

## *Ruling 91-09*

Vermont Department of Taxes

Date: October 17, 1991

Written By: Mary L. Bachman, Attorney for the Department

Approved By: Joyce Errecart, Commissioner of Taxes

You have requested a formal ruling on the application of Vermont's corporate income tax law. This ruling relies on the information contained in your letter of September 17, 1991 and on information conveyed at our meeting on September 20, 1991.

You represent a [Foreign Corporation], a large publicly-traded [foreign] corporation with a substantial retail business in [Foreign Country]. Several years ago, [Foreign Corporation] acquired, through a Delaware holding company, a U.S. retail business which operated principally in [State] [U.S. Corporation]. Over the next several years, [U.S. Corporation] generated large losses and eventually it shut down its retail businesses and terminated its employees. Currently, it maintains only a skeletal office in [State]. [U.S. Corporation] and the holding company, which have always filed consolidated U.S. federal income tax returns, have substantial federal net operating loss carryforwards.

[U.S. Corporation] would like to close its [State] office and reorganize as a Delaware or Vermont company with its principal office in Vermont. [U.S. Corporation] would hold the shares of a new subsidiary [Subsidiary]. In addition to these shares, [U.S. Corporation] will have a limited partnership interest in a newly formed limited partnership, formed to hold for resale some real estate properties previously connected with its [State] retail business and a pool of cash and marketable securities retained to settle environmental liabilities arising out of its [State] operations.

[Subsidiary], wholly owned by [U.S. Corporation], would receive substantial sums of capital from [U.S. Corporation]. [U.S. Corporation] has considerable capital of its own and it expects to raise additional capital through an offering of nonvoting preferred stock to the U.S. public. [Subsidiary] would use some of the capital received from [U.S. Corporation] to purchase, at a discount, dealer receivables from [Foreign Corporation]. Possibly, at a later date, [Subsidiary] will purchase credit card receivables from an affiliate of [Foreign Corporation]. [Subsidiary]'s profits would be the difference between the price it pays for these receivables and the amount that it collects. [Subsidiary] would use the remainder of its capital to purchase highly rated U.S. dollar denominated securities. [Subsidiary] will be prohibited from investing in other assets and from incurring debt or lease obligations.

The Delaware holding company, [U.S. Corporation] and [Subsidiary] will file a consolidated U.S. federal income tax return for 1991 and subsequent years. Because of [U.S. Corporation]'s substantial net operating loss carry-forwards, it is not anticipated that these companies will pay any U.S. federal income tax, other than alternative minimum tax. To compensate [U.S. Corporation] for the use of its net operating losses, [Subsidiary] and [U.S. Corporation] will enter into a tax sharing agreement. Under that agreement, [Subsidiary] will pay [U.S. Corporation] each year an amount roughly equal to the federal taxes that [Subsidiary] would have paid had it not had the benefit of [U.S. Corporation]'s net operating losses. [U.S. Corporation] will use this sum, plus the substantial dividends it expects to receive from [Subsidiary], to pay dividends on its preferred stock. To summarize, [U.S. Corporation] proposes to have its principal office in Vermont from which it will issue preferred stock to the public, pay dividends on such stock, make investments, manage its limited partnership interest, and manage the liabilities remaining from its former [State] retail business; [Subsidiary] proposes to have its principal office in Vermont from which it will invest in high grade U.S. dollar securities and buy and collect dealer and potentially credit card receivables.

You have requested a ruling on whether, for Vermont corporate tax purposes, [U.S. Corporation]'s net operating loss carryforwards may be used to offset [Subsidiary]'s profits. Alternatively, you have requested a ruling as to whether [U.S. Corporation] and [Subsidiary] qualify as holding companies under 32 V.S.A. § 5837.

Vermont allows consideration of net operating loss carry-forwards in determining the Vermont tax to the extent that a U.S. federal net operating loss carryforward exists. "The amount of any net operating loss, or net operating loss carryback or carryforward, which is available to a taxpayer under the laws of the United States, shall be available to a taxpayer in the determination of his Vermont tax, provided, however, that the amount of any refund due to a net operating loss carryback shall not exceed (\$0) for any taxable year. Such amount shall not be adjusted in any manner for any reason, and, particularly shall not be increased in any amount on account of the fact that the taxpayer's income under the laws of the United States included amounts of income which are not subject to taxation by the states." 32 V.S.A. § 5888(4)(B). Vermont does not limit its allowance of net operating losses to losses which arose when the loss corporation was located in Vermont.

If [Subsidiary] is permitted to offset its profits by [U.S. Corporation]'s loss carryforwards through the filing of a U.S. federal consolidated return, the same benefit will be available on the Vermont level as long as [U.S. Corporation] and [Subsidiary] qualify to file a Vermont consolidated return.

Vermont allows the filing of consolidated returns by certain corporations: "Taxable corporations which received any income allocated or apportioned to this state under the provisions of section 5833 of this title for the taxable year and which under the laws of the United States constitute an affiliated group of corporations may file a consolidated return in lieu of separate returns if such corporations qualify and elect to file a

consolidated federal income tax return for that taxable year." 32 V.S.A. § 5862. Thus, in addition to meeting the U.S. federal requirements for consolidated filing, the corporations must have nexus with the state. Based on your representations that [U.S. Corporation] and [Subsidiary] will qualify and elect to file a federal consolidated return and will locate their offices and employees in Vermont, these requirements would be met.

Because your first ruling request was answered in the affirmative, it is not necessary to address your alternative request. The activities of both [U.S. Corporation] and [Subsidiary] appear, however, to exceed those permitted by 32 V.S.A. § 5837.

This ruling is issued solely to your firm and is limited to the facts presented as affected by current statutes and regulations. Other taxpayers may refer to this ruling to determine the Department's general approach, but the Department will not be bound by this ruling in the case of any other taxpayer or in the case of any change in the relevant statute or regulations.