

**IN THE SUPREME COURT OF MISSISSIPPI**

**MISSISSIPPI DEPARTMENT OF REVENUE**

**APPELLANT**

**VS.**

**NO. 2011-CA-00842**

**PIKCO FINANCE, INC.**

**APPELLEE**

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

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**BRIEF OF APPELLANT**

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**ORAL ARGUMENT REQUESTED**

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**I. STATEMENT OF ISSUES**

- I. WHETHER THE DEPARTMENT'S USE OF ITS STATUTORY SUBPOENA POWER IN ADMINISTRATION OF THE FINANCE COMPANY PRIVILEGE TAX IS PREEMPTED BY THE NATIONAL BANK ACT?
- II. ASSUMING ARGUENDO THAT THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE DEPARTMENT'S SUBPOENA POWER IS PREEMPTED BY THE NATIONAL BANK ACT, WHETHER THE COURT'S RULING IMPEDES THE DEPARTMENT'S AUTHORITY TO ISSUE THE JUNE 2, 2011 ASSESSMENT OF TAXES UNDER MISS. CODE ANN. §§27-21-1 ET SEQ.?

National Bank Act. As discussed more fully below, the Department maintains that the exemption afforded national banks under Miss. Code Ann. §27-21-3 is by operation of the Mississippi Legislature, not the National Bank Act, and therefore requires a clear showing that the claimant meets the terms imposed by the statute. As such, the flow through extended by 12 C.F.R. §7.4006 does not operate to exempt Pikco from the tax imposed by Miss. Code Ann. §27-21-3.<sup>8</sup>

Secondly, the area of regulation at issue in *Watters* was an area specifically regulated by the National Bank Act. The regulation at issue in *Watters* required mortgage brokers, lenders, and servicers that were subsidiaries of national banks to register with the state's Office of Finance and Insurance and Services, pay an annual operating fee, file annual reports, and to open their records to inspection. *Watters*, 550 U.S. at 8. 12 U.S.C. §371 grants federally chartered banks the authority to engage in real estate lending, as such, a state's attempt to further regulate a national bank's power to engage in real estate lending would be a "duplicative state examination, supervision, and regulation [that] would significantly burden mortgage lending when engaged in by national banks," and their subsidiaries. *Watters*, 550 U.S. at 17.

The limitations imposed by 12 C.F.R. §7.4000<sup>9</sup> were enacted "[t]o prevent *inconsistent or intrusive state regulation* from impairing the national system," "shield[ing] national banking from unduly burdensome and *duplicative state regulation*." *Watters*, 550 U.S. at 11 (emphasis added). Unlike the statute at issue in *Watters*, the area of taxation is specifically excluded from preemption by the National Bank Act<sup>10</sup> and therefore the State's Finance Company Privilege Tax is not preempted by the National Bank Act for neither national banks nor their subsidiaries.<sup>11</sup>

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<sup>8</sup> The Commissioner in *Watters* conceded that national banks were exempt for the statutory provision at issue, but that subsidiaries were not exempt because they were separately chartered under state law. *Watters*, 550 U.S. at 15.

<sup>9</sup> 12 U.S.C. §484(a)

<sup>10</sup> 12 U.S.C. §548 explicitly authorizes states to tax national banks: "For the purposes of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank

12 C.F.R. §7.4009(c)(2)<sup>12</sup> enumerates specific areas of state law that are applicable to national banks.

(2) State laws on the following subjects *are not inconsistent* with the powers of national banks *and apply to national banks* to the extent that they only incidentally affect the exercise of national bank powers:

- (i) Contracts;
- (ii) Torts;
- (iii) Criminal law
- (iv) Rights to collect debts;
- (v) Acquisition and transfer of property;
- (vi) *Taxation*;
- (vii) Zoning; and
- (viii) Any other law the effect of which the OCC determines to be incidental to the exercise of national bank powers or otherwise consistent with the powers set out in paragraph (a) of this section.

(emphasis added).

The area of taxation cannot both be exempted by the National Bank Act and simultaneously preempted. The OCC explicitly recognizes that state taxation laws, even as to national banks, are not inconsistent with the powers granted to national banks. “[N]ational banks are subject to the laws of a state in respect of their affairs, unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies, or conflict with the paramount law of the United States.” *First National Bank in St. Louis v Missouri ex rel. Barrett*, 263 U.S. 640, 656(1924). “[T]he laws of the States in which national banks or their affiliates are located govern matters the [National Bank Act] does not address.” *Watters*, 550 U.S. at 22. The Finance Company Privilege Tax does not “obstruct, impair, or condition a national’s bank ability to fully exercise its power to conduct activities authorized

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organized and existing under the laws of the State or other jurisdiction within which its principal office is located.”

<sup>11</sup> As more fully discussed hereafter, the exemption provided by Miss. Code Ann. §27-21-3 is an exemption granted by the State of Mississippi, not a result of federal preemption laws.

<sup>12</sup> Effective July 21, 2011 12 C.F.R. §7.4009 has been rescinded in accordance with the provisions of the Dodd-Frank Act. However, the rescission does not operate to abolish the exemption of state taxation from the areas preempted by the National Bank Act.

under Federal law," 12 C.F. R. §7.4009(b), nor does the National Bank Act address taxation of national banks. As such, the Finance Company Privilege Tax is not preempted by the National Bank Act.

**b. The Department's subpoena is not a visitorial power.**

Additionally, the Department's exercise of its administration power through a subpoena is not the exercise of a visitorial power as contemplated by the National Bank Act. 12 C.F.R. 7.4000(a)(3) clarifies the extent of the OCC's visitorial power under 12 U.S.C. §484:

(3) Unless otherwise provided by Federal law, the OCC has exclusive visitorial authority with respect to the *content and conduct of activities authorized for national banks under Federal law.*

(emphasis added). "It is neither the fact of examination nor the extent of examination that determines whether a visitorial power is being exercised; rather, it is the purpose for which the examination is made that is determinative." *State of Minnesota v. The First National Bank of St. Paul*, 313 N.W.2d 390, 393(Minn. 1981)(citing *First National Bank of Youngstown v. Hughes*, 6 F. 737, 740 (Ohio 1881)). The Department is not attempting to regulate the business of Pikco, but rather is merely attempting to exercise its legal duty and authority to enforce the tax law of the State of Mississippi.

**2. The exemption granted by Miss. Code Ann. §27-21-3 is a State granted exemption. As such, Pikco is required to prove it clearly falls within the terms of the exemption.**

Since the National Bank Act does not preempt the State's Finance Company Privilege Tax nor the Department's exercise of its subpoena power thereunder, any exemption under Miss. Code Ann. §27-21-3 is a direct result of the action of the Mississippi Legislature and not an application of 12 C.F.R. §7.4006. Miss. Code Ann. §27-21-3, in relevant part, provides:

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) ....

As such, in order to enjoy the exemption granted state and national banks under Miss. Code Ann.

§27-21-3, Pikco must clearly prove that it is entitled to the right.

Since taxation is the rule and exemption is the exception, and since exemptions from taxation are not favored, general rule is that a grant of exemption from taxation is never presumed; on the contrary, in all cases having doubt as to legislative intention, or as to inclusion of particular property within terms of statute, presumption is in favor of taxing power, and burden is on claimant to prove or establish clearly his right to exemption, bringing himself clearly within terms of such conditions that statute may impose.

*Mississippi State Tax Commission v. Medical Devices, Inc.*, 624 So.2d 987, 990 (Miss. 1993)(citing *United States v. State of Mississippi*, 578 F.Supp. 348,349 (S.D. Miss. 1984)). "All reasonable doubts are resolved against the exemption." *Medical Devices*, 624 So.2d at 991.

There is no dispute that Pikco is neither a state nor national bank as defined under Mississippi law. In fact, prior to the tax period beginning July 1, 2005, Pikco filed returns and paid the Finance Company Privilege Tax pursuant to Miss. Code Ann. §27-21-3, *et seq.*, acknowledging that it was subject to the tax. As such, Pikco's claim for exemption from the Finance Company Privilege Tax fails as a matter of law. Therefore, pursuant to the authority invested in it by the Mississippi Legislature, the Department may exercise its obligation to administer the Finance Privilege Tax through the use of a Department issued subpoena.

*C. Assuming arguendo that the Circuit Court correctly determined that the Department's subpoena power is preempted by the National Bank Act, the Order does not impede the Department's authority to issue the June 2, 2011 assessment of taxes under Miss. Code Ann. §§27-21-1 et seq..*

Understanding the Circuit Court's order to apply only to the Department's authority to enforce the subpoena, an assessment of the Finance Company Privilege Tax was issued to Pikco on June 2, 2011. Pikco subsequently filed a Motion for Contempt, asserting that the court's order found that "Pikco is to be treated as its parent national bank, and is therefore exempt from the privilege tax law set forth in Miss. Code Ann. §27-21-3." (R.E. 6). Pikco has misinterpreted the Circuit Court's order and its holding regarding the powers retained by the Department in light of the National Bank Act.

Assuming arguendo that the Circuit Court correctly determined that the National Bank Act preempts the Department's use of a subpoena as an exercise of visitorial powers reserved strictly to the Office of the Comptroller of the Currency ("OCC"), the issue of the Department's authority to assess the Finance Company Privilege Tax, although not before the Circuit Court<sup>13</sup>, was properly held to not be exempted by the National Bank Act.

The Circuit Court's Order held that:

The Department's desire to inspect property to determine whether or not Pikco Finance must pay the state's finance company privilege tax does not qualify as an exception under any federal law and therefore the subpoena must be quashed pursuant to the Act. *However, 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.E. 5)(emphasis added). The U.S. Supreme Court addressed a similar issue in *Cuomo v. The Clearing House Association, L.L.C.*, holding that the OCC's exclusive exercise of visitorial powers does not excluded state law enforcement. 129 S.Ct. 2710 (2009). "The power to enforce the law exists separate and apart from the power of visitation." *Id.* at 2720. The Department's June 2, 2011 assesement is an act of its power to enforce the State's laws, not visitation.

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<sup>13</sup> Pikco explicitly represented to the Circuit Court that it was not contesting the validity of the Finance Company Privilege Tax. (R.E. 4, p.2, lines 20-25). Furthermore, the validity of the Finance Company Privilege Tax is not subject matter delegated to the jurisdiction of the circuit courts by the State Legislature.

Miss. Code Ann. §27-21-19 grants the Department authority, pursuant to Miss. Code Ann. §27-65-37 to issue the June 2, 2011 assessment:

[T]he commissioner and the state tax commission shall exercise all power and authority and perform all the duties with respect to taxpayers under this chapter as are provided in said Mississippi Sales Tax Law.

...

If adequate records of the gross income or gross proceeds of sales are not maintained or invoices preserved as provided herein, or if an audit of the records of a taxpayer, or any return filed by him, or any other information discloses that taxes are due and unpaid, the commissioner shall make assessments of taxes, damages, and interest from any information available, which shall be prima facie correct.

The State Legislature has further provided that the proper procedure for the Department to seek judicial enforcement of a State tax begins with an assessment. See Miss. Code Ann. §§27-77-5 and 27-77-7.

Pikco asserts that the Department is attempting to "end run" the Circuit Court's order by issuing the June 2, 2011 assessment:

[T]he Department is now attempting an end run around the Court's Order quashing the Subpoena by arbitrarily concocting an amount to purportedly assess Pikco for finance company privilege tax, but implicitly asking Pikco to produce documentation to county the Department's "shotgun" assessments.

(R.E. 6).

While it is true that Pikco may produce to the Department documents responsive to the subpoena, should it contest the June 2, 2011 assessment, it does not follow that the assessment is an exercise of visitatorial powers.

The dissent establishes that in the course of exercising visitation powers the sovereign can compel compliance with the law. But it concludes from that, that *any* sovereign attempt to compel compliance with the law can be deemed an exercise of the visitation power. That conclusion obviously does not follow. For example, in the course of exercising its visitation powers, the sovereign can assuredly compel a bank to honor obligations that are in default. Does that mean that the sovereign's taking the same action in executing a civil judgment for

payment of those obligations can be considered an exercise of the visitation power? Of course not. Many things can be compelled through the visitation power that can be compelled through the exercise of other sovereign power as well. The critical question is not what is being compelled, but what sovereign power has been invoked to compel it. And the power to enforce the law exists separate and apart from the power of visitation.

*Cuomo*, 129 S.Ct. at 2020.


Even if the Department's use of its subpoena power to administer the Finance Privilege Tax is preempted by the National Bank Act, the power of the Department to issue assessments is not so preempted. The power of the Department to issue an assessment under the Finance Privilege Tax is an exercise of its enforcement powers, even if it results in the Department gaining access to documents that were the subject of the preempted subpoena.

#### V. CONCLUSION

For the foregoing reasons, 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 18<sup>th</sup> day of November, 2011.

MISSISSIPPI DEPARTMENT OF REVENUE

  
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**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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This the 18<sup>th</sup> day of November, 2011.

  
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APPENDUM

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Effective:[See Text Amendments] to July 20, 2011

Code of Federal Regulations

Title 12. Banks and Banking

Chapter I. Comptroller of the Currency, Department of the Treasury

Part 7. Bank Activities and Operations

Subpart D. Preemption

→ → § 7.4000 Visitorial powers.

<For statute(s) affecting validity, see: 12 USCA §§ 1 et. seq., 71, 7a, 92, 92a, 93, 93a, 481, 484, and 1818.>

(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. However, production of a bank's records (other than non-public OCC information under 12 CFR part 4, subpart C) may be required under normal judicial procedures.

(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.

(3) Unless otherwise provided by Federal law, the OCC has exclusive visitorial authority with respect to the content and conduct of activities authorized for national banks under Federal law.

(b) Exceptions to the general rule. Under 12 U.S.C. 484, the OCC's exclusive visitorial powers are subject to the

following exceptions:

- (1) Exceptions authorized by Federal law. National banks are subject to such visitorial powers as are provided by Federal law. Examples of laws vesting visitorial power in other governmental entities include laws authorizing state or other Federal officials to:
  - (i) Inspect the list of shareholders, provided that the official is authorized to assess taxes under state authority (12 U.S.C. 62; this section also authorizes inspection of the shareholder list by shareholders and creditors of a national bank);
  - (ii) Review, at reasonable times and upon reasonable notice to a bank, the bank's records solely to ensure compliance with applicable state unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with those laws (12 U.S.C. 484(b));
  - (iii) Verify payroll records for unemployment compensation purposes (26 U.S.C. 3305(c));
  - (iv) Ascertain the correctness of Federal tax returns (26 U.S.C. 7602);
  - (v) Enforce the Fair Labor Standards Act (29 U.S.C. 211); and
  - (vi) Functionally regulate certain activities, as provided under the Gramm-Leach-Bliley Act, Pub.L. 106-102, 113 Stat. 1338 (Nov. 12, 1999).
- (2) Exception for courts of justice. National banks are subject to such visitorial powers as are vested in the courts of justice. This exception pertains to the powers inherent in the judiciary and does not grant state or other governmental authorities any right to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law.
- (3) Exception for Congress. National banks are subject to such visitorial powers as shall be, or have been, exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.
- (c) Report of examination. The report of examination made by an OCC examiner is designated solely for use in the supervision of the bank. The bank's copy of the report is the property of the OCC and is loaned to the bank and any holding company thereof solely for its confidential use. The bank's directors, in keeping with their responsibilities both to depositors and to shareholders, should thoroughly review the report. The report may be made available to other persons only in accordance with the rules on disclosure in 12 CFR part 4.



[64 FR 60100, Nov. 4, 1999; 69 FR 1904, Jan. 13, 2004]

SOURCE: 61 FR 4862, Feb. 9, 1996; 66 FR 34791, July 2, 2001; 68 FR 70131, Dec. 17, 2003; 69 FR 1916, Jan. 13, 2004, unless otherwise noted.

AUTHORITY: 12 U.S.C. 1 et seq., 71, 71a, 92, 92a, 93, 93a, 481, 484, and 1818.

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Effective:[See Text Amendments] to July 20, 2011

## Code of Federal Regulations

## Title 12. Banks and Banking

## Chapter I. Comptroller of the Currency, Department of the Treasury

## Part 7. Bank Activities and Operations

## Subpart D. Preemption

## → § 7.4006 Applicability of State law to national bank operating subsidiaries.

Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank.

[66 FR 34791, July 2, 2001]

SOURCE: 61 FR 4862, Feb. 9, 1996; 66 FR 34791, July 2, 2001; 68 FR 70131, Dec. 17, 2003; 69 FR 1916, Jan. 13, 2004, unless otherwise noted.

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Code of Federal Regulations

Title 12. Banks and Banking

Chapter I. Comptroller of the Currency, Department of the Treasury

Part 7. Bank Activities and Operations

Subpart D. Preemption

→ → § 7.4009 Applicability of state law to national bank operations.

(a) Authority of national banks. A national bank may exercise all powers authorized to it under Federal law, including conducting any activity that is part of, or incidental to, the business of banking, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any applicable Federal law.

(b) Applicability of state law. Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its powers to conduct activities authorized under Federal law do not apply to national banks.

(c) Applicability of state law to particular national bank activities.

(1) The provisions of this section govern with respect to any national bank power or aspect of a national bank's operations that is not covered by another OCC regulation specifically addressing the applicability of state law.

(2) State laws on the following subjects are not inconsistent with the powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national bank powers:

(i) Contracts;

(ii) Torts;

(iii) Criminal law [FN8]

<sup>8</sup> 8 Id.

(iv) Rights to collect debts;

(v) Acquisition and transfer of property;

(vi) Taxation;

(vii) Zoning; and

(viii) Any other law the effect of which the OCC determines to be incidental to the exercise of national bank powers or otherwise consistent with the powers set out in paragraph (a) of this section.

[69 FR 1917, Jan. 13, 2004]

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AUTHORITY: 12 U.S.C. 1 et seq., 71, 71a, 92, 92a, 93, 93a, 481, 484, and 1818.

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