experimentation, irrespective of all precautions, would constitute a serious threat to the public health, the Council may under those circumstances promulgate interim or permanent regulations proscribing the conduct of such category of experimentation and research. Finally, in the event the Council cannot, in its judgment, justify a total ban on one or more categories of the conduct of experimentation and research, it may promulgate reasonable interim or permanent regulations designed to regulate those categories of artificially recombinant DNA research and experimentation which, consistent with the statutory objective, pose a serious risk to the public health. Of course, it is clear that in each of these cases it would be incumbent on the Public Health Council under the requirements of the Act to solicit public and scientific comment on each of its proposals at a public hearing (N.J.S.A. 26:1A-7), to develop an adequate supporting record and to fully document the reasoning underlying its regulatory action.

In conclusion, the Public Health Council may, under its broad regulatory authority under the State Sanitary Code, adopt reasonable interim or permanent regulations to prohibit or regulate one or more categories of the conduct of artificially recombinant DNA research and experimentation where it specifically finds as an administrative determination that such prohibition or regulation is reasonably necessary and related to the prevention of a serious risk to the public health.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

April 29, 1977

JOHN J. HORN, *Acting Commissioner*
Department of Labor and Industry
John Fitch Plaza
Trenton, New Jersey 08625

FORMAL OPINION 1977—No. 7.

Dear Commissioner Horn:

You have requested an opinion as to the taxability of the principal, interest income and capital gain profits relating to bonds issued by the New Jersey Economic Development Authority ("EDA") under the Corporation Business Tax Act, N.J.S.A. 54:10A-1 *et seq.*, the Corporation Income Tax Act, N.J.S.A. 54:10E-1 *et seq.*, the Savings Institution Tax Act, N.J.S.A. 54:10D-1 *et seq.*, and the Gross Income Tax Act, N.J.S.A. 54A:1-1 *et seq.* You are hereby advised that the capital gain and interest income derived from these bonds are exempt from being directly taxed under the corporation income tax and gross income tax but that EDA bonds are not exempt

from being reflected in the tax bases of the corporation business tax and the savings institution tax, with the exception of the interest income derived from EDA bonds which is exempt from being reflected in the income tax base under the savings institution tax.

The EDA is a public body corporate and politic established on August 7, 1974 (L. 1974, c. 80) by the New Jersey Economic Development Act, N.J.S.A. 34:1B-1 *et seq.* in, but not of, the Department of Labor and Industry. N.J.S.A. 34:1B-4. It was established to promote and foster the economy of the State,

> ". . . by inducing manufacturing, industrial, commercial and other employment promoting enterprises by making available financial assistance to locate, remain or expand within the State." N.J.S.A. 34:1B-2.

In order to facilitate the authority in financing the various projects undertaken pursuant to the enabling legislation, the EDA was authorized to issue bonds and notes (N.J.S.A. 34:1B-5(p) and 9), which obligations were accorded the following tax exempt status:

> ". . . any bonds and notes issued under the provisions of this act, their transfer and the income therefrom, including any profits made on the sale thereof, shall at all times be free from taxation of every kind by the State except for transfer, inheritance and estate taxes and by any political subdivision of the State; . . . ." N.J.S.A. 34:1B-15.

In determining the tax exempt nature of the bonds issued by the EDA under each of the four tax statutes in the context of N.J.S.A. 34:1B-15, it is necessary to initially analyze the nature and scope of these tax laws. The Corporation Income Tax Act,[1] which became effective June 7, 1973 (L. 1973, c. 170), imposes an annual income tax upon corporations deriving income from sources within New Jersey and not subject to the Corporation Business Tax Act. N.J.S.A. 54:10E-2 and 3. The tax is not a franchise levy and is imposed at a rate of 7¼% upon the entire net income of a corporation allocable to this State. N.J.S.A. 54:10E-5. The term "entire net income" is defined to include net income from all sources, including the gains derived from the employment of capital or labor as well as profit gained through the sale or conversion of capital assets. N.J.S.A. 54:10E-4 (i). It is clear from an analysis of these provisions that the corporation income tax is a direct tax on the allocable share of a corporation's entire net income, which term may be broadly defined to include the interest and capital gain income derived from the bonds issued by State authorities such as the EDA. Accordingly, under the terms of N.J.S.A. 34:1B-15 the interest income and gain derived from the transfer of EDA bonds is not taxable under the Corporation Income Tax Act.

Similarly, the New Jersey Gross Income Tax Act is a direct tax on the gross income of every individual, estate or trust subject thereto at the rate of 2% of taxable income under $20,000 and at the rate of 2.5% of the taxable income in excess of $20,000. N.J.S.A. 54A:2-1. The gross income tax, however, specifically excludes from taxable income the net gains and interest income derived from obligations issued by or on behalf of any State authority and body corporate politic and further exempts obligations which are statutorily free from State or local taxation under any

act of this State. N.J.S.A. 54A:5-1(c) and N.J.S.A. 54A:6-14. Pursuant to these provisions, the interest income and capital gain profits derived from the EDA bonds are exempt from the New Jersey gross income tax.

It is necessary before examing the impact of the exemption provided by N.J.S.A. 34:1B-15 on the corporation business tax and savings institution tax to discuss in some detail the significant provisions of these taxes. The corporation business tax and the savings institution tax differ conceptually from the direct income taxes (*e.g.* corporation income tax and gross income tax) and constitute excise taxes exacted by the State from corporations for the privilege of exercising their franchises within this State. The corporation business tax, which has been delineated as a franchise tax, *Werner Machine Co. v. Director, Division of Taxation*, 17 N.J. 121 (1954). aff'd 350 U.S. 492, 76 S. Ct. 534, 100 L. Ed. 634 (1956), imposes an annual levy upon a corporation ". . . for the privilege of having or exercising its corporate franchise in this State, or for the privilege of doing business, employing or owning capital or property, or maintaining an office, in this State." N.J.S.A. 54:10A-2. The tax is computed by adding together prescribed percentages of a net worth tax base (at the rate of .002 on the first $100,000,000), N.J.S.A. 54:10A-5, and a net income tax base[2] (at the rate of 7½%). Net worth constitutes in essence the stockholders' book equity in the corporation supplemented by certain compulsory adjustments not here relevant. N.J.S.A. 54:10A-4(d); *F.W. Woolworth Co. v. Director, Div. of Taxation*, 45 N.J. 466, 468 (1965). The net worth tax base, as defined by the statute, would thus reflect the principal value of the EDA bonds. *Motor Finance Corp. v. Director, Divison of Taxation*, 129 N.J. Super. 19 (App. Div. 1974), certif. den. 66 N.J. 319 (1974). Net income is defined as:

> ". . . total net income from all sources, . . . and shall include the gain derived from the employment of capital or labor, or from both combined, as well as profit gained through a sale or conversion of capital assets." N.J.S.A. 54:10A-4(k).

This broad definition of entire net income includes the interest income derived from EDA bonds as well as profits resulting from the sale of the EDA bonds.

The savings institution tax (L. 1973, c. 31), is a franchise tax imposed in lieu of any other state franchise tax upon savings institutions for the privilege of doing financial business in this State. N.J.S.A. 54:10D-3. The tax is payable in the year 1970 and each year thereafter at the rate of 5% upon net income of the institution as of the close of the preceding tax year. N.J.S.A. 54:10D-3. Net income under that statute, although broadly defined to include income from all sources as well as gains derived from the sale of capital assets (N.J.S.A. 54:10D-2(d)), specifically excludes interest or dividends derived from obligations issued by the State of New Jersey or its authorities. N.J.S.A. 54:10D-2(d) (1) (b) (i). This provision clearly exempts the interest income from the EDA bonds from being included in the net income tax base of the savings institutions tax. The savings institution tax, however, does not exclude profits derived from the sale of such obligations from being reflected in its tax base.

Thus, having described the significant operative provisions of the corporation business tax and savings institution tax, it must be determined in what manner the exemption established by N.J.S.A. 34:1B-15 affects the taxable status of the EDA bonds with respect to principal, interest income and capital gain income under those taxes. Initially it is important to discuss the proposition established by *Werner*

Machine v. Director, supra, that franchise taxes are not directly imposed upon either property or income. The issue in the *Werner* case involved whether federal bonds owned by the taxpayer, the income from which was specifically exempt from taxation by federal law, could properly be included in the calculation of the taxpayer's net worth tax base under the corporation business tax.[3] The federal exemption provided, in rather broad and comprehensive language, that:

> "Except as otherwise provided by law, all stocks, bonds, Treasury notes and other obligations of the United States, shall be exempt from taxation by or under state or municipal or local authority." 31 U.S.C.A. § 742.

In its decision, the New Jersey Supreme Court opined that the corporation business tax, since it taxed the privilege of corporations doing business in the State, was a franchise tax which "...is a type of excise tax, namely a form of taxation not laid directly upon persons or property." 17 N.J. at 125. The court concluded that the value of the bonds could lawfully be reflected in the net worth tax base notwithstanding the federal exemption:

> "The tax is imposed upon the corporation for the privilege of exercise by the corporation of corporate powers in this State. The measure of the tax is the net worth or present value of the investment in the corporation and the tax is not levied upon the property owned by the corporation, nor is it measured by the nature or source of the securities in which some or all of the assets of the corporation are invested. It may be said that a franchise tax imposed upon a corporation for the privilege of doing business under a corporate charter is based upon the potential of the corporation for doing business under the sanction and protection of the laws of the State. *Cf. Corporations: Theory of Organizational Franchise Taxation, Michigan Franchise Tax,* 48 Mich. L. Rev. 1130, 1132-1133 (1950).
>
> Property taxation and excise taxation have been said to be distinct and easily distinguishable." *Werner Machine Co., supra,* 17 N.J. at 126, 127.

In its decision, the United States Supreme Court agreed that the corporation business tax was not imposed directly on the property held by the corporation,

> "And since this is a tax on the corporate franchise, it is valid despite the inclusion of federal bonds in the determination of net worth. This Court has consistently upheld franchise taxes measured by a *yardstick which include tax-exempt income or property,* even though a part of the economic impact of the tax may be said to bear indirectly upon such income or property." (emphasis added). 350 U.S. at 484.

In conformity with the principle established in *Werner,* the Division of Taxation has consistently included in the tax bases of franchise taxes the principal and income derived from tax exempt obligations issued by State authorities.[4]

In construing a statute, it is to be assumed that the Legislature is familiar with its own enactments and the judicial and administrative interpretations thereof. *Bar-*

ringer v. Miele, 6 N.J. 139, 144 (1951). The failure of the Legislature to specifically exempt franchise taxes in its enactment of N.J.S.A. 34:1B-15 is a significant indication of legislative intent. It is persuasive that the Legislature did not intend to qualify the principle enunciated in *Werner Machine* and the administrative implementation of these statutes by the Division of Taxation as it relates to the EDA bonds. Thus, the exemption established by N.J.S.A. 34:1B-15 clearly does not affect the imposition of the tax on the value, income and gain on transfer of EDA bonds under the corporation business tax and on the gain derived from the transfer of EDA bonds under the savings institution tax.

You are, therefore, advised that the following tax treatment is to be accorded the obligations issued by the EDA:

(1) The interest income and gain derived from the transfer of EDA bonds should not be subject to the corporation income tax and the gross income tax.

(2) The interest income derived from EDA bonds should not be included in the net income tax base of the savings institution tax under the specific provisions of that statute.

(3) Pursuant to the principle established in the *Werner Machine* case, the principal of EDA bonds should be reflected in the net worth tax base of the corporation business tax; the interest income and gain derived from the transfer of EDA bonds should be reflected in the net income tax base of the corporation business tax; and the gain derived from the transfer of EDA bonds should be reflected in the net income tax base of the savings institution tax.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey
By: HARRY HAUSHALTER
Deputy Attorney General

1. The corporation income tax had its genesis in the *Report of the New Jersey Tax Policy Committee,* Vol. V, pp. 20 to 25, submitted to Governor William T. Cahill on February 23, 1972, which recommended that enactment of a second tier net income tax in order to impose a tax on foreign corporations neither qualified nor doing business within the State in the traditional franchise tax sense, but, nevertheless, deriving income from sources in the State and having adequate due process nexus with New Jersey to give this State jurisdiction to tax.

2. The net worth portion of the tax became effective for the 1946 tax year (L. 1945, c. 162), while the net income portion became effective for the 1959 tax year (L. 1958, c. 63).

3. At the time of the *Werner Machine* case, the net income portion of the corporation business tax had not yet been enacted.

4. It is noteworthy that the relevant language under N.J.S.A. 34:1B-15 provides that the bonds and notes issued under the provisions of the EDA, their transfer and the income therefrom, including any profits made on the sale thereof, shall at all times be free from taxation of every kind by the State except for "transfer, inheritance and estate taxes". This particular exception for inheritance and estate taxes is not found in the earlier enabling provisions of State authorities whose obligations are accorded tax exemption. See *e.g.* N.J. Highway Authority, N.J.S.A. 27:12B-16, L. 1952, c. 16; Delaware River Port Authority, N.J.S.A. 32:3-12, L. 1951, c. 288; N.J. Turnpike Authority, N.J.S.A. 27:23-12, L. 1948, c. 454. It appears that in more recent years the Legislature has been specifically referring to the exception for transfer inheritance and estate taxes when establishing tax exemptions for obligations issued by State authorities. See *e.g.* New Jersey Health Care Facilities Financing Authority, N.J.S.A. 26:2I-16, L. 1972, c. 29; New Jersey Sports and Exposition Authority, N.J.S.A. 5:10-18, L. 1971, c. 137. This exception

for inheritance and estate taxes was enacted undoubtedly to clear up an ambiguity as to the tax treatment of State authority bonds under New Jersey death taxes, which taxes are by their very nature distinguishable from corporate franchise taxes.

April 29, 1977

ROBERT E. MULCAHY, III
Commissioner
Department of Corrections
P.O. Box 7387
Whittlesey Road
Trenton, New Jersey 08625

FORMAL OPINION 1977—No. 8.

Dear Commissioner Mulcahy:

You have inquired as to the proper method for the calculation of the actual parole eligibility dates and the minimum-maximum expiration dates for those State Prison inmates who subsequently receive an additional minimum-maximum term, concurrent in part with, and consecutive in part to, the commitment then being served by the inmate. You have also requested advice with respect to the manner in which commutation credit, N.J.S.A. 30:4-140, work and minimum security credits, N.J.S.A. 30:4-92, and the county jail custodial credit, *R.*3:21-8, are to be incorporated therein. Finally, you have questioned whether the additional fixed minimum-maximum term may be lawfully aggregated with life sentences or indeterminate sentences.

On April 1, 1959, then Attorney General Furman concluded that minimum-maximum sentences, which are imposed at different times by different courts and are concurrent in part and consecutive in part, may be aggregated pursuant to the authority contained in L.1956, c.102, §2, p. 476 (N.J.S.A. 30:4-123.10), with the consent of the inmate and the permission of the State Parole Board, *Memorandum Opinion 1959-P-4*. The Attorney General declared that the aggregated term commences as of the date of imposition of the first sentence, and that it is determined by adding to both the minimum and maximum terms of the second commitment order the amount of time which has elapsed between the sentencing dates. This computation principle does not, however, apply to aggregation of minimum terms where the expiration date of the recently imposed minimum term occurs prior to the expiration date of the previously-imposed minimum term. In such cases, the minimum sentence decreed in the first judgment of conviction remains controlling in the calculation of the aggregated minimum term.*

The sound reasoning of the opinion concerning the aggregation of sentences which are concurrent in part and consecutive in part also pertains to the method for the computation of county jail custodial credits, *R.*3:21-8, county jail work credits, N.J.S.A. 30:8-28.1, and the work and minimum security credits provided for in N.J.S.A. 30:4-92. Sentences which are in character both concurrent and consecutive