

Corp. Comm 2 Eggleston, C.J.
205VA 272
Record No. 5813

**In the
Supreme Court of Appeals of Virginia
at Richmond**

SOUTHERN SPRING BED COMPANY

v.

STATE CORPORATION COMMISSION

FROM THE STATE CORPORATION COMMISSION

RULE 5:12 BRIEFS

§5. **NUMBER OF COPIES.** Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. **SIZE AND TYPE.** Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5813

VIRGINIA :

In the Clerk's Office of the Supreme Court of Appeals at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 31st day of December, 1963.

SOUTHERN SPRING BED COMPANY, Appellant,
against

STATE CORPORATION COMMISSION, Appellee.

From the State Corporation Commission

Upon the petition of Southern Spring Bed Company, a Georgia corporation, an appeal of right and *supersedeas* is awarded it by one of the Justices of the Supreme Court of Appeals on December 31, 1963, from an order entered by the State Corporation Commission on the 10th day of July, 1963, in a certain proceeding then therein depending wherein Commonwealth of Virginia, at the relation of the State Corporation Commission was plaintiff and the petitioner was defendant; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said State Corporation Commission in the penalty of one thousand dollars, with condition as the law directs.

RECORD

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page 1] **COMMONWEALTH OF VIRGINIA**
STATE CORPORATION COMMISSION

AT RICHMOND, JUNE 5, 1963**CASE NO. 16408****COMMONWEALTH OF VIRGINIA****At the Relation of The****STATE CORPORATION COMMISSION****v.****SOUTHERN SPRING BED COMPANY**

A RULE is hereby issued against Southern Spring Bed Company, a foreign corporation, requiring it to appear before the State Corporation Commission at 10:00 A.M., E.D.T., on July 10, 1963 in its Courtroom, Blanton Building, Richmond, Virginia, and show cause, if any it can, why: (1) The certificate of authority of Southern Spring Bed Company to do business in this State should not be revoked because Southern Spring Bed Company amended its articles of incorporation on February 7, 1963 so as to authorize it to issue 300,000 shares of no par value common stock and failed to file within 30 days after such amendment became effective a duly authenticated copy of such amendment in the Clerk's Office of the Commission and pay the fees required by law for filing such amendment; and, (2) Judgment should not be rendered in favor of the Commonwealth of Virginia against Southern Spring Bed Company in the amount of \$505 with interest from February 7, 1963 because Southern Spring Bed Company amended its articles of incorporation as set forth herein on February 7, 1963 and failed to pay to the Commonwealth of Virginia fees in the amount of \$505 required by law for the filing of such amendment.

A True Copy

Teste: WILLIAM C. YOUNG
Clerk of State Corporation Commission

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COMMONWEALTH OF VIRGINIA

At the Relation of The

STATE CORPORATION COMMISSION

v.

SOUTHERN SPRING BED COMPANY

Rule to Show Cause.

PRESENT:

COMMISSIONERS

RALPH T. CATTERALL (Chairman)

H. LESTER HOOKER

JESSE W. DILLON

(Chairman Catterall presiding)

APPEARANCES:

No appearance for Defendant

Norman S. Elliott, Counsel for the Commission

Date of Hearing

July 18, 1963

page 3] **Chairman Catterall: Proceed, Mr. Elliott.**

Mr. Elliott: May it please the Commission, Southern Spring Bed Company is a Georgia corporation, which is authorized to do business in Virginia as a foreign corporation.

On February 6, 1963, it amended its Articles of Incorporation in Georgia by increasing the number of no par shares of stock from one hundred and fifty thousand shares to three hundred thousand shares.

Thereupon, in due course, it sent the amendment to the Clerk's Office for filing, and this amendment was refused because there was an additional Five Hundred Dollars entrance fee due the State because of this amendment introducing the additional no par shares.

Correspondence in the file will show that the Clerk's Office immediately took this matter up with counsel for Southern

Spring Bed Company, and they stated that no additional entrance fee was necessary because the purpose of the amendment was to provide a three to one split of the stock.

Counsel has requested that this case be considered upon its Memorandum in answer to the Rule to Show Cause, page 4] which Memorandum was received yesterday afternoon pursuant to conversation had with me the day before. This Memorandum raises the question and argues the point that no additional entrance fee is required because the book value of the no par stock was not increased, and, therefore, since it was issued in a stock split, that, under the exception in the statute, no additional fee is necessary.

Chairman Catterall: We will take this case under advisement so we can read the Memorandum. Let the record show the Commission will read the Memorandum, and then pass on this question.

Note: Following are copies of:

1. The amendment sent to the Clerk's Office for filing.
2. Respondents answer to the Rule to Show Cause, i.e., "Memorandum in Response to Rule to Show Cause."

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STATE OF GEORGIA

OFFICE OF SECRETARY OF STATE

I, Ben W. Fortson, Jr., Secretary of State of the State of Georgia, do hereby certify, that the six pages of photographed printed matter hereto attached, contain a true and correct copy of the petition for amendment, the Judge's order thereon, the filing of the Clerk and certificate of the Secretary of State for "SOUTHERN SPRING BED COMPANY," as the same appears of file and record in this office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of office, at the Capitol in the City of Atlanta, this 11th day of March in the year of our Lord One Thousand Nine Hundred and Sixty Three and of the Independence of the United States of America the One Hundred and Eighty-Seventh.

BEN W. FORTSON, JR.
Secretary of State,
Ex-Officio Corporation Commissioner
of the State of Georgia.

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DUPLICATE

STATE OF GEORGIA

OFFICE OF SECRETARY OF STATE

I, Ben W. Fortson, Jr., Secretary of State of the State of Georgia, do hereby certify that the charter of SOUTHERN SPRING BED COMPANY was on the 6th day of February, 1963, duly amended under the laws of the State of Georgia by the Superior Court of Fulton County, increasing its capital stock in accordance with the certified copy hereto attached and that a certified copy has been duly filed in the office of the Secretary of State and the fees therefor paid, as prescribed by law.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of office, at the Capitol, in the City of Atlanta, this 7th day of February in the year of our Lord One Thousand Nine Hundred and Sixty Three and of the Independence of the United States of America the One Hundred and Eighty-Seventh.

BEN W. FORTSON, JR.

Secretary of State,
Ex-Officio Corporation Commissioner
of the State of Georgia.

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STATE OF GEORGIA
COUNTY OF FULTON

To the Superior Court of said County:

The petition of SOUTHERN SPRING BED COMPANY, a corporation of said State and County, respectfully shows to the Court as follows:

1.

The principal office of petitioner is located in Fulton County. Petitioner was incorporated for a period of twenty (20) years by order of this Court dated January 14, 1893; petitioner's original charter was amended by order of this Court dated May 15, 1909; petitioner's charter as thus amended was renewed for a period of twenty (20) years, i.e., to terminate on January 14, 1933, by order of this court dated November 30, 1912; petitioner's charter was again amended by order of this Court

dated November 17, 1919; petitioner's charter was further amended, and as thus amended, renewed for a period of twenty (20) years, i.e., to terminate on January 14, 1953, by order of this Court dated November 30, 1927; petitioner's charter was further amended, and as thus amended, renewed for a period of thirty-five (35) years, i.e., to terminate on January 14, 1988, by order of this Court dated February 11, 1952.

2.

Petitioner desires to have its charter amended so as to increase its authorized capital from 150,000 shares of no par value common stock to 300,000 shares of no par value common stock.

WHEREFORE, petitioner prays that the charter of said corporation be amended as hereinabove set out upon due compliance of the law in such cases made and provided.

SMITH, KILPATRICK, CODY, ROGERS & McCLATCHEY

By **HAROLD E. ABRAMS**
Attorneys for Petitioner

1045 Hurt Building
Atlanta 3, Georgia

page 8] **STATE OF GEORGIA**
 COUNTY OF FULTON

**CERTIFICATE OF SECRETARY
OF SOUTHERN SPRING BED COMPANY**

I, Robert W. Schwab, Jr., certify that I am Secretary of Southern Spring Bed Company and that at a special meeting of the stockholders of said company held on the 5th day of February, 1963, upon due notice, the following resolutions were unanimously adopted and are still in full force and effect:

RESOLVED, that the Charter of Southern Spring Bed Company be amended so as to increase the authorized capital from 150,000 shares of No Par Value Common Stock to 300,000 shares of No Par Value Common Stock;

BE IT FURTHER RESOLVED, that the officers and attorneys of the company take appropriate steps for the effectuation of such amendment.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the corporation, this 5th day of February, 1963.

ROBERT W. SCHWAB
Secretary

(Corporate Seal)

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ORDER

The foregoing petition of SOUTHERN SPRING BED COMPANY to amend its charter in the particulars therein set out, read and considered. It appearing that said petition is made in accordance with law, and that the requirements of law in such cases provided have been fully complied with;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that all of the prayers of said petition are hereby granted and the charter of the petitioner is hereby amended in all the particulars set out in said petition.

This 6th day of February, 1963.

s. DURWOOD T. PAGE
Judge, Superior Court of
Fulton County

Filed in office this the Feb. 6 Day of 1963.
Ruby H. Ward, Deputy Clerk

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PUBLISHER'S AFFIDAVIT

STATE OF GEORGIA
COUNTY OF FULTON

Before me, the undersigned, a Notary Public, this day personally came Jack Smith, who, being first duly sworn, according to law, says that he is an Agent of the Daily Report Company, publishers of the FULTON COUNTY DAILY REPORT, the official newspaper in which the Sheriff's advertisements in and for said County are published, and a newspaper of general circulation, with its principal place of business in said County, and that there has been deposited with said newspaper the cost of publishing four (4) insertions of said application for Charter Amendment of "SOUTHERN

SPRING BED COMPANY'' once a week for four (4) weeks with the Order of the Judge thereon.

JACK SMITH

Subscribed and sworn to before me this 6 day of February, 1963.

Earl H. Higgins
Notary Public
Fulton County, Georgia

page 11] **STATE OF GEORGIA**
 COUNTY OF FULTON

I J. W. SIMMONS, Clerk of the Superior Court of Fulton County, Georgia, do hereby certify that the within and foregoing is a true and correct copy of petition of **"SOUTHERN SPRING BED COMPANY''** for Charter Amendment and the Order of Court thereon allowing same, all of which appears of file and record in this Office.

Given under my hand and seal of Office. This the 6 day of February, 1963.

J. W. SIMMONS
Clerk of Superior Court
Fulton County, Georgia

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MEMORANDUM IN RESPONSE
TO RULE TO SHOW CAUSE

1.

Defendant, **SOUTHERN SPRING BED COMPANY** (hereinafter called **"Company"**), respectfully requests the Commission to dismiss this proceeding on the ground that no additional entrance fee is due and owing the Commonwealth

by reason of a certain amendment to the Company's charter, effective February 6, 1963.

Defendant is charged with the failure to file a duly authenticated copy of the amendment within thirty days of this effective date, as required by Code Section 13.1-112. Defendant shows that a duly authenticated copy of the amendment has been tendered to the Commission, together with the required \$5.00 filing fee. Code §13.1-285(2).

This tender has been refused, but on the sole ground that defendant did not at the same time tender \$500.00 in additional entrance fees.

Defendant's position is that in the circumstances involved in this case the additional entrance fees demanded by the Clerk of the Commission are not due and owing under Code Section 58-462 and, accordingly, defendant requests that this proceeding be dismissed and the Clerk be directed
page 13] to receive and file the 1963 amendment.

2.

The Rule to Show Cause

It has been agreed with the counsel for the Commission that the late filing of the 1963 amendment is not an issue in this proceeding. By Code Section 13.1-107, the Clerk is not entitled to receive papers for filing until all fees and taxes have been paid. If an additional entrance fee is due, tender of the amendment has been properly refused. If no additional entrance fee is due, the Clerk's refusal of tender has been erroneous, and defendant is entitled to dismissal of this proceeding and to filing of the 1963 amendment.

3.

Facts

On February 6, 1963, Southern Spring Bed Company amended its corporate charter, increasing the number of authorized shares from 150,000 to 300,000 shares, all without par value. The purpose of this amendment was to allow a 3 for 1 stock split of the Company's common stock, as is shown by the Secretary's certificate which is attached hereto and made a part hereof as "Exhibit A."

Prior to said amendment, the Company was authorized to issue the following maximum amount of capital stock:

<i>Class of Stock</i>	<i>Aggregate Value</i>
10,000 shares of Preferred Stock having a par value of \$100 per share	\$1,000,000
150,000 shares of common stock having no par (valued at \$100 per share for franchise tax purposes in Virginia, see Va. Code Ann. §58-462)	15,000,000
Total	\$16,000,000

Prior to the said amendment, 89,703 shares of no par common stock were issued and outstanding, and after the amendment and the stock split, 269,109 shares were outstanding, thereby causing 30,891 shares to be authorized but unissued.

4.

Argument

When a corporation, domestic in Virginia, or foreign, but authorized to do business in Virginia, increases the amount of its authorized capital stock, Section 58-445 of the Virginia Code provides that it will be taxed to the extent of its total authorized stock, with a credit for the tax previously paid. Consequently, the Clerk of the Virginia Corporation Commission has claimed in this case that the additional 150,000 shares of no par stock has increased Southern Spring Bed Company's authorized capital and, consequently, an additional \$500 franchise tax is due. However, it is clear from a reading of Section 58-462 of the Virginia Code that the *proviso* of that section is applicable to exempt the instant amendment from the general requirement and no additional franchise tax is due. This section provides in part as follows:

Fn. 1

There is some possibility that the exemption in Section 58-462 of the Virginia Code, explained *infra*, does not apply to these 30,891 unissued shares. However, in the instant case, this position is irrelevant, even if true, as the addition of 30,891 shares will not increase the franchise tax. In the situation in which the capital stock is over \$10,000,000 but less than \$20,000,000, the franchise tax is \$1,250. Between 20 and 30 million dollars of authorized capital, the tax is \$1,500. As the Company has already been taxed upon \$16,000,000 and as these additional 30,891 shares will only amount to \$3,089,100, causing the total to be \$19,089,100, the 20 to 30 million bracket will not be reached by their inclusion.

“§58-462. Valuation of stock without par value when determining fees or franchise tax. — For the purpose of ascertaining and determining the amount of any charter fee, registration fee or franchise tax now or hereafter imposed by law upon the maximum amount of authorized capital stock of any corporation organized under the laws of this State having shares of stock without nominal or par value *or for the purpose of ascertaining and determining the amount of any entrance fee now or hereafter required to be paid by any foreign corporation* having such shares for the purpose of page 15] procuring a certificate of authority to do business in this State or the amount of any annual registration fee required to be paid by such foreign corporation, but for no other purpose, *such shares of stock without nominal or par value shall be taken to be of the par value of one hundred dollars each; provided, that in cases in which the authorized number of shares of no par stock is increased by an amendment authorizing the issuance of an increased number of shares in exchange for and in lieu of the previously issued shares no additional charter or entrance fee shall be required unless the capital and surplus, as certified by the officers of the corporation under oath, exclusive of all authorized par value stock, if any, divided by the total number of no par shares authorized at the time of securing such amendment exceeds one hundred dollars . . .*” (Emphasis added)

It seems obvious from a reading of the *proviso* in Section 58-462 that in the situation in which additional no par shares are authorized for a stock split, no additional charter or entrance fee is required. The Commission so held in the case of *State Corporation Commission v. H. W. Lay & Company, Inc. and Frito-Lay, Inc.*, Case No. 15666 (April 16, 1962), in which it stated in regard to the first *proviso* of Section 58-462:

“This language makes it clear that the *proviso* deals only with the exchange of new no-par shares for existing no-par shares. It has nothing to do with the exchange of par value shares.

“... the first *proviso* of §58-462 provides for a reduced entrance fee only when a corporation splits its no-par stock...”

The policy of Section 58-462 is also obvious in that when additional shares of no par value stock are authorized for a

stock split, no additional amount is transferred to the capital of the corporation and, therefore, the total authorized capital upon which the Virginia franchise tax is based is not increased.

In the instant case, the Clerk of the Corporation Commission has denied the applicability of the first *proviso* of Section 58-462 on the ground that the amendment to the corporate charter of Southern Spring Bed Company does not specifically state that the additional authorized shares are to be used as a stock split. ^{Fn. 2} This position does not

page 16] conform with either the specific language of Section 58-462 or its intent. This section merely provides that the amendment authorize the issuance of an increased number of shares, which shares are then issued in exchange for and in lieu of the previously issued shares. The section does not provide, as the Clerk has contended, that the amendment specifically state itself that the shares are to be issued in exchange for and in lieu of the previously issued shares. To impress this latter meaning upon the word "authorized," would be to cause an interpretation which has no basis either in the ordinary meaning of the word or in corporation law in general. For example, the Board of Directors of the corporation elects an individual president, and this election carries with it the normal authorization to perform those duties and exercise those prerogatives as a corporate president in general. Certainly, the Board of Directors does not have to specifically enumerate all of the powers of the president in order for the individual elected to have authority to exercised those powers. This is similar to the law of Georgia in connection with corporate amendments which authorize an increased number of shares in order to effectuate a stock split.

Under Georgia law, corporations are chartered by order of a Superior Court. The charter is granted by presenting a petition to the Superior Court of the county in which the principal office of the corporation is to be located. This petition must set forth (a) the name of the corporation, (b) the general nature of the business, (c) the maximum number of authorized shares with the par value of each share, if any, (d) the amount of capital, (e) the time for which the corporation is to have existence, (f) the principal office of the corpora-

FN. 2

The second *proviso* of Section 58-462 is clearly inapplicable in this case. See Exhibit B attached hereto and made a part hereof.

tion, (g) the names and addresses of the incorporators, and (h) the corporate powers with which the corporation is to be vested. Georgia Code §22-1801 (1937-38). Upon the presentation of the charter to the Judge, and his determination that the application is *legitimately* within the purview of the laws of the State of Georgia, he passes an order declaring the application granted. At that time the corporate existence of the corporation begins. The petition is then filed in the Office of the Clerk of the Superior Court in which the charter was granted, and a certified copy of the application and order creating the corporation are then filed with the Secretary of State of the State of Georgia. Georgia Code §§22-1803-1804 (1937-38).

Under Georgia law it is not necessary to set forth in the petition more than is outlined above. However, besides the corporate powers set forth in the petition, the corporation, as such, is endowed with additional powers which are considered, under Georgia law, inherent in every Georgia corporation. It is, therefore, unnecessary that any of the inherent powers be mentioned or set forth in the petition for incorporation. Nadler, Georgia Corporation Law, Section 270 (1950).

One of the inherent powers of a Georgia corporation is the issuance of the authorized stock as set forth in the corporate charter. This power vests in the stockholders and is not necessary or required in the original petition or in an amendment to the petition. This means that in the event a stock split is desired, the stockholders authorize the same. If the maximum authorized shares of the corporation are not sufficient to allow for the stock split, it is necessary for the corporate charter to be amended, which amendment is accomplished by the same procedure as is utilized for the granting of the corporate charter as set forth above. This is the exact procedure followed by Southern Spring Bed Company, as the stock holders authorized an amendment to the corporate charter as set forth above. This is the exact procedure followed by Southern Spring Bed Company, as the stockholders authorized an amendment to the corporate charter to increase the number of authorized shares and also the stock split. See Exhibit A. Thereupon, in accordance with Georgia law, an amendment was presented to the Superior Court of Fulton County with the resolution of the stockholders authorizing an increased number of shares. As the

page 18] Superior Court has no power in Georgia to authorize a stock split, it is not proper for the

amendment to provide that the additional authorized shares are to be used for the stock split. See Nadler, *Georgia Corporation Law*, Section 270 (1950).

Since the additional authorized shares were actually used for the stock split as is shown in Exhibit A, the requirements of the first *proviso* of Section 58-462 of the Virginia Code are met.

It appears that under Virginia law when Section 58-462 was enacted a charter amendment which was to provide for additional shares for a stock split had to so state. See Virginia Code Ann. §13-35 (Repealed 1956). However, as Section 58-462 of the Virginia Code is equally applicable to foreign as well as domestic corporations in Virginia, its provisions must be so interpreted as to apply to foreign corporations as well as to Virginia corporations. In so doing, the local procedure which must be followed by a foreign corporation in its home state for the amendment of its corporate charter and the issuance of its shares in a stock split must be considered in interpreting Section 58-462, as long as that section's policy is not frustrated.

Any interpretation other than the one suggested above for Section 58-462 appears to raise serious constitutional questions under both the Virginia and United States Constitutions. It is, of course, accepted law in Virginia that the provisions of all tax and revenue statutes are to be construed and restricted in their application as not to conflict with any of the provisions of the Constitution of the United States or of the Commonwealth of Virginia. See Virginia Code Ann. §57-1; *Hunton v. Commonwealth*, 166 Va. 229, 183 S.E. 873 (1936).

In this regard, the following two provisions of the Virginia Constitution are in point:

“Taxable property; taxes shall be uniform as to class of subjects and levied and collected under general laws. All property, except as hereinafter provided, shall be
page 19] taxed; all taxes, whether State, local or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general law. The General Assembly may define and classify taxable subjects, and, except as to classes of property herein expressly segregated for either State or local taxation, the General Assembly may segregate the several classes of property so as to specify and determine upon what subjects State taxes,

and upon what subjects local taxes may be levied." Art. XIII, §168.

"Income, license and franchise taxes; paving and sewer taxes; abutting land owners. — The General Assembly may levy a tax on income in excess of six hundred dollars per annum; may levy a license tax upon any business which cannot be reached by the ad valorem system; and may impose State franchise taxes, and in imposing a franchise tax may, in its discretion, make the same in lieu of taxes upon other property, in whole or in part, of a transportation, industrial, or commercial corporation. *Whenever a franchise tax shall be imposed upon a corporation doing business, in this State, or whenever all the capital, however invested, of a corporation chartered under the laws of the State, shall be taxed, the shares of stock issued by any such corporation shall not be further taxed . . .*" (Emphasis added). Art. VIII, §170.

In *Chapel v. Commonwealth*, 197 Va. 406, 89 S.E. 2d 337 (1955), the Court was faced with a Virginia statute which provided for a license tax to be imposed on dry cleaners in one part of the state and not on dry cleaners in another part of the state. In ruling this statute unconstitutional, the Court stated:

"The legislature has no authority to levy a license tax upon a business conducted in one part of the state and refrain from levying *the same license tax upon the conduct of the same business in other parts of the state.*" (Emphasis added)

The same reasoning applies to the instant situation in that it would be unreasonable and arbitrary to impose a franchise tax upon a foreign corporation which cannot follow the exact procedure which can be followed by a Virginia corporation in a stock split, but with the result being the same. Such a classification is patently illegal under the Virginia Constitution in that there is no basis for the same, and Southern Spring Bed Company as a foreign corporation would be discriminated against for no valid purpose whatsoever. See *Bradley & Co. v. Richmond*, 110 Va. 521, 66 S.E. 872 (1910). The same reasoning is applicable to the argument under the equal
page 20] protection and commerce clauses of the United States Constitution.

Although no cases have been found which interpret Article XIII, Section 170, of the Virginia Constitution, it does by its terms apply to the situation in which a franchise tax has already been imposed upon shares of stock of a corporation. As a stock

split of no par shares does not actually increase the capital of the corporation, the shares of stock of the corporation as represented by its capital have already been taxed.

There is a strong likelihood that such a tax as is proposed in this case would be a denial of equal protection under the Constitution of the United States, Amendment XIV. In the words of the Supreme Court of Virginia in *Town of Ashland v. Board of Supervisors*, 202 Va. 409, 117 S.E. 2d 679, 683 (1961), the Court stated:

“The equal protection clause of the Fourteenth Amendment to the Constitution of the United States does not forbid inequalities or exemptions in state taxation. It does not limit the state’s power to make any *reasonable* classification of property, occupations, persons or corporations for taxation purposes. *It merely prohibits inequality occasioned by clearly arbitrary action especially such as is attributable to hostile discrimination against particular persons or classes.* (Emphasis added).

The Court then further quoted from *Walters v. City of St. Louis*, 347 U.S. 231, 237, 74 Sup. Ct. 505, 509 (1954):

“The power of the State to classify according to occupation for the purpose of taxation is broad. Equal protection does not require identity of treatment. *It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary.*

“... In its discretion it may tax all, or it may tax one or some, taking care to accord to all *in the same class* equally of rights. (Emphasis added).

The case of *First Sec. Corp. of Ogden v. State Tax Comm’n.*, 91 Utah 101, 63 P. 2d 1062 (1936) offers a close analogy. In Utah a corporate privilege tax was imposed on foreign companies doing business in Utah. However, an exemption was given to holding companies whose subsidiary corporations made returns within the state. Two of First Securities’ subsidiaries did no business in Utah and filed no return in that state. Consequently, the Commission denied the exemption. The Utah court reversed, stating that the exemption ap-

Southern Spring Bed Co. v. State Corporation Commission 17

plied and implied that such an interpretation was prompted by doubts as to the constitutionality (equal protection) of the Commission's interpretation. The Court stated that the Commission's interpretation penalized the holding company discriminatorily by requiring a tax because it had subsidiaries not doing business in Utah. Similarly, the Virginia Commission has denied an exemption because Southern Spring Bed Company (being a Georgia corporation) exacted a stock split by Georgia law, rather than following the Virginia procedure. Activity outside the taxing state is not a valid basis of discrimination. In *Southern R. R. v. Greene*, 216 U.S. 400, 30 Sup. Ct. 287 (1910), the Court held that a state may not discriminatorily require a franchise tax of a foreign corporation. Such is the case here. A corporation amending its articles must follow the law of the state of incorporation in so doing, and such corporation should not be penalized by an extra tax for following such procedures, wherein a Virginia corporation, reaching the same result but using Virginia procedure, escapes the tax.

In conclusion, it is, therefore, defendant's position that no additional franchise taxes are due and owing to the Commonwealth by reason of the charter amendment dated February 6, 1963, and the same should be filed upon payment of the \$5.00 filing fee which was tendered to the Clerk of the Commission.

Respectfully submitted,

SMITH, KILPATRICK, CODY, ROGERS & McCLATCHEY

By **HAROLD E. ABRAMS**
RICHARD A. NEWTON

1045 Hurt Building
Atlanta 3, Georgia

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"EXHIBIT A"

STATE OF GEORGIA
COUNTY OF FULTON

I, **ROBERT W. SCHWAB, JR.**, certify that I am Secretary of Southern Spring Bed Company and that at a special meeting of the stockholders of said company held on the 5th day of February, 1963, upon due notice, the following resolutions were unanimously adopted and are still in full force and effect:

RESOLVED, that the Charter of Southern Spring Bed Company be amended so as to increase the authorized capital from 150,000 shares of No Par Value Common Stock to 300,000 shares of No Par Value Common Stock;

BE IT FURTHER RESOLVED, that the officers and attorneys of the company take appropriate steps for the effectuation of such amendment;

BE IT FURTHER RESOLVED, that following effectuation of such Charter amendment the Board of Directors of the company is authorized to declare and distribute a 3 for 1 stock split of the presently outstanding shares of the corporation, and in so doing to fix such record date for such split as the Board of Directors may determine.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the corporation, this 8th day of July, 1963.

ROBERT W. SCHWAB, JR.
Secretary

(Corporate Seal)

**SOUTHERN SPRING BED COMPANY —
ATLANTA, GEORGIA
SOUTHERN CROSS OF FLORIDA —
TAMPA, FLORIDA**

CONSOLIDATED BALANCE SHEET

December 31, 1962, 1961, 1960.

ASSETS	1962	1961	1960
Cash	\$ 473,375.65	\$ 443,227.76	\$ 694,170.19
Marketable Securities	500,000.00	203,300.00	—
Receivables — Customers	1,204,919.47	1,170,624.79	1,229,205.42
Less Reserves & Allow.	53,187.06	35,112.06	35,897.63
Net Receivables, Customers	1,151,732.41	1,135,512.73	1,193,307.79
Other Receivables	12,724.18	20,561.98	81,107.28
Inventories	2,036,569.92	1,924,700.35	1,794,108.12
Total Current Assets	4,174,402.16	3,727,302.82	3,762,693.38
Land and Buildings	1,592,690.40	1,572,405.27	1,545,681.32
Machinery & Equipment	2,207,839.13	2,106,197.63	2,009,217.04
Total	3,800,529.53	3,678,602.90	3,554,898.36
Less Reserves for Depreciation	1,848,987.81	1,721,790.09	1,580,035.93
Depreciated Value	1,951,541.72	1,956,812.81	1,974,862.43
Prepaid Expenses	108,221.24	106,382.42	65,060.19
Patents and Brands	1.00	1.00	1.00
TOTAL	<u>\$6,234,166.12</u>	<u>\$5,790,499.05</u>	<u>\$5,802,617.00</u>
LIABILITIES AND NET WORTH			
Accounts Payable, Trade	\$ 198,496.39	\$ 216,601.71	\$ 157,766.16
Other Payables	46,105.53	62,132.34	49,818.14
Salaries, Wages and Commissions	283,552.37	220,938.42	228,510.77
Reserve for Federal and State Taxes on Income	382,855.14	186,678.97	322,360.34
Other Taxes	33,529.32	25,387.25	23,556.08
Other Accruals	150,253.98	157,586.60	163,835.06
Total Liabilities	1,094,792.73	869,325.29	945,846.55
NET WORTH:			
Capital Stock (89,703 shares)	2,263,479.40	2,263,479.40	2,263,479.40
Earned Surplus	2,875,893.99	2,657,694.36	2,593,291.05
Total Net Worth	5,139,373.39	4,921,173.76	4,856,770.45
TOTAL	<u>\$6,234,166.12</u>	<u>\$5,790,499.05</u>	<u>\$5,802,617.00</u>

1962 Figures Before audit.

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AT RICHMOND, JULY 10, 1963

CASE NO. 16408

THIS DAY came the respondent Southern Spring Bed Company by Richard A. Newton, its counsel, and filed its memorandum in response to the rule to show cause issued by the Commission on June 5, 1963. Thereupon this proceeding was heard upon the record herein and the memorandum of the respondent in response to the rule to show cause and was taken under advisement.

AND THE COMMISSION having now considered the entire record herein including the memorandum filed by the respondent is of the opinion and finds that the respondent Southern Spring Bed Company, a foreign corporation, authorized to transact business in this State amended its articles of incorporation on February 6, 1963 so as to authorize it to issue 300,000 shares of no par value common stock and on March 14, 1963 tendered to the Clerk of this Commission for filing in this State a duly authenticated copy of such amendment but failed and refused to pay to the Commonwealth of Virginia the fees in the amount of \$505 required by law for the filing of such amendment and that the respondent, Southern Spring Bed Company, is indebted to the Commonwealth of Virginia in the sum of \$505.

IT IS THEREFORE ORDERED:

(1) That the Commonwealth of Virginia recover of and from Southern Spring Bed Company the sum of \$505, and that, in the event Southern Spring Bed Company shall fail to pay said sum to the Commonwealth of Virginia on page 25] or before the 10th day of August, 1963, all authority of Southern Spring Bed Company, a foreign corporation, to transact business in this State shall be revoked; and,

(2) That there appearing nothing further to be done herein this proceeding be dropped from the docket and the file placed in the file for ended causes.

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AN ATTESTED copy hereof shall be sent to **Richard A. Newton, Attorney at Law, Hurt Building, Atlanta 3, Georgia,** counsel for the respondent.

A True Copy

Teste: WILLIAM C. YOUNG
Clerk of State Corporation Commission.

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AT RICHMOND, JULY 26, 1963

CASE NO. 16408

THE RESPONDENT, Southern Spring Bed Company, having signified its intention to appeal to the Supreme Court of Appeals from the order entered herein on July 10, 1963, and having applied to the State Corporation Commission to suspend the execution of said order until the final disposition of the Supreme Court of Appeals of such appeal.

IT IS ORDERED that the execution of the Commissioner's order of July 10, 1963 be suspended until the final disposition of such appeal by the Supreme Court of Appeals, provided the respondent, or someone for it, on or before August 10, 1963 shall enter into bond with sufficient surety in the Clerk's Office of the State Corporation Commission in the penalty of \$1,000 conditioned that the respondent will perfect such appeal within the time allowed by law and will perform and satisfy the order of the State Corporation Commission entered herein on July 10, 1963 in the event such order be affirmed or such appeal be dismissed and to pay all damages, costs and fees awarded against or incurred by the respondent in the Supreme Court of Appeals.

AN ATTESTED copy hereof shall be sent to **William Vance, Attorney at Law, Hurt Building, Atlanta 3, Georgia,** counsel for the respondent.

A True Copy

Teste: WILLIAM C. YOUNG
Clerk of State Corporation Commission.

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Opinion, CATTERALL, *Commissioner*:

Southern Spring Bed Company is a Georgia corporation authorized to do business in Virginia. On February 6, 1963, its charter was amended as follows:

“... so as to increase its authorized capital from 150,000 shares of no par value common stock to 300,000 shares of no par value common stock.”

The Clerk of the Commission demanded an additional entrance fee of \$500; the corporation refused to pay it; and the Commission, after hearing on a rule to show cause, entered judgment in favor of the Commonwealth for the additional fee.

The defendant relies on the following proviso in §58-462 of the Code:

“... provided, that in cases in which the authorized number of shares of no par stock is increased by an amendment authorizing the issuance of an increased number of shares in exchange for and in lieu of the previously issued shares no additional charter or entrance fee shall be required. . .”

page 28] Sec. 157 of the Constitution requires the General Assembly to impose *charter fees* on domestic corporations and *entrance fees* on foreign corporations. The charter fees are charged for the privilege of being a Virginia corporation. The entrance fees are charged for the privilege of doing business in Virginia by a foreign corporation. Necessarily, entrance fees can be imposed only on those foreign corporations that the State has the constitutional power to exclude. It follows that these fees are fees and are not, in any sense of the word, taxes.

The constitutionality of this imposition came before the Supreme Court in *Atlantic Refining Company v. Virginia*, 302 U.S. 22 in 1937. The court pointed out that the entrance fee is *a fee and not a tax*. The state is offering to sell a privilege, and a corporation that accepts the offer must pay the stipulated purchase price. The court said (p. 26):

“ . . . no reason appears why the State is not as free to charge \$5000 for the privilege as it would be to charge that amount . . . for a parcel of land which it owned.”

The fees were fixed by Acts of 1910, page 79, over fifty years ago and have not been increased. The fees are based on the maximum par value of the stock that the corporation's charter authorizes it to issue. Since the corporation can elect to have any amount of authorized stock, it follows that each corporation decides for itself what the total authorized maximum par value of its stock is to be; and it is put on notice by the statutes that the higher the authorized maximum is the larger the fees will be. The amount of the fees is thus put within the free election of the corporation itself. The initial charter fees of domestic corporations are necessarily based on the par value of the stock and not page 29] on the value of the assets because when those fees are payable, those corporations have no assets. If a corporation later increases its authorized maximum capital stock it pays an additional charter fee in accordance with the statutory fee schedule. Although it would be physically possible to base the later fees on the gross assets or the net worth of the corporation, it would lead to endless arguments if those methods were employed; and therefore the statutes make the amount of the fees depend on the face of the articles of incorporation and the articles of amendment, so that the clerks in the Clerk's Office can tell at a glance the proper amount of the fees.

When this method of implementing Sec. 157 of the Constitution was adopted, no-par stock had not been invented. The first statute authorizing no-par stock was passed in New York in 1912. The first Virginia statute authorizing no-par stock was Acts of 1918, p. 534.

The statutory scheme for basing charter and entrance fees on the maximum authorized par value would not work if the stock had no par value. Accordingly, by Acts of 1919, page 75, the General Assembly provided that, for purposes of these fees, no-par stock should be treated as if it were \$100 par. The figure, of course, is purely arbitrary, because no-par stock can be issued for one cent a share or for a million dollars a share. The same is true in Virginia of stock having a par value. The corporation decides what stock it wants to issue, and, by so deciding, determines what fees it is to pay.

By Acts of 1926, p. 799 the law was amended to add the *provisos* that appear in the present §58-462. Of those *provisos*,

only the one quoted at the beginning of this opinion is material in this case. That *proviso* says that there shall be no additional charter or entrance fee if:

page 30] “. . . the authorized number of shares of no par stock is increased by an amendment authorizing the issuance of an increased number of shares in exchange for and in lieu of the previously issued shares. . .”

The State Corporation Commission has always taken the position that the *proviso* does not apply unless the amendment itself states that the new stock is to be issued in lieu of the previously issued shares.

The statute is dealing with what is called a “stock-split.” A stock-split is accomplished when new shares are issued to existing shareholders for no consideration except the surrender of existing shares. As a matter of mechanics, if there is a split of two-for-one, it is not customary to call in the old shares and then issue two new shares. The result is accomplished by issuing one new share to each holder of an existing share: i.e., the holder keeps his old *certificate* and receives an additional *certificate*. Since a *certificate* is merely evidence of ownership and is not itself the share, this handling of the certificates results in a split of two shares for one.

If the old certificate was for one share of \$100 par, the new certificate will customarily be for \$50 par. By amendment of the charter the old \$100 certificate automatically becomes a certificate for \$50 par. For many years, big corporations sent the stockholder a sticker reading “\$50” to paste over the number \$100 on his old certificate. This mailing of stickers has been discontinued on the theory that stockholders understand what has been done.

When one share of \$100 par stock is split into two shares of \$50 par stock, the authorized maximum capital stock of the corporation is not changed and there is no additional charter fee or entrance fee. The theory of the *proviso* is that splitting no par stock should have the same consequences as splitting par value stock, when the par value per share is split.

In the case of par value stock the corporation act does not *compel* the par value to be reduced when the stock is split. The last paragraph of §13.1-43 says:

“A split-up of the shares of any class into a greater number of shares without increasing the stated capital of the corporation shall not be construed to be a share dividend.”

That means that the transaction is a stock-split and not a stock dividend if nothing is transferred from surplus account to capital account as consideration for the additional shares. If the maximum authorized capital were increased from 100 shares of \$100 par to 200 shares of \$100 par instead of 200 shares of \$50 par, the corporation would pay an additional charter or entrance fee even if the 200 shares were issued in exchange for the previously issued 100 shares.

Whenever a corporation increases its maximum no-par stock it pays an additional entrance or charter fee (based on the statutory figure of \$100 per share) unless the amendment of the articles of incorporation states that the increased number of shares are to be exchanged for the previously issued shares. If the amendment does not provide for the exchange, the directors of the corporation would be free to sell the new stock instead of exchanging it for the old, and would be free to use the new shares for a stock dividend instead of a stock split.

If the amendment authorizes 100,000 new shares that may or may not be used for a stock split, the *proviso* does not apply. The amendment of the charter of Southern Spring Bed Company says nothing about a stock-split.
page 32] The corporation can use the new shares for the purpose of raising new capital if it wishes to do so. Whenever new shares *can* be used for raising new capital, the additional charter fee or entrance fee is due. The fact that the directors decide not to sell the new shares is immaterial. The charter fees and entrance fees are based on the privilege of selling shares, whether or not any shares are ever sold. Consequently, it is only when the amendment of the charter specifies that the new shares are to be exchanged for previously issued shares that the language of the *proviso* applies. To get the benefit of the proviso, the amendment itself must make certain that the newly authorized shares cannot be used to raise new money. The amendment must show on its face that it is

“... an amendment authorizing the issuance of an increased number of shares in exchange for and in lieu of the previously issued shares...”

Whenever a corporation has authorized but unissued shares, the directors can use those shares for a stock-split as far as they are available. Southern Spring Bed Company, before

the recent amendment, had some authorized but unissued shares. The amendment added to the number of authorized but unissued shares. The amendment did not specify that the new shares could not be issued to raise new money. The shares, so far as the amendment is concerned, could be used for any corporate purpose including a stock split. Whenever such an amendment is obtained the additional charter fee or entrance fee must be paid. In this case the defendant is liable for an additional \$500 fee.

HOOKER and **DILLON**, *Commissioners*, concur.

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CERTIFICATE

It is certified that pursuant to the order entered herein on July 26, 1963, the respondent, with sufficient surety, has entered into a suspending bond in the amount of \$1,000 as provided for in that order.

It is further certified to the Supreme Court of Appeals of Virginia that the foregoing transcript of the record in this proceeding contains all of the facts upon which the action appealed from was based, together with all of the evidence introduced before or considered by this Commission.

Witness the signature of Ralph T. Catterall, Chairman of the State Corporation Commission, under its seal and attested by its Clerk this 11th day of September, 1963, at Richmond, Virginia.

RALPH T. CATTERALL

Chairman

Attest: **WILLIAM C. YOUNG**

Clerk

CERTIFICATE

I, William C. Young, Clerk of the State Corporation Commission, certify that within sixty days after the final order in this case Southern Spring Bed Company, by William Vance, its Attorney, Hurt Building, Atlanta, Georgia, filed with me a notice of appeal therein which had been mailed to Counsel for

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the State Corporation Commission and to the Attorney General of Virginia, pursuant to the provisions of Section 13 of Rule 5:1 of the Rules of Supreme Court of Appeals of Virginia.

Subscribed at Richmond, Virginia, September 11, 1963.

WILLIAM C. YOUNG
Clerk

A Copy—Teste:

H. G. TURNER, Clerk.

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