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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Case No. 2017-ALJ-1709418-CC
South Carolina Court of Appeals Case No. 2020-000999
Appellate Case No. 2024-001675

Opinion No. 6076 (S.C. Ct. App. Filed July 31, 2024)

Synovus BankPetitioner,

v.

South Carolina Department of Revenue Respondent.

**SYNOVUS BANK’S REPLY TO RESPONDENT’S
RETURN TO PETITION FOR A WRIT OF CERTIORARI**

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I. INTRODUCTION

Under SCACR 242 certiorari is warranted because 1) multiple novel issues of law are raised regarding the statutory application of both legislative conformity to the South Carolina Bank Tax (“SC Bank Tax”) and application of the National Bank Tax Act (“NBTA”) savings clause to the SC Bank Tax basis; 2) substantial constitutional issues are directly involved if statutory construction does not conform the SC Bank Tax to the Internal Revenue Code (“IRC”); 3) there is a conflict with prior decisions of this Court regarding long-standing statutory construction principles; and 4) this case has far-reaching implications for agency deference to a current practice the Court described as a “quagmire” and impacts the entire banking industry. The core questions on which the Petitioner asks this Court to grant certiorari is a determination of the definition of the SC Bank Tax basis, how the tax basis is to be calculated, and how deductions, including a Net Operating Loss (“NOL”) carryforward, are applied to the SC Bank Tax basis.

The SC Bank Tax history is long but nascent. It is clear when the SC Bank Tax was initially passed, it was done under the authorization of the NBTA and is a tax based on income. While the NBTA has been repealed, a savings clause remains that is applicable today. The SC Bank Tax cannot be discriminatory in its application. The Administrative Law Court (“ALC”) found the inequity of the refusal to allow a bank (especially one that is also a corporation) to take an NOL carryforward deduction when other non-bank corporations can take carryforwards for identical losses (foreclosures). Am. Final Order at p. 35, n. 6. R. p. 39.

The NBTA savings clause does not apply if there has been a change in the law. This case is about the refusal of the Department of Revenue (“Department”) to recognize the change when the Legislature began to unequivocally act annually to conform to the IRC *all* tax laws found in *Title 12 that the Department administers*. Conformity repealed all prior tax laws and regulations

beginning in 1985. The Legislature then clarified and continued to comprehensively expand conformity, including for the tax years in question (2009-2014).

Conformity is statutorily applicable to *all* taxes in South Carolina, including the SC Bank Tax. Conformity removed the complicating arguments related to the NBTA and the unconstitutional delegation of the taxing authority to the Financial Accounting Standards Board (“FASB”)/ Generally Accepted Accounting Principles (“GAAP”). If conformity applies to the SC Bank Tax, 26 U.S.C. § 172(a) allowing an NOL carryforward applies – period. *Under either scenario - conformity with the IRC or compliance with the National Bank Tax savings clause - an NOL carryforward deduction is allowed for banks.* Based on the above, Petitioner requests this Court grant certiorari to resolve these longstanding issues surrounding the SC Bank Tax.

II. ARGUMENT

A. Petitioner’s Writ of Certiorari Presents Novel Questions of Law

This case involves the appropriate calculation for the tax basis of the SC Bank Tax and Petitioner’s (the taxpayer’s) reliance on conformity with the IRC and the history of bank taxation to allow for a NOL carryforward deduction. The SC Bank Tax was passed in 1937 pursuant to the NBTA. Since that time, there has not been a single case interpreting the SC Bank Tax. There has been no case addressing the SC Bank Tax basis; no case addressing that the SC Bank Tax is part of Title 12, is a tax administered by the Department, and is a tax conformed with the IRC; no case addressing constitutional issues related to the SC Bank Tax and NBTA savings clause; no case addressing how the Department defines and applies the identical term “entire net income” differently for corporate versus bank taxpayers (which are also corporations) and no case that explains how non-bank corporations and mortgage companies are allowed NOL carryforwards for identical losses (foreclosures) but a corporate bank taxpayer cannot without constitutional issues

arising. As a result, all issues raised in this appeal are novel. The Department attempts to frame the lack of case law as a non-issue. Nothing could be further from the truth.

There is no clarity in the SC Bank Tax on the appropriate tax *basis*, defined as “entire net income,” that is rooted in legislative action (outside of conformity), legal opinion or clear direction from the Department. The lower courts failed to address this critical core issue. As stated in the ALC order, which was adopted by the Court of Appeals:

- “‘entire net income’ is not cogently defined for purposes of the Bank Tax”;
- “the Department has not issued any formal guidance on how it calculates or interprets ‘entire net income’”;
- At the ALC hearing “into this matter, the Department modified its interpretation of how to specifically calculate “entire net income” *during* its argument;
- “the evidence did not show the Department has a long-standing statutory interpretation of how to calculate ‘entire net income.’ Indeed, its current interpretation is nascent”;
- the tax form used by the Department for the SC Bank Tax uses the term “total net income” not entire net income “introducing yet another term to this quagmire” created by the Department;
- For “the Department’s interpretation to be longstanding, it must also be sufficiently known to the legislature such that the legislature can be deemed to have acquiesced to the Department’s interpretation Here, the Department has no formal ruling or publication interpreting the meaning or calculation of ‘entire net income.’”

Am. Final Order at pp. 8, 25-27; R. pp. 12, 29-31. *See also* Tr. Ex. 32 (P.L.R. 95-10).

The only fact that is clear is that the corporate tax basis and SC Bank Tax basis began the same in 1937 and remain that way today through conformity. The Petitioner, the Department and the banking industry deserve definitive clarity on how taxes should be calculated, including how deductions are applied, *especially for banks that are also corporations*. Not asking the question does not make silence the correct answer.

The law in South Carolina is absolutely clear: Taxation requires clarity and cannot rely on mere implications. *See S.C. Elec. & Gas Co. v. Pinckney*, 217 S.C. 407, 412, 60 S.E.2d 851, 854

(1950) (well settled rule that tax statutes cannot be extended by implication beyond the clear import of the language used and any substantial doubt must be resolved against the government and in favor of the taxpayer). Critically, the law was not changed from 1937 until conformity in 1985. As discussed below, accounting practices have changed. The conclusion of the Department, ALC and Court of Appeals partially rely on the current lack of a deduction provision in Chapter 11 combined with the fact that today NOL carryforwards are shown on the accounting balance sheet (not the income statement). However, in the early years of the SC Bank Tax, this would not have been true due to historical accounting practices that placed NOL losses on the income statement, thus eliminating any need for a statutory provision based on the Department's own theory.¹

There is no clarity on the tax *basis* of the SC Bank Tax and any attempt to frame the question as one limited to a deduction puts the cart before the horse. Until the tax *basis* of the SC Bank Tax "entire net income" can be defined, the question of a deduction cannot be answered.

B. The Legislature's Affirmative Action to Annually Conform the Entire Tax Code (Title 12) with the IRC Resolves the Issue of NOL Carryforward Deductions for Banks

The IRC provides for an unequivocal and acknowledged NOL carryforward deduction for banks. This is the end of this story because the annual affirmative action taken by the Legislature in the *imposition statute* to conform the "*State tax laws*" "*for purposes of this title*" 12 to the IRC, applies without limitation and contains *all changes necessary* to administer tax laws:

SECTION 12-6-40. Application of federal Internal Revenue Code to *State tax laws*. . . .

(2)(a) *For purposes of this title*, "Internal Revenue Code" is deemed to contain *all changes necessary for the State to administer its provisions*. . . .

S.C. Code § 12-6-40 (2011); S.C. Code § 12-6-40 (2012); S.C. Code § 12-6-40 (2013); S.C. Code § 12-6-40 (2014) (emphasis added).

¹ See Reply pp. 7-8, n. 4; see also Court of Appeals Final Reply Brief, p. 20 n. 19; R. p 277.

To the extent the imposition statute is not clear, the language of Chapter 11 has always incorporated the income tax code “[f]or the purpose of administration, allocation and apportionment, enforcement, collection, liens, penalties, and other similar provisions . . . that may be appropriate or applicable . . . for the enforcement and administration of this chapter [SC Bank Tax chapter].” *See* S.C. Code § 12-11-40 (2011); S.C. Code § 12-11-40 (2012); S.C. Code § 12-11-40 (2013); S.C. Code § 12-11-40 (2014); *see also* Code of Laws of S.C. 65-402 (1937). Since at least conformity in 1985 and arguably 1937, banks have followed the IRC because they are corporations. Because virtually all tax regulations have been repealed in South Carolina, the Department sends bank taxpayers to the IRC.²

The actions of the Legislature are unequivocal. *See State ex rel. McLeod v. Montgomery*, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (S.C. 1964) (“In seeking the intention of the legislature, we must presume that it intended by its action to accomplish something and not to do a futile thing.”). Both parties agree conformity includes all IRC sections not decoupled. Neither the SC Bank Tax (Chapter 11) nor NOL carryforwards have *ever been* decoupled from the IRC. Critically, the Legislature does not ignore banks during IRC annual conformity.

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: . . .

(9) Sections 581, 582, and 585 through 596 relating to the taxation of banking institutions; . . .

(20) Section 162(r) relating to FDIC premiums.

² On at least three prior occasions, the Department has looked towards the IRC when it was unclear what the bank tax statute means. Tr. pp. 214-217; R. pp. 323-326; Tr. Ex. 22 (PLR 95-10); Tr. Ex. 23 (Tax Commission Letter 94-35); Tr. Ex. 24 (Income Tax Decision I-D 200).

See S.C. Code Ann. § 12-6-50(9) (2011); S.C. Code Ann. § 12-6-50(9) (2012); S.C. Code Ann. § 12-6-50(9) (2013); S.C. Code Ann. § 12-6-50(9) (2014); S.C. Code Ann. § 12-6-50(9)(20) (2018).

Certain sections of the IRC that apply to the banking industry *are* specifically decoupled and the Legislature *continues* to address how conformity applies to banks in its annual review and passage of the applicable Legislation, including the 2018 addition of the decoupling of *FDIC premiums*. The decoupling of the FDIC premiums in 2018 is *conclusive*. Beginning in 2018, Section 162(r) was added to the IRC, limiting the amount banks may deduct for certain premiums paid to the FDIC. This section – only relevant to banks – was decoupled in South Carolina. There would be no reason for the Legislature to decouple this provision (or not place it in the SC Bank Tax) unless conformity applies to banks.

There are no clearer words in statutory construction than “*all*” and “*title*.” Both are found in the imposition and decoupling statutes. The use of these two words obviates the need for additional argument. As this Court has previously recognized, “[q]uestions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below.” *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (S.C. 2011). “The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature.” *Centex Int’l, Inc. v. S.C. Dep’t of Rev.*, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (S.C. 2013) (quoting *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (S.C. 2007)).

Past Department practice has been to defer to the income tax code for the bank tax.³ There is not now, nor has there ever been, any reason for the SC Bank Tax to be amended to include a separate NOL deduction. Why would it? The Legislature originally incorporated the South Carolina income tax into the SC Bank Tax. When viewed in its totality it is clear:

³ See *supra* n. 2.

- The SC Bank Tax refers banks to the corporate income tax statute for all things related to “the enforcement and administration” of the SC Bank Tax. S.C. Code § 12-11-40;
- The imposition statute adopted the application of federal IRC “*to State tax laws . . . [f]or purposes of this title, . . . is deemed to contain all changes necessary*” to enforce tax laws without limitation. S.C. Code § 12-6-40 (emphasis added);
- The decoupling statute applies to “*all of Title 12, including all other titles that provide for taxes administered by the department.*” S.C. Code §12-6-50 (emphasis added);
- Following initial conformity, the Legislature took affirmative action to repeal all taxing regulations that included calculations, *including the Bank Tax regulations.* (S.C. Tax Commission Information Letter 88-14); R. pp. 436-39.
- On the bank tax form, the Department instructs bank taxpayers to use the IRC to determine its initial tax basis and then unilaterally requires a bank to reduce any NOL carryforward without any instruction to do so from the Legislature. Tr. pp. 198-200; R. pp. 307-308.
- The Legislature continued to address banks through the decoupling of FDIC premiums only applicable to banks. S.C. Code Ann. § 12-6-50(9)(20) (2018).

The Court of Appeals incorrectly concluded that conformity does not apply due to a limited reading of Chapter 11 and acquiesced in the Department’s unsupported theory that there was a historically-based legislative scheme to exempt banks from the corporate tax and, later, from conformity. No real authority is cited for the Department’s theory of bank taxation.

The Department admits that originally both entire net income and the base to calculate taxes for corporations and banks were identical. (*See* Return p. 16, “because the South Carolina corporate income tax begins with federal taxable income, it too relies indirectly on book income for the tax base. (R. p. 328).”). That is the very point Petitioner (taxpayer) makes. Both taxes have the same tax basis per the Legislature. Further, both banks and corporations would have been able to take an NOL carryforward based on the Department’s position in the early years of taxation due to the inclusion of losses on the income statement.⁴ Since that time, the accounting profession has

⁴ As of at least 1944, taxes based on income were to be computed and shown on the income statement with the benefit of the carryforward. The carryforward was “shown in the income

changed how an NOL is calculated. According to the Department’s argument, the “entire net income” of a bank is limited to the income statement. The problem is that when the bank tax was originally passed, the NOL would have been located on the income statement as a line item. It is the changes in accounting, none of which have been approved or affirmed by the Legislature, which now result in the NOL residing on the balance sheet instead of the income statement and the Department’s position that an NOL carryforward is not allowed.

When Title 12 is reviewed in its entirety, the intent of the Legislature is clear – banks are subject to conformity. SC Bank Tax conformity with the IRC is a product of indisputable legislative action and resolves all questions raised in this appeal. As a result, an NOL carryforward deduction is allowed under 26 U.S.C. § 172.

C. Entire Net Income Must be Interpreted Consistently for Banks and Non-Banks

1. The National Bank Tax Savings Clause Requires Non-discriminatory Treatment Between Banks and Non-Banks

The record contains a voluminous history of bank taxation. The SC Bank Tax requires non-discriminatory treatment based on the savings clause of the NBTA. The ALC held if an NOL deduction is not applied, it “result[s] in a less favorable outcome for banks than for corporations” – *i.e.*, a discriminatory result.⁵ Am. Final Order at p. 35; R. p. 39. If this Court determines

statement as a separate item.” Both the income tax and NOL were included on the income statement, but the NOL was to be shown as a separate line item to not cause confusion. Showing both numbers on income tax expense gave the reader of the income statement a better understanding of the financial health of the company. (*See* R. p. 747). The Department produced no witnesses to testify about when this practice changed.

⁵ For example, the Department allows out of state mortgage companies with foreclosures to take an NOL carryforward deduction under the corporate tax section but not banks that operate in the state. Tr. pp. 211-13; R. pp. 320-322.

Q. But in one case the bank gets to take the NOL carryforward and the other they don't, correct?

A: Correct.

Tr. p. 213; R. p. 322.

conformity does not apply, the NBTA⁶ saving clause does – *with the same result* – an NOL carryforward deduction applies for banks. To hold otherwise, as did the Court of Appeals in its refusal to reconsider this issue, results in a potential preemption of the SC Bank Tax.

2. The Label Used for a Tax Does Not Change the Tax Treatment Between Banks and Non-Banks

The Court of Appeals and Department appear to have become focused on labels, incorrectly taking the position that the SC Bank Tax is different from the corporate income tax in that it is not a tax on income but measured by income because it is called a franchise tax. *See* Return pp. 17-20. The label applied to a tax has no bearing on the validity of the tax. *See Trinova Corp. v. Michigan Dep’t of Treasury*, 498 U.S. 358, 374, 111 S.Ct. 818, 829 (1991) (“A tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes.”). What does matter is that neither the 1948 Attorney General opinion, nor any regulation, case, nor the Department, has ever defined the term “franchise tax.” As a result, “franchise tax” means nothing in South Carolina. Instead, the Court must determine how the tax is applied to determine

⁶ The Department asserts that Synovus’ argument regarding the NBTA should not be a basis for granting certiorari because it was not timely presented to the Court of Appeals. Contrary to the Department’s position, the NBTA was raised below. In its Amended Final Order, the ALC referenced the importance of the NBTA and cases interpreting the Act. (*See* Am. Final Order at 13; R. p. 17 (quoting *Tradesmen Nat. Bank of Oklahoma City v. Oklahoma Tax Comm’n*, 309 U.S. 560, 563-64 (1940); *Pac. Co. v. Johnson*, 285 U.S. 480, 490 (1932)). The Court of Appeals affirmed the ALC’s decision. (*See* 7/31/2024 Op.) Synovus petitioned for rehearing, citing four reasons that the Court’s July 31 decision was incorrect, including that the Court erred by not considering the significance of the NBTA. (*See* Pet. for Reh’g at 3-6.)

For this Court to proceed without the full statutory record before it – including the NBTA – would be in error. As the ALC recognized, “it is necessary [in this case] to engage in statutory interpretation to determine whether the conformity provisions or other elements of the bank tax law have extended the right to deduct the NOL carryforwards to banks as [Petitioner] suggests.” (Am. Final Order at 11; R. p. 15) To proceed as the Department submits and ignore the NBTA would force this Court to rule on this issue without having all applicable statutes before it. This would ignore legislative intent. Critically, “the legislature is presumed to be aware of prior legislation and does not perform futile acts[.]” *Id.* at 72 (citing *State v. McKnight*, 576 S.E.2d 168, 175 (S.C. 2003)). This Court cannot rule on this issue of statutory construction without having all previous legislation before it, including the NBTA.

what the term means. As admitted by the Department’s expert, the SC Bank Tax is a tax based on income and it must be treated as such – including when a deferred tax asset, like an NOL carryforward, under ASC⁷ 740 is in question:

Q: And under ASC 740, the fact that we call it franchise tax doesn't matter because we all agree that the bank tax is based on income, correct?

A: Any franchise tax that is based on income is subject to accounting under section 740 as Mr. Branch indicated.

Q: And the South Carolina bank tax, don't you agree, it is based on income?

A: It is based on net income.

Tr. p. 203; R. p. 312.

The Department’s contention is illogical considering 1) banks, like Petitioner (taxpayer), are, in fact, corporations and 2) both the corporate taxpayer and the bank taxpayer calculate IRC taxes payable using the same financial statements. As the Department admits, to determine this number, the taxpayer (both corporations and banks) must apply IRC rules as these entities determine federal taxable income, including any NOL carryforward. The SC bank tax form requires the federal taxable income be entered as the starting number for tax liability.

COMPUTATION OF BANK TAX LIABILITY		
1. Federal taxable income from federal tax return (S Corporations - see General Information in Instructions)	▶ 1.	00

Accountants, including the Department’s own expert,⁸ then deduct NOLs based on the bank tax form, which is not legally binding or approved by the Legislature. Tr. pp. 192-193; R.

⁷ ASC is the Accounting Standards Codification created by FASB in 2009.

⁸The Department had the opportunity to present a witness who could testify about historical Department practice and Department access to GAAP. Instead, the Department chose a retired accountant who had filed less than 15 South Carolina bank tax forms in his career. Tr. p.122; R. p. 231. The Department’s expert admitted he thought the bank tax regulations had “dead wood he did not follow” (Tr. p. 188; R. p. 297), he did not think the bank tax form was organized correctly (Tr. p 192; R. p. 301), did not think he had to follow Department guidance if there was no documented position (Tr. p 139; R. p. 248), and acknowledged he relied on his “implicit” understanding, not explicit tax rules, to calculate his SC Bank Tax returns (Tr. p.199; R. p. 308).

pp. 301-302. The Department’s expert admitted this is not a good way to complete a tax form (Tr. pp. 137, 192; R. pp. 246, 301), is not the way he calculated bank tax returns (Tr. pp. 138-139), and the ALC determined the tax form itself created an even greater “quagmire” than before. Am. Final Order p. 8; R. p. 12.

That is the very point Petitioner makes. Both taxes have the same tax basis and are based on income. The Department requires bank conformity with the IRC on its own tax form – until it doesn’t. For reasons not in the record, at some point, the tax form began requiring banks to reduce federal taxable income by any NOL carryforward. This is not a legally acceptable form of taxation that is clear of ambiguity.

D. The Legislature is Presumed to Pass Laws that are Constitutionally Sound

To deny certiorari means an unclear “status quo” will remain. This Court will have agreed that if everyone is doing it – it must be ok. That cannot be the rule of taxation. The Department has previously disavowed the relevance of industry practice.⁹ Now, the Department contends that industry practice is relevant, persuasive and, in fact, binding despite raised constitutional issues.

The constitutional concerns about the delegation of taxing authority are valid. This is not an “imaginary bogeyman.” The Department failed to adequately distinguish *E. Fed. Corp. v. Wasson*, 281 S.C. 450, 316 S.E.2d 373 (1984) which is directly on point and highlights the constitutional deficiencies. For the Department to rely on “book income,” the Department must rely on GAAP and the FASB to make all accounting rules (and as a default under the Department’s position – SC Bank Tax rules). The problems with this are numerous including:

1. Per the Department’s expert, the FASB is a third-party nonprofit

⁹ See Br. of Resp’t in Resp. to the Amicus Curiae Br. of the S.C. Chamber of Commerce in Supp. of Appellant, *Duke Energy Corp.*, p. 3-4, 8-10, *Duke Energy Corp. v. S.C. Dep’t of Revenue*, Docket No. 19-ALJ-17-0153-CC (S.C. Ct. App. argued Oct. 9, 2024).

Q: And do you agree with me that the financial accounting standard boards have been independent boards?

A: Yes.

Q: Do you agree with me that it's a private nonprofit organization?

A: To the best of my knowledge.

Tr. p. 219; R. p. 328.

2. Per the Department's expert, the Legislature has never formally adopted GAAP

Q: Has the legislature ever formally adopted GAAP like they do the federal code for the corporate income statement?

A: Specifically, probably not because they're working off of federal taxable income and not adopting certain sections of federal taxable income that they don't want to reflect in South Carolina, corporate taxable income.

Q: Has the legislature ever adopted GAAP as the interpretation of entire net income through conformity with GAAP?

A: The legislature has been silent since the – as far as I know the legislature has been silent since the original adoption of the bank income tax law, so entire net income has been there, as I understand it, from the very beginning.

Q: And at no point in time did the legislature tell us to look to GAAP?

A: Right. . . .

Tr. pp. 220-221; R. pp. 329-330.

3. Per the Department's expert, the Department has no knowledge, understanding, insight or even basic access to the GAAP principal when they are announced

Q: Do you know if the FASB today is -- can you -- do you have to be a member to access the FASB?

A: Typically you have to subscribe to some service in order to log into the pronouncements and everything.

Q: Do you know if the Department is a member of any such service?

A: I have no idea.

Tr. p. 221; R. p. 330.

This is not a fact of little consequence as GAAP changes “frequently.” Tr. p. 75; R. p. 184. ASC 740, which applies to deferred assets like NOL carryforwards “*has been updated over 50 times alone.*” Tr. p. 75 (emphasis added); R. p. 184. This is primarily because GAAP is not a set of hard and fast rules – as required for taxes. Tr. pp. 74-76; R. pp. 183-185. Instead, GAAP is a set of principles. Tr. p. 74; R. p. 183. This inherently leaves room for “interpretation and judgement”

by accountants. Tr. p. 74; R. p. 183. As a result, large accounting firms interpret and issue guidance on how to apply GAAP, not the South Carolina Legislature. Tr. pp. 75-76; R. pp. 184-185.

The Legislature could not have relied on GAAP when the SC Bank Tax was passed in 1937. The FASB did not exist prior to 1973. Am. Final Order at p. 3; R. p. 7. Both experts agree GAAP does not contain the term “*entire net income*,” GAAP cannot be used for cash-based accounting (which is allowed by the Legislature and results in a different outcome on NOL carryforwards¹⁰), and GAAP does not contain the term “book income.” Tr. pp. 76-80, 187, 191, 198, 218; R. pp. 185-189, 296, 300, 307, 327. GAAP cannot possibly be what the Legislature intended the taxpayer to rely upon for calculating its tax basis in 1937 or today.

Even if GAAP is appropriate, the Department (and more accurately accountants) decided to use only a portion of GAAP – the income statement – not all of GAAP for the SC Bank Tax. This decision was not approved by the Legislature. Tr. p. 205; R. p. 314; *See Terry v. Pratt*, 258 S.C. 177, 183, 187 S.E.2d 884, 887 (1972) (“The legislature may not delegate to an administrative agency its power to make laws”). To account for “entire net income,” all four financial statement must be viewed together. Tr. pp. 81-87; 92; 110; R. pp. 190-196, 201, 219. As explained by Petitioner’s expert when determining entire net income under GAAP’s four financial statements,

You would look at the net income of the business on the income statement but you also have to take into account the balance sheet because the balance sheet is reflecting these future reductions in taxes payable. If you don't look at the balance sheet, you're not going to pick up the benefit to the entity for these assets and you're only looking at it myopically from the income statement and that is not in accordance with GAAP.

Tr. p. 110 (emphasis added); R. p. 219.

¹⁰ GAAP cannot be used for cash-based accounting for banks. Tr. pp. 76-78, 187; R. pp. 185-187, 296. Cash-based accounting allows for a “deduction” until all expenses are paid. This can occur over multiple years and has the effect of an NOL carryforward. Tr. p. 191; R. p. 300. Thus, a different result for taxpayers and a constitutional problem.

The result of only reviewing the income statement is an improper limitation of losses to one fiscal year under GAAP (and is inconsistent with historical accounting practices). Tr. pp. 92-93; R. pp. 201-202. The Legislature did not limit losses to one year or use the term “net income” when it passed the SC Bank Tax. The word “*entire*” has no limitations and such losses would have been found on the income statement at or around the time of the passage of the SC Bank Tax Act.¹¹ The position of the Department is nothing more than an immense unconstitutional government overreach when faced with a question never before asked.¹²

E. Deference to the Department is Mystifying Based on the Holdings of the ALC

The ALC spent pages¹³ detailing the past and inconsistent actions of the Department surrounding the SC Bank Tax and then inexplicably adopted the position of the Department because of past practice. The Court of Appeals, without careful analysis, adopted the same arguments. This is the very definition of deference. But when deference is applied in a case where the reliance is questioned in the same opinion, questions of fairness, equity and legal soundness of the arguments are raised and should be reviewed by this Court on an issue as large and important as the tax basis for a billion dollar a year industry.

The lower courts chose to rely on a “quagmire,” instead of listening to the Department’s own expert who admitted that on at least three occasions¹⁴ the Department has looked to the IRC

¹¹ See *supra* pp. 7-8, n. 4.

¹²The statement by the Department that “the South Carolina banking industry has always understood the bank tax” is based on book income, “without regard to the majority of the book/tax, including the NOL carryforward” (R. p. 589) is an overstatement that relies on facts that are not in the record. The record is devoid of how many banks have taken an NOL carryforward or other deduction over the last 85+ years because the records of other taxpayers are confidential.

¹³ See *supra* p. 3.

¹⁴ See *Supra*, p.5, n. 2.

when the SC Bank Tax was silent – the proper result based on conformity. Tr. pp. 214-217; R. pp. 323-326. For example,

Q: And so when the Department didn't know what to do with the bank reorganization, they looked towards the IRC?

A: Correct.

Tr. p. 215; R. p. 324.

This is the very issue in this matter and a position the Department refuses to acknowledge. For the deference to apply when the Department has no formal ruling or publication on the issue is disingenuous and unfair to the State, the taxpaying Petitioner and the banking industry.

III. CONCLUSION

The statutes that dictate conformity unequivocally allow an NOL carryforward deduction for banks because (1) the SC Bank Tax refers banks to the income tax statute for all things related to “the enforcement and administration” of Chapter 11 (SC Code § 12-11-40); (2) the conformity imposition statute passed by the Legislature adopted the entire IRC for all “*state tax laws* without limitation (SC Code § 12-6-40) (emphasis added); (3) the conformity decoupling statute applies to “*all of Title 12*” (SC Code § 12-6-50) (emphasis added); (4) regulations were repealed and (5) the FDIC would not be decoupled if not applicable to banks.

Failure by this Court to grant certiorari leaves banks searching for the “tax scheme” to follow, continuing to rely on accountants who do not make the tax laws of this state, grappling with the NBTA savings clause and multiple constitutional issues. After 85+ years, the Petitioner, the Department and the banking industry deserve clarity on how the SC Bank Tax should be properly calculated, including how deductions are applied. Petitioner Synovus respectfully requests this Court grant certiorari to provide this definitive guidance.

Dated this 18th day of December 2024.

Respectfully submitted,

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