

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

TSB-A-90(11)C
Corporation Tax
February 21, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. 1891205A

On December 5, 1989, a Petition for Advisory Opinion was received from Cayuga Savings Bank, 107-115 Genesee Street, Auburn, New York 13021.

The issue raised by Petitioner, Cayuga Savings Bank, is whether the reorganization of Cayuga Savings Bank, to form a holding company and become a wholly-owned subsidiary of such holding company in a transaction treated by the Internal Revenue Service as a section 351 exchange, will constitute a transaction which is not taxable for purposes of Articles 22 and 32 of the Tax Law.

Cayuga Savings Bank, (hereinafter "Bank") was originally chartered as a New York State mutual savings bank. On January 22, 1986, pursuant to approval by the appropriate regulatory authorities and its voting members, Bank was converted to a New York State chartered stock savings bank. Under the plan of conversion and pursuant to the regulations of the New York State banking board, a liquidation account was established for the benefit of the account holders. As of March 31, 1989, Bank's authorized capital stock consisted of 3,000,000 shares of common stock, of which 941,323 shares were issued and outstanding, and 3,000,000 shares of non-voting preferred stock, of which 40,000 shares were issued and outstanding. Options for the purchase of 41,250 shares of Bank common stock were held by 10 key employees pursuant to Bank's 1988 Stock Option Plan. Bank has one subsidiary with which it files consolidated federal income tax returns.

Pursuant to a plan of reorganization (hereinafter "Plan") adopted by Bank's board of directors, Bank organized Iroquois Bancorp, Inc., (hereinafter "Holding") on March 21, 1989 as a New York State corporation and holding company with Bank as its sole shareholder. New Bank, a New York State stock savings bank, is being organized as a wholly owned subsidiary of Holding for the purpose of effectuating the transaction described below.

Pursuant to the Plan, New Bank will be merged with and into Bank pursuant to applicable federal and New York State law, with Bank as the surviving corporation. Bank will acquire all of the assets and assume all of the liabilities of New Bank. On the effective date of the transaction, each share of Bank common and preferred stock will be converted into and deemed exchanged for one share of Holding common and preferred stock, respectively. Each outstanding stock option held by Bank shareholders will be converted into and deemed exchanged for one stock option in Holding. Each share of Holding common and preferred stock will have the identical rights and terms as the Bank common and preferred stock exchanged therefor.

As a result of the transaction, the shares of common stock of New Bank held by Holding will be converted by operation of law into shares of Bank common stock. The shares of Holding common stock held by Bank prior to the transaction will be cancelled, and Holding will

own all of the shares of the converted Bank stock. The liquidation account of Bank will remain outstanding and will be unaffected by the transaction.

The Internal Revenue Service has ruled as follows:

- (1) For federal income tax purposes, the formation of New Bank and its merger with and into Bank will be disregarded and the transaction will be viewed as a transfer by the transferor shareholders of Bank of all their Bank common and non-voting preferred stock in exchange for Holding common and non-voting preferred stock (Rev Rul 67-448, 1967-2 CB 144).
- (2) No gain or loss will be recognized by Bank's shareholders upon the deemed transfer of their Bank common and non-voting preferred stock to Holding in exchange for Holding's common and non-voting preferred stock (section 351 (a) of the Internal Revenue Code (hereinafter "IRC")).
- (3) No gain or loss will be recognized by Holding upon its deemed receipt of common and non-voting preferred stock of Bank in exchange for Holding common and non-voting preferred stock (section 1032(a) of the IRC).
- (4) The basis of the Holding common and non-voting preferred stock to be received by Bank's shareholders in the transaction will be the same as the basis of the Bank common and non-voting preferred stock deemed exchanged therefor (section 358(a)(1) of the IRC).
- (5) The affiliated group of which Bank was the common parent continues in existence with Holding as the new common parent (Rev Rul 82-152, 1982-1 CB 205).
- (6) The basis of the Bank common stock in the hands of Holding will be equal to the net inside basis of the property of Bank immediately after the transaction, adjusted as necessary in accordance with section 1.1502-31T(a)(2) of the Treasury Regulations (section 1.1502-31T of the Treasury Regulations).
- (7) The earnings and profits of Holding, as new common parent of the affiliated group, will be adjusted to reflect the earnings and profits of Bank (sections 1.1502-31T and 1.1502-33T of the Treasury Regulations).
- (8) The holding period of the Holding common and non-voting preferred stock to be received by Bank's shareholders will include the holding period of Bank stock deemed exchanged therefor, provided that Bank shareholders held such stock as a capital asset on the date of the transaction (section 1223(1) of the IRC).

- (9) The holding period of Bank common and non-voting preferred stock deemed received by Holding in the transaction will include the period during which such stock was held by the shareholders of Bank (section 1223(2) of the IRC).
- (10) The proposed transaction will not affect the federal income tax consequences of Bank's prior conversion from a mutual to stock savings bank.
- (11) The deemed exchange of Bank stock for Holding stock will not result in a change of ownership within the meaning of section 382(g), and therefore section 382 will not apply to Bank as a result of the transaction (section 382(1)(3)).

Section 351(a) of the IRC states: "[no] 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."

Section 1451 of Article 32 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 Bank 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 Bank and Holding under Article 32 of the Tax Law. See Home & City Savings Bank, Adv Op Comm T & F, January 17, 1989, TSB-A-89(1)C.

Section 611(a) of Article 22 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 of the corporations that are each a party to a transaction, that for federal purposes constitutes a tax-free transaction pursuant to section S51(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 Bank 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. If 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. See Home & City Savings Bank, *supra*.

DATED: February 21, 1990

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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