

IN THE MATTER OF THE PETITION OF THE " AUTHORITY"

FOR A DECLARATORY RULING

Document #5835, eff. 6-3-94

Pursuant to RSA 541-A:1, IV, 541-A:2,I(d) and Rev. 209.01, et seq., the Authority

....., (the "Petitioner"),, New Hampshirethrough its attorneys, -----, petitioned the Department of Revenue Administration with respect to whether the Authority is subject to the Business Enterprise Tax ("BET").

Petitioner has requested the following determination:

That the Authority is not subject to the BET because the Authority is not a business enterprise as defined in RSA 77-E:1, III; and that RSA 195-D:15 specifically exempts the Authority from the BET.

Taxpayer Representations:

1. "The Authority was created and established as a corporation and constituted and established as a public body corporate and agency of the State of New Hampshire under RSA 195-D:4.
2. Pursuant to RSA 195-D, the Authority is empowered to issue bonds and other obligations on behalf of participating healthcare and educational institutions for the purpose of financing "projects". Under the statute, "participating institutions" include hospitals, nursing homes, health maintenance organizations, ambulatory clinics, colleges, universities and secondary schools. In order to qualify as a "participating institution", the entity must be exempt from federal income taxation under Section 501(c)(3) of the Code. "Projects" include the financing of new construction and renovation, the acquisition of real and personal property and the refinancing of existing indebtedness. The Authority acts as a conduit for its borrowers; its bonds are issued based on their credit and the State of New Hampshire is in no way obligated for the repayment of such indebtedness. Thus, to the extent the Authority pays interest on its bonds or other obligations, it does so on a "pass through" basis from the underlying 501(c)(3) institutions. The Authority's operations -- including the compensation of its two employees -- are supported by the fees charged these institutions pursuant to the Authority's statute.
3. RSA 195-D:1 provides that the exercise by the Authority of the powers conferred on it under RSA 195-D constitutes the performance of an essential public function.
4. In recognition of the Authority's performance of an essential public function as an agency of the State of New Hampshire, RSA 195-D:15 broadly exempts the Authority and its agents from the imposition of any tax by the State of New Hampshire or its political subdivisions.

5. Although the Authority is not a "tax-exempt" organization for federal income tax purposes, it is effectively exempt from paying federal income taxes pursuant to Section 115(1) of the Internal Revenue Code of 1986, as amended (the "Code"),
6. An organization is subject to the BET only if it is a "business enterprise." RSA 77-E:2.
7. An organization is a business enterprise only if it is engaged in or carrying on any "business activity" within New Hampshire. RSA 77-E:1, III.
8. An organization is engaged in or carrying on a business activity only if it transfers property or performs services "in intrastate, interstate, or foreign commerce, with the object of gain, benefit, income, revenue or advantage...." RSA 77-E:1, II.
9. Petitioner maintains that the Authority does not engage in any business activity. Therefore, the Authority is not a business enterprise and is not subject to the BET.
10. As previously described, the performance by the Authority of the powers conferred on it by RSA 195-D constitutes the performance of an "essential public function." RSA 195-D:1. Thus, the Authority is not engaged in "commerce" with the object of "gain, benefit, income, revenue or advantage."
11. It is noteworthy that RSA 77-E:1, III provides an express exemption from the BET to tax-exempt organizations qualified under Section 501(c)(3) of the Internal Revenue Code (the "Code"). The preamble to the BET legislation (HB 51) indicates that the legislature elected to provide the exemption on the basis that such organizations have traditionally been entitled to an exemption from taxation because they provide charitable or educational services to society that would otherwise need to be provided by government.
12. Although the Authority is not a tax-exempt organization qualified under Code Section 501(c)(3), its bonds and other obligations are issued on a conduit basis for such organizations and it was expressly created to serve such organizations. Consequently, the imposition of the BET on the Authority -- which it would have to pass on to its borrowers -- would in fact result in subjection 501(c)(3) organizations to the BET. In addition, the reason underlying the exemption for such organization, i.e. that they perform services that would "otherwise" be performed by the State, provides additional support for the position that the BET was not intended to apply to state agencies that perform such services directly as essential governmental or public functions.
13. It is difficult to conceive that the legislature would have provided an exemption from the BET for Section 501(c)(3) organizations that perform public or governmental functions without also providing an exemption for agencies of the State of New Hampshire that are authorized and required by statute to perform such functions. Thus, the only rational explanation of the statutory scheme is that the legislature did not provide a specific exemption is necessary -- the exemption is implicit in the definition of business activity.

14. Consequently, although state agencies such as the Authority are not expressly excluded from the statutory definition of business enterprise, they are excluded implicitly through the definition of business activity.

15. Petitioner maintains that even if it were determined that the Authority is a business enterprise, it is nonetheless exempt from the BET pursuant to RSA 195-D:15, which broadly exempts the Authority and its agents from the imposition of any tax by the State of New Hampshire and its political subdivision.

16. RSA 195-D:15 provides that neither the Authority nor its agent "shall or may be required to pay any taxes. . . upon or in respect of a project or any property acquired or used by the [Authority]. . . or upon the activities of the [Authority]. . . or upon the income or other revenues received therefrom, and any bonds, notes and other obligations issued under the provisions of this chapter, their transfer and the income therefrom, including any profit made on the sale thereof, as well as the income and property of the [Authority]. . . are at all times exempt from taxation of every kind by the state and by the municipalities and all other political subdivisions of the state..."

17. The starting point for calculating the BET is the "enterprise value tax base," which represents the sum of the enterprise's compensation, interest and dividend payments. Insofar as all of the compensation and interest paid by the Authority (the Authority does not pay dividends) is paid in respect of its projects, activities or income, if the BET were to be imposed with respect to the Authority, it would necessarily be imposed with respect to the Authority's projects, activities and income in contravention of RSA 195-D:15.

18. Thus, Petitioner maintains that RSA 195-D:15, by its terms, specifically exempts the Authority from the BET.

19. Petitioner notes that the exemption from taxation provided under RSA 195-D:15 was intended to be interpreted broadly. A broad interpretation of the exemption is supported by RSA 195-D:24, which provides that RSA Chapter 195 "being necessary for the state and its inhabitants, shall be liberally construed so as to effect its purposes." In contrast, taxing statutes traditionally have been interpreted narrowly.

20. In conclusion, the Authority does not engage in any business activity. Therefore, it is not a business enterprise subject to the BET. In any event, RSA 195-D:15 exempts the Authority from the BET, which, if it were to be imposed, would be imposed with respect to the Authority's projects, activities or income, in contravention of the applicable statutory provision."

Revised Statutes Annotated (RSA) at Issue:

RSA 77:E; and
RSA 195-D.

Petitioner's Representations:

To the best of the petitioner's knowledge, the issue which is the subject of this petition: (a) is not under examination by the Department of Revenue Administration ("Department"); (b) has not been examined by the Department; (c) is not under

consideration by the Department in connection with a return of a prior period; and (d) is not pending in litigation.

Findings:

In view of the foregoing representations and specifically based upon them, the Department of Revenue Administration finds the following:

1. RSA 195-D, the Higher Educational Building Corporation law exempts this organization from taxation. The law states:

RSA 195-D:15 Exemption from Taxation

*The exercise of the powers granted by this chapter will be in all respects for the benefit of the people of the state, for the increase of their commerce, welfare and prosperity, and for the improvement of their health and living conditions, and will constitute the performance of an essential governmental function, and **neither the corporation nor its agent shall or may be required to pay any taxes or assessment upon or in respect of a project or any property acquired or used by the corporation or its agent or under the jurisdiction, control, possession or supervision of the same or upon the activities of the corporation or its agent in the operation or maintenance of the project under the provisions of this chapter, or upon income or other revenues received therefrom, and any bonds, notes and other obligations issued under the provisions of this chapter, their transfer and the income therefrom, including any profit made on the sale thereof, as well as the income and property of the corporation, are at all times exempt from taxation of every kind by the state and by municipalities and all other political subdivisions of the state; [ALL EMPHASIS ADDED]***

2. The issue of whether or not the petitioner is a business organization is not relevant due to their exemption from taxation pursuant to RSA 195-D and thus need not be addressed herein.

Whereas the above cited law does not specifically exempt the petitioner's interest expense or compensation expense from taxation under the BET, the legislative intent is clear as evinced by the following closing paragraph of the law which established the Higher Educational Building Corporation.

RSA 195-D:24 Act Liberally Construed.

This chapter, being necessary for the welfare of the state and its inhabitants, shall be liberally construed so as to effect its purposes.

Ruling:

Based on the provisions of RSA 195-D, the petitioner is exempt from the business enterprise tax.

Stanley R. Arnold, Commissioner