STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
STERLING BANCORP	:	DETERMINATION DTA NO. 806271
for Redetermination of Deficiencies or for Refund of Franchise Tax on Banking Corporations under Article 32 of the Tax Law for the Years 1980 through 1984.	:	

Petitioner Sterling Bancorp, 540 Madison Avenue, New York, New York 10022 filed a petition for redetermination of deficiencies or for refund of franchise tax on banking corporations under Article 32 of the Tax Law for the years 1980 through 1984.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on February 7, 1991 at 9:15 A.M., with all briefs to be submitted by March 5, 1992. Petitioner appeared by Hutton & Solomon, Esqs. (Roy F. Hutton, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUES

I. Whether, by virtue of the fact that the Division of Taxation issued notices of deficiency to petitioner which indicated that deficiencies were asserted under Article 9-A of the Tax Law when petitioner was not subject to Article 9-A tax but was, instead, a banking corporation subject to tax under Article 32 of the Tax Law, such notices should be cancelled for lack of jurisdiction by the Division of Tax Appeals.

II. Whether a decision of the City of New York, Department of Finance which was upheld by the appellate courts, should be binding upon the present matter under the doctrines of collateral estoppel and/or stare decisis.

III. Whether the Division of Taxation properly denied petitioner's allocation of a portion of its income for the years at issue to a branch established in Nassau, Bahamas.

IV. Whether the Division of Taxation's denial of petitioner's allocation of income to its Nassau, Bahamas branch violated the Commerce Clause of the United States Constitution.

FINDINGS OF FACT

On February 7, 1991, the representatives of Sterling Bancorp and the Division of Taxation ("Division") entered into a written stipulation (including Exhibits "A" through "R"), the relevant portions of which are incorporated into Findings of Fact "1" through "8".

Sterling Bancorp ("Corp") is a bankholding corporation with its principal office located at 540 Madison Avenue, New York, New York. For the taxable years ended December 31, 1980, December 31, 1981, December 31, 1982, December 31, 1983 and December 31, 1984, Corp filed consolidated New York State franchise tax returns with certain of its wholly-owned subsidiaries, including Sterling National Bank & Trust Company of New York ("SNB").

Under date of December 30, 1986, the Division issued statements of audit adjustment and notices of deficiency -- Article 9-A of the Tax Law -- to Corp for the calendar years 1980 through 1984 asserting deficiencies of tax totalling $3,466,634.00, plus interest, for a total due of $5,774,154.00, less a credit allowed of $51,311.00, thereby reducing such total to $5,722,843.00 as follows:

Taxable Year Ended December 31,	Tax	Interest	Total
1980	$ 787,053	$ 753,247	$1,540,300
1981	1,138,594	868,151	2,006,745
1982	896,864	466,867	1,363,731
1982 (Surcharge)	161,428	84,032	245,460
1983	204,840	71,939	276,779
1983 (Surcharge)	34,823	12,230	47,053
1984	207,720	43,636	251,356
1984 (Surcharge)	35,312	7,418	42,730
	$3,466,634	$2,307,520	$5,774,154
Less: Credit			51,311
			$5,722,843

SNB is a Federally-chartered bank (national bank) with its principal office located in New York City and, as such, is subject to Title 12 of the United States Code as well as its rules and regulations.

On October 18, 1968, SNB filed an application with the Board of Governors of the Federal Reserve System, as required by 12 USC § 601, to open a bank branch in Nassau, Bahamas.

On February 20, 1969, the Board of Governors of the Federal Reserve System authorized SNB to open a Nassau, Bahamas bank branch. SNB was duly licensed by the Ministry of Finance, Nassau, Bahamas to open a branch and, on May 26, 1969, SNB notified the Federal Reserve Board of Governors that its banking branch ("NBB") would be opened on June 2, 1969.

NBB is a foreign branch as defined in Title 12 of the United States Code and under regulations promulgated by the Federal Reserve System. As such, NBB:

(a) is exempt from the reserve requirements imposed on member banks by Federal Reserve Regulation D;

(b) did not maintain Federal Deposit Insurance on its deposits; and

(c) is not subject to the restrictions imposed on member banks by Federal Reserve Regulation Q relating to the rates of interest payable on its deposits.

NBB is located at 50 Shirley Street, Nassau, Bahamas at the offices of World Banking Corporation which it shared with numerous other Bahamian branches of U.S. banks and for which it paid $10,000.00 per year. NBB had no employees of its own. Its books and records were maintained at the offices of SNB in New York. Reports of its banking operations were filed with the Ministry of Finance, Nassau, Bahamas.

In the footnotes to the financial statements contained in the Annual Reports issued by Corp, the separate income of NBB for the years ended December 31, 1980, December 31, 1981, December 31, 1982, December 31, 1983 and December 31, 1984 (before taxes), in the respective amounts of $8,813,000.00, $11,700,000.00, $10,357,000.00, $1,734,000.00 and $1,731,000.00, was shown as foreign income.

Prior to the issuance of the notices of deficiency, Corp and its consolidated subsidiaries executed consents extending the period of limitation for assessment of tax under Articles 9

(except section 180), 9-A, 9-B, 9-C, 13, 32 and 33 as follows:

Period Extended[1]	Date for Assessment	Consent Executed
YE 12/31/80	12/31/84	5/10/84
YE 12/31/80	6/30/85	10/11/84

[1]Consents were also executed for periods prior to the years at issue. Such consents have not, therefore, been included in this listing.

YE 12/31/80, 12/31/81	6/30/86	4/16/85
YE 12/31/80, 12/31/81, 12/31/82	12/31/86	5/13/86

This case was assigned to the Division's auditor in June 1982. At that time, Corp was also being audited by the Department of Finance of the City of New York ("City"). As a result thereof, the actual audit did not commence until January 1984. The auditor determined that NBB was a "shell" operation since it had no employees there to conduct its business but, instead, employed independent agents. As a result thereof, 100% of the income from NBB was determined to be taxable to New York State.

In its application to the Board of Governors of the Federal Reserve System for permission to establish a foreign branch in Nassau, Bahamas, SNB stated that the primary reason for the establishment of the foreign branch was to acquire dollar deposits in the Eurodollar ("Eurodollars" are U.S. dollars owned by foreigners) market. The application stated, in part, as follows:

> "The Voluntary Foreign Credit Restraint Program and the Interest Equalization Tax have provided an incentive for the large banks to open foreign branches to tap the Eurodollar markets. Faced with the necessity of curbing lending to foreigners from home offices, a number of large American banks have come to view the overseas branch as an essential adjunct to their banks, not only for the long-run profits from the branch's operations per se, but also in order to serve adequately the needs of multinational clients (excerpted from 1967 Annual Report of the Comptroller of the Currency).
>
> "It is not feasible for the Bank to emulate the large banks by the opening of a London or other foreign branch because of the near prohibitive costs involved in relation to the capital and earnings of the Bank. A Bahamas branch seems to be the ideal vehicle for this Bank to acquire foreign dollar deposits. The ability to attract domestic deposits both nationally and locally is also restricted in competition with the large banks which have widely scattered facilities and branches, thereby attracting deposits from all sources.
>
> "Approval is sought for the opening of a Bahamas branch of the Bank to be serviced under an agreement with the World Banking Corporation Limited (W.B.C. Ltd.) (Details of arrangement in Exhibit 'C'). It is estimated that the entire net cost of such operation would not exceed $20,000 per year including the annual servicing fee of $15,000 to W.B.C. Ltd. The agreement with W.B.C. Ltd. can be terminated at anytime upon reasonable notice."

As previously stated in Finding of Fact "11", the application indicated that the Bahamas branch would be serviced pursuant to an agreement with the World Banking Corporation

Limited ("WBC"). Among the pertinent provisions of this agreement were the following:

(a) A small, enclosed, segregated office would be provided to NBB at WBC's building at 50 Shirley Street, Nassau, Bahamas;

(b) NBB's name would be prominently displayed on the outside of the enclosure (painted on the door);

(c) NBB would be furnished, at its own expense, with a desk, two chairs, a file cabinet and such other equipment as might be necessary;

(d) WBC would provide NBB with a branch manager and assistant manager either from its own staff or from qualified local residents outside of the bank (pursuant to a separate contract between NBB and the manager and assistant manager). NBB could be required or, at its discretion, could decide to pay a salary (at least in a token amount) to the manager and assistant manager who, in turn, would endorse such payment over to WBC.

(e) WBC would sublease to NBB such space as might be required by regulations of the Federal Reserve Board to maintain a Nassau branch;

(f) WBC would arrange for installation of a telephone in NBB's office as well as a listing in the Nassau telephone directory. WBC would also arrange for a separate Telex number and cable address for NBB, using WBC Telex equipment if possible;

(g) new loans, deposits and all other banking transactions of NBB would originate at the head office of SNB, thereby requiring no element of decision making by the manager and/or assistant manager in Nassau;

(h) WBC would maintain bookkeeping records for NBB's loans and deposits; and

(i) the annual fee to be charged by WBC for its services and use of its facilities was $15,000.00 (U.S. currency).

By letter dated February 20, 1969, the Board of Governors of the Federal Reserve System granted SNB its permission, pursuant to the provisions of section 25 of the Federal Reserve Act, to establish a branch in Nassau, Bahamas and to operate and maintain the branch

subject to the provisions of such statute and of Regulation M. This letter stated, in pertinent part, as follows:

> "In granting this permission, it is understood that the branch will be used for developing new international business and not as a means of shifting loans or deposits from offices in the United States. It is also understood that there is to be no contact with the local public at the branch, and that its quarters, staff, and bookkeeping may, at least in part, be supplied under contract by another party. In view of the unusual character of this operation, the foregoing permission is granted subject to continuing special observation and review by the Board and after due notice may be withdrawn or modified. The foregoing permission is also granted on the condition that adequate information covering the branch's operations will be maintained at your head office and will be available to the Board and its accredited representatives. The Board should be promptly notified of any modification in the branch's methods of operation, including changes in any contract under which services are supplied to the branch."

On October 19, 1978, the Division's Technical Services Bureau issued a memorandum (TSB-M-78[23]C) which provided as follows:

> "Subject: Allocation of Entire Net Income of a Banking Corporation
>
> "The following question has been raised concerning Article 32 (Franchise Tax on Banking Corporations) of the Tax Law:
>
> "Question:
>
> > "When may a banking corporation which is doing a banking business allocate its entire net income within and without New York State?
>
> "Answer:
>
> > "A banking corporation which is doing a banking business may only allocate its entire net income within and without New York State when it is carrying on a full service banking business through its office, branch or agency outside New York State.
> >
> > "For purposes of Article 32, an office, branch or agency is a permanent place of business which is regularly and systematically maintained, occupied and used by the taxpayer to carry on a full service banking business. Such business must be conducted through its own employees who are regularly in attendance at such place of business during normal business hours. It is not necessary that the office, branch or agency maintained without New York State conduct all the functions of a banking business.
> >
> > "For an office, branch or agency to do a full service banking business, it must conduct the following functions on a regular basis:
> >
> > > "1. Approve loans and disburse the funds and
> > >
> > > "2. Accept loan repayments

"plus conduct one or more of the other functions of a banking business on a regular basis, such as:

"1. Accept deposits

"2. Pay withdrawals

"3. Cash checks, drafts and other similar items

"4. Issue cashier's checks, treasurer's checks, money orders and other similar items

"5. Buy, sell, pay or collect bills of exchange

"6. Issue letters of credit

"7. Receive money for transmission or transmitting the same by draft, check, cable or otherwise

"8. Exercise fiduciary powers

"A bank which acts as an agent for another bank, is not an office, branch or agency of such bank for New York State purposes."

On February 10, 1984, SNB's representative, Roy F. Hutton, Esq., wrote a letter to Edward P. Eustace, Deputy Superintendent of Banks, New York State Banking Department which stated, in part, as follows:

"Pursuant to Sect. R46-37.2(b) of the Financial Corporation Tax Law of the New York City Finance Corporation Tax Law, the determination of whether a national bank is conducting a banking business is made under both the Federal and State banking laws. As stated above, under the Federal banking law, SNB is deemed to be conducting a banking business outside of the United States at its Nassau branch. Accordingly, we respectfully request that the New York State Department of Banks review the enclosed exhibits for the purpose of determining whether, under the New York State banking laws if applicable to SNB, such bank would be deemed to be conducting a banking business outside of the State of New York at its Nassau branch or conversely whether the banking operations of such branch would not be deemed part of the banking business conducted by SNB in New York State."

Mr. Eustace's reply, dated February 16, 1984, stated:

"Replying to your letter of February 10, 1984, we confirm that Nassau branch of Sterling National Bank and Trust Company of New York would be considered as a foreign branch for New York State regulatory and supervisory purposes if SNB were a New York State chartered bank.

"In supervising such branch, this Department would follow the same procedures as are applied in the supervision of other branches of state chartered banks located outside the U.S."

On July 24, 1984, the City issued a decision in the Matter of the Petition of Sterling Bancorp for redetermination of a deficiency of financial corporation tax under Title R of Chapter 46 of the Administrative Code of the City of New York for the years ended December 31, 1979, December 31, 1980 and December 31, 1981. The issue therein was whether the City properly disallowed SNB's allocation of a portion of its net income outside New York City.

In Finding of Fact "7" of this decision, the basis for the deficiencies was set forth, to wit, that the City determined that the Nassau, Bahamas branch of SNB was not a branch where its functions were systematically and regularly carried on within the meaning of financial corporation tax regulation section 2-1(a) and (b). Corp contended that, based upon Administrative Code §§ R46-37.1 and R46-37.2(a) and (b), the only type of business that a corporation subject to the financial corporation tax can do is a banking business as determined by Federal or State banking laws. Therefore, it was Corp's position that a determination as to whether or not SNB's Nassau branch is a branch for purposes of the financial corporation tax must be made by reference to Federal and State banking laws.

Finding of Fact "20" of the City decision indicated that the chief investigator of the City's Enforcement Division visited SNB's Bahamas branch (NBB) in January 1983 (a date subsequent to the audit period at issue in the City matter, but a date within the audit period at issue herein). The findings of the chief investigator, as set forth in Finding of Fact "20", were as follows:

"a) that SNB had a listing in the Nassau, Bahamas telephone directory for premises at 50 Shirley Street, Nassau, Bahamas;

"b) that SNB shared the telephone with some other corporations;

"c) that SNB shared office space at 50 Shirley Street, Nassau, Bahamas, consisting of a room approximately 20 x 40 feet, with approximately forty-six other corporations, most of which appeared to be banks;

"d) that said office contained three to four desks;

"e) that at the time of his visit to said office, which was in midday on a business work day, there was only one female employee on the premises;

"f) that said premises had neither teller windows or any name plates on the desks indicating loan officers; and

"g) that banking hours were not listed on the door to said office."

It should be noted that there is no indication that the Division, in asserting the deficiencies at issue herein, relied on the findings of the City's chief investigator or that the Division made any independent observation of NBB's operation.

The decision held that the City properly disallowed SNB's allocation of a portion of its net income outside New York City. The rationale for this decision was set forth in Conclusions of Law "G" through "L" which stated as follows:

"G. That references in sections R46-37.2(a) and R46-37.2(b) of the Administrative Code to the Federal and State Banking Laws are merely to determine whether a corporation is subject to the financial corporation tax, pursuant to section R46-37.1(a).

"H. That the determination of whether SNB is doing business or carrying on business at a branch outside the City, so as to enable it to allocate its income pursuant to section R46-37.4 of the Administrative Code, is to be made by reference to regulation section 2-1(b) issued by the Finance Administrator (now the Commissioner of Finance) and not by reference to the Federal and State Banking Laws.

"I. That, although SNB's Nassau facility may qualify as a branch under Federal and State Banking Laws (including the requirements of the Federal Reserve System and Federal Deposit Insurance Corporation (FDIC)), it is not a branch, office or agency where functions are systematically and regularly carried on within the meaning and intent of financial corporation tax regulation section 2-1(b).

"J. That, pursuant to section R46-70.0.5 of the Administrative Code, petitioner had the burden of proof to overcome the deficiency assessment and to show that SNB had the right to allocate a portion of its net income outside the City.

"K. That petitioner did not sustain its burden of proof to show that SNB had the right to allocate a portion of its net income outside the City pursuant to section R46-37.4 of the Administrative Code and regulation sections 2-1(a) and 2-1(b). Petitioner offered no evidence to show that SNB maintained a branch, office or agency outside the City where its functions were systematically and regularly carried on within the meaning of the aforementioned regulations. All transactions of SNB's Nassau branch originate and occur in New York City, including all decisions regarding the investment of funds reported as Nassau branch funds. (See Finding of Fact '16' supra). Moreover, the Nassau branch is not even permitted to deal with the local public. (See Finding of Fact '13' supra).

"L. That SNB's Nassau branch in the Bahamas is a legal device, set up for the sole purpose of enabling it to participate in the Eurodollar market; and wholly lacking the attributes of a bona fide bank branch, office or agency, where its functions are systematically and regularly carried on. (Emphasis added)."

The City's determination was confirmed, without opinion, by the Appellate Division, First Department (Matter of Sterling Bancorp v. New York City Dept. of Finance, 128 AD2d 1026, 512 NYS2d 609). On July 2, 1987, the Court of Appeals denied Corp's motion for leave to appeal (Matter of Sterling Bancorp v. New York City Dept. of Finance, 70 NY2d 610) and, on July 7, 1987, the Court of Appeals dismissed the appeal (Matter of Sterling Bancorp v. New York City Dept. of Finance, 70 NY2d 692). On March 21, 1988, the United States Supreme Court dismissed an appeal for want of a substantial Federal question (Sterling Bancorp v. New York City Dept. of Finance, 485 US 950, 99 L Ed 2d 409).

SUMMARY OF THE PARTIES' POSITIONS

The position of petitioner may be summarized as follows:

(a) The Division of Tax Appeals does not have jurisdiction over this matter because the Division failed to properly issue and mail a Notice of Deficiency of tax due under Article 32 of the Tax Law. The notices of deficiency issued to petitioner were notices issued under Article 9-A of the Tax Law; the Conciliation Order also stated that such notices issued under Article 9-A were sustained. Since petitioner is not a business corporation, it is not subject to tax under Article 9-A.

(b) Contrary to the contention of the Division, the doctrines of stare decisis and collateral estoppel have no application in this matter. Moreover, since collateral estoppel is an affirmative defense (see, CPLR 3018[b]), the Division's failure to plead it in its answer results in such affirmative defense having been waived.

(c) NBB was not a "shell" but was a separate and distinct branch which, under Federal and State banking laws, was carrying on a "banking business" in Nassau, Bahamas.

(d) The Division's requirements that, in order to allocate income outside of the State, a bank must maintain a permanent and continuous office with employees regularly in attendance outside of the State are requirements not found in the Tax Law or in the regulations promulgated thereunder.

(e) The Division's denial of an allocation for the income of SNB's branch in Nassau,

Bahamas is unconstitutional as violative of the Commerce Clause of the United States Constitution since it subjects such income to the risk of multiple taxation.

The position of the Division is as follows:

(a) The decision of the City was confirmed by the Appellate Division, First Department and both the New York Court of Appeals and the United States Supreme Court refused to alter the decision. The issue in the City matter and the issue in the present matter are identical and, in addition, involves two of the same years (1980 and 1981). Therefore, it is the Division's position that the doctrines of stare decisis and/or collateral estoppel are applicable since the primary issue in the present matter (allocation of income outside the State) has already been decided by the courts.

(b) TSB-M-78(23)C reflects the Division's interpretation of the New York Banking Law definition of "branch" and "agency". Petitioner has no real branch outside New York; its only non-New York presence is the Nassau shell. The regulations promulgated under Articles 9-B and 9-C (which were in effect during the years at issue) stated that a bank is doing business or carrying on business without New York if it has an office, branch or agency where its functions are systematically and regularly carried on. The City decision found that petitioner was not able to show that its shell facility was systematically and regularly carrying on the functions of a bank and, during the present proceeding, no additional evidence has been presented.

(c) Petitioner's argument that the fact that the headings on the notices of deficiency referred to Article 9-A rather than Article 32 invalidates such notices is without merit since, throughout all of the proceedings including the audit, petitioner was aware that franchise tax on banking corporations was at issue. In addition, deficiencies of tax under Articles 9-A, 32 and 33 are asserted using the same form. Petitioner was fully apprised that the issue was identical to that in the City proceeding and, therefore, was in no way prejudiced by Article 9-A appearing on the notices of deficiency.

CONCLUSIONS OF LAW

A. With respect to the contention by petitioner that the Division of Tax Appeals has no jurisdiction over this matter because the notices of deficiency issued by the Division indicated that the deficiencies were asserted pursuant to Article 9-A of the Tax Law, such contention must be rejected. Petitioner has made no showing that it was in any way prejudiced by the fact that the notices of deficiency failed to indicate that the deficiencies were asserted pursuant to Article 32 rather than Article 9-A of the Tax Law. The record herein is clear that petitioner was aware of the subject matter of this audit at all stages and petitions challenging the deficiencies were timely filed. In Pepsico v. Bouchard (102 AD2d 1000, 477 NYS2d 892, 893), the court stated:

> "That petitioner was not confused by the notice and that it was adequately informed of the need to pursue remedies of protest and review is apparent from the very fact of its timely challenge of the assessment."

The court in Pepsico also noted that the statute mandating that notice be given does not prescribe the content of the notice. While, in Pepsico, the subject taxes were sales and use taxes (issuance of statutory notices is governed by Tax Law § 1138[a][1]), Tax Law § 1081 (made applicable to the franchise tax on banking corporations by Tax Law § 1468) likewise fails to set forth the required content of a Notice of Deficiency issued thereunder. It must also be noted that the Tax Appeals Tribunal, in Matter of Kadish (Tax Appeals Tribunal, January 12, 1989) and in Matter of Tops, Inc. (Tax Appeals Tribunal, November 22, 1989), held that despite errors in the statutory notices, absent a showing by the taxpayer of a lack of knowledge concerning the subject matter of the audit or the periods at issue therein or a showing that the taxpayer was, in some manner, prejudiced by such errors, the assessments should not be voided.

B. As to the applicability of the doctrines of collateral estoppel and stare decisis, petitioner is correct in its assertion that the Division failed to plead collateral estoppel as an affirmative defense in its answer (stare decisis is a "[p]olicy of courts to stand by precedent and not to disturb settled point" [Black's Law Dictionary, Fifth Edition]). However, the Division did raise the defense of collateral estoppel at the administrative hearing. It is clear that petitioner was in no way surprised since its representative, Mr. Solomon, stated, at page 31 of

the hearing transcript:

> "The representative of the State of New York will inform you that in July of 1984, the City of New York came forward with a determination saying that the City of New York, for this taxpayer, in interpreting the sections of the laws that apply to the City, could impose by regulation requirements that had not been imposed by statute. I am sure that the representative of the State of New York will inform you that the First Department confirmed that without opinion. He will also tell you that the Court of Appeals refused to review the case."

Following the legal argument of petitioner's representative, the Division's representative, Mr. Lefebvre, did, in fact, raise the defense of collateral estoppel and stare decisis. Petitioner did not claim surprise or prejudice at any time during the hearing. Petitioner did not request a continuance or indicate, in any way, that it needed additional time to prepare to refute the Division's position (see, Multari v. Town of Stony Point, 99 AD2d 838, 472 NYS2d 439). The first time petitioner objected to the Division's raising such new defenses was in its post-hearing brief when it claimed that the failure to raise these defenses in the answer should result in a waiver thereof.

The Tax Appeals Tribunal Rules of Practice and Procedure (20 NYCRR 3000.4[c]) provide that, after the time has expired for amendment of a pleading without leave:

> "a pleading may be amended only by consent of the supervising administrative law judge or the administrative law judge . . . assigned to the matter. Leave shall be freely given upon such terms as may be just, including the granting of continuances."

This regulation mirrors CPLR 3025(b) which leaves the matter of whether or not to allow an amendment almost entirely to the court's discretion to be determined on a sui generis basis. "The policy is to permit amendment, for almost any purpose, as long as the adverse party cannot claim prejudice" (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3025:4, at 355). "If the amendment sought does not add any new facts to the case, but seeks only to add a new or additional ground or theory in support of a claim or defense, the amendment is all the more likely to be allowed" (id. at C3025:8, 359).

Courts have been liberal in allowing amendments, even sua sponte, where no new factual issues are created and only the theory of law upon which relief is granted is changed (Sellnow v. Sellnow, 70 AD2d 980, 417 NYS2d 790, 791). Therefore, since petitioner has shown neither

surprise nor prejudice and has had an opportunity to refute the Division's collateral estoppel defense, the Division's answer shall be deemed amended to include the doctrines of collateral estoppel and stare decisis.

C. Since it has heretofore been determined that the doctrine of collateral estoppel was properly raised, its application to the present matter must be examined.[2] Collateral estoppel is a doctrine which is a narrower form of res judicata. It precludes a party from relitigating, in a subsequent action or proceeding, an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same (Ryan v. New York Telephone Co., 62 NY2d 494, 478 NYS2d 823).

Prior to the 1967 Court of Appeals decision in B. R. DeWitt, Inc. v. Hall (19 NY2d 141, 278 NYS2d 596), mutuality of estoppel was required, i.e., unless both parties were bound by the prior judgment, neither could use it. If mutuality were still required, collateral estoppel could not apply to the present matter since it was the City rather than the Division

which, along with petitioner, was a party in the prior action. The court in DeWitt applied collateral estoppel because the issues raised were no different than those raised in the prior action and the party against whom the defense was raised was a party to the action and had a full opportunity to litigate such issues.

In Capital Telephone Co. v. Pattersonville Telephone Co. (56 NY2d 11, 451 NYS2d 11), the Court of Appeals held that collateral estoppel (or its more modern name of issue preclusion) applies to administrative as well as judicial proceedings. This is true as long as the determination of the administrative agency was rendered pursuant to the adjudicatory authority of the agency to decide cases brought before its tribunal employing procedures substantially similar to those used in a court of law (Staatsburg Water Co. v. Staatsburg Fire District, 72

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[2]Since "stare decisis" is a policy of adherence to decided cases which is what is sought by the Division in its collateral estoppel defense, for purposes of this matter only the applicability of collateral estoppel shall be considered herein.

NY2d 147, 531 NYS2d 876). In either type of proceeding, required for application of the doctrine are: (1) that the issue as to which preclusion is sought be identical with that in the prior proceeding; (2) that the issue was necessarily decided in the prior proceeding; and (3) that the litigant who will be held precluded in the present matter had a full and fair opportunity to litigate the issue in the prior proceeding. The court also held that the burden of establishing that the issue was identical and that the issue was necessarily decided in the prior proceeding is on the proponent of preclusion. As to the element of lack of full and fair opportunity to contest the issue, the burden is on the party who opposes the preclusion.

With respect to whether or not the issues were identical, the court stated:

> "Whether the issues in the two proceedings are identical depends, however, not upon how one or all of the parties characterize them, but on what facts are determinative of each proceeding in light of the substantive law principles, common law or statutory, governing each." (Capital Telephone Co. v. Pattersonville Telephone Co., supra, 451 NYS2d at 14.)

D. For the years at issue in the present proceeding, Tax Law former § 1454(a) provided as follows:

> "Entire net income. -- If the taxpayer's entire net income is derived from business carried on both within and without the state, the portion thereof which is derived from business carried on within the state shall be allocated under rules and regulations prescribed by the tax commission."

For the years ended December 31, 1979, December 31, 1980 and December 31, 1981 (the years applicable to the City determination), Administrative Code of the City of New York former § R46-37.4 provided as follows:

> "If the taxpayer's entire net income is derived from business carried on both within and without the city, the portion thereof which is derived from business carried on within the city shall be allocated under rules and regulations prescribed by the finance administrator."

Although Article 32 of the Tax Law took effect for taxable years beginning on or after January 1, 1973, no regulations were promulgated under Article 32 until December 1985, to apply to taxable years beginning on or after January 1, 1985. In response to a letter from Commerce Clearing House, Inc., the Director of the Division's Corporation Tax Bureau (by letter dated February 26, 1973) stated:

"Inasmuch as the provisions of Article 32 conform with Articles 9-B and 9-C, except in areas of privilege period and Federal conformity, regulations issued under Articles 9-B and 9-C remain applicable except when they are in conflict with the provisions of Article 32. Federal taxable income is the starting point in computing entire net income and therefore Federal regulations applicable to such computation will be followed." (1 New York Tax Reporter, p. 1555.)

20 NYCRR former part 35, entitled Apportionment of Income From Sources Within and Without the State, provided as follows:

"Section 35.1 Apportionment of Income. (a) The tax is imposed upon that proportion of the net income which is derived from business carried on within the State.

"(b) A corporation or association which maintains an office or place of business within the State, and not elsewhere, is taxable on all of its net income as herein defined. A corporation or association which is doing business or carries on its business through offices maintained both within the State and without the State must apportion its net income as provided in these regulations.

"35.2 Definitions of doing business and of business carried on. (a) A corporation or association is regarded as doing business or carrying on business within or without the State when it occupies, has or maintains an office, agency or branch where its functions are systematically and regularly carried on.

"(b) In order to require an apportionment of the income from business carried on within and without New York State, it is not necessary that the branch or agency maintained without the State, in the case of a domestic corporation or association, or within the State, in the case of a foreign corporation or association, shall necessarily conduct all functions of the banking business of the corporation or association. It is sufficient if the branch conducts some of the functions which the corporation or association is authorized to exercise regularly and with a fair measure of permanency and continuity.

"35.3 Apportionment where business is carried on both within and without the State. (a) A corporation or association doing business or carrying on business both within and without the State which keeps accounts of the income of each branch or agency which in the opinion of the Tax Commission actually reflect the net income from business carried on within the State of each branch, should report as its net income subject to tax, the income derived from the branches or agencies maintained within the State. In all cases, however, a report will be required of the gross and net income of the corporation or association from all business carried on within and without New York State.

"(b) Where the corporation or association does not keep accounts of the income and expenses of each branch or agency separately in such a way as to reflect accurately the net income from business carried on within the State, an apportionment shall be made as provided by section 219-y and subdivision 7 of 219-z [of the Tax Law]."

The applicable New York City regulation (referred to in the City decision) was section 2-1(b) which provided as follows:

> "Definitions of 'Doing Business' and of 'Business Carried On'. -- A corporation or association is regarded as 'doing business' or 'carrying on business' within or without the City when it occupies, has or maintains an office, agency or branch where its functions are systematically and regularly carried on.
>
> "In order to require an allocation of the income from business carried on within or without New York City, it is not necessary that the branch or agency maintained within or without the City conduct all the functions of the corporation or association. It is sufficient if the branch or office conducts some of the functions which the corporation or association is authorized to exercise regularly and with a fair measure of permanency and continuity."

It is clear, therefore, that the City decision was based upon a statute and regulations which were identical to those at issue herein.

E. There can be no doubt that the issue was necessarily decided in the prior matter; the issue of proper disallowance of SNB's allocation of a portion of its net income outside the City of New York was the sole issue decided.

Petitioner contends that the City decision is not a well-defined precedent. In its brief, it cites to three other cases which it states are the prevailing decisions (and the only other cases in the country on point). These cases (Seattle-First National Bank, decided by the Department of Revenue of the State of Washington; Crocker National Corporation, decided by the State Board of Equalization of the State of California; and Manufacturers Bank of Detroit v. Dept. of Treasury, 167 Mich App 467, 423 NW2d 228, decided by the Court of Appeals in Michigan), if petitioner's position is to be accepted, should be given greater weight than the City decision which, though absent opinion, was confirmed by the Appellate Division, First Department. As indicated in Finding of Fact "16", petitioner's motion for leave to appeal was denied and the appeal was dismissed by the Court of Appeals.

In determining whether the first action or proceeding provided a full and fair opportunity to litigate the matter now sought to be made controlling, the Court of Appeals, in Ryan v. New York Telephone Co. (supra, 478 NYS2d at 827), stated:

> "Among the specific factors to be considered are the nature of the forum and the importance of the claim in the prior litigation, the incentive and initiative to litigate and the actual extent of litigation, the competence and expertise of counsel, the availability of new evidence, the differences in the applicable law and the foreseeability of future litigation." (Citations omitted.)

In the prior proceeding, the amount at issue (after a reduction in the deficiency) was $1,264,429.00, plus interest, a not insignificant sum of money. Petitioner's representatives, in the proceeding before the City and on appeal, were the same representatives as in the present matter. At the hearing in the present matter, no new evidence was presented. As previously indicated, there is little or no difference between the statutes and regulations at issue in both matters. The record on review which was considered by the Appellate Division in support of petitioner's petition, pursuant to Article 78 of the Civil Practice Law and Rules, for a judgment annulling the City's determination consisted of over 1,000 pages. It cannot be found, therefore, that petitioner did not have a full and fair opportunity to litigate the issue in the prior proceeding. Accordingly, it is hereby found and determined that the doctrine of collateral estoppel is applicable herein and that petitioner is barred from relitigating the issue of whether its allocation of a portion of its income to a branch located in Nassau, Bahamas was proper.

F. By virtue of Conclusion of Law "E", Issue III may not be relitigated and Issue IV is thereby rendered moot.

G. The petition of Sterling Bancorp is denied and the notices of deficiency issued to petitioner by the Division on December 30, 1986 are sustained in their entirety.

DATED: Troy, New York
December 17, 1992

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE