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I. STATEMENT OF ISSUES

- I. THE DEPARTMENT'S USE OF ITS STATUTORY SUBPOENA POWER IN ADMINISTRATION OF THE FINANCE COMPANY PRIVILEGE TAX IS NOT PREEMPTED BY THE NATIONAL BANK ACT.

II. ARGUMENT

A. The National Bank Act does not preempt Mississippi's Finance Company Privilege Tax and therefore does not prohibit the Department's use of its subpoena power to enforce state tax laws.

Pikco's assertion that it is not required to comply with the Department's subpoena is based on an attempt to combine the provisions of state and federal law. The visitorial *preemption* of the National Bank Act is separate from the *exemption* provided to national banks by the Mississippi Legislature under Miss. Code Ann. §27-21-3. Preemption by the National Bank Act is not equivalent to a state granted exemption. As such, Pikco's attempt to combine the limitations of these provisions is flawed.

"In the years since the NBA's enactment, we have repeatedly made clear that federal control shields national banking from *unduly burdensome and duplicative state regulation.*" *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007)(emphasis added). "Federally chartered banks are subject to state laws of general application in their daily business to the extent such laws *do not conflict with the letter or general purposes of the NBA.*" *Watters*, 550 U.S. at 11 (emphasis added). "The OCC noted that section 7.4006 does not itself preempt any particular state law. But the implication is that state laws effecting visitorial power over national bank operating subsidiaries- ... would be preempted, just as they are *preempted as applied* to national banks." *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 313 (2nd Cir. 2005)(internal citations omitted). The Department's exercise of its subpoena power in enforcing the State's tax law is only preempted as to Pikco if the same would be preempted as applied to a national bank. This is not the case.

Preemption is proper: "(1) where Congress explicitly preempts state law; (2) where preemption is implied because Congress has occupied the entire field; or (3) where preemption is implied because there is an actual conflict between federal and state law." *Sanders v. Advanced*

Neuromodulation Systems, Inc., 44 So.3d 960, 966 (Miss. 2010). Congress has not explicitly preempted taxation of national banks by states¹, has not occupied the entire field of national bank taxation, and has not enacted laws in conflict with the Finance Company Privilege Tax. As such, the Department's exercise of its subpoena authority under State laws is not preempted by the National Bank Act.²

B. The propriety of the Department's authority to assess Pikco taxes under Miss. Code Ann. §§27-21-1 et seq. is inherently tied to Pikco's claim of exemption from the subpoena power of the Department.

As noted above, Pikco attempts to avoid compliance with the Department's subpoena by combining the visitorial preemption of the National Bank Act with the Mississippi Legislature granted exemption in Miss. Code Ann. §27-21-3. Whether Pikco is subject to (not exempt from) taxes under Miss. Code Ann. §27-21-3, which includes the authority of the Department to issue an assessment of taxes due under Miss. Code Ann. §27-21-3, has a direct bearing on whether or not Pikco is required to comply with the Department's subpoena. Pikco's assertion that the

¹ Prior to several amendments to the National Bank Act and its regulations, in its December 9, 1974 Banking Circular 59, the OCC addressed the question of visitorial powers over national banks by state taxing authorities.

This Office recognizes the practical necessity of state officials being able to inspect the records of national banks to the extent necessary to verify the accuracy of tax returns filed by the banks. *Accordingly, we have taken the position that we have no objections to state officials examining records of national banks for the purpose of ascertaining payment of applicable taxes.* Further, it is the policy of this Office to cooperate fully with state officials whenever a possible violation of law is uncovered. In this connection, we direct your attention to the enclosed article dated December 19, 1973, appearing in the Great Falls Tribune, Great Falls, Montana, indicating that the Montana Department of Revenue is planning to audit all banks within its jurisdiction. Two national banks have already been audited. And it should be noted that the investigation of these banks was sparked by this Office. As indicated by the Montana situation, *there are no practical limitations to state officials examining the records of national banks for tax purposes.*

1974 WL 21171(O.C.C.)(emphasis added)(cited with approval in OCC Interpretive Letter, December 14, 1983, 1983 WL 145737(O.C.C.)). The cited Circular and Interpretive Letter are attached to the Addendum hereto.

² Pikco has not addressed whether or not the National Bank Act preempts Miss. Code Ann. §27-21-3. The Department refers to and incorporates its more detail discussion in its Appellant's Brief addressing the issue of preemption.

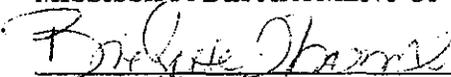
Department's authority to assess Pikco taxes under Miss. Code Ann. §27-21-3 was not an issue before the lower court is refuted by the fact that Pikco filed a Motion for Contempt following the Department's June 2, 2011 correspondence. (R. at 25-35). Pikco's Motion for Contempt alleges that the lower court found that Pikco is "exempt from the privilege tax law set forth in Miss. Code Ann. §27-21-3" and that by issuing the assessments, "[t]he Department is clearly in contempt of [the lower] Court's May 12, 2011 Order". (R. at 26-27). The authority of the Department to issue an assessment of taxes under Miss. Code Ann. §27-21-3 was a matter to be considered by the lower court in determining the issue of preemption and is properly before this Court.³

III. CONCLUSION

For the foregoing reasons and those addressed in the Appellant's Brief, the Department requests that this Court reverse the May 12, 2011 Order of the Hinds County Circuit Court quashing the Department's subpoena and order Pikco to comply with the subpoena.

RESPECTFULLY SUBMITTED, this the 3rd day of March, 2012.

MISSISSIPPI DEPARTMENT OF REVENUE


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³ The issue of whether or not Pikco was exempt from Miss. Code Ann. §27-21-3 and whether or not the National Bank Act preempted the Department's authority to issue a subpoena in its administration of the State's tax law was specifically presented to the lower court in the Department's Response in Opposition to Quash Subpoena (R. at 8-12) and at hearing on the Petition.

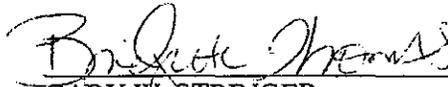
CERTIFICATE OF SERVICE

I, the undersigned counsel, do hereby certify that I have this day caused to be served, via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing document to:

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Circuit Court Judge

This the 5th day of March, 2012.



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ADDENDUM

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