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Directive 86-37: Security Corporations Denial Of Section 38b Treatment

FACTS: Dover Corporation is a domestic corporation that was classified as a security corporation by the Commissioner several years ago. At that time, Dover had been engaged exclusively in buying, selling, dealing in, or holding securities on its own behalf and not as a broker. During its prior two taxable years, however, Dover engaged in activities not permitted under section 38B of chapter 63 and did not notify the Commissioner of this change. It ceased these activities before the start of its current taxable year.

ISSUE: Is Dover entitled to taxation as a security corporation for the taxable years in which it engaged in activities not permitted under section 38B of chapter 63?

DISCUSSION: Any domestic business or foreign corporation is entitled to tax treatment as a security corporation, provided that it satisfies two requirements. First, the corporation must be engaged exclusively in buying, selling, dealing in, or holding securities on its own behalf and not as a broker. Second, the corporation must be classified as a security corporation by the Commissioner. G.L. c. 63, § 38B.

A corporation that has been so classified is entitled to taxation under section 38B of chapter 63 only if, as a matter of fact, it remains engaged exclusively in activities permitted under that section. Accordingly, if a corporation has been engaged in other activities during an open taxable year, the Commissioner may retroactively assess any additional amounts due under the corporate excise for the year notwithstanding the corporation's classification. See generally *John S. Lane & Sons, Inc. v. Commissioner of Revenue*, 396 Mass. 137 (1985).

A finding that the corporation has been engaged in activities not permitted under section 38B may also constitute grounds for the retroactive revocation of the corporation's classification. *Id.* However, unless, in addition to making an assessment for a particular period, the Commissioner acts affirmatively to revoke the classification, the corporation will remain entitled to section 38B treatment for other open taxable years.

An "open taxable year" is any taxable year within the statutes of limitations for additional assessments by the Commissioner under chapter 62C, § 26-30.

DIRECTIVE: Dover is not entitled to taxation as a security corporation for the taxable years in which it engaged in activities not permitted under section 38B of chapter 63. The Commissioner may retroactively assess any additional amounts due under the corporate excise for those years.

REFERENCE: G.L. c. 63, § 38B; G.L. c. 62C, §§ 26-30; *John S. Lane & Sons, Inv. v. Commissioner of Revenue*, 396 Mass. 137 (1985).

31 December 1986

[/s/Ira A. Jackson](#)

Ira A. Jackson

Commissioner of Revenue

This Directive represents the official position of the Department of Revenue on the application of the law to the facts as stated. The Department and its personnel will follow this Directive, and taxpayers may rely upon it, unless it is revoked or modified pursuant to 830 C.M.R. § 62C.01(5)(e). In applying

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this Directive, however, the effect of subsequent legislation, regulations, court decisions, Directives, and TIRs must be considered, and Department personnel and taxpayers may rely upon this Directive only if the facts, circumstances and issues presented in other cases are substantially the same as those set forth in this Directive.

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