

**In The Matter of the Petition of "B"**

**for a Declaratory Ruling**

**DOC #4303, Effective August 18, 1987**

Pursuant to RSA 541-A:1, I-b., 541-A:2, I., (c), and Rev PART 209 of the New Hampshire Code of Administrative Rules, "B" , a resident and taxpayer subject to the provisions of RSA 77, having his principal place of residence at ... .., has petitioned the Department of Revenue Administration for a declaratory ruling stating that United States Treasury Notes held in an account in his name at the Federal Reserve Bank of ....., the interest income from such notes being mailed directly to him in ....., in the form of a Federal Reserve check or Treasury check is non-taxable interest income under the provisions of RSA 77. "B" adds no additional facts relevant to an analysis of his inquiry. All significant facts are reproduced on the above formulation of the question presented.

RSA 77, commonly called the "Interest and Dividends Tax", although statutorily entitled the "Taxation of Incomes", is a tax based on the receipt of income/property" doctrine which was the cornerstone of the U.S. Supreme Court's Eisner v. Macomber decision 252 U.S. 189, 40 S.Ct 189 (1919), and which was followed by the drafters of the New Hampshire "Tax on Incomes", as was made clear in Connor v. State, 82 NH 126, 130 A 357 (1925). See: The New Hampshire Constitution at Part II, Article 6, Leland v. Hayden, 102 Mass. 542 (1869), Commissioner v. Putnam, 227 Mass. 522 (1917), as well as two prior declaratory rulings by this Department Document #4102, July 12, 1986

and Document #4254, April 7, 1987. Not all "income received" is taxed, only interest and dividend income (RSA 77:4,I, II, III and IV).

Not only does this tax not levy against all income, it does not levy against all intangible income. There have always been exclusions (See Document #4102, July 12, 1986) and exemptions (RSA 77:5 and 8, for example).

The exclusion which this request concerns itself with flows directly from the wording of RSA 77:2, which states in full:

77:2 Conformity to Laws. It is the intention of this chapter, and it shall be construed, anything contained herein to the contrary notwithstanding, not to impose any tax upon income in violation of the constitution of the United States or in violation of any constitutional federal laws, or in violation of the constitution of this state, or in violation of any contractual obligations of exemption from taxation established prior to May 4, 1923, by the state or any of its political subdivisions or by the United States, which may not be impaired lawfully hereby.

The clause, " ... not to impose any tax upon any income in violation of the constitution of the United States ... " is original 1923 language. It assuredly was placed in the statute to accommodate the concerns of the New Hampshire Supreme Court as they were expressed in Opinion of the Justices, 53 NH 634 (1866). That opinion was issued by the Court in response to a request by then Governor Frederick Smyth concerning the constitutionality of the act of July 1, 1865, entitled "An Act for the Taxation of Incomes." Our Supreme Court reasoned that Article 1, Section 8, Clause 3 of the United States Constitution which granted to Congress the power "To borrow money on credit of the United States;" effectively barred the State from taxing the interest earned upon the direct obligation of the United States. It cited Weston v. The City Council of Charleston, 2 Peters 448 (1829); Bank of Commerce v. New York City, 2 Black 620 (1863); Bank-Tax Case , 2 Wall 200 (1864); and Ableman v. Booth , 21 Howard 506. This principle of law is clearly a derivative of McCulloch v. Maryland, 4 Wheat 116 (1819), which established the principle that the states can enact no law which conflicts directly or indirectly with the powers conferred on Congress by the U.S. Constitution. Thus, our Supreme Court concluded;

We therefore certify our opinion to be, that the act of July 1, 1865, entitled "An Act for the Taxation of Incomes," in so far as it was the intention of the legislature to impose a tax on income derived from bonds, or other securities., given for loans of money to the United States, duly authorized by Congress, is in conflict with the Constitution of the United States, and void. 53 NH 634, 640 (1866).

Prior to passage of the current statute in 1923, an effort was made to enact legislation in 1915 very similar to the current RSA 77. The Court was asked at that time for its opinion on the constitutionality of the same, to which it replied;

In the opinion given by the justices of this court, March 19, 1866, as to the validity of the act of July 1, 1865, which resembled the act proposed in its income-taxing features, it was considered that the law was not obnoxious to the state constitution. But the justices felt themselves compelled by sundry federal decisions to advise that so much of the act as was apparently intended to tax income from securities of the national government was in violation of the constitution of the United States. Opinion of the Justices, 53 NH 634. The same objection would lie to the proposed act. The objection doubtless at this time would be of little practical importance and could be avoided by exempting interest received from securities of the national government.

77 NH 610, 617; 93 A 311, 314 (1915).

Thus, when the current statute was presented to the court in 1923 with the addition of RSA 77:2, the Court expressly approved of RSA 77 and echoed its prior holdings at page 554 with;

The first question of those now submitted is a repetition of the question asked in 1915. The views then held are still entertained. There seems to be no occasion for the justices then answering to add to what was then said. The opinions then submitted are printed in the Journal of the House for 1915, page 435, and in the 77th Volume of the Law Reports, page 611. 81 NH 552, 554; 120 A 629 (1923).

The exclusion of U.S. Government obligations, follows from RSA 77:2. It is apparent from the briefs of Mr. Alexander Murchie who argued against the current RSA 77 in 1925 on every conceivable constitutional ground except the unlawful taxation of U.S. Government obligations, that even fierce opponents of RSA 77 recognized this point; Arthur J. Connor v. State, 82 NH 126; 130 A 357 (1925).

Thus, although the mailing of a Federal Reserve check or Treasury check to you, a resident of New Hampshire, by the Federal Reserve Bank of ... is the "receipt of income", it is not the receipt of taxable income per RSA 77:2. That income is excluded.

Wherefore, under the specific circumstances represented, and only as to those specific facts, the Department of Revenue Administration hereby rules as to the application of the New Hampshire Taxation of Incomes (RSA 77) with respect to the income received by "B" from United States Treasury Notes.

Everett V. Taylor, Commissioner