THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals

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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

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Synovus Bank, Appellant,

v.

South Carolina Department of Revenue, Respondent.

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# BRIEF OF AMICUS CURIAE FIRST CITIZENS BANK & TRUST COMPANY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

**Cases**



**Statutes**

## STATEMENT OF ISSUES ON APPEAL

First Citizens Bank & Trust Company adopts and incorporates by reference the Statement of Issues on Appeal set forth in the Initial Brief of Appellant dated September 14, 2020.

## STATEMENT OF THE CASE

First Citizens Bank & Trust Company adopts and incorporates by reference the Statement of the Case set forth in the Initial Brief of Appellant dated September 14, 2020.

## STATEMENT OF FACTS

First Citizens Bank & Trust Company adopts and incorporates by reference the Statement of Facts set forth in the Initial Brief of Appellant dated September 14, 2020.

## STANDARD OF REVIEW

First Citizens Bank & Trust Company adopts and incorporates by reference the Standard of Review set forth in the Initial Brief of Appellant dated September 14, 2020.

## FIRST ARGUMENT

I. The Term "Entire Net Income" as Used in the 1937 Imposition of the Bank Tax and as Now Used in S.C. Code § 12-11-20 to Tax Banks Is Not the Financial Accounting Term of "Book Income" But Is Instead a Well-Settled, Judicially-Determined Tax Accounting Term

A. An Introduction to the Synovus Dispute Shows Banks Suffering Loss-Years—Including the Loss-Years of First Citizens and Synovus—Present a Paramount Question to the Court: Is a Bank's South Carolina Tax Liability Determined by the Financial Accounting Term of "Book Income"?

First Citizens Bank & Trust Company ("First Citizens") and Synovus are similarly situated in that both suffered loss-years while conducting a banking business in South Carolina. In an attempt to account for its loss-year, First Citizens filed with the South Carolina Department of Revenue ("SCDOR") a refund claim seeking overpaid bank taxes for tax years 2015, 2016, and

2017. The excess payments arose from First Citizens' $95 million loss-year of 2014, a loss creating net operating loss ("NOL") carryforward deductions.

However, those carryforward deductions were not claimed when First Citizens paid its taxes and filed its returns for 2015, 2016, and 2017. To correct both the payments made and the returns filed, First Citizens on August 16, 2019, filed with SCDOR amended returns for 2015, 2016, and 2017 listing the NOL carryforward deductions and claiming a refund of $4.3 million in bank taxes overpaid.

SCDOR denied the refund claim on February 3, 2021 and finalized that denial by SCDOR's November 17, 2022, Final Department Determination. Just as Synovus disagreed with SCDOR's determination, First Citizens disagreed as well.

It is that determination by SCDOR in the Synovus controversy that sets this Court's analysis beginning-point as the statutory duty of banks to pay a tax "levied, collected and paid annually with respect to the [bank's] entire net income " S.C. Code § 12-11-20. Thus, to decide Synovus' tax liability (or the liability of any bank doing business in South Carolina), one must first determine the bank's "entire net income".

That determination is at the heart of the Synovus dispute since both parties to the controversy make the meaning of "entire net income" central to their arguments—so much so they both raise positions requiring an answer to the same question. What is a bank's "entire net income"? The parties correctly make that question the center of their arguments[1] since the lower

[1] Synovus' Statement of the Issues: "[The] ALC erred in its determination that the term 'entire net income' does not inherently authorize an NOL carryforward [deduction]. See Initial Brief of Appellant, p. i. SCDOR's Counter-Statement of the Issues on Appeal: "[T]he ALC correctly [held] it was reasonable for the Department to calculate Synovus' 'entire net income' based on its net book income as computed in accordance with GAAP." See Initial Brief of SCDOR, p. 3.

court unequivocally identifies its task as deciding how to calculate "entire net income".[2]

B. The Lower Court's Analysis Holding "Entire Net Income" Means "Book Income" Is in Error Since the Analysis' Beginning Premise—Entire Net Income Means Book Income—Is Incorrect in that by 1937 the Term "Entire Net Income" Had a Judicially-Determined, Well-Settled Tax Accounting Meaning In South Carolina and In Similar Taxing Jurisdictions

While the lower court properly identified the issue as establishing the meaning of the term "entire net income", the Court failed to recognize the term has a well-established, judicially-defined meaning as a tax accounting term, not a meaning of "book income" as used in financial accounting. That point is addressed here.

1. The Lower Court Created an Incorrect Chain of Logic Denying Synovus' NOL Carryforward Deductions Since It Based Its Denial on the Faulty Premise of "Entire Net Income" Means "Book Income", a Financial Accounting Term

In performing its task of deciding the meaning of "entire net income", the lower court recognized the two positions urged upon it by the parties. SCDOR asserted "'entire net income' is based [on] 'book income' or financial net income and not federal taxable income." Amended Final Order, p. 24. (R. p. 28). Synovus' argued "the word 'entire' creates the statutory authorization that allows NOL carryovers." Amended Final Order, p. 27. (R. p. 31).

Of these two positions, the lower court agreed with SCDOR by deciding "entire net income" is properly expressed as a financial accounting term, "book income". Amended Final Order, p. 36 – 39. (R. p. 40 – 43). The Court applies its "book income" decision to Synovus by concluding "because [Synovus] keeps it books according to GAAP, [Synovus'] 'book income' is equivalent to its 'net income' as calculated pursuant to GAAP." Amended Final Order, p. 39. (R. p. 43). Then, further applying its "book income" decision to Synovus, the Court denies the

[2] "The remaining issue following this Court's order on summary judgment [is] how to calculate the base of the tax (entire net income) for the purpose of the South Carolina bank tax." Amended Final Order, p. 1. (R. p. 5).

requested NOL carryforward deductions by holding "NOL carryforwards are [only] statutorily authorized deductions[,] not [deductions within the] ordinary annual expenses [of 'GAAP book income']." Amended Final Order, p. 39. (R. p. 43).

Thus, the lower court's decision relies on a chain of logic with four premises and one ultimate conclusion. The premises: (1) "entire net income" means "book income"; (2) "book income" can be set by the rules of "GAAP"; (3) the rules of "GAAP" have no statutorily created system of income and deductions; and (4) a deduction for NOL carryforwards requires a statutory creation. The ultimate conclusion: therefore, "book income" under GAAP accounting grants no deductions for NOL carryforwards.

The lower court's logic is in error; its first premise is faulty. "Entire net income" does not mean the financial accounting term of "book income". Instead, rather than being a financial accounting concept, "entire net income" is a tax accounting concept combining all tax accounting incomes from whatever source less all tax accounting subtractions allowed as deductions. A survey of applicable authorities proves the point.

2. The Term "Entire Net Income" Has a Judicially-Determined Tax Accounting Meaning from 1924 Which by 1937 Had Become a Well- Settled Meaning In South Carolina and In Similar Taxing Jurisdictions

The lower court correctly began by identifying the need to interpret the term "entire net income" in S.C. Code § 12-11-20. However, in its review, the lower court failed to recognize the commonly-used and well-understood meaning of "entire net income" as being a term from tax accounting, not financial accounting. That failure is examined here.

A court required to interpret the meaning of a statutory term triggers the use of statutory construction as an aid in finding the term's legislative intent. *Media General Communs. v. South Carolina*, 388 S.C. 138, 147, 694 S.E.2d 525, 529 (2010) ("[T]he interpretation of the statute

[invokes 't]he cardinal rule of statutory construction . . . to ascertain and effectuate the intent of the legislature.'"). Legislative intent always begins with examining the meaning of the words used in the statute. *State v. Adams*, 430 S.C. 420, 433 (S.C. Ct. App. 2020) ("In discussing legislative intent, we begin, as always, with the words of the statute."). The meaning assigned to the words under review will have the meaning the words had at the time of enactment. *Summer v. State Highway Comm'n of S.C.,* 143 S.C. 196, 141 S.E. 366, 374 (1928) ("The words of a statute must be taken in the sense in which they were understood at the time when the statute was enacted."). And, if the words used at the time of enactment have acquired a legal meaning, that legal meaning will be applied. *Hughes v. Edwards*, 265 S.C. 529, 536 (S.C. 1975) ("if the words used have a well recognized meaning in law . . . the words are to be presumed to have been used in their legal meaning."); *Pee v. AVM, Inc*., 344 S.C. 162, 168 (S.C. Ct. App. 2001) ("The legislature is presumed to have fully understood the meaning of the words used in a statute and . . . intended to use them . . . in their well-defined legal sense").

When Act 349 of 1937 first applied the term "entire net income" to banks, the term had a decade-old legal meaning established in 1924. In *Crescent Mfg. Co. v. Tax Comm'n*, 129 S.C. 480, 124 S.E. 761, 762 (1924), the Court identifies the question as "whether the [income] tax imposed . . . is limited . . . to such proportion of the recipient's *entire net income* as is derived from sources and operations within the state of South Carolina. *Id.*, 124 S.E. at 762 (Emphasis added.) The Court said "no" and held "entire net income" captures all of a taxpayer's tax accounting income and all of a taxpayer's tax accounting deductions *even if* the income and deductions arose entirely from out-of-state business activities.

The definition supplied by *Crescent Mfg*. gives a meaning with no hint of a suggestion the term "entire net income" means "book income" or the term is produced by financial accounting

concepts. Rather, the *Crescent Mfg*. Court explains, "We think the act, . . . [cannot] be construed and interpreted to limit the tax imposed upon residents and citizens of the state, natural and corporate, to income derived exclusively from sources and operations within the state." *Id.*

Thus, due to *Crescent Mfg*. in 1924, "entire net income" in 1937 had an uncomplicated, judicially-determined legal meaning unrelated to "book income" or financial accounting. "Entire net income" means all of a taxpayer's tax accounting net income irrespective of where the income is earned or the deductions are incurred.

By 1937, the legal meaning of "entire net income" was not only established in South Carolina but had acquired the same well-settled meaning in South Carolina's neighboring states. For Alabama in 1936, see *State v. Weil*, 232 Ala. 578, 584, 168 So. 679, 685 (1936) ("[S]ection 22, . . . imposes the tax on 'every corporation organized under the laws of Alabama and doing business in this State . . . upon and with respect to their entire net income' [and] it seems reasonably clear that the legislative intent was to impose the tax on residents, natural persons, and corporations, within the state's jurisdiction in respect to their entire net incomes, from whatsoever source derived."); for Georgia in 1935, *see Interstate Bond Co. v. State Revenue Comm'n of Ga*., 50 Ga. App. 744, 179 S.E. 559, 559 (1935) ("the tax was assessed on the entire net income of the defendant, from business done outside of Georgia, as well as business done herein, and the execution, which is for the full amount of the assessment, is [objected to by the taxpayer as] therefore proceeding illegally."); for North Carolina in 1931, see *Hans Rees' Sons v. State of N. Carolina ex rel. Maxwell*, 283 U.S. 123, 128 and 133, 51 S. Ct. 385, 387 and 389 (1931) ("Every corporation organized under the laws of this State shall pay annually an income tax, equivalent to four per cent. of the entire net income [b]ut the fact that the corporate enterprise is a unitary one, . . . does not mean . . . the entire net income may be taxed in one state regardless of the extent to

which it may be derived from the conduct of the enterprise in another state.").[3]

Thus, in 1937 "entire net income" was an established tax accounting term, not the financial accounting term of "book income". But, what about the concept in today's post-1937 taxation systems? Is "entire net income" still used as a tax accounting concept? Yes.

The term is still in use in South Carolina. S.C. Code § 12-6-2210(A) ("If the entire business of a taxpayer is transacted or conducted within this State, the income tax as provided in this chapter is measured by the entire net income of the taxpayer for the taxable year."). And the term is not unique to South Carolina. For Delaware, see Del. Code Ann. tit. 5, § 1101A ("If the entire business of a banking organization or trust company . . . is transacted or conducted within this State, 100% of the entire net income shall be apportioned to this State."); for Hawaii, see Haw. Rev. Stat. Ann. § 241-4(a) ("The measure of the tax imposed by this chapter is the entire net income from all sources for the preceding calendar year, or in the case of a taxpayer operating on a fiscal year basis, for the preceding fiscal year."); for New York, see N.Y. Tax Law § 208(9)(i) ("The term 'entire net income' means total net income from all sources, which shall be presumably the same as the entire taxable income, which . . . the taxpayer is required to report to the United States treasury department."); for Iowa, see Iowa Code § 422.63 ("If the net income of the financial institution is derived from its business carried on entirely within the state, the tax shall be imposed on the entire net income"). Hence, in 1937 and today, "entire net income" is a tax accounting term unconnected to "book income" or financial accounting.

[3] The US Supreme Court in *Hans Rees* did not object to North Carolina's tax accounting concept of "entire net income". It objected to North Carolina's unreasonable and arbitrary apportioning of "entire net income". *See Hans Rees' Sons v. State of N. Carolina ex rel. Maxwell*, 283 U.S. 123, 135, 51 S. Ct. 385, 389 (1931) ("[T]he statutory [apportionment] method, as applied to the [Hans Rees'] business for the years in question[,] operated unreasonably and arbitrarily.").

C. The General Assembly Made No Change After 1937 Shifting the Meaning of "Entire Net Income" from a Tax Accounting Concept to a Financial Accounting Concept Meaning Book Income Since To Do So It Would Need to Make Such a Change by Plain, Certain, and Unequivocal Language

The legislature made no post-1937 change moving away from "entire net income" being a tax accounting term. To find a post-1937 reversal adopting a "book income" position to replace the longstanding 1924 tax accounting policy requires the General Assembly declare that position in a fashion that is plain, certain, and unequivocal. *Brewer v. Brewer*, 242 S.C. 9, 24, 129 S.E.2d 736, 744 (1963) ("[T]he legislature will be presumed not to intend to overturn the long established principles of law, and the statute will be so construed, unless an intention to do so plainly appears by express declaration or necessary or unmistakable implication, and the language employed admits of no other reasonable construction."); *Kitchen v. Southern Ry.*, 68 S.C. 554, 565, 48 S.E. 4, 8 (S.C. 1904) ("it is not to be supposed that the legislature will overturn an established principle of law without expressing such intention with irresistible clearness."). First Citizens is unaware of any statute from the General Assembly after 1937 that makes a plain, certain, and unequivocal statement shifting the 1924 tax accounting meaning of "entire net income" to a financial accounting term meaning "book income".

In practice, when the South Carolina General Assembly enacts a tax grounded in financial accounting it does so directly and specifically. That is the method chosen by the General Assembly when it imposed the corporate license tax in Chapter 20 of Title 12.

Chapter 20 of Title 12 imposes a corporate license tax on the right "to do business in this State" measured by the "capital stock and paid-in or capital surplus of the corporation " S.C. Code § 12-20-20 and S.C. Code § 12-20-50. The tax is a franchise tax. *Alderman v. Wells*, 85 S.C. 507, 509, 67 S.E. 781, 782 (S.C. 1910) ("the said corporations had been required to pay the franchise

tax in the proportion to the amount of their capital stock, as required by the laws of the State of South Carolina.").

The measure for the tax is the capital stock and paid-in surplus which, for each, "is the amount reported on the *taxpayer's applicable financial statement*." S.C. Code § 12-20-50(B). (Emphasis added.) The "applicable financial statement" includes, among others, documents "required to be filed with the Securities and Exchange Commission" and "a *certified audited balance sheet*." *Id*. (Emphasis added.)

That is how the General Assembly relies upon "financial accounting" to fix the base for a taxation methodology. The General Assembly's reliance on financial accounting in the corporate license tax is direct, unambiguous, and specific.

Contrast the deliberate and precise means used by the General Assembly in delineating the role of financial accounting for the corporate license tax with the lack of precision identifying any use of financial accounting for the bank tax statutes. For the bank tax statutes, "book income" is *never* mentioned; financial accounting is *never* mentioned. Accordingly, the General Assembly has made no post-1937 decision adopting a "book income" position to replace the longstanding 1924 tax accounting policy used to define "entire net income".

SECOND ARGUMENT

II. Application of "Entire Net Income" as a Tax Accounting Term Grants NOL Carryforward Deductions to Banks

With the above as background, the Court can repair the faulty logic-chain relied upon by the lower court. The corrected logic rests on three premises and one ultimate conclusion. The premises: (1) "entire net income" for banks means tax accounting of income from whatever source derived and tax accounting of deductions from whatever event allowed by law; (2) tax accounting of income and tax accounting of deductions are set by the statutory enactments in Chapter 6 of

Title 12; and (3) Chapter 6 of Title 12 at S.C. Code § 12-6-1130(4) sets the statutory enactment of a deduction for NOL carryforwards. The ultimate conclusion: therefore, "entire net income" includes and allows NOL carryforwards for banks.

As support and proof of the above corrected chain of logic, First Citizens urges the Court to find *Crescent Mfg*. *supra* in 1924 sets the tax accounting meaning of "entire net income". Then, given the General Assembly's deliberate, intentional decision not to create a definition of "entire net income" within the 1937 bank taxation statutes, the Court should find (i) the rules of statutory construction apply for terms like "entire net income" which (when enacted for bank tax purposes) already had a well-defined legal meaning requiring that meaning be applied to "entire net income" for bank taxation, and (ii) the operation of *in pari materia* applies to give "entire net income" the meaning already in use in the corporate income tax statutes.

These circumstances all show the General Assembly intended the 1924 *Crescent Mfg.* tax accounting definition of "entire net income" to apply to bank taxation, not a financial accounting definition meaning "book income". Next, by relying on the tax accounting of income and the tax accounting of deductions as statutorily established in what is now Chapter 6 of Title 12, banks (entities, just as are corporate taxpayers, taxable on "entire net income") are eligible to receive the NOL carryforward deduction permitted by S.C. Code § 12-6-1130(4) and IRC § 172.[4]

## CONCLUSION

The above discussion and arguments present, from First Citizens' Amicus perspective, a reasoned and fair application of the term "entire net income" to the taxation of banks. These views

[4] S.C. Code § 12-6-1130(4) ("A net operating loss deduction is computed in accordance with the Internal Revenue Code except that: . . . (b) No carrybacks are allowed."); 26 U.S.C. § 172(b)(1)(A)(ii) ("A net operating loss for any taxable year . . . shall be a net operating loss carryover [deduction].").

of Amicus should and will stand on their own merits.

However, as a final note we offer for the Court's consideration the unsurprising statement that the current controversy between Synovus and SCDOR is not the first instance in which the judiciary has been asked to settle competing positions between taxpayers and taxing authorities arguing the merits of financial accounting versus tax accounting. Given that such disputes have arisen before, the views of the United States Supreme Court are relevant here:

> [A] presumptive equivalency between tax and financial accounting would create insurmountable difficulties of tax administration. Accountants long have recognized that "generally accepted accounting principles" are far from being a canonical set of rules that will ensure identical accounting treatment of identical transactions. "Generally accepted accounting principles," rather, tolerate a range of "reasonable" treatments, leaving the choice among alternatives to management. Such, indeed, is precisely the case here. Variances of this sort may be tolerable in financial reporting, but they are questionable in a tax system designed to ensure as far as possible that similarly situated taxpayers pay the same tax. If management's election among "acceptable" options were dispositive for tax purposes, a firm, indeed, could decide unilaterally—within limits dictated only by its accountants—the tax it wished to pay. Such unilateral decisions would not just make the Code inequitable; they would make it unenforceable.

*Thor Power Tool Co. v. Comm'r*, 439 U.S. 522, 544, 99 S. Ct. 773, 787 (1979).

From First Citizens' position as an Amicus and as a sister-bank with all other banks doing business in South Carolina, we urge the Court to not allow a meaning of "entire net income" permitting unilateral taxpayer decisions as to a bank's tax liability. Rather, all banks want and need both equitable and enforceable statutes. Neither of those goals is achieved if "entire net income" means "book income".

Respectfully submitted,

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**CERTIFICATE OF COUNSEL**

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The undersigned certifies that this Brief of Amicus Curiae of First Citizens Bank & Trust Company complies with Rule 211(b), SCACR.

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## CERTIFICATE OF SERVICE

The undersigned certifies a true and correct copy of the above **Brief of Amicus Curiae First Citizens Bank & Trust Company** was served this 13th day of March, 2023 via Electronic Mail to the following counsel of record:

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**Subject:** Synovus Bank v. SCDOR, Appellate Case No. 2020-000999
**Attachments:** 2023.03.13 - Motion for Leave to File Amicus Brief and Amicus Brief - Synovus Bank v. SCDOR (First Citizens Bank and Trust Company).PDF

All,

Please see the attached Notice of Motion and Motion for Leave to File an Amicus Brief, and an accompanying Brief of Amicus Curiae First Citizens Bank & Trust Company in the matter referenced above. We are serving this Motion and accompanying Brief on you in accordance with SCACR Rules 211 and 240, and Order of the Supreme Court of South Carolina dated May 6, 2022.

Do not hesitate to contact me if you have any questions or comments.

Thanks,

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Nexsen Pruet has agreed to merge with Maynard Cooper & Gale on April 1, 2023.