

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2011-CA-00842

MISSISSIPPI DEPARTMENT OF REVENUE

APPELLANT

V.

PIKCO FINANCE, INC.

APPELLEE

**ON APPEAL FROM THE CIRCUIT COURT,
HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT**

BRIEF OF APPELLEE PIKCO FINANCE, INC.

(ORAL ARGUMENT REQUESTED)

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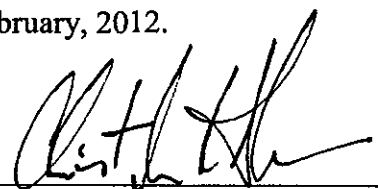
APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Mississippi Supreme Court and/or the judges of the Mississippi Court of Appeals may evaluate possible disqualification or recusal:

Mississippi Department of Revenue
Ed Morgan, Director of Mississippi Department of Revenue
Pikco Finance, Inc.
Pike National Bank
Christopher R. Shaw
Bridgette T. Thomas
Gary W. Stringer

Respectfully submitted, this the 21st day of February, 2012.



Christopher R. Shaw

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I. STATEMENT OF ISSUES

- I. WHETHER FEDERAL LAW PROHIBITS THE MISSISSIPPI DEPARTMENT OF REVENUE FROM OBTAINING RECORDS THROUGH SUBPOENA FROM PIKCO FINANCE COMPANY.
- II. WHETHER PIKCO FINANCE COMPANY IS EXEMPT FROM MISSISSIPPI'S FINANCE COMPANY PRIVILEGE TAX LAW, MISS. CODE ANN. § 27-21-1, *ET SEQ.*

II. STATEMENT OF THE CASE

This case arises from the Mississippi Department of Revenue's (the "MDOR" or the "Department") attempt to subpoena and inspect certain books and records of Pikco Finance Company ("Pikco"). The Department served the subpoena on Pikco for purposes of assessing a finance company privilege tax against Pikco pursuant to Miss. Code Ann. § 27-21-1, *et seq.* Pikco asserts that it is exempt not only from such visitorial powers of the Department, but also exempt from Mississippi's finance company privilege tax.

Pikco is a McComb, Mississippi-based finance company engaged in the business of sales financing and consumer lending. It is a wholly-owned subsidiary of Pike National Bank ("PNB"), a national banking association chartered under the National Banking Act, with its principal place of business in McComb, Mississippi. Pikco was created by PNB as the entity through which PNB conducts its sale financing and consumer lending business. Pikco is licensed as an operating subsidiary of PNB by the Office of the Comptroller of the Currency ("OCC").

On December 15, 2010, the Department issued a subpoena to Pikco requesting the inspection of books and records from July 1, 2005 through September 30, 2005 for purposes of assessing against Pikco a Finance Company Privilege Tax under Miss. Code Ann. § 27-21-1, *et seq.* (R. 7; R.E.1). On January 24, 2011, Pikco filed its Petition to Quash Subpoena with the Circuit Court of Hinds County, Mississippi, arguing, among other things, that the Department's actions were preempted by federal law, specifically the National Bank Act (the "NBA") 12 U.S.C. § 1, *et seq.* (R. 3-6; R.E. 2). Pikco further asserted that as an operating subsidiary of a national bank it was to be treated as a national bank itself and thus, exempt from paying the privilege tax under Miss. Code Ann. § 27-21-3, which explicitly exempts state and national banks from Mississippi's finance company privilege tax. *Id.* The Department opposed the

Motion, asserting that the NBA does not preempt the State's ability to tax and audit national banks, including operating subsidiaries of national banks such as Pikco. (R. at 8-12; R.E. 3).

The Hinds County Circuit Court entered an Order on May 12, 2011 quashing the Department's Subpoena. (R. 13-15; R.E. 4). The Circuit Court's Order stated that the Department did not have the right to inspect Pikco's books and records, and thus, the Subpoena should be quashed. *Id.* Nevertheless, on June 2, 2011, the Department sent to Pikco by certified mail correspondence regarding an assessment against Pikco for finance company privilege taxes from July 2005 through December 2008 and January 2009 through March 2011. (R. at 30-35; R.E.5). Even though the Department had no records upon which to base its figures, the correspondence contained calculations on Pikco's purported franchise tax indebtedness and asserted that Pikco owed the Department \$322,287.00 in franchise tax payments dating back to July 2005.¹ *Id.*

On June 10, 2011, the Department filed its Notice of Appeal to the Mississippi Supreme Court regarding the Circuit Court's Order granting Pikco's Petition to Quash the Department's Subpoena. (R. 16-20; R.E. 6). On June 30, 2011, Pikco filed a Motion for Contempt against the Department for the Department's alleged willful violation of the Circuit Court's Order by serving a franchise tax assessment on Pikco. (R. 25-29; R.E. 7). That Motion remains pending.

III. SUMMARY OF THE ARGUMENT

Federal law preempts the Department's attempts to exercise visitatorial powers over Pikco, as Pikco – an operating subsidiary of a national bank – is subject to exclusive examination oversight by the OCC. This is because federal law provides that state laws apply to operating

¹ Indeed, the transmittal letter containing the purported assessment began: “**In the absence of records, please find the enclosed Finance Company Privilege Tax Assessments for July 2005-December 2008 and January 2009-March 2011.**” (emphasis added) (R. 30; R.E. 5). The purported assessment was an obvious attempt by the Department to force Pikco to produce records upon which the Department

subsidiaries of national banks to the same extent those laws apply to the parent national bank. Thus, Pikco is to be treated as a national bank itself for purposes of the application of the NBA and exempt from the Department's visitorial powers. Furthermore, because Pikco is to be treated as a national bank, it is exempt from Mississippi's finance company privilege tax under Miss. Code Ann. § 27-21-3, which explicitly exempts state and national banks.

IV. ARGUMENT

A. Standard of Review

The standard of review for questions of law is de novo. *Syngenta Crop Protection, Inc. v. Monsanto Co.*, 908 So. 2d 121, 124 (Miss. 2005).

B. Federal Law Prohibits The Mississippi Department of Revenue From Obtaining Records Through Subpoena From Pikco Finance Company.

National banks are instrumentalities of federal law, created and chartered under the National Bank Act, 12 U.S.C § 1, *et seq.*, and the regulations promulgated thereunder by the OCC. The Act authorizes federally chartered banks to engage in "such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24. Among their incidental powers, national banks may conduct certain activities through "operating subsidiaries," which are discrete entities authorized to engage solely in activities the bank itself could undertake, and subject to the same terms and conditions as the bank. 12 U.S.C. §24a(g)(3)(A); 12 CFR § 5.34(e). *See also Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007) and 12 CFR § 7.4006 ("Unless otherwise provided by federal law or OCC regulation, state laws apply to national bank operating subsidiaries *to the same extent those laws apply to the parent national bank.*") (emphasis added).

could use to make an assessment of finance company privilege taxes against Pikco, even though Miss. Code Ann. § 27-21-3 specifically exempts national banks.

Pursuant to the Act, including 12 U.S.C. § 484, and federal regulations, the OCC has plenary regulatory authority over national banks and their operating subsidiaries. *See Watters*, 550 U.S. at 1 (OCC is charged with supervision of the Act, and thus, oversees the banks' operations). The Act grants the OCC, as part of its supervisory authority, visitorial powers to audit national banks' books and records, largely to the exclusion of other state or federal entities. *See* 12 U.S.C. § 484(a); 12 CFR § 7.4000.² Section 484(a) of Title 12 of the United States Code also provides as follows:

No national bank shall be subject to any visitorial powers except as authorized by federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress of either House duly authorized.

12 U.S.C. 484(a). The OCC, charged with administering the Act, adopted the following regulation in line with statute:

§ 7.4000 Visitorial Powers

(a) General rule.

(1) Only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks, except as provided in paragraph (b) of this section. State officials may not exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law.

(2) For purposes of this section, visitorial powers include:

- (i) Examination of a bank;
- (ii) **Inspection of a bank's books and records;**
- iii) Regulation and supervision of activities authorized or permitted pursuant to federal banking law; and
- (iv) Enforcing compliance with any applicable federal or state laws concerning those activities.

² All references to Sections 7.4000, 7.4006 and 7.4009 are to the version prior to July 21, 2011, the effective date of the Dodd-Frank Act. Copies of the applicable sections are included in the Addendum to Appellant's Brief.

12 CFR § 7.4000 (emphasis added). The Act vests exclusive authority to examine and inspect in the OCC. 12 U.S.C. 484(a). State law cannot interfere with the business of banking by subjecting national banks or their OCC-licensed operating subsidiaries to multiple audits under rival oversight regimes. *Watters*, 550 U.S. at 4.

In *Watters*, the Michigan Office of Insurance and Financial Services sought to enforce state registration and inspection requirements against Wachovia Mortgage, a state-chartered mortgage company which was a subsidiary of a federally chartered bank. *Id.* at 8-9. The requirements were that Wachovia Bank register with the state and pay a fee to the state before conducting activities. *Id.* Wachovia Mortgage challenged these requirements as preempted and sought declaratory and injunctive relief against the Commissioner of Michigan's Finance and Insurance Services to prevent their enforcement. *Id.* The United States Supreme Court affirmed both the district court and the Sixth Circuit's grant of summary judgment in favor of Wachovia Bank, holding that "Wachovia's mortgage business, whether conducted by the bank itself or through the Bank's operating subsidiary, is subject to [the] OCC's superintendence, and not to the licensing, reporting, and visitorial regimes of the several states in which the subsidiary operates." *Id.* at 2. The Court further stated that the preemptive reach of the Act reaches beyond the national bank itself, such that operating subsidiaries of national banks are to be treated "***as equivalent to national banks with respect to powers exercised under federal law.***" *Id.* at 1570-71 (emphasis added).

The Supreme Court in *Watters* found that to subject Wachovia Mortgage to Michigan's "investigative and enforcement machinery would surely interfere with the banks' federally authorized business." *Id.* at 13. State regulators, such as the Department, "cannot interfere with the 'business of banking' by subjecting national banks or their OCC-licensed operating subsidiaries to multiple audits and surveillance under rival oversight regimes.

Pikco's lending business, if conducted by Pike National Bank itself, would be subject to the OCC's sole control to the exclusion of state registration requirements and visitorial powers, which includes the inspection of books and records – the very thing the Department seeks here. Here, by attempting to inspect Pikco's books and records, the Department makes clear that a conflict exists between its attempts to regulate Pikco and federal law, which provides that such right belongs exclusively to the OCC.

The question in *Watters*, as it is here, was whether a bank subsidiary's lending activities were outside the governance of state licensing and auditing agencies when those activities were conducted not by the national bank itself, but by the bank's operating subsidiary. The Supreme Court in *Watters* found that such state activities were preempted, holding that such business, whether conducted by the bank itself or through the bank's operating subsidiary, is subject to the OCC's sole supervision and not the visitorial regime of the state in which the subsidiary operates. The Circuit Court correctly quashed the Department's subpoena, which sought to inspect certain books and records of Pikco for purportedly assessing the applicable tax. Thus, the Department's argument that it subpoenaed records for a proper purpose-taxation and is thus not attempting to exercise visitorial powers fails. To wit, the Department could not assess such a tax on a national bank and thus, cannot assess that tax on its operating subsidiary.

C. Pikco Is Exempt From Mississippi Finance Company Privilege Tax Under Miss. Code Ann. § 27-21-3.

1. The Department's argument regarding the propriety of Pikco's liability for privilege tax was not raised in the Court below and is therefore improper.

As a preliminary point, the Department's argument that even if the Department's subpoena power is exempted by the National Bank that it was correct in issuing the June 2, 2011 assessment is improper. This argument was not raised before the Circuit Court, which dealt only with the issue of whether the Department could exercise visitorial powers over Pikco by

enforcement of a subpoena. “Issues not raised at trial cannot be raised on appeal.” *Fitch v. Valentine*, 959 So. 2d 1012, 1021 (Miss. 2007). While the Department’s authority to assess was addressed in Pikco’s Motion for Contempt, that issue was never addressed or adjudicated by the court below and may not be addressed by this Court on appeal. *See Johnson v. Alcorn State Univ.*, 929 So. 2d 398, 407 (Miss. App. 2006) (“appellate courts may not rule upon material matters which the trial judge did not have the opportunity to judge”); *Ditto v. Hinds County, Miss.*, 665 So. 2d 878, 880 (Miss. 1995).

The Department concedes that its authority to assess the Finance Company Privilege Tax was not before the Circuit Court, but appears to argue that the Circuit Court addressed the issue anyway by stating that the Department “has a right to ensure state laws are followed and has every right to file a judicial enforcement action in chancery court.” (R. 20, R.E. 6). However, the Circuit Court’s Order – without clarification – cannot be read to have addressed the issue of the Department’s authority to assess the privilege tax against Pikco, particularly the application of Miss. Code Ann. § 27-21-3. Neither the briefing of the parties in the Circuit Court nor the Circuit Court’s Order squarely address the issue as briefed by the Department on appeal and it is improper to now bring it before this Court.

2. Even if a proper subject for appeal, Pikco is exempt from Mississippi’s Finance Company Privilege Tax.

Assuming *arguendo* that this argument is proper for consideration by this Court, which Pikco disputes, the Department is still incorrect in its assertion that Pikco is subject to Mississippi’s Finance Company Privilege Tax. Under Miss. Code Ann. § 27-21-3, banks – state or national – are exempt from Mississippi’s finance company privilege tax under the plain language of the statute. Section 27-21-3 states, in pertinent part:

There is hereby levied a statewide privilege tax upon every person, firm, corporation, or association, *other than banks, state or national*, doing business of lending money secured by mortgages,

trust receipts, retained-title or purchase contracts, on motor vehicles, furniture, refrigerators containing mechanical freezing units operated by gas or electricity, or radios or any other tangible personal property, located in the State of Mississippi, or doing a business of purchasing, discounting, or otherwise acquiring notes, trust receipts, or other forms of indebtedness secured by liens, in the form of mortgages, retained-title or purchase contracts, or other liens, upon motor vehicles, furniture, refrigerators containing mechanical units operated by gas or electricity or other fuels, or radios or any other tangible personal property, located in this state (not including, however, cotton, cotton seed or agricultural products); the amount of said tax to bear a direct relationship to the value of the securities held, owned, or acquired by such person, firm, corporation or association, and exacted in return for the protection afforded by the government and laws of this state in the enjoyment of such ownership and rights acquired thereby; the tax to be computed by application of the rate hereinafter set out to the total value of such securities, other than those securities representing loans for the payment of the wholesale sales price and those securities representing transactions known as "floor plan," upon which no tax is to be imposed.

(emphasis added).

Here, both Congress and the United States Supreme Court have explicitly stated that state laws apply to an operating subsidiary of a national bank to the same extent those laws apply to the parent national bank. See 12 CFR § 7.4006 ("unless otherwise provided by federal law or OCC regulation, state laws apply to national bank operating subsidiaries to the same extent those laws apply to the parent national bank.") (emphasis added) and *Watters*, 550 U.S. at 4. In other words, just as a national bank is not subject to Mississippi's Finance Company Privilege Tax under the plain language of Miss. Code Ann. § 27-21-3, neither is Pikco, as an operating subsidiary of a national bank. Indeed, to construe state law to apply to Pikco such that it is treated differently than a national bank would fly in the face of the *Watters* and the National Bank Act. See *National City Bank of IN v. Turnbaugh*, 463 F.3d 325, 327 (4th Cir. 2006), cert. denied, 127 S. Ct. 2096 (U.S. 2007) (if state law applied to operating subsidiaries to a greater extent than it applied to their parent national banks it would frustrate a national bank's rights to

conduct the business of banking through operating subsidiaries). Such a conflict makes clear that preemption is proper here. *Sanders Advanced Neuromodulation Systems, Inc.*, 44 So. 3d 960, 966 (Miss. 2010) (preemption is proper when, *inter alia*, there is a conflict between state and federal law).

The *Watters* case is directly on point for this issue as well. In *Watters*, Michigan's statutory regime at issue – like Miss. Code Ann. § 27-21-3 – exempted banks, both national and state, from state mortgage lending, but required lenders that are subsidiaries of national and state banks to register with the Michigan Office of Financial and Insurance Services and submit to state supervision. However, as the *Watters* court ruled, the subsidiary was to be treated the same as a national bank. Here, Pikco, as an operating subsidiary of a national bank, is to be treated as a national bank and is exempt under the plain language of Miss. Code Ann. § 27-21-3. This is no different from the Department attempting to tax Pikco when it cannot tax Pike National Bank for the same activities. The plain language of Miss. Code Ann. § 27-21-3 would exempt Pike National Bank, and under *Watters*, it should exempt Pikco.

The Department makes two arguments against the application of the exemption under Miss. Code Ann. § 27-21-3. First, it argues that state taxation is specifically exempted from the areas preempted by the National Bank Act and therefore, the limitations imposed by 12 C.F.R. § 7.4000 and 12 C.F.R. § 7.4006 are not applicable to administration of Mississippi's Finance Company Privilege Tax. However, the Department admits that the very laws that it is charged with enforcing specifically exempts national banks, which under *Watters* and 12 CFR § 7.4006, is how Pikco is to be treated. The *Watters* case is precisely on point for how the exemption of Miss. Code Ann. § 27-21-3 is to be read, which is to treat operating subsidiaries of national banks as national banks themselves. To construe it any other way creates preemption, as federal

preempts state law “to the extent it actually conflicts with federal law.” *Stephenson v. Bartlett*, 562 S.E.2d 377, 388 (N.C. 2002).

The Department also asserts that Pikco has not “clearly prove[ed] it is entitled to the exemption of Miss. Code Ann. § 27-21-3 since taxation is the rule and exemption is the exception under *Mississippi State Tax Commission v. Medical Devices, Inc.*, 624 So. 2d 897 (Miss. 1993).” This is incorrect on two grounds. First, while taxation is the rule and not the exception, the Mississippi Supreme Court has held that it will not simply defer to the Department’s interpretation of a taxation when the interpretation “is repugnant to [the] plain meaning” of the statute. *Kerr-McGee Chemical Corp. v. Buelow*, 670 So. 2d 12, 16 (Miss. 1995). Indeed, no esoteric statutory interpretation is needed to construe that national banks are exempt from Mississippi Finance Company Privilege Tax under Miss. Code Ann. § 27-21-3 and that 12 CFR § 7.4006 requires that state laws apply to a national bank operating subsidiary “*to the same extent those laws apply to the parent national bank.*” (emphasis added). This Court has repeatedly made clear that it will not engage in statutory interpretation if a statute is plain and unambiguous. *Trustmark National Bank v. Roxco, LTD.*, No. 2009-CA-00559, 2011 WL 6091153 at *5 (Miss. Dec. 8, 2011); *Buffington v. Mississippi State Tax Commission*, 43 So. 3d 450, 455 (Miss. 2010) (in the absence of a statutory definition of a phrase it must be given its common and ordinary meaning).

Finally, the Departments’ reliance on the *Cuomo*³ case and the Department’s right to enforce state law misses the point. In *Cuomo*, unlike here, no statute existed which exempted the national bank operating subsidiary from New York’s fair lending laws, and thus, New York was allowed to demand records in connection with such enforcement. Pikco is not arguing that the Department cannot enforce its laws with respect to enforcement of franchise company privilege

³ *Cuomo v. The Clearing House Association, LLC*, 557 U.S. 519 (2009).

taxes. Quite the contrary – Pikco is asking that the Department enforce its laws and recognize the exemption under Miss. Code Ann. § 27-21-3 that exempts national banks and thus, exempts Pikco as a subsidiary of a national bank.

V. CONCLUSION

For the foregoing reasons, Pikco requests that this Court affirm the May 12, 2011 Order of the Hinds County Circuit Court.

This the 21st day of February, 2012.

Respectfully submitted,

PIKCO FINANCE, INC.

By Its Attorneys

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CERTIFICATE OF SERVICE

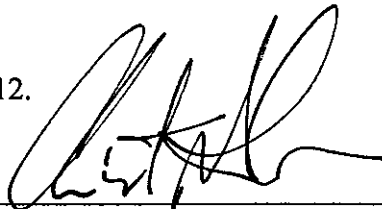
I hereby certify on February 21st, 2012, a true and correct copy of the above and foregoing document was served via United States Mail, postage prepaid, on the following:

Bridgette T. Thomas
Gary W. Stringer
Mississippi Department of Revenue
P.O. Box 22828
Jackson, MS 39225

I further certify that on February 21st, 2012, a true and correct copy of the above and foregoing document was served via United States Mail, postage prepaid, on the following:

Honorable William Gowan
Hinds County Circuit Judge
P.O. Box 22711
Jackson, MS 39225-2711

DATED this the 21st day of February, 2012.



CHRISTOPHER R. SHAW
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