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Jan 15 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the South Carolina Supreme Court

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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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**MOTION TO CERTIFY THE ABOVE CAPTIONED APPEAL  
FOR REVIEW BY THE SOUTH CAROLINA SUPREME COURT  
PURSUANT TO RULE 204(b) OF THE SCACR**

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This matter as captioned above is pending on appeal before the South Carolina Court of Appeals. However, Rule 204(b), SCACR, authorizes the South Carolina Supreme Court to certify a case for review by the Supreme Court rather than by the Court of Appeals. Certification to the Supreme Court is proper “where the case involves an issue of significant public interest or a legal principle of major importance.” Rule 204(b), SCACR. Under Rule 204(b), SCACR, Appellant Synovus Bank (Synovus) moves to certify this case for review by the South Carolina Supreme Court because the matter on appeal is one of significant public interest and involves legal principles of major importance.

**THIS CASE INVOLVES ISSUES OF SIGNIFICANT PUBLIC INTEREST**

This dispute impacts the entire banking industry of South Carolina. This dispute arises from Synovus seeking a deduction for a net operating loss carryforward when computing its South

Carolina bank tax liability. A net operating loss is defined as “[t]he excess of operating expenses over revenues, the amount of which can be deducted from gross income if other deductions do not exceed gross income....” Further, an NOL “carryforward” or “carryover” is “[a]n income tax deduction (esp. for a net operating loss) that cannot be taken entirely in a given period but may be taken in a later period.” *Carryforward*, BLACK’S LAW DICTIONARY 227 (8th ed. 2004).

The South Carolina Department of Revenue (Department) disallowed the NOL deduction by asserting no such deduction is allowed against “book income,” the tax base used by the Department for taxing banks. Synovus claims (among other assertions) banks are not taxed on “book income.” Instead, banks are taxed on South Carolina taxable income, a tax base which allows deductions for NOLs under the income tax code which is specifically adopted and made part of the bank tax pursuant to S.C. Code § Ann. 12-11-40. It is this fundamental difference between “book income” and “South Carolina taxable income” that produces a change in the way banks have paid taxes for the past eighty years.

South Carolina first imposed an income tax in 1897 but subsequently passed the Income Tax Act of 1922 adopting the then existing federal tax code. The 1922 Act required South Carolina taxpayers to pay a South Carolina income tax equal to 33.3% of the tax paid to the federal government. South Carolina repealed and replaced the 1922 Act with the Income Tax Act of 1926. The 1926 Act created a unique tax code specifically designed for South Carolina, one no longer based on the federal tax code. The 1926 Act imposed taxes on the “entire net income” of all corporations, including for-profit corporate banks, at a tax rate of 4%. Thus, banks and all other taxable corporations paid an income tax on the same base—entire net income.

Then, in 1937, the General Assembly imposed a tax specific only to banks (the “bank tax”). The bank tax was imposed at a rate higher than the tax on other corporations (banks taxed at 4.5%,

other corporations at 4%). The bank tax was imposed on the bank's "entire net income" with "entire net income" not being defined in the bank tax statutes. The General Assembly used the term "entire net income" in the bank tax, which was the identical terminology the General Assembly was already using to tax the income of corporations. 1937 S.C. Acts § 563(2). Thus, before 1937, banks and other corporations were paying an income tax on the same tax base of "entire net income" and, logically so, after 1937, banks and other corporations were paying an income tax on the same tax base of "entire net income."

What happened next remains a mystery. From 1937 to 1948, no testimony from any expert of either Synovus or the Department identifies any legislative action changing the meaning of "entire net income" in the bank tax statutes from the meaning of "entire net income" in the corporate tax statutes. Rather, the only event the experts can point to for the Department concluding "entire net income" in the bank tax changed from the meaning of "entire net income" in the corporate tax statutes is a terse 1948 opinion from the South Carolina Attorney General.

In 1948 the Attorney General in a three paragraph letter opined "the bank tax is a franchise tax for the privilege of operating, or doing business in this State, the amount thereof being measured by the entire net income [and banks] are permitted to deduct all expenses incurred in the operation of their banks including Federal and State income taxes." This single event apparently caused accounting firms to treat "entire net income" in the bank tax as having a meaning wholly different and totally foreign to the meaning of the exact same phrase in the corporate income tax statutes. According to the Department, despite no substantive legislative change in the corporate tax or in the bank tax, the term "entire net income" in the bank tax was transformed into a tax on "book income" while the same phrase meant South Carolina taxable income based on gross income and tax deductions in the corporate tax statutes. And, to make the transformation of the bank tax

to a tax on “book income” even more confusing, the Department did not provide in 1948 and does not provide today any definition of “book income.”

Accordingly, for purposes of this Court’s examination of the presence of issues of significant public interest, Synovus believes several unopposed observations are noteworthy. First, the term “entire net income” is not defined in the bank tax statutes. After more than eighty years of indecision, the time for a definition has come. Second, the inability of the banking industry to comply with its taxing duties to pay tax based on “entire net income” is compounded by the Department not having defined the term. Instead, banks have simply been told by the Department to treat “entire net income” as meaning “book income” with no definition given by the Department as to what “book income” means. Third, the lack of understanding as to the meaning of “entire net income” has continued because, until now, the Department’s direction to pay tax on “book income” has never been examined by any court of law. Fourth, the only authority offered by the Department of Revenue for banks paying tax on “book income” is a 1948 opinion of the Attorney General which opinion never uses the term “book income.” Fifth, and finally, the impact on the banking industry from the South Carolina Administrative Law Court’s decision is significant since the Court candidly concludes “[t]o the extent the Department asserts that ‘book income’ means GAAP is the required accounting methodology to be used, the Court finds this is . . . incorrect [but instead ‘b]ook income’ represents the revenues minus [expenses] based upon whatever accounting method is used, which may be GAAP.” ALC Final Order and Decision, fn. 33, April 17, 2020. Thus, under the view of the lower court, two identical banks with the same income and same expenses can pay dramatically different amounts of bank tax simply by each bank determining its “book income” by “whatever accounting method is used.” Given such a standardless measure of

tax, confusion is inevitable. Avoidance of disarray in the taxation of banks warrants certifying this matter for review by the South Carolina Supreme Court.

Besides the above discussion of the public impact of a decision in this litigation, the need for clarity on the tax base to be used by banks will only increase not only for today but into the future because of COVID-19. The NOLs at issue in this matter result from losses incurred in the economic crash of 2008 during the last recession. The significance of this litigation on banks as they weather the COVID-19 storm cannot be understated. Banks operating in South Carolina must have clarity as to whether losses suffered during the current economic downturn can be carried forward to offset future potential tax liabilities.

**THIS CASE INVOLVES LEGAL PRINCIPLES OF MAJOR IMPORTANCE**

**1. The Dispute Here Involves the Major Legal Principle of What Tax Base Exists for the Bank Tax**

The above discussion of issues of public interest demonstrates this controversy raises legal principles of major importance. For example, no position is more fundamental to taxation than setting the base upon which a tax is imposed. Here, the Department says the base is “book income” in the context of financial accounting with reliance upon non-uniform public accounting terminology for income and expenses. Synovus says the base is “entire net income” in the context of tax accounting with reliance upon uniform code-defined terminology for taxable income and tax deductions. Deciding which base is proper—a public accounting base or a code-defined taxable income base—raises issues of sufficient legal principles to warrant certifying this matter for review by the South Carolina Supreme Court.

**2. The Dispute Here Involves the Legal Principle of Unlawful Delegation of Taxing Powers**

This is no small matter for publicly traded companies. Financial accounting is governed by Generally Accepted Accounting Principles (GAAP). Publicly traded companies are required to use GAAP for accounting purposes. GAAP is a systematization of accounting rules established by the Financial Accounting Standards Board (FASB). The FASB is the independent, private-sector, not-for-profit organization that establishes financial accounting and reporting standards for public and private companies and not-for-profit organizations. The Department's directing of banks to use "book income" raises an issue of major legal importance since basing the bank tax on financial accounting, and therefore requiring the use of GAAP, means the Department is unconstitutionally committing the General Assembly's taxing power to FASB, an independent, private-sector organization.

**3. The Dispute Here Involves the Legal Principle of the Standard of Review for Agency Deference**

Agency deference is a key issue in this litigation. Whether administrative views are entitled to any weight and, if so, to what extent, are matters for our courts to decide. In the pending matter, the South Carolina Administrative Law Court (ALC) identified a new standard under which administrative interpretation shall be entitled to deference in South Carolina and when deference to an agency and its views will not be given.

In brief, the Department argued the ALC may defer the Department's position under either of two separate standards. The first is when the agency charged with administering a statute interprets a statute that is a silent or ambiguous. This facet for agency deference was addressed in *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Environmental Control*, 411 S.C. 16, 32-33, 766 S.E.2d 707, 717 (2014) (Kiawah). The Department argued a second standard can apply when

the agency has taken a uniform position for many years so that it can be characterized as a long-standing interpretation of a statute or regulation. This was addressed most recently in *Charleston Cnty. Assessor v. Univ. Ventures, LLC*, where the South Carolina Supreme Court noted “[w]e have previously ‘held in many cases that where the construction of the statute has been uniform for many years in administrative practice, and has been acquiesced in by the General Assembly for a long period of time, such construction is entitled to weight, and should not be overruled without cogent reasons.’” 427 S.C. 273, 289, 831 S.E.2d 412, 420 (2019) (quoting *Etiwan Fertilizer Co. v. S.C. Tax Comm’n*, 217 S.C. 354, 359, 60 S.E.2d 682, 684 (1950)).

The ALC reviewed these decisions and determined these holdings must not be treated as separate and unrelated principals but as part of an overall consideration of when it is appropriate to apply agency deference. Agency deference and the standard of review to be applied to agency deference is one critical to all aspects of state government and the citizens to South Carolina. The standard for agency deference is a proper basis upon which certification should be granted for review by the Supreme Court.

Wherefore, based on all the above, Synovus Bank asks that its motion under Rule 204(b) for certification for review by the South Carolina Supreme Court be granted.

Dated this 15th day of January 2021.

Respectfully submitted,

s/Ashley P. Cuttino

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Proof of Service

SC Court of Appeals

I certify that I have served Synovus Bank's MOTION TO CERTIFY THE ABOVE CAPTIONED APPEAL FOR REVIEW BY THE SOUTH CAROLINA SUPREME COURT PURSUANT TO RULE 204(b) OF THE SCACR by U.S. First Class Mail.

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