

IN THE MATTER OF THE PETITION OF ABC

FOR A DECLARATORY RULING

DOC#6695, EFFECTIVE 1/21/98

Pursuant to RSA 541-A:1, V, 541-A:24 and Rev 209.01 et seq., ABC Company ("ABC"), petitioned the Department of Revenue Administration with respect to the New Hampshire Legacy and Succession Tax, the New Hampshire Estate Tax, the New Hampshire Transfer Tax Upon the Personal Property of Nonresident Decedents, and Interest and Dividends Tax as applied to trusts managed by ABC and its banking subsidiaries.

DETERMINATION REQUESTED BY THE PETITIONER

Under a proposed transaction, ABC would reorganize its existing banking subsidiaries (currently operating in New Hampshire, North State, USA, and several other states) whereby its banking subsidiaries and their operations would be combined into, and become divisions of, DEF National Bank ("DEF Bank"), a subsidiary of ABC. After reorganization, DEF Bank would have its main office in North State, USA.

Petitioner requests a response to the following questions:

1. Will the proposed reorganization of ABC and its subsidiaries alter or affect the application of New Hampshire Interest and Dividends Tax on any of the trusts currently managed by the banking subsidiaries?
2. Will the proposed reorganization of ABC and its subsidiaries alter or affect the application of New Hampshire Legacy and Succession Tax, the New Hampshire Estate Tax, or the Transfer Tax Upon the Personal Property of Nonresident Decedents on any of the trusts managed by the banking subsidiaries?

FACTS PRESENTED BY THE PETITIONERS

The petitioners made the following representations of relevant facts:

The trust operations of each existing subsidiary are presently carried on and administered by separate personnel physically located in each of the subsidiary states. Following the reorganization, the trust operations of each former banking subsidiary will be carried on by a separate division of DEF Bank consisting of the former trust personnel and officers of each separate subsidiary bank. Each division will maintain the physical situs of its predecessor subsidiary bank. The place of administration of each trust managed by a banking subsidiary is in the state in which such subsidiary is based and will remain in that state following reorganization.

The trust operations of each banking subsidiary administer trusts which hold principally intangible assets and real estate assets. The intangible assets are passively held and are not utilized in a trade or business conducted by the trust or an entity controlled by or affiliated with the trust. The intangible assets owned by the trusts are held by XYZ Trust Company (AXYZ@) in South State, USA either in fungible bulk, where no certificates are issued, or in a vault, where certificates are

issued. In the case of assets held in fungible bulk, each separate state bank currently keeps records as to which trust the assets are allocable to and each separate division of DEF Bank will maintain these records after the reorganization. The interests of the beneficiaries are not represented by transferable shares.

REVISED STATUTES ANNOTATED [RSA] AT ISSUE

RSA 21:6 Statutory Construction

RSA 77, et. seq. Taxation of Incomes

RSA 86, et. seq. Taxation of Legacies and Successions

RSA 87, et. seq. Taxation of Transfers of Certain Estates

RSA 89, et. seq. Transfer Tax Upon the Personal Property of Nonresident Decedents

RULES AT ISSUE

N.H. Rev 900, et. seq. Interest and Dividends Tax

N.H. Rev 1300, et. seq. Legacy and Succession Tax

PETITIONER'S REPRESENTATIONS

To the best of petitioner's knowledge, the issues that are the subject of this petition:

- 1) Are not under examination by the department;
- 2) Have not been examined by the department;
- 3) Are not under consideration by the department in connection with a return of a prior period; and
- 4) Are not pending in litigation.

FINDINGS

In view of the foregoing facts and representations, and specifically based upon them, the Department finds the following.

We refer to *Black's Law Dictionary* for clarity in the various terms used in both the statutes and administrative rules governing these issues in New Hampshire. A trustee is known by *Black's* as the person appointed, or required by law, to execute a trust....to administer or exercise it [the trust] for the benefit or to the use of another called the "cestui que trust". The same resource defines "cestui que trust" as "the person for whose benefit a trust is created or who is to enjoy the income or the avails of it, or the beneficiary." *Black's* defines a "trust beneficiary" as "a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer...." A "trustor" or "settlor" is defined

by *Black's* as "one who creates a trust." A "grantor trust" is that in which the grantor transfers or conveys property in trust for his own benefit alone, or for himself and another.

RSA 21:6 defines a resident of New Hampshire as a person who is domiciled or has a place of abode, or both, in this state and who has demonstrated a current intent to designate that place of abode as his principal place of physical presence for the indefinite future to the exclusion of all others. Corporate domicile is defined by *Black's* as the place considered by law as the center of corporate affairs and place where the corporation functions are discharged.

In addressing the petitioner=s first question, we refer to Taxation of Incomes N.H. RSA 77, et. seq. and Interest and Dividends Tax Rev 900, et. seq., effective 8-22-96 (Document #6321).

In New Hampshire, the property taxed under RSA 77 is made up of a number of described classes. Among these are "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 and notes or bonds of any political subdivision of this state. RSA 77:4, I (Supp. 1996). Trusts, other than trusts comprising a part of an ERISA employee benefit plan, are taxable if the beneficial interest in the trust is not represented by transferable shares, and the trust's gross interest and dividend income from all sources exceeds \$2,400 during the taxable year. RSA 77:3, I(b) (Supp.1996).

The income received by estates held by trustees, any one of whom is an inhabitant of this state, or has derived his appointment from a court of this state, shall be subject to the taxes imposed by this chapter, except that income received by estates held by trustees treated as grantor trusts under section 671 of the United States Internal Revenue Code shall be included in the return of their owners, to the extent that the persons to whom the income from the trust is payable, or for whose benefit it is accumulated, are inhabitants of this state.

RSA 77:10 (Supp. 1996). From the statutory language, it is clear that grantor trusts are treated differently than other types of trusts. Any income received by a grantor trust is included in the income of the trust owner, who is the grantor. Since the income of grantor trusts is taxed to the individual owner, the proposed reorganization will have no effect, since it will not affect the trust grantor. The remainder of this statute deals with income received by a trust whose trustee is an inhabitant of this state or was appointed by a court of this state. In the case of the trust with an in-state trustee, the trust itself will be the entity responsible for any interest and dividends tax liability.

If an inhabitant of this state receives income from one or more trustees, none of whom is an inhabitant of this state or has derived his appointment from a court of this state, such income shall be subject to the taxes imposed by this chapter if it would be taxable to such inhabitant if received by him from its source.

RSA 77:12. After the proposed reorganization, the resulting entity, DEF Bank, would not have a New Hampshire domicile. Therefore, as trustee, it would not qualify as an inhabitant of the state. Therefore, to the extent that, as trustee, it paid trust income to New Hampshire residents, RSA 77:12 would apply and the resident recipient would be responsible for any applicable interest and dividends tax liability. Thus,

while the proposed reorganization would not change the tax liability, it would shift the responsibility for filing and payment from the bank, to the resident recipient of the trust income.

For a trust in which ABC's New Hampshire subsidiary was appointed as trustee by a court of this state and there is no in-state trustee, the trust would still be responsible for any interest and dividends tax liability even though their legal domicile moves out-of-state. Under the given facts, the Department believes that ABC's New Hampshire subsidiary, as trustee, is presently filing interest and dividends tax returns on behalf of its New Hampshire trusts and reporting the interest and dividend income payable to, or accumulated for the benefit of, state residents. In these circumstances, if the trusteeship was by appointment, ABC, as trustee, would maintain filing and payment responsibility for interest and dividends tax.

In addressing the petitioner's second question regarding legacy and succession taxes on trusts, we refer to Taxation of Legacy and Succession N.H. RSA 86, et. seq., and Legacy and Succession and Estate Taxes Rev 1300, et. seq., effective 6-24-97 (Document #6525).

Rev. 1301.17 defines a "settlor" to be "a person who provides the real, tangible or intangible property for the creation of a trust." Rev. 1301.21 defines "Trustee" as "a person or entity appointed by a settlor or who is court appointed to manage the real, tangible or intangible property placed in trust for the benefit of the beneficiaries." Rev. 1302.01 identifies the taxpayer for purposes of the legacy and succession tax as the person who receives an interest in property passing from a decedent, unless such individual refuses the legacy in which case the person receiving the property shall become the taxpayer. According to the definitions provided in these rules, the owner of the trust property is the settlor, the trustee is the manager of the trust, and the property in the trust is for the benefit of the beneficiary who does not own the property until it is transferred to the beneficiary for their enjoyment and use, or upon death of the settlor.

RSA 86:6 (Supp. 1996) states in pertinent part that all property within the jurisdiction of the state belonging in whole or part to a domiciliary of the state, and any in-state real estate belonging to a non-domiciliary, which passes to any taxable person absolutely or in trust, by will, or by gift made in contemplation of death or made or intended to take effect in possession or enjoyment at or after death of the grantor, shall be subject to the legacy and succession tax. Thus, application of the legacy and succession tax requires a determination that property has passed in a manner which is taxable, the property was of the type and ownership so as to be taxable, and the recipient of the property is a taxable person.

In New Hampshire, estate taxes are imposed under the provisions of the United States Internal Revenue Code of 1986 as follows:

I. In addition to the taxes imposed by RSA 86 an estate tax is hereby imposed on the transfer of the estate of every decedent leaving an estate which is subject to an estate tax under the provisions of the United States Internal Revenue Code of 1986, as amended, and who has property within this state.

II. The amount of the New Hampshire estate tax shall be equal to the maximum federal estate tax credit allowable for state death taxes with respect to property subject to this state's jurisdiction to impose a tax.

III. If only a portion of a decedent's estate is located in this state, such maximum tax credit shall be determined by multiplying the entire amount of the credit allowable by the percentage which the gross value of the portion of the decedent's estate located in this state bears to the gross value of the entire estate.

IV. This tax shall be imposed in every case in which the credit for state death taxes paid is available as a credit on the decedent's federal estate tax return.

RSA 87:1 (Supp. 1996).

The proposed reorganization of ABC will not change the recipient of any trust assets, nor will it change the manner in which property will pass, that is the terms of any particular trust document. Therefore, the focus in answering ABC's question is on the portion of the statute dealing with "property within the jurisdiction of the state" "belonging to domiciliaries of the state" and real estate within the state "belonging to persons who are not domiciliaries of the state." If the proposed reorganization will change the status of property with respect to being either within or without the state, or change the status of the owner with respect to domicile, then the proposed organization will affect application of the legacy and succession tax as well as estate tax.

Based on the information provided by ABC, it appears that the physical location of trust assets will be unchanged by the proposed reorganization. If this is correct, there will be no change in the status of property as within or without the state. The only trusts whose assets are subject to the legacy and succession, or estate, taxes are those whose assets the Department determines still belong to the settlor decedent at the time of death. If the assets do not belong to the settlor decedent at death, they are not subject to the legacy and succession, or estate, taxes. If they do belong to the settlor decedent at death, then the proposed reorganization will not affect the owner's domicile. Thus, the proposed reorganization will not affect trust asset taxability under the legacy and succession, or estate, taxes.

RULINGS

Based on the facts as represented by the petitioners and the statutory provisions discussed above, the department makes the following rulings:

(1) The reorganization of ABC with a New Hampshire trustee subsidiary to DEF Bank with a North State, USA trustee corporate domicile will not change the income and dividend taxation of the trust. However, as described above, the proposed reorganization of ABC will change the filing and payment responsibility from the bank, to the resident recipient of the trust income except in certain circumstances as described previously.

(2) The reorganization of ABC with a New Hampshire trustee subsidiary to DEF Bank with a North State, USA trustee corporate domicile will not change the legacy and succession taxation or the estate taxation of the trusts provided, however, as stated

above, the physical location of the trust assets are unchanged by the proposed reorganization and the trust assets still belong to an in-state settlor decedent at the time of death.

Adopted 1-21-98

Stanley R. Arnold, Commissioner