**In The Matter of the Petition of "N" & "O"**

**for a Declaratory Ruling**

**DOC #4254, Effective April 7, 1987**

Pursuant to RSA 541-A:1, IV, RSA 541-A:2, (d), and PART Rev 209 New Hampshire Code of Administrative Rules, "N" of New Hampshire (The "Bank"), a mutual savings and loan association chartered under the laws of the State of New Hampshire, petitions the Department of Revenue Administration for a declaratory ruling concerning the New Hampshire tax consequences of the conversion of "Bank" from a New Hampshire-chartered mutual savings and loan association to a New Hampshire chartered stock savings and loan association, "Converted Bank" as part of a transaction in which "Converted Bank" will become a wholly-owned subsidiary of "O" (the "Holding Company").

The Bank has its principal office at ....., New Hampshire (EIN: ..... The Holding Company has its principal place of business at ..... , New Hampshire (EIN: ..... ). Bank was chartered as a New Hampshire mutual savings and loan association in 18--. It operates with #### full-service offices in ..... County, New Hampshire and ### full-service office in ..... County, New Hampshire.

As a mutual institution, Bank has no capital stock. The corporate powers of Bank are vested in its depositors and borrowers (referred to as "Members"). Management of Bank is directed by a Board of ##### directors elected by the members. In the unlikely event of a complete liquidation of Bank while in a solvent condition, each savings depositor would be entitled to receive his pro-rata share of any assets remaining after payment of the claims of all creditors (including the claims of all depositors to the withdrawal values of their accounts).

Holding Company was incorporated under New Hampshire law in 19--. Its purposes are to engage in the business of a bank holding company and generally to carry on any activity permitted by the New Hampshire Business Corporation Act. The authorized capital stock of Holding Company consists of xxx shares of common stock, par value of $x per share and xxx shares of preferred stock, par value of $x per share. Holding Company has no assets or liabilities and has not conducted any business.

I. The petitioner presents the following facts:

1. Proposed Conversion Transaction:

The board of directors of Bank have adopted a Plan of Conversion ("Plan") pursuant to which Bank will be converted from a state-chartered mutual savings and loan association to a state-chartered stock savings and loan association, all of the stock in which will be held by Holding Company.

2. Legal Basis for Conversion:

The Bank will convert from a mutual savings and loan association to a stock savings and loan association in accordance with NH RSA 393-A and the rules and regulations of the Federal Savings and Loan Insurance Corporation (the "FSLIC") and the Federal Home Loan Bank Board (the "FHLBB"). The FHLBB and the FSLIC have detailed conversion regulations. The regulations provide that a mutual savings and loan association may convert to stock form as part of a transaction in which a holding company is organized to acquire upon issuance all the capital stock of the converted savings bank. §563b.10 The board of directors of Bank believes that the plan meets all of the applicable requirements of the FHLBB and the FSLIC and New Hampshire law.

3. The Conversion Process Generally:

The Holding Company will offer stock ("Conversion Stock") for sale in a subscription offering to eligible categories of depositors, other members and officers, directors and employees of Bank and thereafter the remaining shares will be offered in an underwritten public offering; and approximately 80 percent

of the net proceeds from the sale of the Conversion Stock will be used by the Holding Company to purchase all of the capital stock of Bank. The purchase price at which Conversion Stock will be sold will be based upon the estimated pro forma market value of the Holding Company and Bank on a consolidated basis determined by an independent firm experienced and skilled in the valuation and appraisal of thrift institutions.

4. The Conversion is for a Business Purpose.

As stated in the Plan, the board of directors of Bank believes that conversion to stock form provides a means by which Bank can increase the scope of its banking and permitted non-banking operations to provide more complete services to its existing and future customers. It will enable Bank to meet more effectively the increasing competition of other banks and bank holding companies in the State of New Hampshire.

5. The Effects of the Conversion:

Bank as a stock savings and loan association ("Converted Bank") will be a continuation of the mutual entity, not a new entity, and the Plan so states. Section 563 b.8(d) (3) of the conversion regulations of the FHLBB provides that the corporate existence of the converted insured institution shall be deemed a continuation of the entity converted, unless state law provides otherwise. The name of the converted institution will continue to be "N" of New Hampshire. Converted Bank will automatically succeed to all the properties, rights, interests, duties and obligations of Bank. While the conversion is being accomplished, the normal business of Bank of accepting deposits and making loans will be continued without interruption. Following conversion, the voting rights of the members will terminate and all voting power in Bank will be held exclusively by its stockholder, Holding Company.

An application for conversion will not be approved if the conversion would result in a taxable reorganization of the applicant under the Internal Revenue Code of 1986 (the "Code").

6. The Offering of Conversion Stock:

The aggregate purchase price at which all shares of Conversion Stock will be offered and sold will be equal to the consolidated pro forma market value of the Holding Company and Converted Bank, based on an independent appraisal. All such shares will be issued and sold at a uniform price per share.

The Plan calls for a 2-phase stock offering.

Under the Plan, any shares remaining unsubscribed for after the close of the subscription offering will be offered to the public in an underwritten public offering. The public offering is to commence as soon as practicable after the end of the subscription offering.

After the independent appraiser determines the estimated pro forma market value of Holding Company, on a consolidated basis, Converted Bank and Holding Company will establish the number of shares of common stock to, be issued and sold and establish a price range per share. Stock will then be offered in the subscription offering at a price within the estimated range, with a refund given to subscribers if the final price is lower. By this means, the price per share ultimately paid by subscribers in the subscription offering and by purchasers in the public offering will be the same.

7. Purchase Limitations:

Under the Plan, there are purchase limitations applying to all shares of Conversion Stock to be issued in the conversion except for purchases by the underwriters for the public offering.

8. Establishment of a Liquidation Account:

Pursuant to conversion regulations of the FHLBB, Bank will establish under the Plan, a "Liquidation Account" which will be equal in amount of Bank's net worth as shown on its latest statement of financial condition to be included in the latest prospectus used in the conversion. The Liquidation

Account will be for the purpose of granting account holders who continue to maintain accounts in the Converted Bank, an absolute right of priority over Holding Company as holder of the common stock of the Converted Bank in the event of a complete liquidation of the Converted Bank to the extent of the interest of each account holder as hereinafter described. Establishment of the Liquidation Account will not operate to restrict the use or application by Converted Bank of any of its net worth, except that net worth accounts of Converted Bank shall not be reduced voluntarily to less than the required dollar amount of the Liquidation Account.

An interest in the Liquidation Account will never be increased. It will be decreased generally to reflect subsequent withdrawals from an account holder's account that reduce the account balance below what it was at the time of the conversion.

9. Further Representations:

In addition to the foregoing facts, Bank and Holding Company make the following further representations in connection with the proposed transaction:

A. Bank's depositors will pay the expenses of the conversion which are solely attributable to them, if any. Bank will pay its own expenses of the conversion and will not pay any expenses solely attributable to the stockholders or to Holding Company.

B. Following the conversion, Converted Bank will continue to engage in its business in the same manner as prior to the conversion, and it has no plan or intention to sell or otherwise dispose of any of its assets other than in the ordinary course of business.

C. The fair market value of the Converted Bank's withdrawable deposits plus the interests in the Liquidation Account be received under the Plan will, in each instance, be approximately equal to the fair market value of Bank's deposits and any proprietary interests surrendered in exchange therefore.

D. Immediately following consummation of the conversion, Converted Bank will possess the same assets and liabilities as it held immediately prior to the proposed transaction, plus the applicable proceeds from the sale of the Bank's common stock.

E. There will be no purchase price advantage to account-holders purchasing shares with subscription rights over persons purchasing shares in the public offering because all purchasers will pay the same price for the stock.

II. The Petitioner Has Requested That the Commissioner Issue a Declaratory Ruling Based on These Facts as to the Following Matters:

(1) Provided that the conversion of Bank from a New Hampshire-chartered mutual savings and loan association to a New Hampshire-chartered stock savings and loan association, as described above, is deemed by the Internal Revenue Service to constitute a reorganization within the meaning of Section 368 (a) (1) (F) of the Code, and Bank and Converted Bank are deemed to each be a "party to a reorganization," within the meaning of Section 368 (b) of the Code, no gross or taxable business profits under the New Hampshire Business Profits Tax (RSA 77-A) will be recognized to Bank or Converted Bank as a result of such conversion (RSA 77-A:1, III (a)).

(2) Provided that the conversion of Bank from a New Hampshire-chartered mutual savings and loan association to a New Hampshire-chartered stock savings and loan association is deemed by the Internal Revenue Service to constitute a reorganization within the meaning of Section 368 (a) (1) (F) of the Code, and provided further that the Internal Revenue Service determines pursuant to Section 354(a) of the Code that no gain or loss will be recognized by the eligible account holders upon the issuance to them of savings accounts in Converted Bank in the same dollar amount as their savings accounts in Bank plus interests in the Liquidation Account of Converted Bank, in exchange for their

savings accounts in Bank, no gross or taxable business profits under the New Hampshire Business Profits Tax (RSA 77-A) will be recognized to any eligible account holder that is a business organization under RSA 77-A:1, by virtue of said exchange.

(3) Provided that Code Section 356 (a) (1) applies with respect to the non-transferable subscription rights to purchase Conversion Stock received by eligible account holders in the conversion and provided further that such rights have no market value, so that no gain or loss is recognized to such eligible account holders under Section 356 (a) (1) of the Code, no gross business profits tax (RSA 77-A) will be recognized to eligible account holders that are deemed to be "business organizations" within the meaning of RSA 77-A:1 by reason of the receipt of such rights.

(4) The conversion of the Bank will not result in taxable income to the depositors of Bank and Converted Bank under the provisions of the New Hampshire interest and dividends tax.

(5) Upon the acquisition of the assets and liabilities of Bank by Converted Bank, Converted Bank, as a continuation of Bank shall be liable for the franchise tax imposed by RSA 84:16-a through 84:16-c, inclusive, and liable for capital stock taxes pursuant to RSA 84:16-d, provided, however, that the tax due under RSA 84:16-d will be deducted from the tax due under RSA 84:16-c.

III. The Department of Revenue Administration takes notice that the fact pattern sketched by Petitioner is substantially parallel to the factual parameters of seven previous ruling request. (Document Numbers 2025; 2479; 2581; 3114; 4102; 4081 and4156). In many respects the requested rulings in each of these prior petitions echoes the ruling points of this petition. None of the rulings requested today is new analytical matter. The Department views these circumstances as evidence of tax preparer uncertainty in a factually distinct area which may more effectively be answered by regulation than by repeated, fact-intensive rulings. Regulation in this area may be pursued by the Department in the near future.

IV. However, in view of the foregoing representations, and specifically based upon them, the Department of Revenue Administration finds the following:

A. Relative to the Business Profits Tax Issues (RSA 77-A).

It is standard form for this type of request to raise three business profits tax issues: one related to the taxability of the conversion transaction itself to either the Bank or the Converted Bank, a second and third related to the taxability of business organization/depositors on the exchange of same dollar savings accounts in Bank for accounts in the Converted Bank and relative to these same business organization/depositors a question is usually posed relative to the taxability of the distribution of non-transferable, no-market value subscription rights. This part (IV, A) of this ruling will historically summarize the position of the Department of Revenue Administration with respect to the business profits tax (RSA 77-A) consequences of a standard bank conversion from a mutual to a stock bank and address the particular ruling request.

1. No Business Profits Tax Incurred on the Conversion Transaction. On April 28, 1982 in Document Number 2025, page 2, the Department Of Revenue Administration was petitioned,

Provided that the reorganization of the "M" Bank as the "N" Bank, a state chartered commercial stock bank, subsidiary of "O" Company, is deemed by the Internal Revenue Service to qualify as a reorganization within the meaning of Section 368 (a) (1) (A), 368 (a) (1) (C), and (a) (2) (D), and/or 368 (a) (1) (F) of the Internal Revenue Code of 1954, as amended, ("Code") and "Bank", "New Bank", and the "Holding Company" are each deemed to be a "party to a reorganization" within the meaning of Section 368 (b) of the "Code", no gross or taxable business profits will be recognized by "Bank", "New Bank" or the "Holding Company", pursuant to the provisions of the New Hampshire Business Profits Tax (RSA Chapter 77-A) N. H. RSA 77-A:1 (III) (a).

Except for cosmetic variations such as "Provided that the reorganization above, versus the current Petitioner's "Provided that the conversion . . . and the substitution of the phrase "New Hampshire-chartered" for "state chartered" the current ruling request is virtually a mirror image of the 1982

request. The 1982 request was reflected similarly in each of the six intervening ruling requests. See: Document Number 2479, of August 19, 1983, page 2; Document Number 2581, of January 12, 1984, page 3; Document Number 2838, of August 24, 1984, page 8; Document Number 3114 of September 16, 1985, page 8; Document Number 4081, of July 2, 1986, page 2; and Document Number 4156, of October 31, 1986, page 1.

The specific fact pattern of a mutual bank converting to a guaranteed, stock savings bank is identical to the pattern of the current request in Docket Number 4081 of July 2, 1986; Docket Number 2581, of January 12, 1984; Docket Number 2479 of August 19, 1983, and Docket Number 2025, of April 28, 1982. There are slight factual variances of immaterial significance in Docket Number 4156, of October 31, 1986 and Docket Number 3114 of September 16, 1985 due to the fact that actual control of the converting mutual bank is vested in "corporators" who elect the Bank's trustees, rather than in the depositors. The facts of Document Number 2838, of August 24, 1984 differ from all other requests because there is no conversion of mutual bank to stock, guaranteed bank in that request. All entities in that request are stock entities at the inception of the reorganization.

In each and every instance the Department of Revenue Administration has answered the question posed by the Petitioner on identical and similar facts that:

N.H. RSA 77-A:1 (III) (a) defines "gross business profits" in the case of a corporation as the amount shown or which would be shown on a separate federal corporation income tax return as taxable income before net operating loss deduction and special deductions. If it is determined, and conditional upon such determination, that "Bank", "New Bank" and the "Holding Company" and "parties to a reorganization" within the meaning of Internal Revenue Code Section 368 (b), the nonrecognition of gain or loss provisions of Internal Revenue Code Section 361 would apply and no gross or taxable business profits would be recognized for purposes of Chapter 77-A, the New Hampshire Business Profits Tax, by "Bank", "New Bank", and the "Holding Company".

Document Number 2025, April 28, 1982, page 3. Virtually identical language has been used with Document Number 2479, August 19, 1983, page 4 and 5; Document Number 2581, January 12, 1984, page 4; Document Number 2838, August 24, 1984, page 9;Document Number 3114, September 16, 1985, page 10 and 11; Document Number 4081, July 2, 1986, page 4; and Document Number 4156, October 31, 1986, page 12 and 13.

Thus, with the factual premises indistinguishable, and with the controlling statutes unaltered, and with the analytical premises and reasoning unvaried in the seven months since the Department has last spoke on this issue, the Department of Revenue Administration will rule on this petition with the exact wording utilized in our first ruling on this matter.

The reasoning of the Department has always followed that of the New Hampshire Supreme Court in its analysis of the operative language controlling the tax base in RSA 77-A at 1, III (a). Since its inception, the business profits tax has been rooted in, been indexed to, or followed the Internal Revenue Service form 1120, for corporate taxpayers. The phrase ". . . shown . . . on such return . . ." has been briefed and argued before the court by the Department, and the court has always agreed with our reasoning whenever the Department concludes that New Hampshire follows what is "shown" on the federal return. Shangri-La, Inc. v. State of New Hampshire, 113 NH 440, 309 A2d 285 (1973); Estate of Kennett v. State of_New Hampshire, 115 NH 50, 333 A2d 452 (1975); New Jersey Machine of New Hampshire, Inc. v. State Department of Revenue Administration, 117 NH 262, 372 A2d 604 (1977); Johns-Manville Products Corp. v. Commissioner of Revenue Administration, 115 NH 428, 343 A2d 221, Appeal Dismissed, 423 US 1069, 96 S.Ct. 851, 47 L.Ed. 2d 79 (1976). See: Jacobs v. Price, 125 NH 196, 485 A2d 282 (1984); Bradley Real Estate Trust v. Department of Revenue Administration, 128 NH (1986). This analysis is constitutionally approved. Opinion of the Justices, 111 NH 206, 278 A2d 348 (1971); Opinion of the Justices, 123 NH 344, 461 A2d 129 (1983). Thus, it is clear that when a reorganization produces no tax effect federally because of certain non-recognition provisions in the Internal Revenue Code, then the non-recognition impact flows through to the business profits tax.

Thus, the Department of Revenue Administration rules: N. H. RSA 77-A: I (111) (a) defines "gross business profits" in the case of a corporation as the amount shown or which would be shown on a separate federal corporation income tax return as taxable income before net operation loss deduction and special deductions. If it is determined, and conditional upon such determination, that "Bank", "Converted Bank" are "parties to a reorganization" within the meaning of Internal Revenue Code Section 368 (b), the non-recognition of gain or loss provisions of Internal Revenue Code Section 361 would apply and no gross or taxable business profits would be recognized for purposes of Chapter 77-A, the New Hampshire business profits tax, by "Bank" and the "Converted Bank."

2. No Business Profits Tax Incurred on Exchange of Depositor Rights in "Bank" for Rights in "Converted Bank." Although the second ruling request of this petition follows logically from the fact pattern which this petitioner shares with the seven previous petitioners, it's a question not always posed. It has been uniformly answered, however, whenever it has been asked. In Document Number 2479, August 19, 1983 at pages 2 and 3 we were asked:

Provided that the conversion of Savings Bank from a state- chartered mutual savings bank to a state-chartered stock savings bank is deemed by the Internal Revenue Service to qualify as a reorganization within the meaning of Section 368 (a) (1) (F) of the Internal Revenue Code, and provided further that the Internal Revenue Service determined pursuant to Section 354 (a) of the Code that no gain or loss will be recognized to savings depositors of Savings Bank upon the receipt by them of savings deposits in Converted Savings Bank (in the same dollar amount as their savings deposits in Savings Bank) plus their respective interests in the Liquidation Account of Converted Savings Bank, in exchange for their savings deposits and proprietary interests in Savings Bank, no gross or taxable business profits under the New Hampshire Business Profits Tax (RSA 77-A) will be recognized to any of said savings depositors of Savings Bank that are business organizations under RSA 77-A:1, I by virtue of said exchange.

See also: Document Number 3114, September 16, 1985; Document Number 4081, July 2, 1986, page 3; and Document Number 4156, October 31, 1986, page 2.

In the earliest ruling on this matter the Department ruled:

If it is determined by the Internal Revenue Service that "Savings Bank" and "Converted Savings Bank" are parties to an "F" type reorganization, and conditional upon such determination, and it is further determined by the Internal Revenue Service that (i) the provisions of Sec. 354 (a) of the Internal Revenue Code are applicable in the case of exchange by savings depositors of "Savings Bank" of their savings deposits and proprietary interests in "Savings Bank" for identical savings deposits in "Converted Savings Bank" plus their respective interests in the Liquidation Account of "Converted Savings Bank", and (ii) the provisions of Sec. 356 (a) (1) of the Internal Revenue Code are applicable in the case of the non-transferable subscription rights to purchase "Holding Company" shares that are received by eligible savings depositors in the conversion of "Savings Bank", no gross business profits or taxable business profits under the New Hampshire Business Profits Tax (RSA Ch. 77-A) will be recognized to savings depositors of "Savings Bank" that are deemed to be "business organizations" within the meaning of RSA 77-A:1, I by virtue of said exchange, or by reason of the receipt of such non-transferable subscription rights provided such rights have no market value. (Document Number 2479, August 19, 1983, page 5)

It should be apparent that the analytical support for this position by the Department derives from the same premises of federal form linkage inherent in the business profits tax statute, the interpretive case law, and the long-standing interpretation of the Department. The focus of this facet of the Petitioner's request is directed at depositors' business profits tax returns, not the returns of the distinct banking entities involved in the proposed merger. The Department's answer to this question looks to federal forms. Depositors have no federal taxable income under Petitioner's scenario. Thus, there is no New Hampshire tax impact different from that shown federally. Unless, of course, there could be found a special New Hampshire tax provision to alter the federal result. There is no such provision.

Thus, the Department of Revenue Administration rules: If it is determined by the Internal Revenue Service that "Bank" and "Converted Bank" are parties to an "F" type reorganization, and conditional upon such determination, and it is further determined by the Internal Revenue Service that (i) the provisions of Sec. 354 (a) of the Internal Revenue Code are applicable in the case of exchange by savings depositors of "Bank" of their savings deposits and proprietary interests in "Bank" for identical savings deposits in "Converted Bank" plus their respective interests in the Liquidation Account of "Converted Bank," and (ii) the provisions of Sec. 356 (a) (1) of the Internal Revenue Code are applicable in the case of the non-transferable subscription rights to purchase "Holding Company" shares that are received by eligible savings depositors in the conversion of "Bank," no gross business profits or taxable business profits under the New Hampshire Business Profits Tax (RSA Ch. 77-A) will be recognized to savings depositors of "Bank" that are deemed to be "business organizations" within the meaning of RSA 77-A:1, I by virtue of said exchange.

3. No Business Profits Tax Incurred on Receipt of Non-Transferable Subscription Rights (to Purchase Conversion Stock) Where Such Rights Have No Market Value. This request, like the second question posed, is also a logical permutation of the initial question. Again, it is a question asked of some, but not all of the prior declaratory ruling requests in this area. Its focus is on the depositor of the "Bank" who receives from the Holding Company" some non-transferable subscription rights. In Document Number 2479, August 19, 1983 we merged the answer to this question into our answer of the previous question at page 5 of that document. It read:

If it is determined by the Internal Revenue Service that "Savings Bank" and "Converted Savings Bank" are parties to an "F" type reorganization, and conditional upon such determination, and it is further determined by the Internal Revenue Service that (i) the provisions of Sec. 354 (a) of the Internal Revenue Code are applicable in the case of exchange by savings depositors of "Savings Bank" of their savings deposits and proprietary interests in "Savings Bank" for identical savings deposits in "Converted Savings Bank" plus their respective interests in the Liquidation Account of "Converted Savings Bank", and (ii) the provisions of Sec. 356 (a) (1) of the Internal Revenue Code are applicable in the case of the non-transferable subscription rights to purchase "Holding Company" shares that are received by eligible savings depositors in the con- version of "Savings Bank", no gross business profits or taxable business profits under the New Hampshire Business Profits Tax (RSA Ch. 77-A) will be recognized to savings depositors of "Savings Bank" that are deemed to be "business organizations" within the meaning of RSA 77-A:1, I by virtue of said exchange, or by reason of the receipt of such non-transferable subscription rights provided such rights have no market value.

A similar merged response is evident in the petition which was answered in Document Number 3114, September 16, 1985 at pages 10 and 11. It read as follows:

New Hampshire RSA 77-A:1, III (a) defines "gross business profits" in the case of a corporation, except "S" corporation, or any other business organization required to make and file a United States corporation income tax return, or in the case of a corporation which does not make and file a separate United States corporation tax return for itself because it is a member of an affiliated group pursuant to the provisions of Chapter 6 of the United States Internal Revenue Code (1954) as amended, as the amount shown as, or which would be shown as taxable income before net operating loss deduction and special deductions on such return; thus, adhering to federal tax definitions and principles. If it is determined, and conditional upon such determination that Bank, Converted Bank and Holding are each determined to be parties to a reorganization" within the meaning of Internal Revenue Code Section 368(b) no gross or taxable business profits or taxable business profits will be recognized to either Bank or Converted Bank as a result of the conversion, and provided further, that if the Internal Revenue Service determines, pursuant to Section 354(a) of the Code, no gain or loss will be recognized to savings depositors of the Bank upon the receipt by them of savings deposits in Converted Bank plus their respective interests in the Liquidation Account of Converted Bank in exchange for their proprietary interests in the Bank, no gross or taxable business profits will be recognized under RSA 77-A:1, III (a) by reason of the exchange by any of the savings depositors of the Bank that are "business organizations" as defined in RSA 77-A:1, I. It is further ruled that no gross or taxable busi- ness profits will be recognized under RSA 77-A:I, III (a) by virtue of the receipt of the exercise of subscription rights by any of the Eligible Account Holders that are "business organizations" as defined in RSA 77-A:1, I.

In Document Number 4081, July 2, 1986 the answer to this question was segmented from the prior question's answer. That document at page 3 stated:

Provided that Code Section 356 (a) (1) applies with respect to the non-transferable subscription rights to purchase Conversion Stock received by Eligible Account Holders in the Conversion and provided further that such rights have no market value, so that no gain or loss is recognized to such Eligible Account Holders under Section 356 (a) (1) of the Code, no gross business profits or taxable business profits under the New Hampshire Business profits tax (RSA 77-A) will be recognized to Eligible Account Holders that are deemed to be "business organizations" within the meaning of RSA 77-A:1 by reason of the receipt of such rights.

It's clear that the reasoning under this question has always been seen in harmonious accord with that of the prior questions. The logic being again that the starting point for taxation under RSA 77-A is with the federal form. Because this reorganization does not impact on federal taxability, it does not impact on New Hampshire taxability.

It is well worth the time and effort to record at this point the legal position of the Department of Revenue Administration on the point of the tax base tie between the federal form and RSA 77-A. Our earliest statement of this position was recorded in the brief filed by Attorney Charles G. Cleveland for one of the acknowledged authors of the business profits tax, the then Attorney General Warren B. Rudman. That case was Shangri-La, Inc. v. State of New Hampshire, 113 NH 440, 309 A2d 285 (1973). At pages two and three of our brief we argued as follows:

ARGUMENT

I. LEGISLATURE INTENDED THAT GAIN FROM THE SALE OF BUSINESS PROPERTY REALIZED ON OR AFTER JANUARY 1, 1970, SHOULD BE COMPUTED UPON A BASIS IDENTICAL TO THAT REPORTED BY THE TAXPAYER ON ITS FEDERAL INCOME TAX RETURN FOR THE TAXABLE YEAR IN WHICH THE SALE OCCURRED.

RSA 77-A:1 (III) (a) provides the definition of Gross Business Profits applicable to the petitioner as follows:

In the case of a corporation or any other business organization required to make and file a United States corporation income tax return, the amount shown as "taxable income before net operating loss deduction and special deductions" on such return, or in the case of a corporation which elects treatment as a small business corporation under the United States Internal Revenue Code (1954) as amended, the amount shown as "taxable income" on its United States small business corporation income tax return;

This definition does not attempt merely to use terms of art familiar in the federal income tax context such as net capital gains or ordinary income. Rather, this definition makes specific and unambiguous reference to an amount shown on the taxpayer's federal income tax return at a certain line item, and identifies that item by quotation of the label given that item on the federal return. In this case, the federal return in question was a form 1120S, petitioner being a small business corporation within the meaning of the Internal Revenue Code, the amount shown as taxable income" on form 1120S is line 28, and that amount on petitioner's return for the year in question is $ ..... .

We simply do not perceive any room for dispute about what the Legislature intended in this definition. The Legislature said in effect "that is the amount we want to use, however, it may be computed under federal code and regulations." If a basis other than that used to compute gain for federal income purposes is used to compute gain for New Hampshire Business Profits Tax purposes, then, ipso facto, the amount so arrived atwill not be "the amount shown as 'taxable income' on [the federal] return" as required by RSA 77-A:1 (III) (a).

We submit that to achieve the result desired by the petitioner, this Court would necessarily have to rewrite the law, not merely interpret it.

The court framed this issue in Shangri-La as,

This appeal questions the tax commission's determination that for the purpose of the Business Profits Tax (RSA ch. 77-A) the taxpayer's gain on the sale of its business property should be computed on the basis of its federal income tax return (cost less accumulated depreciation) rather than the fair market value on the effective date of the tax statute (January 1, 1979). (113 NH at 440-441)

The court ruled in favor of the Department in Shangri-La holding that the gain from the sale of assets by Shangri-La Inc. was taxable because that gain appeared on a properly filed form 1120 with the Internal Revenue Service.

This position has been consistently adopted by the New Hampshire Supreme Court inThe Estate of Kenneth v. State, 115 NH 50; 333 A2d 452 (1975); Concord Investment Corporation v. New-Hampshire Tax Commissioner 114 NH 105, 316 A2d 192 (1974);New Jersey Machine of New Hampshire Inc. v. State Department of Revenue Administration, 117 NH 262, 372 A2d 604 (1977); Johns-Manville Products Corp. v. Commissioner of Revenue Administration, 115 NH 428, 343 A2d 221 (1975); Jacobs v. Price, 125 N.H. 196, 485 A2d 282 (1984) and Bradley Real Estate Investment Trust v. Department of Revenue Administration, 128 NH (1986). The Department of Revenue Administration adheres to this consistently adopted interpretation. If the amount will be "shown" on a properly filed federal 1120, then that amount is presumptively includible in the New Hampshire tax base. It is ipso facto part of the measure of property, or calculation of net income for purposes of the business profits tax. It is, of course, the converse of this analysis that we utilize in the business profits tax aspect of this ruling. To do otherwise, however, would be to advocate an analytical contradiction at a fundamental policy level. We will not consciously take such a stance.

B. Relative to the Interest and Dividends Tax Issues (RSA 77)

The interest and dividends tax of RSA 77 predates the business profits tax of RSA 77-A by nearly 50 years. It was enacted in 1923 and remains substantially unaltered since its original adoption. It was substantially copied from Section 1 of Chapter 62 of the Massachusetts General Laws. This fact has been judicially acknowledged by our Supreme Court. There are well accepted legal consequences from this occurrence which the Department has always recognized as our interpretive guide. Sagendorph v. Marvin, 101 NH 79; 133 A2d 490 (1957) states,

Since there are no decisions in this state determinative of the issue, we look to the Massachusetts cases inasmuch as our statute (RSA 77) was substantially copied from the original Massachusetts statute.

The interest and dividends tax is assessed upon the gross income received within a limited class of taxable receipts (RSA 77:4) which is received by specifically listed residents of New Hampshire (RSA 77:3). Significantly, that group of taxpayers does not include corporations, because distributions from corporate entities, or from partnerships, associations, or trusts which resemble corporations in that the beneficial interests are represented by transferable shares are taxed when distributed to these owners. See Conner v. State, 82 NH 126; 145 A 782 (1929) and the briefs of Jeremy R. Waldron, Attorney General at page 26 and Fred C. Demond at pages 36-39 in that case, and Document Number 4102, July 21, 1986 at pages 3-5. This long recognized and constitutional (Conner v. State, 82 NH 126, 128 (1925)) distinction between corporate and non-corporate taxpayers for purposes of RSA 77 accounts, in terms of this petition, for the questions raised at IV A-2 and IV A-3 above and that at IV B herein. Although essentially the same transaction and transfer is considered in all three areas, the former deal with RSA 77-A alone whereas this query focuses on different taxpayers and a different tax. This observation is significant because even though the questions advanced by the taxpayer at IV A-2 and IV A-3 are similar to that at IV B, the analysis at IV B is rooted in Massachusetts statute and case law, whereas that at IV A-2 and IV A-3 is grounded in the federal forms and indirectly the Internal Revenue Code by the express wording of RSA 77-A. In Mann v. Carter, 74 NH 345; 68 A 130 (1907) the Court said,

Whatever ambiguity there may be in the language of the legislature in relation to this question disappears upon a consideration of the material circumstances under which the statute was passed.

The quoted section is almost a literal copy of section 1, Chapter 15 of the Revised Laws of Massachusetts (Mass. Laws 1891, c. 425.), while the other sections of the act are substantially the same as the corresponding section of the Massachusetts Act. This coincidence is persuasive evidence of a practical re-enactment here of the foreign statute, and an adoption of the construction which the highest courts of that state had given to it. Parsons v. Parsons, 67 NH 419, 420 (1891);Commonwealth v. Hartnett, 3 Gray 450. The legislature is ordinarily presumed to have had in mind, when adopting the statutory language of another state, existing decisions of that state defining the extent and purpose of the statute, and to have used the identical language in the sense thus indicated.

Every request for a ruling we have received has isolated the interest and dividends issue from the business profits tax issued. In Document Number 2025, April 28, 1982 at page 2 the request was formulated as:

The proposed reorganization will not result in taxable income to the shareholders and depositors of "Bank" and "New Bank" or to the holders of the voting trust certificates of the Holding Company" pursuant to the provisions of the Taxation of Incomes imposed by New Hampshire RSA Chapter 77, except if and to the extent that dividends become payable to holders of the stock and/or voting trust certificates of the "Holding Company", other than in new stock of the "Holding Company", New Hampshire RSA 77:4 (I) and (II).

Our answer to this inquiry has been formulaic to say the least. It is a standard three sentence answer. The first paraphrases the statute on interest, the second on dividends, and the third concludes in terms of income generally, excluding stock dividends. The narrow issue of stock dividends was considered in depth at Document Number 4102, July 21, 1986, pages I through 25. The analytical underpinnings of this ruling are in complete harmony with the position of the Department in each of the seven prior rulings issued by this Department on bank reorganization issues. We will set out that harmony more fully below. Our short answer, however, has always been as follows:

N. H. RSA 77:4 (I) and (II) provide, in part, that interest from all sources, except interest from notes or bonds of the State of New Hampshire or any political subdivision thereof, or interest from notes or bonds which are direct obligations of the United States, or interest from savings on deposits in all bank, building and loan associations, trust companies and national banks located in the states of New Hampshire and Vermont, is taxable. All dividends except stock dividends paid in new stock of a corporation, association or trust, issuing them, or dividends paid by banks, trust companies, building and loan associations, or national banks located in the State of New Hampshire are taxable. Thus, any income accruing to depositors or shareholders of "Bank" or "New Bank" or to the holders of voting trust certificates of the "Holding Company", as a result of the proposed reorganization, will constitute income exempt from taxation under RSA 77, except for dividends paid to stockholders or voting trust certificate holders of the "Holding Company".

Document Number 2025, April 28, 1982, page 3. See also: Document Number 2479, August 19, 1983, page 5; Document Number 2581, January 12, 1984, page 3;Document Number 2838, August 24, 1984, page 9; Document Number 3114, September 16, 1985, page 11; Document Number 4081, July 2, 1986, page 5 and 6; and Document Number 4156, October 31, 1986, page 13.

Because only interest and dividends are taxable under RSA 77, the definition of each term is critical. The definitions are not transferred from the Internal Revenue Code because the roots of the interest and dividends tax are in Massachusetts not federal law. In the area of "interest" there is little dispute or variance in the common usage of the term. However, a discussion of imputed interest amounts is not intended to be encompassed by the prior statement. Dividends, on the other hand, have continually undergone scrutiny by this department due to both (1) later changes in the Massachusetts statute which were not carried over into our interest and dividends tax by any New Hampshire Legislature even though the modifications to Massachusetts tax law have been operational for over 30 years and (2) both the variant federal treatment of dividends as distributions only from corporations whereas New Hampshire perceives dividends as distributions from partnerships, associations and trusts as well as from corporations, and the variant federal distinction between corporate distributions

as successively dividends, return of capital, then capital gain whereas New Hampshire looks at distributions in our broader framework as successively dividends then capital.

For purposes of this ruling the RSA 77:3, I, II, and III listed entities of individuals and partnerships, associations and trusts represented by non-transferable shares, and fiduciaries deriving their appointment from New Hampshire courts who could be depositors in "Bank" and "Converted Bank" do not receive interest in the transaction in question. If they did receive interest it would be nontaxable by the specific exclusionary language of RSA 77:4, I.

77:4 What Taxable. Income of the following described classes is taxable:

I. Interest from bonds, notes, money at interest, and from all debts due the person to be taxed, except interest from notes or bonds of this state, deposits in any credit union, savings bank, building and loan association, or savings department of any loan and trust company or national bank in this state or in those of any state which exempts from taxation the principal or income of deposits in such institutions in this state owned by residents of that state and notes or bonds of any political subdivision of this state.

Thus, our traditional explanation of the nontaxability of any perceived interest amount paid to potential interest and dividends taxpayers on the aspect of interest seems adequate. There seems to be no interest amount, and if there were an amount determined then such an amount seems assured of statutory exclusion. Of course the exclusion of RSA 77:4, I would not apply to any interest payment from the "Holding Company." However, there is no evidence of an amount paid which is readily ascertainable by computation (Lemire v. Haley, (1944) 93 NH 206, 39 A2d 10) with funds flowing from the "Holding Company" to the RSA 77:3, I, 11 and III taxpayers.

Analysis under the dividend rubric of RSA 77 is not so simple. The long standing exclusion of RSA 77:4, II and III of "other than stock dividends paid in new stock of the company issuing the same" does not apply in any of the facts of any of the ruling request yet presented to the Department. As was made clear in Document Number 4102, July 12, 1986 at pages 4 and 5, this language of exclusion is not a Massachusetts "copied" part of the statute. The remainder of the section, however, is copied. In the non-copied exclusion two words control its operation "paid" and "new stock." As Document Number 4102 makes clear, these words get their meaning from the confluence of legal principles within Leland v. Hayden, 102 Mass 542 (1869);Commissioner v. Putnam, 262 US 188 (1919) especially the dissent of Mr. Justice Brandeis; Connor v. State 82 NH 126 (1925) and the New Hampshire Constitution at Part II, Article 6. A fact pattern of "new stock" which is "paid" would be present in this context if the "Bank" were to issue stock payable directly to mutual depositors. Regardless of the added number of shares newly in the stockholder's hands the transaction would merely be a "re-capitalization." This is the fact pattern of Eisner v. Macomber, 262 U.S. 188 (1919). It would be non-taxable. This pattern was so carefully noted and distinguished by Mr. Justice Brandeis in the Macomber dissent that legal echoes of his perception molded §305(b) of the Internal Revenue Code as well as the full-clause exclusion for specially defined stock dividends in RSA 77. See Document Number 4101, July 12, 1986 for a comprehensive analysis of this type of exempt dividend as well as superficially similar but clearly distinguishable non-exempt stock dividends. Non-exempt dividends would be found on the facts of this ruling if the shareholder/depositors were offered the choice of stock or cash distributions. These amounts would be a taxable dividend under RSA 77.

To define a dividend New Hampshire has always looked to Massachusetts. See Commissioner v. Thayer, 314 Mass. 375, 50 NE2d 11 (1943) ; Davis V. Commissioner, 1944 Mass. A.T.B. 85 Commissioner v. Filoon, 310 Mass. 374, 385, 38 NE 2d 693, 700 (1941); Sears v. Commissioner, 322 Mass. 446, 452, 78 NE2d 89, 92, 93 (1948);Maguire v. Commissioner, 230 Mass. 503 (1918); Gifford v. Thompson, 115 Mass. 478 (1874); Tilton v. Commissioner, 238 Mass. 596 (1921); Rand v. Hubbell, 115 Mass. 461 (1874); D'Ooge v. Leeds, 176 Mass 558 (1900); Talbot v. Milliken, 221 Mass. 367 (1915) and Moore v. Tax Commissioner, 239 Mass. 547 (1921). However, the offer made by "Holding Company," to depositors of "Bank" cannot be construed as a dividend because depositors have no prior interest in the "Holding Company" at the time of the offer. If the offer is not a dividend, the stock dividend exclusion is immaterial. If, however, the offer were to be construed as a dividend, it should be clear also that the stock dividend exclusion would not be relevant because there clearly is no "new

stock paid" only an offer to let individual depositors "purchase" stock. The additional facts of this petition's non-transferable, no market value measure of the economic worth of these "offers to sell" shares in the "Holding Company" is what assures non-taxability of the "offers" if they were construable as dividends. That is, if there is a "dividend," which we doubt, then there is no amount received to assess a tax against. (Connor v. State, 82 NH 126 (1925)).

Thus, the Department of Revenue Administration rules: N. H. RSA 77:4 (I) and (II) provide, in part, that interest from all sources, except interest from notes or bonds of the State of New Hampshire or any political subdivision thereof, or interest from notes or bonds which are direct obligations of the United States, or interest from savings on deposits in all bank, building and loan associations, trust companies and national banks located in the states of New Hampshire and Vermont, is taxable. All dividends except stock dividends paid in new stock of a corporation, association or trust issuing them, or dividends paid by banks, trust companies, building and loan associations, or national banks located in the State of New Hampshire are taxable. Thus, any income accruing to depositors of shareholders of "Bank" or "Converted Bank" or to the holders of voting trust certificates of the "Holding Company," as a result of the proposed reorganization, will constitute income exempt from taxation under RSA 77, except for dividends paid to stockholders or voting trust certificate holders of the "Holding Company."

C. Relative to the Bank Tax Issues (RSA 84).

The Bank Tax of RSA 84 in many of its provisions dates back to the American Civil War era. We are not asked in this petition, nor have we been asked in prior petitions to construe or harmonize modern with ancient provisions of statute. We have been asked in almost every bank reorganization ruling to assure taxpayers that the franchise tax of RSA 84 will be assessed on the whole enterprise as if nothing has occurred which will precipitate a taxable event. In Document Number 2025, April 28, 1982 at page 2 we were asked:

Upon the acquisition of the banking assets and liabilities of "Bank" by "New Bank", "New Bank" will continue to be liable for the franchise tax imposed pursuant to New Hampshire RSA 84:16-a. through c. In addition, "New Bank" will be liable pursuant to RSA 84:16-d for additional franchise taxes; provided, however, that pursuant to RSA 84:16-c, "New Bank" will be entitled to a credit against any tax imposed under that section in an amount equal to the additional tax imposed under Section 16-d.

Nearly identical questions were posed in Document Number 2479, August 19, 1983, page 3; Document Number 2581, January 12, 1984, page 3; Document Number 3114, September 16, 1985, page 5 and 6; Document Number 4081, July 2, 1986, page 4; and Document Number 4156, October 31, 1986, page 3. For equitable reasons the Department of Revenue Administration has always seen the reorganizations of banks from mutual to stock institutions as nontaxable events. We see no reason to change this long-standing interpretation at this time. Thus, the Department of Revenue Administration Rules as we have in each of the aforementioned petitions with language substantially copied from those rulings that: N.H. RSA 84:16-c provides that every savings bank, trust company, loan and trust company, loan and banking company, building and loan association, co-operative bank, or other similar bank organized under the laws of this state and of every federal savings and loan association organized to do business in this state shall pay annually a franchise tax equal to one percent of the amount by which the total amount of interest, dividends and divided profits paid or credited by it on its savings deposits, savings shares, savings share accounts, or other similar evidences of savings in the twelve months preceding April first exceeds ten thousand dollars. RSA 84:16-d provides that every banking corporation whose ownership is represented by stock shall in additional pay a tax equal in amount to one percent annually upon its capital stock and special deposits provided, however, that the tax due under Sec. 16-d will be deducted to the extent of any tax due under Sec. 16-C. Thus "Converted Bank," upon its acquisition of the banking assets and assumption of the liabilities of "Bank," will become liable for the franchise taxes imposed under RSA 84:16-c, and RSA 84:16-d assessed as indicated herein.

V. Conclusion:

Wherefore, under the specific circumstances represented, the Department of Revenue Administration hereby rules as to the application of the New Hampshire Business Profits Tax (RSA Chapter 77-A), the

New Hampshire Taxation of Incomes (RSA Chapter 77) and the New Hampshire Taxation of Banks (RSA Chapter 84) with respect to the reorganization "N" of New Hampshire, a state chartered mutual saving and loan association, as "N" of New Hampshire, a state chartered stock savings and loan association, employing the capital stock of the latter bank; parent corp, "O" to effectuate the reorganization.

Everett V. Taylor, Commissioner