New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-96 (20) C
Corporation Tax
July 25, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C960319A

On March 19,1996, a Petition for Advisory Opinion was received from Dime Savings Bank of New York, FSB, EAB Plaza East Tower, Uniondale, New York 115560123.

The issues raised by Petitioner, Dime Savings Bank of New York, FSB, are:

(1) Whether the combined activities of a combined group are used in computing the entire net income, alternative entire net income and taxable assets allocation percentages on a combined return under Article 32 of the Tax Law.

(2) When sourcing the assets and receipts of the combined group: (a) whether the character and nature of the assets and receipts are determined by viewing the combined group as if it were one entity; and (b) whether the transfers and sales between entities of the combined group would result in a recharacterization of the asset or the subsequent receipts attributable to the asset.

(3) When sourcing the receipts from the loan originations described below: (a) whether all the activities and efforts undertaken by employees of all members of the combined group are examined regardless of which entity ultimately has actual ownership of the assets and records the receipts; and (b) whether the method for determining the correct sourcing of receipts from the loans would differ if the loan origination activities of the subsidiaries described below were conducted as divisions of Petitioner rather than through a subsidiary form.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner is a Federal savings bank. Its Federal charter permits the active origination of loans by Petitioner in states other than its state of commercial domicile. Alternatively, Petitioner is permitted to conduct its loan origination activities in operating subsidiaries which would be incorporated in New York.

Petitioner has loan origination offices in other states. Assuming Petitioner establishes operating subsidiaries to conduct its residential loan origination activities in certain states outside of New York, the subsidiaries would receive funding from Petitioner and would be responsible for most aspects of the origination function, i.e., solicitation, investigation, negotiation and administration of the initial loan. Final loan approval may also be made by the subsidiaries. Establishment of the general credit standards as well as directives as to the financial terms and products to be offered would come from Petitioner's management.

Upon the successful underwriting of the loan, the subsidiaries intend to either sell the loan immediately to Petitioner or sell certain loan products in the secondary market. Based on the agreement in place, the sale to Petitioner would be at par (principal) or fair market value with an appropriate arm's length fee structured to compensate the subsidiary for the origination effort. Servicing rights and continued administration of the loan would be transferred to Petitioner along with the loan.

Loans acquired by Petitioner from its subsidiaries and held in Petitioner's portfolio would be classified as "loans" for financial statement presentation of the balance sheet to the Securities and Exchange Commission and its banking regulators without any distinction made between these loans and loans originated directly by Petitioner for its own portfolio.

Section 1452(a) of the Tax Law and section 16-2.5 of the Franchise Tax on Banking Corporations Regulations ("Regulations") define "banking corporation." Section 1452(a)(4) of the Tax Law and section 16-2.5(e) of the Regulations provides that every Federal savings bank which is doing a banking business is a banking corporation. Section 1452(a)(9) of the Tax Law and section 162.5(j)(1)(i) of the Regulations provides that any corporation whose voting stock is 65 percent or more owned or controlled, directly or indirectly, by a Federal savings bank is a banking corporation if certain requirements are met. The requirements are that the corporation must be principally engaged in a business which:

> (a) might be lawfully conducted by a corporation subject to Article 3 of the New York State Banking Law or by a national banking association; or
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> (b) is so closely related to banking or managing or controlling banks as to be a proper incident thereto, as set forth in section 4(c)(8) of the Federal Bank Holding Company Act of 1956, as amended (12 USC 1843(c)(8)).

Section 21-2.1 of the Regulations provides that each banking corporation, as defined in section 16-2.5 of the Regulations, is a separate taxable entity and must file its own return. However, where certain requirements are met, a group of banking corporations and bank holding companies may be required or permitted to file a combined return.

Section 1462(f)(3) of the Tax Law states that:

> [i]n the case of a combined return, the tax shall be measured by the combined entire net income, combined alternative entire net income or combined assets of all the corporations included in the return. The allocation percentage shall be computed based on the combined factors with respect to all the corporations included in the combined return. In computing combined entire net income and combined alternative entire net income intercorporate dividends and all other intercorporate transactions shall be eliminated and in computing combined assets intercorporate stockholdings and intercorporate bills, notes and accounts receivable and payable and other intercorporate indebtedness shall be eliminated.

Sections 19-2.4, 19-3.4, and 19-4.3 of the Regulations, respectively, provide that in the case of a combined return, the factors comprising the entire net income, alternative entire net income and asset allocation percentages, respectively, are computed as though the corporations included in the return were one corporation. Intercorporate dividends and all other intercorporate transactions, including intercorporate receipts between the corporations included in the combined return, are eliminated.

Section 19-6.10 of the Regulations provides that the receipts factor on a combined return is computed as though the corporations included in the return were one corporation. All intercorporate receipts between the corporations included in the combined return are eliminated in computing the combined receipts factor.

Section 19-6.2(a) of the Regulations provides that gross income from a loan is allocated to New York State if the income is attributable to a loan which is located in New York State. A loan is located where the greater portion of income-producing activity relating to the loan occurred. Provided, however:

> (1) In the case of a [Federal savings bank], a loan ... that is attributed by such taxpayer to a branch without New York State is presumed to be properly attributed, provided that such presumption may be rebutted if the [Commissioner of Taxation and Finance] demonstrates that the greater portion of income-producing activity relating to the loan ... did not occur at such branch. Where such presumption has been rebutted by the [Commissioner], the loan ... shall be presumed to be within New York State if the taxpayer had a branch within New York State at the time the loan ... was made. However, the taxpayer may rebut such presumption by demonstrating that the greater portion of income-producing activity relating to the loan ... did not occur within New York State. For purposes of this section, a loan ... is made when such loan ... is approved.
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> (2) In the case of a [Federal savings bank] which records a loan ... on the books of a place without New York State which is not a branch, it shall be presumed that the greater portion of income-producing activity related to such loan ... occurred within New York State if the taxpayer had a branch within New York State at the time the loan ... was made. The taxpayer may rebut such presumption by demonstrating that the greater portion of income-producing activity related to the loan ... did not occur within New York State. A loan ... is made when such loan ... is approved.
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> (3) In the case of a taxpayer ... described in [section 16-2.5(j) of the Regulations], a loan ... attributed by such taxpayer to a bona fide office without New York State is presumed to be properly attributed, provided that such presumption may be rebutted if the [Commissioner of Taxation and Finance] demonstrates that the greater portion of income-producing activity relating to the loan did not occur without New York State.

Section 19-6.2(c) of the Regulations provides that to determine where the greater portion of income-producing activity relating to a loan occurred, consideration is given to such activities as the solicitation, investigation, negotiation, final approval and administration of the loan. Each loan has its own characteristics. In some cases, one or more of the activities to be considered may not be present. The significance to be accorded to each activity depends upon the facts in each case.

In this case, it is assumed that Petitioner and the subsidiaries described above are permitted or required to file a combined return pursuant to section 212.1 of the Regulations. It is also assumed that the combined group has the right to allocate its combined entire net income, combined alternative entire net income and combined assets pursuant to section 1454 of the Tax Law and Part 19 of the Regulations.

With respect to Issue "1", pursuant to section 1462(f)(3) of the Tax Law and sections 19-2.4, 19-3.4 and 19-4.3 of the Regulations, the combined activities of the combined group are used in computing the factors of the entire net income, alternative entire net income and asset allocation percentages on a combined return. The factors are computed as though the corporations included in the combined return were one corporation. Intercorporate dividends and all other intercorporate transactions between the corporations included in the combined return are eliminated.

With respect to Issue "2", when sourcing the assets and receipts of the combined group for purposes of the allocation factors, the character and nature of the assets and receipts are determined by viewing the activities of the combined group as if it were one entity, eliminating intercorporate dividends and all other intercorporate transactions. Therefore, the transfers and sales between the entities of the combined group are eliminated when computing the factors of the entire net income, alternative net income and asset allocation percentages on the combined return. Accordingly, the intercorporate transfers and sales would not result in a recharacterization of an asset or the subsequent receipts attributable to the asset.

With respect to Issue "3", the method for determining the correct sourcing of receipts from loans would differ if the loan origination activities of the subsidiaries described above were conducted as divisions of Petitioner. Pursuant to section 1454 of the Tax Law and section 19-6.2 of the Regulations, gross income from a loan is allocated to New York State if the income is attributable to a loan which is located in New York State. A loan is located where the greater portion of income-producing activity relating to the loan occurred. Therefore, when determining the source of a loan pursuant to section 19-6.2(c) of the Regulations, the activities and efforts undertaken by employees of all members of the combined group in making the loan are considered, although the significance to be accorded to each activity depends upon the facts in each case. However, when sourcing loans, certain rebuttable presumptions are made depending on whether the bank, itself, or a subsidiary made the loan. For these purposes, a loan is made when the loan is approved.

Accordingly, if the loan is made by a subsidiary described in section 162.5(j) of the Regulations, the presumption contained in section 19-6.2(a)(3) of the Regulations applies. If the loan is made by Petitioner, the presumption contained in section 19-6.2(a)(1) or (2) of the Regulations would apply. The subsequent receipts attributable to the loan are allocated to New York if the loan, when made, is located in New York. Because intercorporate transactions between the entities of the combined group are eliminated when computing the receipts factor of the allocation percentages on the combined return, the transfer or sale of a loan among the entities included in the combined group would not change the location of the loan after it is made, that is, after it is approved. Therefore, it does not matter which entity, the bank or the subsidiary, ultimately has actual ownership of the assets and records the receipts.

/s/

DATED: July 25, 1996

John W. Bartlett
Deputy Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.