

IN THE MATTER OF THE PETITION OF

"R" Bank and "S" Company

FOR A DECLARATORY RULING

Doc. #4049, Effective 5-2-86

DECLARATORY RULING

Pursuant to RSA 541-A:1, 1 b, 541-A:2, and Rev 104.04 of the New Hampshire Code of Administrative Rules, "S" Company has petitioned, on behalf of "R" Bank, the Department of Revenue Administration for a Declaratory Ruling.

"R" Bank, is acting as trustee of funds which were borrowed at a public offering subject to the Security and Exchange laws of the United States and which were secured by a mortgage and pledge of certain corporate assets, including real estate. "R" Bank has its principal place of business at EIN#; "S" Company, corporation organized and existing under the laws of the State of New Hampshire, the beneficiary of the borrowed funds which are secured by its assets through the above recited public offering, has its principal

offices, and files its New Hampshire business profits tax return under EIN#.....

"S" Company has petitioned the Department of Revenue Administration for a Declaratory Ruling stating that the Trustee, solely by reason of the interests conveyed or assigned to the Trustees by the Indenture or by reason of the Trustee's performance and exercise of its duties and rights as Trustee under the Indenture, other than rights or remedies that may arise in the event of a default by the Company under the Indenture, shall not be subject to the business profits tax, New Hampshire Revised Statutes Annotated Chapter 77-A.

The Petitioner represents that the following is a complete description of the Trustee's rights and duties under the Indenture set forth in the Third Mortgage Indenture, attached hereto as Exhibit A. In summary form, those rights and duties include the following:

(1) The Company grants to the Trustee a third mortgage security interest in certain described real estate and other assets (the "Trust Estate") of the Company, for the equal prorata benefit, security and protection of the individual registered owners of the Bonds. (Ex A, p.15)

(2) The Trust Estate shall be held by the Trustee under the terms of the Indenture, until such time as the Company shall pay all principal and interest on the Bonds at the times and in the manner provided by the terms of the Bonds. (Ex A, p. 15)

(3) The Bonds issued under the terms of the Indenture must be delivered to and authenticated by the Trustee prior to delivery by the Trustee to registered owners. The Trustee is required to certify that the Bonds are valid and entitled to the security, rights and benefits granted bondholders against the Trust Estate and the Company. (Ex A, pp.32, 46)

(4) The Trustee is required to maintain at its principal office a bond register containing identifying information regarding each registered owner of Bonds, and shall be responsible for transferring title to Bonds to transferees of registered owners upon receipt of proper instructions from said registered owners. (Ex A, p. 35)

(5) The Trustee is appointed a Paying Agent for the purpose of honoring Bonds presented for payment, exchange, transfer, or registration and for purposes of issuing replacement Bonds for those that have been mutilated, destroyed, lost or stolen. (Ex A, p.36).

(6) Interest installments and the principal due on any Bond at a given date shall be paid by the Company to the registered owner thereof, at the principal office of the Trustee, (Ex A, p.41), by depositing with the Trustee the entire amount necessary to pay all the principal and interest payable at that time. The amount so paid shall be held by the Trustee in trust until applied to the payment of the Bonds payable on each such date. (Ex A, p.51).

(7) The Trustee is a named loss payee with respect to policies of insurance on the property included in the Trust Estate, and shall hold the policies of insurance. (Ex a, p.57) In case of any loss or damage, proceeds of insurance shall be paid to the Trustee. (Ex A, p.58).

(8) Unless and until a default by the Company occurs under the terms of the Indenture, the Company and not the Trustee shall be permitted to possess, enjoy, use and operate the property included in the Trust Estate and to take and use all income generated from such possession and use. (Ex A, p.68).

(9) The Company is required to submit to the Trustee copies of Securities and Exchange Commission annual reports and supplemental information and the Company's annual Officers' Certificate stating whether or not a default has occurred under the Indenture. (Ex A, p.81).

(10) The Trustee is required to submit annual reports to all registered Bondholders summarizing the results of the Trust for the preceding year, the status of property held in the Trust Estate, the amount of all indebtedness owing by the Company, and other information. (Ex a, p.81).

(11) In the event of a default by the Company under the Indenture, the Trustee is required to give notice to all Bondholders of the occurrence thereof. (Ex A, p.85)

(12) If a default exists, the Trustee may declare the principal of all Bonds then outstanding and the interest accrued thereon immediately due and payable. (Ex A, p.86). If such amounts are not paid promptly, the Trustee becomes authorized to exercise one or more powers and remedies for the benefit of the Bondholders, including but not limited to the right to take possession of the Trust Estate and operate or liquidate the same, subject to the rights of prior lienholders. (Ex A, p.87). Individual Bondholders do not have similar rights and remedies unless the Trustee, having been requested to act on behalf of the Bondholder, refuses or neglects to comply with such request. (Ex A, p.100)

(13) The Trustee shall be entitled to reasonable compensation to be paid by the Company for all services rendered by it in the execution of the Trusts created by the Indenture and in the exercise and performance of its powers and duties granted under the Indenture. (Ex A, p.105).

(14) Prior to the Trustee's exercise of rights or remedies that may arise in the event of a default by the Company under the Indenture, the Trustee will not own, rent, or use real or personal property in the State of New Hampshire that will be operated in connection with its business as Trustee. It employs no individuals in this state, and performs no income producing services in this state.

The Petitioner requests that the Department of Revenue Administration apply the provisions of RSA 77-A:1, I., which provide, in part, that "...'business organizations' means any enterprise, whether corporation, partnership, proprietorship, association, business trust, real estate trust or other form of organization, ... carrying on any business activity within the state..." to these facts.

The Petitioner additionally requested that the Department of Revenue Administration recognize certain "legislative guidance" in the language of RSA 293-A:107, the Business Corporations Act. The Department wishes to make clear that it will not look that way for guidance. The Department looks to the provisions of RSA 77-A to determine the legislatively intended scope of the business profits tax. A thorough search of Department files indicates that RSA 293-A or its predecessors have never been so used by the Department or accorded merit by the Department when utilized by taxpayers.

Without reference to RSA 293-A, the Department agrees with the taxpayer that the Trustee, solely by reason of the interests conveyed or assigned to the Trustees by the Indenture or by reason of the Trustee's performance and exercise of its duties and rights as Trustee under the Indenture does not bring the Trustee within the ambit of RSA 77-A. This ruling specifically does not address the consequences of the Trustee's participation in unitary business which may or may not be conducting business in New Hampshire.

May 2, 1986

Everett V. Taylor Commissioner