THE STATE OF SOUTH CAROLINA
In the South Carolina Supreme Court

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT
Honorable Ralph King Anderson, III, Chief Judge

Case No. 2017-ALJ-17-0418-CC
Appellate Case No. 2020-000999

Synovus Bank, Appellant,

v.

South Carolina Department of Revenue, Respondent.

APPELLANT'S PETITION FOR REHEARING

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I. INTRODUCTION

Pursuant to Rule 221(a) SCACR, Appellant Synovus Bank files this Petition for Rehearing of the Court of Appeals' order filed on July 31, 2024.[1] The Court's conclusion that Synovus' "entire net income" cannot be reduced by its Net Operating Loss (NOL) carryforwards was wrong for four primary reasons.

First, the Court erred by not considering the significance of the National Bank Act, 12 U.S.C. § 548. The National Bank Act was the federal law that originally allowed states the ability to tax national banks. It also prohibited states from discriminating against banks as compared to other businesses. The National Bank Act provided ***only*** four methods for states to tax banks. Among the permitted forms of taxation was a tax based on or measured by "entire net income."

Consistent with federal law, in 1937, South Carolina enacted the bank tax on "entire net income." A tax on "entire net income," as that phrase was used in the National Bank Act, was one of the permitted forms of taxation of banks. However, to comply with federal law, the bank tax also had to be applied and interpreted in a manner that did not discriminate against banks. Accordingly, the phrase "entire net income" was also required to be interpreted in line with the state corporate income tax. Initially, the Court properly agreed the bank and corporate income tax were both based on the same entire net income, but then, in error, the Court determined that at some point in time a change occurred to the bank tax. This secondary conclusion – a change in the bank tax – disregarded the non-discrimination limitations placed on states by Congress and changed the meaning of "entire net income as used in federal law" and simply interpreted the bank tax without its full historical context.

[1] The Court of Appeals granted an extension, until August 28, 2024, to file this Petition for Rehearing. *Synovus Bank v. South Carolina Dept. of Revenue*, South Carolina Court of Appeals, case no. 2020-000999 (order dated August 13, 2024).

Second, the Court erred in dismissing the South Carolina Legislature's directive for conformity between the state's bank tax and corporate income tax. Since the inception of the bank tax, South Carolina law has required that "all of the provisions of Chapter 6[, which codifies the general corporate income tax,]" apply equally "[f]or the purpose of administration, allocation and apportionment, enforcement, collection, liens, penalties, and other similar provisions . . . ." S.C. Code Ann. § 12-11-40. Allowing banks to claim NOL carryforwards in computing their "entire net income" under the bank tax, just as other businesses were allowed to do, was necessary to ensure that administration and enforcement of the bank tax did not exceed or violate the non-discrimination limitations established by Congress.

The Court dismissed the significance of S.C. Code Ann. § 12-11-40 as a limited reference to only the procedural provisions of the corporate income tax. That was an error because allowing general businesses to reduce their income under the corporate income tax while not providing the same benefit to banks certainly results in favoring general businesses while discriminating against banks, which was exactly what the National Bank Act prohibited and the Legislature could not have intended.

Third, the Court mistakenly framed the issue in this case as one involving a tax deduction statute. As a result, it construed the phrase "entire net income" narrowly against the taxpayer. This case is not about construing the applicability of a deduction statute, it is about the meaning of the phrase "entire net income," which is part of the statute that ***imposes*** the bank tax. As such, the phrase should have been construed narrowly against the government and in favor of the taxpayer.

Fourth, the Court erred in deferring to the Department's interpretation of "bank tax." This case is about the interpretation of the phrase "entire net income" as that phrase was used in federal law and adopted by South Carolina. Both the Administrative Law Court (ALC) and this Court

gave great deference to the Department based on the lack of case law and legal interpretation of the bank tax. The Department's shifting views on the bank tax and its determination to eliminate a taxpayer's deferred tax assets (which arise from NOL carryforwards) is not one to which this Court should give any deference or weight in a post-*Chevron* world.

The ultimate impact of the Court's decision is a mistaken and misguided interpretation that the bank tax was created in a vacuum, remaining static since 1937, when the tax was enacted. If the bank tax remained static since 1937, without regard to any changes to the income tax in the years that followed, as this Court appears to believe, then banks would most certainly have been subject to discriminatory taxation versus other businesses in South Carolina, because other businesses have been able to reduce their "entire net income" by the amount of NOL carryforwards, but banks have not. The only significant action of the Legislature since 1937 regarding the bank tax is, as Synovus argues, modern conformity to the corporate income tax. Under both the original definition of "entire net income" under the National Bank Act and modern conformity, banks are entitled to reduce entire net income by the amount of their NOL carryforwards. As such, reconsideration is requested and warranted.

II. ARGUMENT

A. The Court Erred in Construing the Bank Tax in Violation of the National Bank Act

South Carolina was authorized to enact its 1937 bank tax on "entire net income" pursuant to the National Bank Act, which was the federal law that exclusively governed a state's ability to tax national banks. Therefore, in construing the meaning of "entire net income" for purposes of the bank tax, the Court should have considered the historical application of the National Bank Act on the bank tax today.[2]

[2] *See* ALC opinion page 13 referencing the importance of the National Bank Act and cases interpreting the National Bank Act, including but not limited to *Tradesman Nat'l Bank of*

Congress enacted the National Bank Act to ensure nondiscriminatory taxation of banks as compared to other businesses.[3] To that end, it prescribed ***only*** four mutually exclusive methods of state taxation of banks.[4] One of those four methods was "a tax on or according to or measured by net income":

> In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the ***entire net income*** received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits . . . .

First Nat'l Bank v. Oklahoma Tax Comm'n, 185 Okla. 98, 90 P.2d 438 (Okla. 1939) (emphasis added).

The National Bank Act's legislative history makes clear that Congress intended that general businesses and banks were "similarly treated by the taxing State."[5] Therefore, "entire net income" for purposes of a state bank tax must have the same meaning of the term for purposes of a state income tax imposed on general businesses. In other words, any modifications to "entire net income" under the general income tax must necessarily modify "entire net income" under the bank tax to avoid having the effect of a discriminatory tax. Thus, when the Legislature amended the

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Oklahoma City v. Oklahoma Tax Comm'n, 309 U.S. 560, 563-64 (1940) ("The plain meaning of the amendment [12 U.S.C.A. s. 548] is confirmed by its legislative history showing beyond a doubt that Congress intended to authorize a franchise tax measured by net income including interest on tax-immune federal securities."); *Pac. C. V. Johnson*, 285 U.S. 480, 490 (1932).

[3] Prior to the enactment of the National Bank Act, taxation on banks was controlled by Congress. *McCulloch v. Maryland*, 17 U.S. 316 (1819) (the Supreme Court held that states could not impose any tax on a national bank); *see* 13 St. c. 106, Sec. 41 (it was not until 1864 that Congress permitted states to impose a property tax on national bank shares, however, no other tax was permitted).

[4] The four mutually exclusive methods of taxation for banks as of 1926 were:

1. An ad valorem tax on national bank shares;
2. A tax on dividends in the taxable income of an owner or holder of national bank shares;
3. The net income of national bank; and
4. A tax according to or measured by the net income of national banks.

[5] *See, e.g.,* H. Rep. No. 526, 69th Cong., 1st Sess. 2 (1926) (allowing the inclusion of income from tax-exempt securities as part of "entire net income" of banks, but only "provided other corporations generally are similarly treated by the taxing State.") (emphasis added).

South Carolina corporate income tax to allow NOL carryforwards in calculating entire net income for purposes of the corporate income tax, NOL carryforwards also became available to banks subject to the bank tax.[6]

Unfortunately, this Court did not consider the complete and complicated history of the taxation of banks (and corporations) before characterizing the NOL carryforward provision as "a new and separate corporate tax deduction" that was specifically authorized by the Legislature and unrelated to the bank tax. *See* Ct. App. Op. at 5-6. That was an error because the Court's conclusion that banks cannot utilize NOL carryforwards in computing their entire net income while general business could, is discriminatory. The Legislature was aware, or is presumed to have been aware, of the National Bank Act and, most certainly, it did not intend to enact an illegal tax given the clear Congressional directive in the National Bank Act. *See* Norman J. Singer, SUTHERLAND STATUTORY CONSTRUCTION, § 51:6 (7th ed.); *See, e.g., Bailey v. State*, 424 S.E.2d 503, 508 (S.C. 1992) (reasoning that the South Carolina Supreme Court "has long recognized that legislative acts are to be construed in favor of constitutionality and will be presumed constitutional absent a showing to the contrary."); *Henderson v. Evans*, 232 S.E.2d 331, 333-34 (S.C. 1977) ("Constitutional construction of statutes are not only judicially preferred, they are mandated; a possible constitutional construction must prevail over an unconstitutional interpretation.").

Indeed, the Court of Appeals acknowledged that both the bank tax and income tax initially had the same bases: *"[a]t the time of the bank tax's enactment, and for several years thereafter, both the bank tax and the corporate income tax were based on entire net income.*" *See* Ct. App. Op. p. 4 (emphasis added). But then, the Court concluded that only the corporate income tax base included NOL carryforwards, relying on an Attorney General's opinion that the bank tax was a franchise tax and based on the fact NOL carryforwards were not in the bank tax section itself.[7] The Court is wrong because no matter the label attributed to

[6] Code of Laws of S.C. § 65-259(13)(A) (Supp. 1955) (NOL carryforwards available to new businesses); § 12-7-705(2)(A) (1980) (NOL carryforwards available for all taxpayers).

[7] Under the National Bank Act, a bank tax could be a franchise tax as long as the impact was not discriminatory. *See* FN 9 and 10 below.

the tax, what is important is that the tax is "based on or measured" by "entire net income." *See Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358 (1991). Indeed, the Legislature itself referred to the bank tax as "Income Tax on Banks" as well as "the income tax provided herein." Code of Laws of S.C. § 2676 (1942). Further, based on the non-discriminatory mandate of the National Bank Act, a change to the corporate tax necessitates a change to the bank tax if the action was discriminatory.

B. The Court Erred in Dismissing the Significance of South Carolina Legislative History Demonstrating Conformity Between the Bank Tax and the Corporate Income Tax

1. The National Bank Act Created "Rolling Conformity" Between the Bank Tax and Corporate Income Tax

The legislative history of the bank tax leaves little doubt that the tax must be interpreted in concert with the corporate income tax, including the application of NOL carryforwards. Stated differently, the National Bank Act required rolling conformity between the bank tax and corporate tax if a discriminatory outcome would occur. This is especially true considering the bank tax has remained essentially unchanged since its inception.[8]

When the Legislature originally enacted the bank tax, it did not provide any definition or means of computing "entire net income." Instead, the Legislature originally and purposefully tied the bank tax base to the income tax code because it was required to by the National Bank Act, by referring to—and explicitly adopting—all the provisions of the income tax code for purposes of defining the bank tax base. Code of Laws of S.C. 1937 (40) 565, § 4 (stating that all of the provisions of the income tax "are hereby adopted and made a part of this Section for the enforcement and administration of this Act").

Thus, the only way that a bank has ever determined the starting point of its liability under the bank tax is through application of the adopted provisions of the corporate income tax code, which long defined "net income" as "the gross income of a taxpayer less the deductions allowed

[8] The history of the bank and corporate income tax is detailed in the record. *See* Appellant Final Br. pp. 4-5, 15-16, 18-24, 27; *see also* R. pp. 386-387; ALC Am. Final Order, pp. 12-16, 27-32.

by this [the corporate income tax] chapter." *See* 1932 S.C. Code § 2443; 1942 S.C. Code § 2443; S.C. Code Ann, § 65-255 (1962); S.C. Code Ann. § 12-7-600 (1976).

Where the Court and Department erred was in placing undue emphasis on the 1948 Attorney General opinion interpreting the bank tax as a franchise tax. [9] A franchise tax was allowed under the National Bank Act as long as it did not discriminate against banks. [10] The problem is the disallowance of NOL carryforwards *does* discriminate against banks.

The point Synovus is making is highlighted by the Court of Appeals' decision. As discussed above, banks could not be discriminated against versus other businesses. Essentially, banks can be subject to a "burden of tax [that] is no higher than that imposed upon other corporations[.]" H.R. Rep. No. 526, 69th Congress (1926).[11] The Court of Appeals' decision focused on just such a violation of the non-discrimination section of the National Bank Act when

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[9] South Carolina was not alone in passing a bank tax during this era. In *Flint v. Stone Tracy Co.* (220 U. S. 107), the U.S. Supreme Court held the language of the National Bank Act was "broad enough to permit a State that imposes corporate excise *or franchise taxes* which are not based on income to apply the net income method to national banking associations, *provided the burden of tax is no higher than that imposed upon other corporations generally under such excise or franchise tax*." (emphasis added). However, if the Court of Appeals' decision is correct, the bank tax was preempted many years ago based on the innumerable changes in the corporate tax code that were not made in the bank tax (unless Synovus is correct and the two tax codes have aways acted together harmoniously with rolling conformity).

[10] In a seminal case also involving the same type of tax as the South Carolina bank tax, a franchise tax, the California Supreme Court, relying on the Supreme Court's decision in *Tradesmans Nat'l Bank*, emphasized that in determining whether a state tax on national banks according to or measured by net income violates the limitation, consideration must be given to the state tax structure as a whole, not merely to taxes of the kind imposed upon those banks. The state tax on them is valid so long as the resulting burden does not exceed the burden to which state banks, are subject. *Security-First Nat. Bank of Los Angeles v. Franchise Tax Bd*., 55 Cal.2d 407, 414 (1961).

[11] The Department has placed an inordinate amount of emphasis on the fact that the bank tax only speaks to the "rate" of tax assessed on banks. However, the term "rate" must be understood to include modifications to the tax base such as NOL carryforwards. Otherwise, the provision would be rendered meaningless. For example, a state would not have been free to impose a tax on net income on non-banks and allow deductions that would reduce the tax to zero while not allowing those same deductions for banks. Viewing a tax rate without reference to the tax base creates an absurd result.

it pointed to South Carolina's 1955 adoption of NOL carryforwards for corporate income tax purposes, while not making a similar adoption for the bank tax. Ct. App. Op. p.5. The 1955 adoption of NOL carryforwards necessarily applied to banks subject to the bank tax, otherwise this action was discriminatory.

In 1969, Congress amended the National Bank Act, 12 USC § 548 (Revised Statutes 5219), to only prohibit a national bank from being treated differently than a state bank. This amendment was not effective until 1972. However, Congress's 1969 amendment to the National Bank Act included a *savings clause*. Pub. L. 91-156, 91 Congress, § 3, 83 Stat. 434, 435 (1969). As stated above, South Carolina was not alone in imposing a bank tax, and state courts have consistently found that when a tax on banks has not been amended after 1972, the statute must continue to be interpreted to conform to the National Bank Act.[12]

Critically important to this case is the fact that at no time since 1972 has the Legislature taken any legislative action related to the bank tax chapter that would impact the savings clause. As a result, what is essentially rolling conformity with the income tax has continued or the bank tax has been preempted innumerable times by the National Bank Act. The only affirmative action taken by the Legislature is, as Synovus has argued, the conformity of Title 12 of the tax code,

[12] *See Siegelman v. Chase Manhattan Bank (USA), Nat. Ass'n*, 575 So. 2d 1041 (Ala. 1991) (holding national banks located outside Alabama could not be subject to the state's 1935 financial institutions excise tax because of 12 U.S.C. § 548. Even after Congress amended § 548, no corresponding amendment was made to Alabama's financial institutions excise tax. Thus, Chase Manhattan Bank, a national bank, continued to not be subject to the financial institutions excise tax because the 1935 tax was constrained by the National Bank Act and there was no subsequent amendment expanding the tax beyond the scope allowable in 1935); *McNamara v. First Commerce Corp.*, 392 So. 2d 467 (La. Ct. App. 1981) (On rehearing, the Louisiana Court of Appeals similarly concluded that Louisiana's exclusion of national banks from its tax on income in 1935 remained in effect even after the subsequent amendment to 12 U.S.C. § 548, allowing Louisiana to tax national banks.)

including the bank tax, to the IRC – which again includes an NOL carryforward deduction. *See* IRC §172.

In other words, either entire net income must be interpreted to remain non-discriminatory in comparison to other businesses or modern conformity applies. Either argument results with the same end – an NOL carryforward is applicable to banks in South Carolina.

The Department does not seem completely oblivious to this issue. Since the inception of the bank tax, the Department has, at times, carried out the intent of the Legislature to interpret the bank tax by incorporating the provisions of the income tax, thereby preserving the validity of the bank tax under the National Bank Act, when questions about the bank tax have arisen.[13] This includes the fact that it initially granted the NOL carryforwards at issue in this very case before reversing its own position. *See* Ct. App. Op. p. 3.

From the very beginning, the Legislature purposefully tied the bank tax base to the income tax code because it was required to do so by the National Bank Act. The Legislature is presumed to be aware of congressional actions. *See* Singer, *supra*, § 51:6. Violating the National Bank Act most certainly was not what the Legislature intended when enacting the bank tax. The South Carolina Supreme Court "has long recognized that legislative acts are to be construed in favor of constitutionality and will be presumed constitutional absent a showing to the contrary." *Bailey*, 424 S.E.2d at 508. "Constitutional construction of statutes are not only judicially preferred, they

[13] SC PLR 95-10 (Aug. 28, 1995) (ruling that "the principles embodied in the Internal Revenue Code sections … which apply to corporations taxed under Chapter 7, Title 12 of the Code should apply to transactions involving banks taxed under Chapter 11, Title 12 of the South Carolina Code of Laws."); *see also* I-D-30 (Aug. 1, 1962); I-D-200 (Aug. 4, 1975) (same); I-D-189 (Jan. 24, 1975) (applying the income tax code for overall method of cash/accrual accounting for purposes of the bank tax); I-D-118 (Feb. 28, 1967) (ruling that for purposes of the South Carolina bank tax, bad debt is deducted in the same manner as for purposes of the corporate income tax); I-D-30 (Aug. 1, 1962) (same).

are mandated; a possible constitutional construction must prevail over an unconstitutional interpretation." *Henderson*, 232 S.E.2d at 333-34. When the Legislature passed the bank tax, it was required to have parity between the income tax and the bank tax.

The ultimate impact of this action is that the tax bases for the income tax and bank tax are now and have always been the same. Since the very beginning, there has been rolling conformity between the bank tax and the corporate income tax. The complete lack of specificity in the definition of "entire net income" and the wholesale lack of change to the bank tax in 85+ years is proof of this intent.

2. Modern Day Conformity with the IRC Supports Synovus' Position

To the extent there is still confusion over the tax basis for the bank tax, that issue was rectified by the Legislature through modern conformity with the IRC. Every year since 1985, the General Assembly adopts the entire IRC in a conformity statute; every year it then excludes specific IRC sections in a Decoupling Statute. In typical fashion, the 2005 General Assembly's Conformity Act adopted the entire IRC except for specific IRC provisions specified under South Carolina law. The Legislature was clear that this conformity framework applies to *all* taxes administered under Title 12 of the South Carolina Code, which includes both the corporate income tax and the bank tax. In 2005, the General Assembly deliberately and significantly changed the language of the Decoupling Statute. *See* S.C. Code Ann. § 12-6-50. Following the 2005 amendment to S.C. Code Ann. § 12-6-50, the Decoupling Statute language was clarified to make clear it included and applied to *all of Title 12*:

> SECTION 12-6-50. Internal Revenue Code sections specifically not adopted by State.
>
> **For purposes of this title and all other titles that provide for taxes administered by the department**, except as otherwise specifically provided, the following Internal Revenue Code Sections are specifically not adopted by this State:

S.C. Code Ann. § 12-6-50 (emphasis added).

The change in language underscored conformity's application to *all of Title 12* and all other "*taxes administered by the Department*," (emphasis added) including the bank tax in Title 12, Chapter 11. *See Id.; see also* Synovus Mot. for Summ. J., Ex. 5.

When Title 12 and its relevant Chapters are reviewed in their entirety, the intent of the Legislature is that banks and corporations are (and have always been) subject to conformity and equivalent, non-discriminatory treatment. The inclusion of banks as legal entities covered by Chapter 6 is also consistent with the overall scheme found in Title 12 (and prior Department determinations (*see* Appellant Initial Br., p.33, FN 11)). The bank tax chapter is short, containing only six sections. The substantive aspects of Chapter 11 address property tax (S.C. Code Ann. § 12-11-30) and the tax rate charged to banks (S.C. Code Ann. § 12-11-20). The bank tax chapter itself directs the taxpayer to Chapter 6 of Title 12 for the administration, enforcement, and collection of the bank tax. There is no more guidance (without conformity with the corporate income tax code) on how banks calculate taxes. *This is especially important after the prior bank tax regulations were repealed post modern conformity*. *See* Appellant Final Br., p. 23. How else would a bank taxpayer know how to calculate "entire net income?" *See* S.C. Code Ann. § 12-11-40.

> The canon of construction "expressio unius est exclusio alterius" or "inclusio unius est exclusio alterius" holds that "to express or include one thing implies the exclusion of another, or of the alternative."

BLACK'S LAW DICTIONARY 602 (7th ed. 1999).

If the Legislature did not intend for modern conformity to apply to the bank tax, it would have made clear that the IRC does not apply to the banks by having the 2005 enactment of Section 12-6-50 state: "For purposes of this Title, except for the bank tax in Chapter 11." It did not do so.

The Legislature deliberately chose to apply the IRC to banks. Any other interpretation is wholly inconsistent with the history of the corporate income tax and the bank tax. Thus, when considering all reasonable conclusions, the joint bank tax and the corporate income tax base of "entire net income" remain unbroken since 1937 and apply to the 2011–2014 years here in dispute, including the applicability of NOL carryforward deductions for banks pursuant to IRC § 172.

C. The Court of Appeals Erred in Construing "Entire Net Income" Against the Taxpayer Because the Issue on Appeal Involves the Construction of an Imposition Statute that Must Be Resolved in Favor of the Taxpayer, not a Deduction Statute

The issue before the Court is whether the phrase "entire net income," as contained in the bank tax imposition statute, must be construed consistently between the bank tax, income tax, and National Bank Act. The South Carolina appellate courts have unequivocally held that tax imposition statutes must be construed in favor of the taxpayer. *See* Appellant Final Br., p. 7; *Hayden v. S.C. Tax Comm'n*, 183 S.C. 38, 46-47,190 S.E. 249, 251 (1937).

However, after the Court of Appeals dismissed modern conformity and failed to consider the significance of historical and rolling conformity, it ultimately focused on the narrow question of whether the bank tax statutes explicitly codify an NOL carryforward deduction for banks. That was an error. Thus, the Court of Appeals erred when it started at the end of the inquiry, instead of the beginning – *essentially placing the cart before the horse*. Whether NOL carryforwards are to be considered in determining "entire net income" should be considered under the imposition standard not the deduction standard. Regardless, to the extent this case is viewed through the lens of a deduction statute, the deduction is clear and unambiguous. It is found in both (1) the very definition of "entire net income" from the origins of the bank tax and (2) is also found through federal conformity with the income tax which specifically allows for NOL carryforward deductions. See IRC § 172. The Court erred in applying the statutory construction principle

applicable to deduction statutes, and instead should have applied construction principles applicable to imposition statutes, which require that such statutes must be construed in favor of the taxpayer.

D. The Court of Appeals Erred in Giving Deference to the Department's Determination that Book Income Should be Used to Calculate the Bank Tax Post-*Chevron*, Misunderstands How Book Income Tax Works, and Is Bad Public Policy

The Court of Appeals granted great deference to the Department's determination that the tax base for the bank tax was a franchise tax and the impact of the term "franchise tax" on the overall bank tax scheme.[14] The Department's error and reliance on the bank tax being a franchise tax began in 1948. The error was then exacerbated based on a myriad of conflicting policy documents and opinions by the Department over the decades since the initial passage of the bank tax. The Court of Appeals' (and Department's) reasoning that the bank tax is based on book income without a NOL carryforward misunderstands how NOL carryforwards apply for book purposes and creates a permanent difference between book and tax income. For financial statement (book) purposes, losses are taken in the year incurred, but a corporation cannot reduce their taxable income below zero, so the excess loss that was incurred and utilized for book purposes, becomes a deferred tax asset for financial statement purposes. *Synovus Bank v. S.C. DOR*, No. 17-ALJ-17-0418-CC, at 86-91 (S.C. Admin. Law Ct. Oct. 17, 2019). Those unused losses are carried forward as a deferred tax asset. Under the Court of Appeals' decision, by prohibiting loss carryforwards, the Court of Appeals has eliminated the accompanying deferred tax asset for book purposes arising from the losses for book purposes – which even the ALC acknowledged was an unfair result which is "an obvious inequity."[15] *See* ALC Am. Final Order, pp. 33.

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[14] *See* FN 9 above.

[15] Pursuant to the ALC, as explained in the Columbia Law Review: "The fundamental proposition underlying the carryover concept is one of tax equity: a taxpayer with a given aggregate income over a period of years whose annual returns vary between profit and loss should not be required to bear a greater tax burden than another taxpayer with the same aggregate income who suffers no annual losses." ALC Op. p. 33.

To the extent the Court gave great deference to the Department's position (see Ct. App. Op. pp. 7-10) all such deference is improper. As Judge Anderson laid out clearly in the ALC opinion, the Department has essentially ignored the bank tax and, when an issue did arise, it most often looked to either the income tax code or the IRC for guidance.[16] Further agency deference should no longer be considered post-*Chevron*.[17]

III. CONCLUSION

As originally stated, any analysis of allowable tax deductions must first start with the base of the tax at hand. In this instance, the question is the definition of "entire net income." The Court erred in its interpretation that the definition of "entire net income" for banks is not equivalent to the corporate income tax. The Court further erred in failing to appreciate that the bank tax and the corporate income tax required rolling conformity to prevent preemption based on a discriminatory impact to the banks due to the innumerable changes to the corporate income tax code over the last 85+ years. Modern conformity confirmed the legislative intent to treat the entire income tax Title,

[16] SC PLR 95-10 (Aug. 28, 1995) (ruling that "the principles embodied in the Internal Revenue Code sections … which apply to corporations taxed under Chapter 7, Title 12 of the Code should apply to transactions involving banks taxed under Chapter 11, Title 12 of the South Carolina Code of Laws."); *see also* I-D-30 (Aug. 1, 1962); I-D-200 (Aug. 4, 1975) (same); I-D-189 (Jan. 24, 1975) (applying the income tax code for overall method of cash/accrual accounting for purposes of the bank tax); I-D-118 (Feb. 28, 1967) (ruling that for purposes of the South Carolina bank tax, bad debt is deducted in the same manner as for purposes of the corporate income tax); I-D-30 (Aug. 1, 1962) (same).

[17] South Carolina's deference doctrine was adopted from "United States Supreme Court precedent, *Kiawah Dev. Partners v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 32, 766 S.E.2d 707, 717 (2014) ("citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). However, under the United States Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), the deference doctrine outlined in *Chevron* is no longer valid, and agencies are no longer entitled to deference from a reviewing court. The United States Supreme Court has instructed courts to apply the "best interpretation" of a statute without giving deference to the agencies tasked with applying statutes and promulgating regulations. As a result, South Carolina's deference doctrine, which is explicitly premised on federal case law, is no longer valid, and the Department is not entitled to deference.

including the bank tax, the same. Instead of reviewing the tax code from its inception and ending with the application of modern day conformity, the Court looked to the original language of the 1937 bank tax and "agree[d] with the ALC that adopting corporate tax statutes for purposes of "administration, enforcement, collections, liens, penalties, and other provisions of enforcement" is not broad enough to incorporate the corporate income tax code for purposes of tax deductions or other modifications." This myopic conclusion misses the point and defies the historical application of the bank tax based on the original Congressional authority given to the Legislature. Further, the Court gave undue and improper deference to the Department in a post-*Chevron* world and critically reviewed this issue under a deduction standard instead of a statutory imposition standard. As a result, Synovus hereby requests a rehearing of this matter.

Dated this 28th day of August 2024.

Respectfully submitted,

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Proof of Service

I certify that I have served Appellant's Petition for Rehearing on Respondent South Carolina Department of Revenue by U.S. First Class Mail.

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