[J-135-2012]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, ORIE MELVIN, JJ.

LEBANON VALLEY FARMERS BANK,	: No. 78 MAP 2011
	:
Appellant	: Appeal from the order of Commonwealth Court at No. 698 FR 2005 dated 08-04-2011 dismissing the exceptions and
v.	: entering judgment of the 02-12-2009 order that affirmed the decision of the Board of Finance & Revenue dated 10-18-2005,
COMMONWEALTH OF PENNSYLVANIA,	: exited 10-21-2005 at No. 0504946.
	:
Appellee	: ARGUED: November 27, 2012

OPINION

MR. JUSTICE EAKIN **DECIDED: December 27, 2013**

Appellant, Lebanon Valley Farmers Bank (LVFB), appeals from the August 4, 2011, order and opinion of the en banc Commonwealth Court dismissing its exceptions to the February 12, 2009, order and opinion of the Commonwealth Court, which affirmed the order of the Board of Finance and Revenue. This is an appeal as of right pursuant to 42 Pa.C.S. § 723(b).[1] After careful review, we reverse.

The stipulated facts show Farmers Bank was a Pennsylvania chartered bank, and a subsidiary of Fulton Financial Corporation, which merged with Keystone Heritage Group, Inc. The merger made Fulton the parent company of Lebanon Valley National Bank, which merged with Farmers Bank as part of the transaction, thereby forming LVFB.

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[1] 42 Pa.C.S. § 723(b) provides: "Any final order of the Commonwealth Court entered in any appeal from a decision of the Board of Finance and Revenue shall be appealable to the Supreme Court, as of right, under this section." Id.

Prior to the merger, both Farmers Bank and National Bank were "institutions" subject to the Shares Tax, 72 P.S. §§ 7701-7706.

The Shares Tax is set forth in Article VII of the Pennsylvania Tax Reform Code; it is imposed on the average taxable amount of a banking institution's shares of capital stock. "[C]alculation of the tax is based on the book value of the bank's net assets (adjusted to deduct value attributable to United States obligations)." Allfirst Bank v. Commonwealth, 933 A.2d 75, 81 (Pa. 2007) (citing 72 P.S. § 7701.1). The Shares Tax has three provisions relevant to the present claim. First, the tax is imposed only upon "institutions," which is defined to include "[e]very bank operating as such and having capital stock which is incorporated under any law of this Commonwealth, under the law of the United States or under the law of any other jurisdiction and is located within this Commonwealth." 72 P.S. § 7701.5 (emphasis added). Thus, an out-of-state bank is not an "institution" for purposes of the Shares Tax, and thus, is not subject to the tax.

Second, in order to mitigate the effect of year-to-year fluctuations in value, the Shares Tax mandates an averaging method for calculating the taxable amount of shares — the tax is not imposed on present value but on the six-year average value. Specifically, § 7701.1(a) (the "averaging provision") of the Shares Tax provides:

> The taxable amount of shares shall be ascertained and fixed by adding together the value determined under subsection (b) for the current and preceding five years and dividing the resulting sum by six. If an institution has not been in existence for a period of six years, the taxable amount of shares shall be ascertained and fixed by adding together the values determined under subsection (b) for the number of years the institution has been in existence and dividing the resulting sum by such number of years.

Id., § 7701.1(a).

Third, to prevent corporate maneuvering from creating this loss of revenue when two institutions merge, § 7701.1(c)(2) of the Shares Tax (the "combination provision") provides, in pertinent part:

> [T]he combination of two or more institutions into one shall be treated as if the constituent institutions had been a single institution in existence prior to as well as after the combination and the book values and deductions for United States obligations from the Reports of Condition of the constituent institutions shall be combined.

Id., § 7701.1(c)(2).

For the 2002 tax year, LVFB filed a Bank Shares Tax return, which included National Bank's pre-merger value in its calculation of its six-year average share value, as required by the combination provision. However, in 2005, LVFB filed a petition with the Board of Appeals, seeking a refund of the portion of its 2002 tax payment attributable to National Bank's pre-merger share value. It claimed disparate treatment because the combination provision is inapplicable when mergers involve out-of-state banks or banks less than six years old. In fact, the Commonwealth Court has held, under the plain language of the statute, the combination provision applies only to combinations of "institutions" (i.e., banks with Pennsylvania locations). First Union National Bank v. Commonwealth, 867 A.2d 711, 716 (Pa. Cmwlth.), exceptions dismissed, 885 A.2d 112, 114 (Pa. Cmwlth. 2005), aff'd per curiam, 901 A.2d 981 (Pa. 2006). Thus, the pre-combination value of an out-of-state bank is not included in a surviving institution's six-year average value calculation under the terms of the statute.

LVFB argued the "First Union rule" affords disparate treatment for mergers of Pennsylvania and non-Pennsylvania banks, in violation of the Uniformity Clause. The Board of Appeals rejected the claim, and LVFB appealed to the Board of Finance and Revenue. Relying on First Union, the Board also denied the appeal. The Commonwealth Court initially affirmed, finding because the combination provision was revenue neutral, it did not violate the constitutional requirement of uniformity. Lebanon Valley Farmers Bank v. Commonwealth (Farmers Bank I), 965 A.2d 1249, 1253 (Pa. Cmwlth. 2009). The court relied on the Commonwealth's explanation of the averaging provision, in light of First Union, as treating newly-acquired out-of-state banks "in the

same manner as an institution that has not been in existence for six years." Id., at 1253 n.10 (citing 72 P.S. § 7701.1(a)).

LVFB filed exceptions asserting the court misunderstood the share value calculation required by the combination provision and First Union, and the court directed the matter to an en banc panel. In reply, the Commonwealth admitted its prior explanation to the court was incorrect and conceded the averaging provision will render an artificially low share value if either (1) an out-of-state bank is merged into an in-state bank, or (2) an in-state bank in existence for less than six years is merged into another in-state bank with a longer history. Lebanon Valley Farmers Bank v. Commonwealth (Farmers Bank II), 27 A.3d 288, 292-93 (Pa. Cmwlth. 2011) (en banc) (citation omitted). In either of these situations, the averaging calculation used by the Commonwealth assigned a zero taxable share value for a bank for years in which it was not subject to the Shares Tax. Although "the disparity is eventually dissipated, the lost value during the first few post merger years, and the tax which should have been paid on those values, is never recovered." Id., at 294. Because such dilution is unavailable to mergers between institutions that have been subject to the Shares Tax for six or more years, the court concluded the statutory scheme resulted in an unconstitutional lack of uniformity. Id.

The court, however, did not agree that this lack of uniformity required the severance of the combination provision, finding "the lack of uniformity occurs [only] when the combination provision is coupled with the use of an average share value." Id. The court reasoned, severing the combination provision in its entirety would frustrate the statutory purpose of the averaging methodology by favoring institutions which have recently undergone a merger over those that have not. Instead, the court held the averaging methodology should "be severed or limited when the taxable amount of shares results from the merger of an institution with a[n out-of-state bank] or an institution that

has been in existence for fewer than six years[.]" Id., at 297. Consequently, the court overruled First Union insofar as it "sanctions use of the six-year averaging methodology to calculate taxable amount of shares following a merger of an institution with an out-of-state bank or an institution fewer than six years old[.]" Id., at 298.

In sum, the court held that when two Pennsylvania banks merge, the present and historical share values of each are combined and averaged over the past six years. See 72 P.S. § 7701.1(a), (c)(2). However, when a Pennsylvania institution combines with an out-of-state bank, the surviving institution (if subject to the Shares Tax) would be treated as a new institution with only the post-merger values of each considered in calculating the taxable share value. Farmers Bank II, at 298. Finally, when two Pennsylvania banks merge, one of which is fewer than six years old, the surviving institution will be treated as if it were the age of the newer constituent institution. Id., at 298 n.16.

As a result, the court held LVFB, as the survivor of the merger of two Pennsylvania banks, must report a taxable share value which averages the combined share value of each constituent institution over the past six years and is, therefore, not entitled to a refund. See id., at 298. However, the court ordered the Commonwealth "to provide meaningful retrospective relief" to cure LVFB's non-uniform treatment. Id., at 299.

LVFB appealed, and this Court heard argument on whether the Shares Tax violates the Uniformity Clause and, if so, which remedy is proper. In addition, we considered the following issues on briefs:

> Whether the Court's use of overly simplified examples caused it to misapprehend the facts and arrive at the erroneous legal conclusion that its holding "will yield a fair approximation of full share value for all institutions."
>
> Whether proper application of principles of stare decisis should have precluded the Court from overruling the decision in First Union, a decision which was affirmed per curium [sic] by the Supreme Court of Pennsylvania.

Appellant's Brief, at 4-5. A challenge to the constitutionality of a statute presents this Court with a question of law; thus, "our standard of review is de novo, and our scope of review is plenary." Schwartz v. Rockey, 932 A.2d 885, 891 (Pa. 2007).

Initially, LVFB argues the issue of whether the Shares Tax violates the Uniformity Clause is not properly before us because the Commonwealth failed to file a cross-appeal challenging the Commonwealth Court's uniformity holding, and LVFB's appeal only challenged the remedy prescribed. In response, the Commonwealth asserts it was not required to file a cross-appeal since the Commonwealth Court's judgment granted the relief it sought. Moreover, the Commonwealth argues it is entitled to present arguments in support of the Commonwealth Court's judgment, which it seeks to have affirmed, even if those arguments differ in some respects from the reasoning relied upon by the Commonwealth Court. We agree the Commonwealth was not required to file a cross-appeal, and its argument challenging the Commonwealth Court's Uniformity Clause holding is properly before us.

Pennsylvania Rule of Appellate Procedure 501 provides, "any party who is aggrieved by an appealable order … may appeal therefrom." Pa.R.A.P. 501 (emphasis added). The Note to Rule 511 further states, "An appellee should not be required to file a cross appeal because the [c]ourt below ruled against it on an issue, as long as the judgment granted appellee the relief it sought." Id., 511 note (citation omitted). "Pennsylvania case law also recognizes that a party adversely affected by earlier rulings in a case is not required to file a protective cross-appeal if that same party ultimately wins a judgment in its favor; the winner is not an 'aggrieved party.'" Basile v. H & R Block, Inc., 973 A.2d 417, 421 (Pa. 2009) (citation omitted) (emphasis in original). Moreover, several Justices of this Court have gone a step further and suggested such appeals should not be permitted. See id., at 424 (Saylor, J., concurring) (footnote omitted)

(asserting "[protective] cross-appeals generally should not be permitted" given that "the collective burden of screening and addressing such cross-appeals may outweigh the benefits from the opportunity for an appellate court to advance the resolution of the litigation in individual cases"); id., at 426-27 (Baer, J., concurring) (writing "separately to second Justice Saylor's inclinations to deem protective cross-appeals impermissible" because "refusing to hear [them] will streamline cases on appeal and prevent prevailing parties from deluging the courts with unnecessary protective cross-appeals[,]" and noting such practice would "eliminate[] the question of whether a non-aggrieved party filing a protective cross-appeal must raise every potential appealable issue for fear of waiver").

While appellant cites a case in which this Court has found an issue waived due to a party's failure to raise the same on cross-appeal, that case is distinguishable as it involved an issue on which the lower court's holding was adverse to the appellee. See Pennsylvania Human Relations Commission v. Alto-Reste Park Cemetery Association, 306 A.2d 881, 885 (Pa. 1973) (holding appellee precluded from challenging propriety of amended final order — issue decided adversely to it by Commonwealth Court — where failed to raise same in cross-appeal). In Alto-Reste, the Commission ordered Alto-Reste to undertake specific measures to end its discriminatory burial acceptance practices. On appeal, the Commonwealth Court affirmed, but modified the final order by deleting several of the specific measures. The Commission appealed the Commonwealth Court's modification. On appeal, Alto-Reste challenged the propriety of the amended final order of the Commission, an issue not raised by the Commission and decided adversely to Alto-Reste by the Commonwealth Court. We held Alto-Reste's challenge was waived by its failure to raise the same in a cross-appeal.

Here, the Commonwealth Court's judgment granted the relief the Commonwealth sought — LVFB's refund request was denied — even though the court disagreed with the

constitutionality argument proffered by the Commonwealth to reach that result. While the Commonwealth certainly could have filed a cross-appeal raising a challenge to the Commonwealth Court's constitutionality determination, this Court refuses to require such a filing where the court's holding granted the relief sought, although based on an alternate reasoning.

Moreover, any positive impact stemming from the filing of a protective cross-appeal is greatly outweighed by its negative impact on court efficiency. The court system is constantly inundated with appeals. "[R]efusing to hear protective cross-appeals will streamline cases on appeal and prevent prevailing parties from deluging the courts with unnecessary protective cross-appeals." Basile, at 427 (Baer, J., concurring). Protective cross-appeals by a party who received the relief requested are not favored. As such, a successful litigant need not file a protective cross-appeal on pain of waiver.

Finding the Commonwealth Court's constitutionality ruling is properly before us, we move to the merits of this appeal. The Uniformity Clause prescribes "[a]ll taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." Pa. Const. art. VIII, § 1. "Taxation, however, is not a matter of exact science; hence[,] absolute equality and perfect uniformity are not required to satisfy the constitutional uniformity requirement." Clifton v. Allegheny County, 969 A.2d 1197, 1210 (Pa. 2009) (citing Leonard v. Thornburgh, 489 A.2d 1349, 1352 (Pa. 1985); In re Harleigh Realty Co., 149 A. 653, 654 (Pa. 1930) ("Scientific formulae, arithmetical deductions and mental contemplations, have small value in making assessments under our practical system of taxation.")). "Some practical inequalities are obviously anticipated, and so long as the taxing scheme does not impose substantially unequal tax burdens, rough uniformity with

a limited amount of variation is permitted." Id., at 1210-11 (citations omitted); see also Delaware, L. & W. R. Co.'s Tax Assessment, 73 A. 429, 430 (Pa. 1909) (noting Uniformity Clause requires only substantial uniformity, "which means as nearly uniform as practicable in view of the instrumentalities with which and subjects upon which tax laws operate").

A taxpayer who believes he has been subjected to unequal taxation due to an allegedly unconstitutional statute must demonstrate: "(1) the enactment results in some form of classification;[2] and (2) such classification is unreasonable and not rationally related to any legitimate state purpose." Clifton, at 1211 (citation omitted). When this Court is presented with such a challenge, we must remain cognizant of the General Assembly's broad authority and wide discretion in taxing matters, see Wilson Partners, L.P. v. Commonwealth, Board of Finance and Revenue, 737 A.2d 1215, 1220 (Pa. 1999), and the presumption of constitutionality afforded to statutes. See 1 Pa.C.S. § 1922(3). Thus, a tax enactment will not be invalidated unless it "'clearly, palpably, and plainly violates the Constitution.'" Clifton, at 1211 (quoting Wilson Partners, at 1220).

The Commonwealth Court described its result as "limited severance," applicable to the averaging provision when certain banks merge. As noted previously, this tax is not based on current assets, but on the average assets of the institution over the prior six years. The averaging provision is not an adjunct section applicable or inapplicable depending on the corporate history of the institution. See 72 P.S. § 7701.1(a). To hold

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[2] Neither party challenges the treatment of institutions formed from the merger of two institutions or institutions formed from the merger of an institution with an out-of-state bank or a bank in existence for less than six years as members of the same class for purposes of the Uniformity Clause. Accordingly, they will be treated as members of the same class.

it applicable some of the time but not others is not appropriate, for it is the express statutory methodology of calculating the tax for every taxable institution.

The "non-uniform" treatment arises from the combination provision, which treats the joinder of previously taxable institutions in such a manner as to prevent the dissipation of historically taxable assets. The averaging provision clearly applies to all institutions and does not speak at all to combinations. The combination provision in turn is silent on the methodology applicable to a combination of an institution and a non-institution; in that situation, it simply does not apply. See id., § 7701.1(c)(2).

There is an initial confounding of the analysis because of the differences in language between corporate law and tax law. Merger is not the only method for companies to consolidate; indeed, the parties' briefs speak of bank acquisitions as opposed to bank absorptions, and of surviving institutions rather than new institutions. The question of what form of combination occurred and what corporate term describes the resulting institution is one of corporate jargon, not Shares Tax application.[3]

The Shares Tax is only applicable post-merger if there is an "institution" to tax. When the merger or combination adds previously untaxed assets to the institution's value, the complaint is that the averaging calculation used by the Commonwealth treats the assets as previously non-existent. The assets, however, are new to the reach of Pennsylvania's tax. While these assets may have existed pre-merger, they were not subject to tax pre-merger. The Commonwealth thus benefits from such a merger, as the addition of taxable assets enriches the public coffers.

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[3] When asked whether a merger can create a "new" institution for tax purposes, LVFB replied that it cannot, although LVFB itself did not exist before this merger. The Commonwealth's position is that if the surviving bank is out-of-state, it is a new institution; if in-state, it is not a new institution. This is equally confounding, as a "surviving" bank is a concept not mentioned in the tax law, and an out-of-state bank is not an institution at all.

Because the averaging provision is the method of calculating tax, the additional assets will not be immediately reflected dollar-for-dollar in the average taxable assets of the post-merger institution. What is significant, however, is that the adding of assets to the reach of Pennsylvania's tax law is a tangibly different scenario than merging two previously taxed institutions. This in turn justifies the short-term disparity of result that lies at the heart of the present appeal, for the situations are sufficiently distinguishable to warrant distinguishable results. The merger or combination of two institutions, both previously taxed on their historic average values, is a different scenario than a combination that introduces previously untaxable assets to the calculation. We see no unconstitutional disparity of treatment in this legislative scheme.

Accordingly, the Commonwealth Court erred in determining the averaging provision was unconstitutional and limitedly severing it on this basis.

Order reversed. Jurisdiction relinquished.

Former Justice Orie Melvin did not participate in the consideration or decision of this case.

Mr. Chief Justice Castille, Madame Justice Todd and Mr. Justice McCaffery join the opinion.

Mr. Justice Saylor files a dissenting opinion in which Mr. Justice Baer joins.