

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

TSB-A-95 (7) C  
Corporation Tax  
TSB-A-95 (1) I  
Income Tax  
March 31, 1995

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C941220A

On December 20, 1994, a Petition for Advisory Opinion was received from Oswego City Savings Bank, 214 West First St., Oswego, New York 13126.

The issue raised by Petitioner, Oswego City Savings Bank ("Bank"), is whether the reorganization of Oswego City Savings Bank from a mutual savings bank to a stock savings bank, that will be controlled by a newly-formed mutual holding company in a transaction to be effected under sections 368(a)(1)(F) and 351 of the Internal Revenue Code ("IRC") will be accorded the same treatment for purposes of Articles 32 and 22 of the Tax Law as for Federal income tax purposes with respect to the Bank, the holding company, the eligible account holders and any new stockholders of the stock savings bank.

The Bank, a New York chartered mutual savings bank proposes to establish a New York chartered mutual holding company (the "Mutual Holding Company") of the Bank. The Bank is headquartered in Oswego, New York. The Bank's deposits are insured by the Federal Deposit Insurance Corporation ("FDIC"). The Bank is currently regulated by the New York State Banking Department ("Department") and the FDIC. On May 31, 1994, the Bank had total assets of \$133.2 million, total deposits of \$118.1 million and stockholders' equity of \$13.7 million. Subsequent to May 31, 1994, the Bank assumed \$42.3 million in deposit liabilities and acquired \$288,000 in accounts from the Resolution Trust Corporation ("RTC"). As part of the RTC purchase of assets and assumption of liabilities, the Bank exercised its option to acquire two branch locations in Oswego and Fulton, New York. The Bank has, and the Mutual Holding Company will have a December 31 fiscal year end. All entities are or will use the accrual method of accounting and each will be subject to the audit jurisdiction of the Buffalo District Director.

The Bank's primary lending activity is the origination of first mortgage loans secured by one- to four-family residential properties. A significant portion of one to four-family loans originated by the Bank are secured by non-owner occupied homes which are primarily used to furnish housing to students attending the SUNY College at Oswego. The Bank also originates adjustable rate mortgage ("ARM") loans which serve to reduce interest rate risk. The Bank generally retains in its portfolio all fixed rate and ARM loans that it originates.

As a New York chartered mutual savings bank, the Bank has no capital stock. Instead, depositors of the Bank possess the right (i) to share in the Bank's current earnings (which is in the nature of the right to receive interest on deposits) and (ii) upon liquidation of the Bank, to share in any surplus remaining after all of the Bank's liabilities have been satisfied. A depositor's rights terminate when the depositor's account is closed.

The Bank has no subsidiaries.

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On May 10, 1994, the board of directors of the Bank adopted a Plan of Reorganization from Mutual Savings Bank to Mutual Holding Company and Stock Issuance Plan ("Plan for Reorganization" or "Plan") which Plan was subsequently amended. Pursuant to the Plan, the Bank will effect the "Reorganization" (as defined below) as follows:

(i) The Bank will organize an interim stock savings bank ("Interim One");

(ii) Interim One will organize an interim stock savings bank ("Interim Two") as a wholly-owned subsidiary; and

(iii) The Bank will exchange its charter for a stock savings bank charter to become the Stock Bank ("Bank Conversion") and, at the same time, Interim One will cancel its outstanding shares of common stock and will exchange its charter for a New York mutual holding company charter to become the Mutual Holding Company ("MHC Conversion"). Simultaneously with the charter exchanges, Interim Two will merge with and into Stock Bank. As part of the Plan of Reorganization, all of the initially issued stock of Stock Bank will be transferred to the Mutual Holding Company in exchange for membership interests in the Mutual Holding Company in a transaction intended to qualify under section 351 of the IRC.

At the conclusion of these steps the former members (i.e., the depositors) of the Bank will own all of the Mutual Holding Company by virtue of their membership interests in the Mutual Holding Company and the Mutual Holding Company will own all the outstanding stock of Stock Bank. These transactions are referred to herein collectively as the "Reorganization". The Reorganization and Plan are subject to approval of the Department and the FDIC. The approval of the Board of Governors of the Federal Reserve System is required for the Mutual Holding Company to be a bank holding company.

Contemporaneously with the Reorganization, the opportunity to purchase up to 49% of the common stock of the Stock Bank will be offered in a stock offering ("Offering") to depositors and borrowers of the Bank; the Bank's tax-qualified employee stock benefit plans; and members of the community, pursuant to priorities established by the board of directors of the Bank. Any remaining shares may be offered to the public at the sole discretion of the board of directors. These persons are collectively referred to herein as the minority shareholders. The common stock will be sold in the Offering on a best efforts basis by a registered broker-dealer. The common stock issued in the Offering will be sold at a total price equal to the estimated pro forma market value of such common stock, based upon an independent valuation. The aggregate amount of outstanding common stock owned or controlled by persons other than the Mutual Holding company at the close of the proposed Offering will be less than 50% of the Stock Bank's total outstanding common stock. As of the date of the Reorganization, the common stock issued to the Mutual Holding Company and minority shareholders by the Stock Bank will be the only issued and outstanding shares of capital stock of the Stock Bank. The Offering will not be made if market conditions dictate against such offering or regulatory approvals cannot be obtained.

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Following the completion of the Reorganization, all depositors who had membership or liquidation rights with respect to the Bank will continue to have such rights solely with respect to the Mutual Holding Company so long as they continue to hold deposit accounts with the Stock Bank. In addition, all persons who become depositors of the Stock Bank subsequent to the Reorganization will have such membership and liquidation rights with respect to the Mutual Holding Company.

Following the approval of the Plan of Reorganization by the Department and the FDIC, a special meeting of depositors of the Bank to approve the Plan of Reorganization will be scheduled in accordance with New York banking laws. An affirmative vote of not less than 752 of the aggregate dollar amount of the book value of deposits represented at such meeting either in person or by proxy is required for approval of the Plan of Reorganization.

Following the Reorganization, Stock Bank will have the power to issue shares of capital stock (including common and preferred stock) to persons other than the Mutual Holding Company. So long as the Mutual Holding Company is in existence, however, it must own a majority of the voting stock of Stock Bank. Stock Bank may issue any amount of non-voting stock to persons other than the Mutual Holding Company. No such non-voting stock will be issued as of the date of the Reorganization. In the future the Mutual Holding Company may elect to convert to stock form, but currently has no plan to do so.

The principal reasons for the Reorganization are to (i) enable depositors, employees and directors of the Bank to have an equity ownership interest in the Bank; (ii) reorganize the Bank into a corporate structure that enables it to access capital sources not available to mutual savings banks; (iii) facilitate acquisitions and the diversification of the Bank's activities.

The Reorganization is being effected pursuant to Article VI-C -Mutual Holding Companies, section 290 et. seq. of the New York State Banking Law ("Banking Law"). Section 292.1(a)(ii) of the Banking Law states that the plan of reorganization may authorize the formation of a mutual holding company by: "the organization by the mutual savings bank of a mutual holding company and the organization by such mutual holding company of a stock savings bank subsidiary which merges with the mutual savings bank".

The Reorganization is also subject to the approval of the FDIC. To the extent that the Banking Law and federal law, as administered by the FDIC, are inconsistent, the Reorganization will be effected pursuant to federal law.

With respect to the exchange of the Bank's charter for a stock bank charter pursuant to the Bank Conversion:

1. The fair market value of the Stock Bank stock constructively received by the members of the Bank in exchange for their equity interest in the Bank will be approximately equal to the fair market value of the equity interest in the Bank constructively surrendered in the exchange. (Rev Proc 86-42)

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2. There is no plan or intention by the members of the Bank, to sell, exchange, or otherwise dispose of any of the shares of Stock Bank stock constructively received in the transaction, other than as described herein (i.e., the transfer to Mutual Holding Company). Following the transaction, the Stock Bank may sell up to 49% of its authorized but unissued shares to depositors and borrowers of the Stock Bank, and to members of the general public. (Rev Proc 86-42)
3. Immediately following the consummation of the transaction, the members of the Bank will own all of the outstanding Stock Bank stock and will own such stock solely by reason of their ownership of all of the equity interests in Bank immediately prior to the transaction. (Rev Proc 86-42)
4. Stock Bank has no plan or intention to issue additional shares of its stock following the transaction, except as set forth in the Plan. Pursuant to the Plan, Stock Bank has applied for approval from the Department to issue additional shares of common stock to depositors, borrowers, and members of the general public ("Minority Shareholders") in a public Offering. At any time, the Stock Bank's Board of Directors may elect not to consummate the Offering if it determines conditions are not favorable. If the Stock Bank issues additional shares in the Offering to Minority Shareholders, the additional shares issued will not exceed 49% of the total number of shares authorized and outstanding. (Rev Proc 86-42)
5. Immediately following consummation of the transaction, Stock Bank will possess the same assets and liabilities, except for assets used to pay expenses incurred in connection with the transaction, as those possessed by Bank immediately prior to the transaction. Dissenters will not have dissenters rights in connection with the Bank Conversion. Also there will be no property distributed to any shareholder in connection with this transaction and no distributions other than the regular distributions (i.e., interest credited to accounts). Additional cash, as raised in the Offering, may be held by the Stock Bank immediately following consummation of this transaction. (Rev Proc 86-42)
6. At the time of the transaction, Bank will not have outstanding any warrants, options, convertible securities, or any other type of right pursuant to which any person could acquire stock of Bank.
7. Stock Bank has no plan or intention to reacquire any of its stock issued in the transaction.
8. Stock Bank has no plan or intention to sell or otherwise dispose of any of the assets of Bank acquired in the transaction, except for dispositions made in the ordinary course of business.
9. The liabilities of Bank assumed by Stock Bank plus the liabilities, if any, to which the transferred assets are subject were incurred by Bank in the ordinary course of its business and are associated with the assets transferred.

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10. Following the transaction, Stock Bank will continue the historic business of Bank or use a significant portion of Bank's historic business assets in a business.
11. The shareholders will pay their respective expenses, if any, incurred in connection with the transaction.
12. Bank is not under the jurisdiction of a court in a Title 11 or similar case within the meaning of section 368(a)(3)(A) of the IRC. With respect to the transfer of Stock Bank stock to Mutual Holding Company for membership interests (the "351 Transaction"):
13. No stock or securities will be issued for services rendered to or for the benefit of the Mutual Holding Company in connection with the 351 Transaction, and no stock or securities will be issued for indebtedness of the Mutual Holding Company that is not evidenced by a security, or for interest on indebtedness of the Mutual Holding Company which accrued on or after the beginning of the holding period for the debt.
14. None of the assets to be transferred were received by the Stock Bank shareholders as part of a plan of liquidation of another corporation.
15. The property to be transferred to the Mutual Holding Company will not include accounts receivable, loans receivable, or commissions. Solely stock of Stock Bank will be transferred.
16. None of the stock to be transferred is "section 306 stock" within the meaning of section 306(c) of the IRC.
17. The Stock Bank shareholders did not incur any acquisition indebtedness with respect to stock of Stock Bank that is part of the property being transferred to the Mutual Holding Company.
18. The transfer is not the result of the solicitation by a promoter, broker, or investment firm.
19. The Stock Bank shareholders will not retain any right or continuing interest in the property being transferred to the Mutual Holding Company.
20. The adjusted basis and the fair market value of the assets to be transferred to Mutual Holding Company by Stock Bank shareholders will, in each instance, equal or exceed the sum of the liabilities to be assumed by Mutual Holding Company plus the liabilities to which the transferred assets are subject.
21. The Mutual Holding Company will assume no liabilities of the Stock Bank shareholders in connection with the 351 Transaction. (Rev Proc 83-59)

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22. There is no indebtedness between the Mutual Holding Company and Stock Bank shareholders, and there will be no indebtedness created as a result of the 351 Transaction.
23. The transfers and exchanges will occur pursuant to the Plan which was agreed upon before the 351 Transaction and under which the rights of the parties are defined.
24. All exchanges will occur on approximately the same date.
25. There is no plan or intention on the part of the Mutual Holding Company to redeem or otherwise reacquire any stock or securities to be issued in the 351 Transaction.
26. Taking into account any issuance of additional shares of Mutual Holding Company's equity, any issuance of stock for services, the exercise of any stock rights, warrants or subscriptions; a public offering of stock; and the sale, exchange, transfer by gift, or other disposition of any equity of the Mutual Holding Company to be received in the 351 Transaction, the Stock Bank shareholders will be in "control" of Mutual Holding Company within the meaning of section 368(c) of the IRC.
27. The Stock Bank shareholders will receive only membership interests of Mutual Holding Company approximately equal to the fair market value of the property transferred to Mutual Holding Company.
28. Mutual Holding Company will remain in existence and retain and use the property transferred to it in a trade or business.
29. There is no plan or intention by Mutual Holding Company to dispose of the transferred property other than in the normal course of business operations.
30. Each of the parties to the 351 Transaction will pay its own expenses, if any, incurred in connection with the proposed transaction.
31. Mutual Holding Company will not be an investment company within the meaning of section 351(e)(1) of the IRC and section 1.351-1(c)(1)(ii) of the Treasury Regulations.
32. The Stock Bank shareholders are not under the jurisdiction of a court in a Title 11 or similar case (within the meaning of section 368(a)(3)(A) of the IRC) and the equity interests in Mutual Holding Company received in the Exchange will not be used to satisfy any indebtedness.
33. Mutual Holding Company will not be a "personal service corporation" within the meaning of section 269A of the IRC.
34. The Bank is not a "loss corporation" within the meaning of section 382(k) of the IRC.

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Section 351(a) of the IRC states: "[n]o gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock in such corporation and immediately after the exchange such person or persons are in control (as defined in section 368(c)) of the corporation."

Section 368(a)(1)(F) of the IRC provides that the term "reorganization" means a mere change in identity, form, or place of organization of one corporation, however effected.

Section 1451 of Article 32 of the Tax Law imposes, annually, a franchise tax on every banking corporation for the privilege of exercising its franchise or doing business in New York State in a corporate or organized capacity.

Section 1455(a) of the Tax Law provides that the basic tax is nine percent of the taxpayer's entire net income, or portion thereof allocated to New York State, for the taxable year or part thereof.

Entire net income is defined in section 1453(a) of the Tax Law as "total net income from all sources which shall be the same as the entire taxable income (but not alternative minimum taxable income) ... which the taxpayer is required to report to the United States treasury department ... subject to the modifications and adjustments hereinafter provided."

Section 1453(b) through (k) of the Tax Law and sections 18-2.3, 18-2.4 and 18-2.5 of the Franchise Tax on Banking Corporations Regulations, promulgated thereunder, provide for the modifications and adjustments required by section 1453(a). However, there is no modification or adjustment applicable to a transaction where, for Federal income tax purposes, the transaction constitutes a tax-free exchange within the meaning of sections 351 and 368(a)(1)(F) of the IRC. Therefore, for purposes of section 1453 of the Tax Law, such transaction would be treated the same as it is treated for Federal income tax purposes.

This advisory opinion assumes that for Federal income tax purposes, the Internal Revenue Service rules that:

A. With respect to the Bank Conversion:

1. Neither the 351 Transaction nor the offering of up to 49% of Stock Bank's stock to the public as described herein will prevent the Bank's exchange of its charter to that of a stock savings bank from qualifying as a reorganization within the meaning of section 368(a)(1)(F) of the IRC;

2. The Bank members exchange of their membership interests in the Bank (i.e., liquidation rights) or stock in the Stock Bank which they will constructively receive in the Bank Conversion, will satisfy the continuity of interest requirement of section 1.368-1(b) of the Treasury Regulations and this result will not be changed by the exchange of such stock for membership interests in the Mutual Holding Company; and

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B. With respect to the 351 Transaction:

3. The transfer of the Stock Bank stock constructively received in the Bank Conversion by the Stock Bank shareholders to Mutual Holding Company in exchange for membership interest will be considered a transfer of property solely in exchange for stock within the meaning of section 351 of the IRC.

Accordingly, since the transaction by which Petitioner will reorganize as a stock savings bank and which will be controlled by a newly-formed New York mutual holding company will be a tax-free transaction under sections 368(a)(1)(F) and 351(a) of the IRC, such reorganization of Petitioner as a Stock Bank and the establishment of Mutual Holding Company will be tax-free transaction for Petitioner, Stock Bank and Mutual Holding Company under Article 32 of the Tax Law.

Section 611(a) of Article 22 of the Tax Law provides: "[t]he New York taxable income of a resident individual shall be his New York adjusted gross income less his New York deduction and New York exemptions, as determined under this part."

Section 612(a) of the Tax Law provides: "[t]he New York adjusted gross income of a resident individual means his federal adjusted gross income as defined in the laws of the United States for the taxable year, with the modifications specified in this section."

Section 612 of the Tax Law does not contain any modification that affects the shareholders or stockholders of the banks or corporations that are each a party to a transaction, that for Federal income tax purposes constitutes a tax-free transaction pursuant to section 351(a) of the IRC.

Accordingly, if for Federal income tax purposes, no taxable income will be realized by New York State resident individuals who are eligible account holders and new stockholders of Stock Bank as a result of the transaction whereby Petitioner will reorganize as a stock savings bank which will be controlled by a newly-formed New York mutual holding company as a tax-free transaction under sections 368(a)(1)(F) and 351(a) of the IRC, no taxable income will be realized by such eligible account holders and new stockholders of Stock Bank for New York State personal income tax purposes under Article 22 of the Tax Law. Also, with respect to nonresident individuals of New York State, no taxable income will be realized by eligible account holders and new stockholders of Stock Bank for New York State personal income tax purposes under Article 22 of the Tax Law.

DATED: March 31, 1995

s/PAUL B. COBURN  
Deputy Director  
Taxpayer Services Division

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