



**State Tax Department
of West Virginia**

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June 9, 1983

Honorable A. James Manchin
Secretary of State
Capitol Building, W-157
Charleston, West Virginia 25305

FILED IN THE OFFICE OF
A. JAMES MANCHIN
SECRETARY OF STATE
THIS DATE 6/9/83
Administrative Law Division

Dear Mr. Secretary:

Enclosed are three copies of a taxability ruling which this office recently issued concerning the business and occupation tax liability of bank holding companies. Two copies are presented for filing in the State Register. Please mark the third copy as having been filed and return it to this office.

As a general rule, taxability rulings are protected from public disclosure or release by W. Va. Code § 11-10-5(e). However, in this instance, the taxpayer waived its right to confidentiality provided its identity remained confidential so that copies of the taxability ruling could be released to the public.

Having determined that publication of this taxability ruling is both appropriate and in the interest of sound tax administration, we are submitting these copies for filing in the State Register, as permitted by W. Va. Code § 29A-2-3(f).

We appreciate your assistance in this matter.

Very truly yours,

Herschel H. Rose III
State Tax Commissioner

HHR/dse

Enclosure



**State Tax Department
of West Virginia**

Charleston 25305

TAXABILITY RULING MAY 17, 1983
WEST VIRGINIA TAX DEPARTMENT
HERSCHEL H. ROSE III, COMMISSIONER

FILED IN THE OFFICE OF
A. JAMES MANCHIN
SECRETARY OF STATE
THIS DATE 6/9/83
Administrative Law Division

RE: BUSINESS AND OCCUPATION TAX - TAXABILITY OF
BANK HOLDING COMPANIES ON DIVIDENDS RECEIVED
FROM SUBSIDIARIES.

On May 17, 1983, the West Virginia State Tax Commissioner issued a letter ruling to a herein unnamed bank holding company, concerning its liability for business and occupation taxes. Recently, that bank holding company executed a waiver under W. V. Code § 11-13-5(e), authorizing the release of that letter ruling, provided its name and that of its subsidiary were deleted. The Tax Commissioner has determined that release of this letter ruling is appropriate and in the interest of sound tax administration. A copy of this ruling was filed in the State Register on June 10, 1983.

A "taxability ruling" is a written statement issued by the Tax Commissioner to a specific taxpayer or his authorized representative. It interprets and applies the laws over which the Tax Commissioner has jurisdiction to the specific set of facts presented by that taxpayer. This is to be distinguished from the Tax Department's Administrative Regulations, which are statements of policy of general application promulgated in accordance with State Administrative Procedures Act, W. Va. Code § 29A-1-1 et. seq.

With respect to any other taxpayer, the results reached will depend upon the particular facts of that ruling request.

TEXT OF RULING

This letter ruling is in reply to your request on behalf of Bancorp, for a ruling on the business and occupation tax liability of a bank holding company. We understand your questions to be:

1. Whether Bancorp, a bank holding company, will be subject to the business and occupation tax on dividends received from its wholly owned subsidiary, a Bank, and any other subsequently acquired subsidiary corporation?
2. What is the proper treatment for business and occupation tax purposes of gross income received by a bank holding company from activities which are permitted by Federal and State law?

Arguments in support of your client's contention that it is not subject to tax under W. Va. Code § 11-13-2k, and that the dividends which it receives from subsidiary corporations engaged in business activity taxed under W. Va. Code § 11-13-2k, are not subject to business and occupation tax, were submitted by letter.

FACTS AND LEGAL BACKGROUND

The Bank is a national banking association with its principal office in West Virginia. The Board of Directors and shareholders of the Bank approved a plan of reorganization whereby the Bank became a wholly owned subsidiary of Bancorp, a West Virginia corporation. The reorganization was implemented by the Bank shareholder's exchanging their stock for stock in Bancorp, on a share for share basis.

Presently, Bancorp's only major asset consists of one hundred percent of the issued and outstanding stock of the Bank. However, with the passage of Senate Bill No. 331 by the West Virginia Legislature during the 1982 regular session, it is now permissible for a corporation such as Bancorp, to own twenty-five percent (25%) or more of the stock of more than one bank.

In the past and prior to the reorganization, the Bank paid dividends to its shareholders. In the reorganization, the shareholders of the Bank surrendered their stock for stock in Bancorp. Now the Bank will pay dividends to Bancorp. Shareholders of Bancorp are entitled to receive dividends from Bancorp just as they were entitled to dividends as shareholders of the Bank.

Until passage of Senate Bill No. 331, effective in June of 1982, West Virginia had "unit banking" in the sense that it was unlawful for two or more banks to be owned or controlled by any one individual, partnership, corporation, association or other legal entity or combination of entities acting in concert. W. Va. Code § 31A-8-12(b) (1975).

Additionally, until the passage of Senate Bill No. 331, a bank holding company was not subject to the supervision of the West Virginia State Banking Commissioner. The only law which affected the formation of a bank holding company in West Virginia was the Federal Bank Holding Company Act of 1956, as amended. Under this Act, a holding company cannot be formed without the prior approval of the Federal Reserve Board. Once that approval has been obtained and the holding company formed, the holding company must comply with the Act, and make certain reports and disclosures to the Federal Reserve Board.

The activities of a bank holding company are severely restricted. A bank holding company may only engage in activities which the Federal Reserve Board deems to be related to the business of banking, and sufficiently supportive of the banking business. 12 C.F.R. § 225.4(a). By regulation, there is a list of fourteen (14) different activities which the Federal Reserve Board deems sufficiently supportive of the banking business and permissible activities in which a bank holding company may engage. 12 C.F.R. § 225.4 (a). These activities include:

- (1) Making or acquiring, for its own account or for the account of others, loans and other extensions of credit (including issuing letters of credit and accepting drafts), such as would be made, for example, by a mortgage, finance, credit card, or factoring company;
- (2) Operating as an industrial bank, Morris Plan bank, or industrial loan company, in the manner authorized by State law so long as the institution does not both accept demand deposits and make commercial loans;
- (3) Servicing loans and other extensions of credit for any person;
- (4) Performing or carrying on any one or more of the functions or activities that may be performed or carried on by a trust company in accordance with Federal and State law;

- (5) Acting as investment or financial adviser in accordance with Federal and State law;
- (6) Leasing property in accordance with Federal and State law;
- (7) Making equity and debt investments in corporations or projects designed primarily to promote community welfare, such as the economic rehabilitation and development of low-income areas;
- (8) Data processing consisting of providing bookkeeping or data processing services for the internal operations of the holding company and its subsidiaries, and storing and processing other banking, financial, or related economic data, such as performing payroll, accounts receivable or payable, or billing services;
- (9) Acting as insurance agent or broker in offices at which the holding company or its subsidiaries are otherwise engaged in business (or in an office adjacent thereto) with respect to insurance that is directly related to banking or financial services provided by a bank or a bank-related business;
- (10) Acting as underwriter for credit life insurance and credit accident and health insurance which is directly related to extensions of credit by the bank holding company system;
- (11) Providing courier services;
- (12) Providing management consulting advice to nonaffiliated banks;
- (13) Selling at retail money orders having a face value of not more than \$1,000, U.S. Savings Bonds and travelers checks; and
- (14) Performing appraisals of real estate.

If a bank holding company wishes to engage in an activity not covered by this "laundry list," then it must petition the Federal Reserve Board for approval to engage in that activity.

Bancorp does not currently engage in any of the activities enumerated above. Its only function is to hold and manage its investment in its subsidiary corporation. The holding company does not receive deposits, make loans, provide checking services, issue certificates of deposit, sell travelers checks or perform any other services customarily performed by banks and financial institutions.

WHETHER A BANK HOLDING COMPANY IS A
"BANKING BUSINESS" OR "FINANCIAL ORGANIZATION"

Both of your client's questions turn upon whether a bank holding company is a "financial business" or falls within the definition of "banking business" or "financial organization" as defined in W. Va. Code § 11-13-1. If it is determined that your client is engaged in the "business of banking" or "financial business," it will be subject to the business and occupation tax measured by "gross income," as defined in W. Va. Code § 11-13-2k. This would include "dividend income." However, if it is determined that your client is not engaged in the "business of banking" or "financial business," it will be subject to the business and occupation tax measured by "gross income" as defined in W. Va. Code § 11-13-1, and taxed under W. Va. Code §§ 11-13-2 and 11-13-2a through 11-13-2m.

W. Va. Code §§ 11-13-2 and 11-13-2k impose a business and occupation tax "[u]pon every person engaging or continuing within this State in the business of banking or financial business...."

The term "financial business" is not defined in the business and occupation tax law or by administrative regulation. The terms "banking business" and "financial organization" are defined, however, in W. Va. Code § 11-13-1 as follows:

The term "banking business" or "financial organization" shall mean any bank, banking association, trust company, industrial loan company, small loan company or licensee, building and loan association, savings and loan association, finance company, investment company, investment broker or dealer, and any other similar business organization at least ninety per centum of the assets

of which consists of intangible personal property and at least ninety per centum of the gross receipts of which consists of dividends, interest and other charges derived from the use of money or credit.

A bank holding company is not one of the ten (10) specifically enumerated business organizations listed in the definition of "banking business" and "financial organization" in W. Va. Code § 11-13-1. The issue therefore becomes whether a bank holding company is a "financial business" within the meaning of W. Va. § 11-13-2k, or falls within the catchall provision in the definition of "banking business" or "financial organization" in W. Va. Code § 11-13-1.

The businesses taxable under W. Va. Code § 11-13-2k include persons engaged in the "business of banking" or in the "financial business." Use of the disjunctive "or" in W. Va. Code § 11-13-2k, indicates that the term "business of banking" is not synonymous with the term "financial business." This conclusion is reinforced by the fact that the terms "banking business" and "financial organization" are defined in W. Va. Code § 11-13-1, and have the same meaning.

One rule of statutory construction is that terms not defined by statute should, in the absence of specific instructions to the contrary, be given their common, ordinary and accepted meaning. Tug Valley Recovery Center v. Mingo County Commission, W. Va., 261 S.E.2d 265, 269 (1979).

The State of Washington in its business and occupation tax law, taxes persons engaged in "banking, loan, or other financial businesses." See RCW 82.04.430(1); CCH Washington Tax Reports para. 65-352 and 68-546. In John H. Sellen Construction Co. v. State Dept. of Revenue, 87 Wash.2d 878, 558 P.2d 1342, 1344 (1976), the court found that the common and ordinary meaning of the term "financial business" contemplates a business whose primary purpose and object is to earn income through the utilization of significant cash outlays.

In Rainier Bancorporation v. State, Dept. of Revenue, 96 Wash.2d 669, 638 P.2d 575 (1982), Washington sought to impose its business and occupation tax on receipts which the bank holding company received from three wholly owned subsidiaries. The receipts in question were dividends and interest from some marketable securities that were being liquidated, gains from the sale of securities, and interest received from its subsidiaries for financing in the form of equity capital, loans and advances. Dividends which the

bank holding company received from its subsidiaries were not in issue since, by statute, they are an allowable deduction from gross income.

The court found that technically the bank holding company did not fall within the definition of a banking, loan or security business, and that it was not regulated by the State. It did not loan money to the public at large, and its activities were not identical to those of a banking, loan or security business. The court found, however, that by loaning money to its subsidiaries, its activities were similar or comparable to those of banking, loan or security business. Consequently, the bank holding company was found to be a "financial business" and subject to the business and occupation tax.

At the present time, Bancorp is not engaged in any of the bank holding company activities deemed permissible activities under 12 C.F.R. § 225.4. Its sole activity is holding and managing its investment (stock) in its subsidiary corporation. We conclude that Bancorp is not presently a "financial business" within the meaning of W. Va. Code § 11-13-2k.

Next, we must decide whether a bank holding company falls within the definition of "banking business" and "financial organization" in W. Va. Code § 11-13-1.

As previously pointed out, the statutory definition of these terms specifically enumerates ten (10) business organizations as being included therein. The statutory definition also contains a catchall provision to include "any other similar business organization" that meets a two prong test, consisting of an asset test (at least 90% must be intangible personal property), and an income test (at least 90% must come from the use of money or credit). The catchall provision reads:

and any other similar business organization at least ninety per centum of the assets of which consist of intangible personal property and at least ninety per centum of the gross receipts of which consist of dividends, interest and other charges derived from the use of money or credit. (Emphasis added.)

Terms used within the statutory definition of "business of banking" and "financial organization" are not further defined in the business and occupation tax law, or by administrative regulation. Accordingly, in the absence of specific

instructions to the contrary, they should be given their common, ordinary and accepted meaning. Tug Valley Recovery Center v. Mingo County Commission, W. Va., 261 S.E.2d 265, 269, (1979).

The "ejusdem generis" rule of statutory construction helps clarify the meaning of the catchall provision in the definition of "banking business" and "financial organization" in W. Va. Code § 11-13-1. This rule provides:

General terms appearing in a statute in connection with precise, specific terms, shall be accorded meaning and effect only to the extent that the general terms suggest items or things similar to those designated by the precise or specific terms. In other words, the precise terms modify, influence or restrict the interpretation or application of the general terms where both are used in sequence of collocation in legislative enactments. John H. Sellen Const. Co. v. State, Dept. of Rev., 87 Wash.2d 878, 558 P.2d 1342, 1345 (1976).

West Virginia follows the "ejusdem generis" rule of statutory construction. W. Va. Dept. of Highways v. Farmer, W. Va., 226 S.E.2d 717 (1976); Pioneer Co. v. Hutchinson, W. Va., 220 S.E.2d 894 (1975); Vector Co. v. Bd. of Zoning Appeals, 155 W. Va. 362, 184 S.E.2d 301 (1971).

Accordingly, the generic term "other similar business organizations" is to be read in conjunction with the terms "bank, banking association, trust company, industrial loan company, small loan company or licensee, building and loan association, savings and loan association, finance company, investment company, [and] investment broker or dealer." The generic term only extends to businesses that are comparable to one of the specific categories but technically not falling within one of the ten (10) categories. Even if the business is comparable, it still must satisfy both the 90% asset test and the 90% income test for it to be a "banking business" or "financial organization" within the meaning of W. Va. Code § 11-13-1, and a W. Va. Code § 11-13-2k taxpayer.

Bancorp submits that under W. Va. Code § 31A-1-2(b), both before and after amendment of Senate Bill No. 331 in 1982, a bank holding company is not a "bank" or "banking institution;" and that its charter, being a regular corporate charter and not a banking charter, should be dispositive of the issue.

The terms "bank" and "banking institution" are defined in W. Va. Code § 31A-1-2(b) to include a corporation chartered to conduct banking business, and includes trust companies and industrial banks. Bank holding companies may engage in a number of activities that "banks" engage in. See 12 C.F.R. § 225.4. For example, a bank holding company may operate as an industrial bank, 12 C.F.R. § 225.4(a)(2), or provide trust company services, 12 C.F.R. § 225.4(c)(4). Whether or not a bank holding company is a "bank" within the meaning of W. Va. Code § 31A-1-2(b), is not, however, dispositive of whether a bank holding company is a taxpayer under W. Va. Code § 11-13-2k.

The term "financial institutions" as defined in W. Va. Code § 31A-1-2(k), is similar to the definition of "financial organization" in W. Va. Code § 11-13-1. However, "financial organization" specifically includes business organizations that are not "financial institutions" as defined in W. Va. Code § 31A-1-2(k), because they are not under the jurisdiction of the State Banking Commissioner. For example, national banking associations, federal savings and loan associations, investment companies, investment brokers and investment dealers are "financial organizations" as defined in W. Va. Code § 11-13-1. They are not "financial institutions" as defined in W. Va. Code § 31A-1-2(k).

As previously pointed out, Bancorp is not currently engaged in any of the bank holding company activities deemed permissible activities under 12 C.F.R. § 225.4. Its sole business activity is holding and managing its investment (stock) in its subsidiary corporation. This activity is not similar to the business activities engaged in by the ten (10) enumerated business organizations listed in the definition of "banking business" in W. Va. Code § 11-13-1. We conclude that while Bancorp satisfies the two prong test set forth in the catchall provision, it currently does not satisfy the condition precedent, that it be engaged in business activity similar to that engaged in by the ten (10) enumerated business organizations. Thus, at this time, Bancorp is not a "banking business" or "financial organization" as defined in W. Va. Code § 11-13-1, and is not subject to tax under W. Va. Code § 11-13-2k.

WHETHER A BANK HOLDING COMPANY
NOT TAXABLE UNDER 2k IS SUBJECT
TO BUSINESS & OCCUPATION TAX
ON ITS DIVIDEND INCOME

A holding company is a business corporation that may be organized under West Virginia law "for any lawful purpose."

W. Va. Code § 31-1-7(a). One of the general powers of a corporation is "to purchase...own, hold, vote, use...and deal in and with shares or interests in...other domestic or foreign corporations...." W. Va. Code § 31-1-8(g).

The term "holding company" has been defined to mean:

a supercorporation which owns or at least controls such a dominant interest in one or more other corporation that it is able to dictate the policies through voting power, or which is in the position to control or materially to influence the management of one or more companies by virtue, in part at least, of its ownership of securities in the other company or companies. 18 Am. Jur.2d Corporations § 12, page 557 (1965), citing North American Co., v. Securities & Exch. Co., 327 U.S. 686, 90 L. Ed 945, 66 S. Ct. 785.

As a general rule, the fact that one corporation owns all or the majority of the stock of another corporation does not destroy the identity of the subsidiary as a distinct legal entity. 18 Am. Jur.2d Corporations § 17, page 654 (1965).

Generally speaking, a bank holding company is formed for the same purpose that any other holding company is formed. The differences, however, are that before a holding company may be a bank holding company, it must have approval from the Federal Reserve Board and the West Virginia Board of Banking and Financial Institutions; and it may engage only in activities approved by the Federal Reserve Board.

The West Virginia business and occupation tax imposed by W. Va. Code, Chapter 11, Article 13, as amended, is not an income tax. It is a tax upon the privilege of doing business in this State. Bethlehem Mines Corporation v. Haden, 153 W. Va. 721, 172 S.E.2d 126, 137-138 (1969).

W. Va. Code § 11-13-2 states:

There is hereby levied and shall be collected annual privilege taxes against the persons, on account of the business and other activities, and in the amounts to be determined by the application of rates against values or gross income as set forth in sections two-a to two-m, inclusive of this article.

The term "business" is defined in W. Va. Code § 11-13-1, and includes:

all activities engaged in or caused to be engaged in with the object of gain or economic benefit, either direct or indirect...and shall include the activities of a banking business or financial organization.

Whether a person, firm or corporation is engaging or continuing within this State in any business or calling taxable under our business and occupation tax law depends upon the facts and circumstances of each case. Syl. pt.1, J. C. Penney Co., Inc. v. Hardesty, W. Va., 264 S.E.2d 604, 606 (1979); Syl. pt. 1, Virginia Foods of Bluefield, Va. Inc. v. Dailey, W. Va., 239 S.E.2d 770, 771 (1977).

The measure of the tax is gross income or value as set forth in sections two-a through two-m. W. Va. Code § 11-13-2. "Gross income" is defined in W. Va. Code § 11-13-1 to mean:

the gross receipts of the taxpayer, other than a banking or financial business, received as compensation for personal services and the gross receipts of the taxpayer derived from trade, business, commerce or sales and the value proceeding or accruing from the sale of property (real or personal) or service, or both, and all receipts by reason of the investment of the capital of the business engaged in, including rentals, royalties, fees reimbursed costs or expenses or other emoluments however designated... (Emphasis added.)

The business of a bank holding company is to invest its money in banking institutions and to manage its investment for the benefit of its shareholders. The West Virginia Legislature has recognized that the activities of bank holding companies will enhance the financial well being of the citizens of this State and the future economic growth and development of this State. See W. Va. Code § 31A-8A-1(a). In this regard, bank holding companies will strengthen and supplement traditional banking services and facilitate development the types of banking institutions that are necessary for the economic and industrial growth and development of this State. See W. Va. Code § 31A-8A-1(b).

We conclude that Bancorp is engaged in business activity within the meaning of "business" in W. Va. Code § 11-13-1. We also conclude that the dividends which it derives from its subsidiary are "gross income" derived "by reason of the investment of the capital of the business engaged in." W. Va. Code § 11-13-1. However, no classification presently exists in the business and occupation tax law that taxes dividend income earned by a business that is not a 2k taxpayer. Consequently, until such time as Bancorp becomes a taxpayer under W. Va. Code § 11-13-2k, the dividend income in question is not subject to business and occupation tax. Any other gross income that Bancorp derives will be taxable just like any other business, under the appropriate classification of the business and occupation tax.

The conclusions reached in this letter are based upon the facts recited herein and application of current statutory and case law. Should the pertinent facts change or be different from those recited herein, the conclusions reached herein may no longer apply. Similarly, should there be a change in the pertinent statutory or case law, the conclusions reached herein may no longer apply.
