

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

TSB-89 (1) C
Corporation Tax
TSB-89 (1) I
Income Tax
January 17, 1989

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z881014B

On October 14, 1988, a Petition for Advisory Opinion was received from Home & City Savings Bank, 100 State Street, Albany, New York 12207.

The issue raised is whether the formation of Home & City Bancorp, Inc., (hereinafter "Holding") as a savings and loan holding company and the exchange of all of the outstanding shares in Petitioner by its shareholders for shares in Holding will constitute a transaction which is not taxable for purposes of Articles 22 and 32 of the Tax Law.

Specifically, the questions are:

1. For purposes of Article 32, will "entire net income", as defined in section 1453 of the Tax Law, be recognized to Holding or Petitioner as a result of the transaction.

2. For purposes of Article 22, will income be taxed to the shareholders of Petitioner under section 611 and section 612 of Tax Law, other than those who perfect their dissenters' rights under section 6022 of the New York State Banking Law.

3. For purposes of any other provision of the Tax Law, will income be taxed to Holding, Petitioner or the shareholders of Petitioner.

Petitioner is a stock savings bank organized under New York State law and has its principal office at 100 State Street, Albany, New York 12207. On February 13, 1986, Petitioner converted from a New York State chartered mutual savings bank to a New York State chartered stock savings bank. Pursuant to the conversion, Petitioner maintains a liquidation account to recognize the proprietary interest of Petitioner's account holders at the time of the conversion.

Petitioner has 2,875,000 shares of \$1.00 par value common stock outstanding as of June 30, 1988. Petitioner also has certain stock options outstanding which are held by employees pursuant to an Incentive Stock Option Plan qualifying under section 422A of the Internal Revenue Code (hereinafter "IRC").

Holding is a corporation to be organized under New York State law and section 408(a)(1)(B) of the National Housing Act, as a savings and loan holding company and will have its principal office at 100 State Street, Albany, New York 12207. Holding shall be organized by Petitioner to engage in business as a savings and loan holding company after acquiring 100 percent of the stock of Petitioner in the transaction described below. Holding will be authorized to issue approximately 25,000,000 shares of \$.10 par value common stock, of which 100 shares shall be issued to Petitioner as organizational shares. An additional

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10,000,000 shares of preferred stock will be authorized, none of which will be immediately issued and outstanding.

The Board of Directors of Petitioner believes that a savings and loan holding company structure will allow the bank to broaden its range of banking services and will provide Petitioner with greater operational flexibility and opportunity for expansion and diversification. Accordingly, pursuant to a plan of reorganization to be adopted, and subject to the approval of the parties at interest and the appropriate state and federal regulatory agencies, the following transaction is proposed:

- (1) Petitioner will transfer to Holding \$8,000,000 for working capital and expansion activities of Holding.
- (2) On the effective date of the transaction, each share of Petitioner common stock held by the stockholders of Petitioner (hereinafter "shareholders") will be transferred to Holding in exchange for one share of Holding common stock, except to the extent dissenters' rights apply under applicable federal and New York State law. No fractional shares of Holding common stock will be issued in the transaction. Instead, cash will be paid by Holding in lieu of issuing fractional shares of Holding common stock. No other property or assets will be transferred by the share holders to Holding.
- (3) Each shareholder will have the right, pursuant to New York State law to dissent from the proposed transaction. However, under the proposed plan of reorganization, Petitioner may, in its discretion and subject to regulatory review, terminate the proposed reorganization if the shareholders of 10 percent or more of the issued and outstanding shares of Petitioner common stock exercise their right to dissent from the transaction. Each dissenting shareholder will be entitled to receive from Petitioner the fair market value of his or her shares established under New York State law.
- (4) The liquidation account of Petitioner will remain outstanding and will not be affected by the transaction.
- (5) The stock options held by employees of Petitioner under Petitioner's Incentive Stock Option Plan shall be exchanged for identical options for purchasing Holding common stock.
- (6) As a result of the transaction, the organizational shares of Holding common stock held by Petitioner prior to the transaction will be cancelled.
- (7) After the transaction, Petitioner will continue the same business it operated prior to the transaction, and will continue to operate under its present name and under the same New York State charter. All savings accounts of Petitioner outstanding immediately prior to

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the transaction will remain as savings accounts of Petitioner immediately after the transaction.

- (8) None of the shares of stock in Petitioner to be transferred by the shareholders to Holding were received by the shareholders as part of a plan of liquidation of another corporation.
- (9) After the transaction the shareholders shall own 100 percent of the outstanding common stock of Holding and Holding will own 100 percent of the outstanding stock of Petitioner.

Contemporaneously with the submission of this Petition, Petitioner has submitted to the Internal Revenue Service an application for a private letter ruling to the effect that:

(1) The transaction will constitute an exchange within the meaning of section 351 of the IRC, and no gain or loss will be recognized by the shareholders upon the transfer of their Petitioner common stock to Holding solely in exchange for all of the Holding common stock, pursuant to section 351(a) of the IRC.

(2) No gain or loss will be recognized by Holding upon the receipt of Petitioner common stock solely in exchange for Holding common stock, pursuant to section 1032(a) of the IRC.

(3) The basis to the shareholders of the Holding common stock to be received in the transaction will, in each incident, be the same as the basis of Petitioner common stock surrendered and exchanged therefore, pursuant to section 358(a)(1) of the IRC.

(4) The basis to Holding of Petitioner stock to be received in the transaction will be the same as the basis of such stock in the hands of the exchanging shareholders, pursuant to section 362(a) of the IRC.

(5) The holding period of the Holding stock to be received by the shareholders will include the holding period of Petitioner stock exchanged therefore, provided that Petitioner's stock is held as a capital asset on the date of the exchange, pursuant to section 1223(1) of the IRC.

(6) The holding period of Petitioner's stock to be received by Holding in the transaction will include the period during which such stock was held by the shareholders, pursuant to section 1223(2) of the IRC.

(7) Dissenting shareholders who receive solely cash in exchange for their shares of Petitioner stock will be treated as having received such payments as distributions in redemption of their Petitioner stock subject to the provisions and limitations of section 302 of the IRC.

- (8) The proposed transaction will have no effect on Petitioner's prior

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conversion from a mutual to a stock savings bank.

(9) For the purposes of filing a consolidated return, Petitioner will be considered a 100 percent owned subsidiary of Holding and any other owned subsidiary of Holding will be deemed to be a member of the affiliated group of which Holding is common parent, pursuant to section 1504(a) of the IRC. The affiliated group of which Petitioner was the common parent corporation prior to the proposed transaction will continue in existence with Holding as the new common parent, pursuant section 1.1502-75(d)(2)(ii) of the Income Tax Regulations.

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 or securities in such corporation and immediately after the exchange such person or persons are in control (as defined in section 368(c)) of the corporation."

Question 1

Section 1451 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 9 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 section 351 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.

Accordingly, since the transaction by which all of the outstanding shares in Petitioner are exchanged by shareholders for shares in Holding, is a tax-free transaction under section 351(a) of the IRC, such exchange is a tax-free transaction for both Petitioner and Holding under Article 32 of the Tax Law.

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Question 2

Section 611(a) of the Tax Law provides: "It]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 of the corporations that are each a party to a transaction, that for federal 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 the shareholders as a result of an exchange of Petitioner stock for Holding stock that is treated as a tax-free transaction pursuant to section 351(a) of the IRC, no taxable income will be realized by the shareholders for New York State personal income tax purposes. Where shareholders perfect their dissenters' rights under section 6022 of the Banking Law, such transaction, for New York State personal income tax purposes, will be accorded the same treatment as the transaction receives for federal income tax purposes.

Question 3

There is no other provision of the Tax Law where income would be taxed to Petitioner, Holding or the shareholders as a result of the tax-free transaction as described herein.

DATED: January 17, 1989

FRANK J. PUCCIA
Director
Technical Services

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