[J-135-2012][M.O. – Eakin, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

LEBANON VALLEY FARMERS BANK,	:	No. 78 MAP 2011
	:	
Appellant	:	Appeal from the Order of the Commonwealth Court at No. 698 FR 2005 dated 8/4/11 dismissing the exceptions and entering judgment of the
v.	:	2/12/09 order that affirmed the decision of the Board of Finance & Revenue dated 10/18/05, exited 10/21/05 at No. 0504946
COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
Appellee	:	ARGUED: November 27, 2012

DISSENTING OPINION

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

I respectfully dissent, as I would find that the Bank Shares Tax's combination provision violates tax uniformity insofar as it has been interpreted to exclude out-of-state banks. I would not, however, affirm the Commonwealth Court's decision, as I believe that its attempt to resolve the infirmity also leads to a non-uniform taxing scheme. Rather, I would construe the combination provision to subsume mergers with in-state or out-of-state banks equally. My reasoning follows.

Under Pennsylvania's Uniformity Clause, see Pa. Const. art. VIII, §1 (requiring all taxes to be uniform upon the same class of subjects), taxpayers are entitled to pay no more or less than their proportionate share of government. See Deitch Co. v. Bd. of Prop. Assessment, Appeals, & Review, 417 Pa. 213, 220, 209 A.2d 397, 401 (1965).

Thus, the intermediate court in Fidelity Bank, N.A. v. Commonwealth, 165 Pa. Cmwlth. 524, 645 A.2d 452 (1994), noted that, "[f]or a tax to be considered uniform, the classification of taxpayers must be reasonable and the tax itself must be applied with uniformity upon similar kinds of businesses or property with substantial equality of the tax burden on all members of the class." Id. at 540, 645 A.2d at 461; accord Columbia Gas Transmission Corp. v. Commonwealth, 468 Pa. 145, 151, 360 A.2d 592, 595 (1976). The court continued:

> Just because . . . a difference can be articulated does not mean the difference is one that satisfies the Uniformity Clause. For example, while there are substantial differences between commercial or industrial real estate and residential real estate, to tax them differently has been held to violate the Uniformity Clause.

Fidelity Bank, 165 Pa. Cmwlth. at 541, 645 A.2d at 461 (citing, inter alia, Appeal of Mass. Mut. Life Ins. Co., 426 Pa. 566, 235 A.2d 790 (1967), and McKnight Shopping Ctr. v. Bd. of Prop. Assessment, 417 Pa. 234, 209 A.2d 389 (1965)).

Here, the majority recognizes that an institution formed from the merger of two in-state banks (an "in-state merger") is part of the same class of taxable entities as an institution formed from the merger of one in-state bank and one extraterritorial bank (a "hybrid merger"). See Majority Opinion, slip op. at 9 n.2. It also acknowledges that, under the Commonwealth Court's prevailing interpretation of the combination provision, see 72 P.S. §7701(c)(2), as set forth in its First Union decisions,[1] an in-state merger may be subject to substantially higher tax liability than a hybrid merger for several years. See Majority Opinion, slip op. at 3. This is because, under the First Union rule, when the combination provision is applied to a hybrid merger, the pre-merger book

[1] First Union Nat'l Bank v. Commonwealth, 867 A.2d 711 (Pa. Cmwlth.) ("First Union I"), exceptions dismissed, 885 A.2d 112 (Pa. Cmwlth. 2005) ("First Union II"), aff'd per curiam, 587 Pa. 507, 901 A.2d 981 (2006) ("First Union III").

value of the extraterritorial bank is not included in the historical averaging methodology to determine its current value for purposes of computing its tax liability. See First Union I, 867 A.2d at 716; First Union II, 885 A.2d at 113-14. The majority accepts the First Union rule and justifies the disparity, for uniformity purposes, solely on the basis that the extraterritorial bank's assets were previously untaxable by Pennsylvania, and hence, the hybrid merger "add[s] assets to the reach of Pennsylvania tax law[.]" Id. at 11.

I find this justification difficult to support, for two primary reasons. First, the distinction stems from the fortuity that one of the banks involved in a hybrid-merger was, prior to the tax year in question, located outside of Pennsylvania. Notably, the statute is designed to tax the value of shares in the current tax year, see 72 P.S. §§7701, 7701.1(a), and not to re-tax share values from previous years. See Fidelity Bank, 165 Pa. Cmwlth. at 539, 645 A.2d at 460 (observing that the share values from prior years are considered solely as a means of ascertaining the value of shares to be taxed in the current year); accord Reply Appellant's Brief at 5 ("The uniformity analysis in this case hinges on whether two Pennsylvania banks . . . could be required to measure their post-merger share value based upon where their merger partners were located prior to the mergers."). Presumably to account for potential fluctuations, the Legislature added a moving six-year average to the assessment formula in 1989. See generally Fidelity Bank, 165 Pa. Cmwlth. at 539, 645 A.2d at 460 ("The purpose of determining a reliable value of property subject to tax is certainly a legitimate purpose and based on the expert testimony this averaging method is a rational means to that purpose.").[2] That being the

[2] The constitutional validity of that mechanism was upheld by the Commonwealth Court in Fidelity Bank and Royal Bank of Pennsylvania v. Commonwealth, 705 A.2d 515, 516 (Pa. Cmwlth. 1998) ("[T]here is nothing in the Uniformity Clause that requires that the value of the property in the current taxing year be the only consideration for the calculation of actual value." (internal quotation marks omitted)), and it has not been challenged as a general matter in the present dispute.

case, the distinguishing circumstance identified by the majority – that one of the banks was immune from Pennsylvania taxation in previous tax years – is, to my mind at least, an arbitrary basis for disparate tax treatment, since it has no apparent relevance to the purpose of the bank shares tax generally or to the legislative intent underlying six-year averaging. Accordingly, I find the majority's reasoning to be in substantial tension with uniformity precepts previously articulated by this Court.[3] Although perhaps not a perfect analogy, it is as if the Court were to declare that tax uniformity was satisfied by either: (1) a municipal property tax on mobile homes that was substantially lower for mobile homes that had been brought into the municipality within the past six years; or (2) a state income tax levied on workers who moved to Pennsylvania within the last six years at only a fraction of the rate for longstanding in-state workers. The relocated mobile home or income stream in such a case would be "new to the reach" of the tax, Majority Opinion, slip op. at 10, but that would be of little relevance to the uniformity analysis.

The second reason I have difficulty accepting the majority's rationale is that it is unclear whether its factual premise can withstand scrutiny. The concept that the Commonwealth invariably benefits, at least to some degree, from hybrid mergers because "the addition of taxable assets enriches the public coffers," Majority Opinion, slip op. at 10, overlooks that the institution may apportion the taxable value of its shares

[3] See, e.g., Leonard v. Thornburgh, 507 Pa. 317, 321, 489 A.2d 1349, 1352 (1985) (explaining that, to justify differential tax treatment, the distinction must be non-arbitrary, reasonable, and just); accord Clifton v. Allegheny Cnty., 600 Pa. 662, 686, 969 A.2d 1197, 1211 (2009); see also Bond v. Cnty. of Lancaster, 569 Pa. 107, 116, 801 A.2d 469, 474 (2002) (observing that classifications in a taxing scheme must have a rational basis); Leventhal v. City of Phila., 518 Pa. 233, 239, 542 A.2d 1328, 1331 (1988) (same); cf. Columbia Gas Transmission Corp. v. Commonwealth, 468 Pa. 145, 150, 360 A.2d 592, 595 (1976) (determining that disparate tax treatment based solely on whether the taxpayer was incorporated in, or outside of, Pennsylvania, violates the Uniformity Clause); Gilbert Assocs., Inc. v. Commonwealth, 498 Pa. 514, 519, 447 A.2d 944, 947 (1982) (same).

according to the percentage of its total payroll, receipts, and deposits that are located in Pennsylvania. See 72 P.S. §7701.4. If the extraterritorial bank delays in bringing any of these items into the Commonwealth, not only will Pennsylvania not benefit, but it will lose significant revenue due to the distorting effects of the First Union rule on the Commonwealth's ability to tax in-state assets. Hence, the Pennsylvania-will-benefit predicate for imposing a lower tax on hybrid mergers appears insufficient, from my perspective, to sustain a more lenient tax burden for this additional reason.

With that said, I also agree with Appellant to the extent it argues that the Commonwealth Court's purported resolution of the uniformity issue does not cure the infirmity. The court directed new-bank treatment for hybrid mergers, stating that this would produce a "reliable reflection" of such an institution's share values while also retaining the benefits of six-year averaging for in-state mergers. Lebanon Valley Farmers Bank v. Commonwealth, 27 A.3d 288, 297 (Pa. Cmwlth. 2011) (en banc); see also id. at 298 (reasoning that preventing use of six-year averaging only in the hybrid-merger scenario "will cure the Uniformity Clause violation without impairing the intended statutory purpose, as such procedure will yield a fair approximation of full share value for all institutions"). The difficulty, as the Commonwealth Court itself noted, is that its ultimate determination was based on "overly simplified" data. Id. at 294 n.11. Indeed, all of the court's examples assumed that each bank had exactly the same value every year for at least six consecutive years.

Not only is this assumption unrealistic, but Appellant has provided additional examples demonstrating that the Commonwealth Court's holding may produce arbitrary tax burdens in situations where the value of the banks are not stable over a six-year period. For instance, where the banks have been declining in value, affording new-bank treatment to a hybrid merger results in substantially reduced tax liability for the "new"

institution because the previous years' higher values are not factored in. See Brief for Appellant at 29. In such a circumstance, the tax disparity as compared to an in-state merger can be even more dramatic than under the First Union rule that the Commonwealth Court presently overruled on uniformity grounds.[4] Conversely, where the banks have been increasing in value over the last six years, new-bank treatment for the hybrid merger will occasion significantly increased liabilities as compared to six-year averaging because the prior years' lower values are not taken into account. See id. at 28.

In view of the above, the question arises how to interpret the statute in accordance with legislative intent while also avoiding unconstitutionally disparate tax liabilities. In this regard, I initially agree with the majority's premise that the averaging provision, 72 P.S. §7701.1(a), was intended to apply to hybrid mergers. See Majority Opinion, slip op. at 9. I would not, however, endorse the First Union rule in light of the unequal tax burdens that it engenders, as explained above. Instead, I believe it is worth re-examining the use of the word "institution" in the combination provision. The majority proceeds from the assumption that the term was not intended to include out-of-state banks, see Majority Opinion, slip op. at 10 – which is consistent with the Commonwealth Court's reading in its First Union decisions, see, e.g., First Union I, 867 A.2d at 716, and the statutory definition, which contemplates banks that are "located within this Commonwealth," 72 P.S. §7701.5. Notably, however, that definition is expressly made subject to the proviso, "except where the context clearly indicates a different meaning."

[4] This Court's summary affirmance, in First Union III, of the Commonwealth Court's decision was not stated to be on the basis of that court's opinions. Thus, we did not approve the intermediate court's rationale, and our per curiam order became law of the case rather than binding precedent. See Commonwealth v. Tilghman, 543 Pa. 578, 589, 673 A.2d 898, 904 (1996).

Id. In this regard, it bears noting that the combination provision was added to the statute in 1989 at the same time that six-year averaging was introduced into the valuation scheme. See Act of July 1, 1989, P.L. 95, No. 21, §1. At that time, the tax was imposed on banks only, there was no definitional section, and it is unclear whether the Legislature considered how these changes might apply to hybrid mergers.

Nearly five years later, the General Assembly made a general substitution of "institution" for "bank," and defined "institution" in a new definitional section, Section 701.5. See Act of June 16, 1994, P.L. 279, No. 48, §17; 72 P.S. §7701.5. However, the restricted definition of "institution," to include only in-state banks, was not evidently formulated with the combination provision in mind, especially since the Bank Shares Tax sets forth no distinct method for determining the taxable amount in cases involving hybrid mergers. While this alone may not mean that the context of the combination provision indicates a different meaning for "institution," it is notable that applying the new, after-the-fact definition within the context of the combination provision leads to a conundrum that is evidenced by the Commonwealth Court's shifting views on how that provision is to be applied to hybrid mergers, and its inability to formulate a satisfactory mode of application after nearly two decades of co-existence of the combination provision and the definitional section. As well, after the Commonwealth Court issued its decision in this case, the Legislature eliminated six-year averaging entirely, effectively reverting to the pre-1989 valuation scheme. See Act of July 9, 2013, P.L. 270, No. 52, §22.

As a general matter, limiting language formulated in terms of whether the context "indicates otherwise" has been described as a "practical qualifying pressure valve." Pope v. Sec'y of Pers., 420 A.2d 1017, 1018 (Md. Ct. Spec. App. 1980). Under this view, in assessing whether the context indicates otherwise, courts may consider

whether the "broad policy of the law" would be vitiated under the restrictive definition in question. Maryland State Bar Ass'n v. Frank, 325 A.2d 718, 721 (Md. 1974). A fortiori, where a constitutional violation would ensue from application of the restrictive definition, it seems reasonable to believe that the General Assembly may have intended for a different meaning to pertain. See generally 1 Pa.C.S. §1922(3) (reflecting that the Legislature does not intend to violate the U.S. Constitution or the Pennsylvania Constitution). As explained, I consider the First Union methodology as giving rise to a Uniformity Clause violation. Moreover, the General Assembly has not provided any alternative means for assessing the taxable value of hybrid mergers; indeed, the combination provision is the only statement of the intention of the Assembly with respect to the assessment of taxable share value in the case of merger. Finally, the legislative policy underlying the moving six-year averaging scheme is effectuated more fully by reading "institution" to include out-of-state banks for purposes of the combination provision, than by the First Union rule presently endorsed by the majority. Therefore, I would conclude that the term "institution," as it is used in the combination provision, appears in a context that clearly indicates a different meaning than that provided in the definition, and that it was meant to encompass both in-state and out-of-state banks. Hence, I would hold that the combination provision applies equally to in-state and hybrid mergers.[5]

[5] Notably, the combination provision does not expressly or impliedly prohibit application of the same six-year averaging method for in-state and hybrid mergers. Thus, even apart from a broad reading "institution" within the framework of the combination provision, I would defer to the government's administrative interpretation that the same method of six-year averaging was intended to obtain for in-state and hybrid mergers, as I find this position to be reasonable. Accord Fidelity Bank II, 885 A.2d at 117 (Smith-Ribner, J., dissenting).

For the reasons given, I would vacate the order of the Commonwealth Court and remand for further proceedings aimed at achieving rough tax equalization as between in-state and hybrid mergers in accordance with prevailing law. Because the majority adopts the First Union rule and precludes such relief, I respectfully dissent.

Mr. Justice Baer joins this dissenting opinion.