preceding year.

An increase in fees appears to be substantive in nature rather than procedural. In accordance with the common law presumption, this statute should be construed prospectively in the absence of evidence that the statute is remedial or procedural. Substantive legislation is "that which creates duties, rights, and obligations...". *Kilbreath v. Rudy*, 16 Ohio St. 2d 70, 242 N.E.2d 658 (1968). This statute creates an obligation for the taxpayer to pay \$25 rather than the previous \$10. It should therefore be applied prospectively. In order to apply Section 12-19-120 prospectively, the increased license fee must be applied to license periods beginning on or after January 1, 1989 which are to be paid with the income return for taxable periods ending on or after December 31, 1988.

2. Section 12-19-20 was amended to list information required in annual reports and to make mandatory information open to unrestricted public inspection and copying. Copies of the mandatory information may be requested from the Commission or the office of the Secretary of State. These amendments are effective January 1, 1989. Section 12-7-1695 also allows the Commission to furnish to the Secretary of State a more restricted list of information from annual reports prior to January 1, 1989.

It therefore appears that Sections 12-19-20 and 12-7-1695 contain conflicting language with regard to information which may be released to the Secretary of State. The issue then is which of the two conflicting statutes is controlling in the instant case. The South Carolina Supreme Court said in *Jolly v. Atlantic Greyhound Corporation et al*, 207 S.C. 1, 35 S.E.2d 42 (1945), "where two sections of a statute are irreconcilable, the subsequent section, or the last legislative expression, prevails over the prior one. This rule is used only where it is impossible to harmonize the two sections or statutes in some acceptable way. Such is the case here where the two statutes are in conflict. Section 12-7-1695 was last amended in 1976. Section 12-19-20 was amended in 1988 with an effective date of January 1, 1989. Therefore, Section 12-19-20 should control.

Another issue which must be resolved is whether 12-19-20 should be applied retroactively thereby rendering 12-7-1695 ineffectual. As stated above, statutes are generally presumed to be prospective in nature. Only procedural or remedial statutes may be applied retroactively. Remedial legislation is that which "implies an intention to reform or extend existing rights... The term applies to a statute giving a party a remedy where he had none, or a different one, before". 73 Am Jur 2d Statutes Section 11 (1974). Section 12-19-20 appears to broaden the rights of the public to inspect information included in the Annual Report. Construing 12-19-20 as a remedial statute, the Commission may retroactively make available for public inspection or disclosure the mandatory information listed in 12-19-20, as amended, for annual reports filed prior to January 1, 1989.

3. Section 12-54-125 was added to allow the Commission to withdraw warrants of distraints issued against corporations when the corporations have been dissolved by the Secretary of State. The Commission must make a determination that the corporation (1) has engaged in no business since filing its last return or (2) has no available assets. There is no distinction as to whether the dissolution was voluntary or involuntary. The provisions of this section do not include the withdrawal of a foreign corporation.

Conclusions:

1. The increase in the minimum license fee imposed by Section 12-19-100 and 12-19-110 is applicable to returns for license periods beginning on or after January 1, 1989.
2. The Commission may disclose to the public, mandatory information listed in 12-19-20 for annual reports filed prior to January 1, 1989.
3. Section 12-54-125 allows the Commission to withdraw warrants on corporations that have been dissolved by the Secretary of State and does not distinguish between voluntary or involuntary dissolution. This Section refers only to dissolved corporations and not to corporations that withdraw from the State or have their certificate of authority revoked.