

**OPINION
60-38**

January 12, 1960 (OPINION)

CORPORATIONS

RE: Business Corporation Act - Penalties Imposed Upon Corporations - Failure to File Annual Report

This is in reply to your request for an interpretation and construction of section 10-2303 of the 1957 Supplement to the N.D.R.C. of 1943.

The material portion of this section as pertaining to your question is:

PENALTIES IMPOSED UPON CORPORATIONS. Each corporation, domestic or foreign, that fails or refuses to file its annual report for any year within the time prescribed by this Act (chapters 10-19, 10-20, 10-21, 10-22, and 10-23) shall be subject to a penalty of ten percent of the license fee which would be payable if it were filing its articles of incorporation at the time such annual report was to have been filed. * * * "(Underscoring ours).

You specifically ask whether the penalty provided for therein applies to each year for which no report was filed or only to the year in which the current report is filed. The underscored language strongly indicates that the penalty applies for each year in which the report was not filed.

The above quoted section, which is part of chapter 102, is in a way an amendment to section 10-0529 of the 1943 Code. Section 10-0529 provided for the reinstatement of domestic corporations after the charter had been canceled by filing an annual report and paying the filing fee plus five dollars for each year in which the corporation had failed to file its report chapter 102, while it did repeal certain laws relating to corporations as found in the 1943 Code and substituted new laws therefor, is in effect a recodification and revision of the corporation laws.

Considering section 10-2303 in light of its history, it leaves little doubt that the penalty applies to each year in which a report was not filed.

In direct response to your question it is our opinion that the penalty applies to each year in which the report was not filed and does not apply merely to the current year in which the report is filed.

Having arrived at this conclusion we are confronted with another question which immediately arises. This question is whether the penalty as provided in section 10-2303 applies or whether the provisions of 10-0529 apply where the corporation failed to file its annual report for years prior to the effective date of section 10-2303. As applying to

corporations which were in existence and doing business in North Dakota section 10-2303 does not apply until July 1, 1959, unless such corporation elected to come within such new law prior to such time.

The general rule of laws is that where a penalty is provided for by statute, it is repealed where such statute is repealed, unless there is language to the contrary or has a savings clause. Section 10-0529 of the 1943 Code was repealed by chapter 102 of the 1957 Session Laws. However, section 10-2318 of chapter 102 of the 1957 Session Laws specifically provided that:

EFFECT OF REPEAL OF PRIOR ACTS. The repeal of a prior Act by this Act (chapters 10-19, 10-20, 10-21, 10-22, and 10-23) shall not affect any right accrued or established, or any liability or penalty incurred, under the provisions of such Act (chapters 10-19, 10-20, 10-21, 10-22, and 10-23), prior to the repeal thereof."

In view of this statutory provision the penalties incurred prior to the effective date of the new corporation Act still remain. Being that a statute cannot be given retroactive application unless specifically provided for, the penalty set out in 10-2303 can be applied only after July 1, 1959. Any penalty prior to that time would be based on the provisions of 10-0529 of the 1943 Code. As such, a corporation that has failed to file its annual report, depending on the years involved, is subject to a penalty under 10-0529 and also 10-2303. The penalty prior to July 1, 1959 would be only as provided for in 10-0529 and after July 1, 1959 as provided for in 10-2303. Also where a corporation either by operation of law or on a voluntary basis was subject to the new law then section 10-2303 would govern.

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