

ALABAMA TAX TRIBUNAL

ALLY FINANCIAL & SUBSIDIARIES,	§	
AND ALLY BANK		
Taxpayer,	§	
		DOCKET NOS. INC. 20-659-LP
	§	MISC. 21-380-LP
		FIET. 22-1113-LP
v.	§	FIET. 22-1124-LP
STATE OF ALABAMA	§	
DEPARTMENT OF REVENUE.		

FINAL ORDER

These consolidated appeals involve adjustments to net operating losses, final assessments, or denials of refund petitions for financial institution excise tax for tax years ending December 31, 2011, through December 31, 2019 (the 2012-2020 return years). A trial was held on these consolidated appeals on August 29, 2023. Matthew Setzer and Michael Jacobs represented the Taxpayer¹, and David Avery and Andrew Gidiere represented the Revenue Department. Robert Parker, the Director of Tax Audits for the Taxpayer, testified for the Taxpayer. Matt Tidwell, the Revenue Department Manager for Multistate Audits and Appeals, testified for the Revenue Department. The parties filed post-hearing briefs.

Stipulated Facts

Prior to the hearing, the parties submitted the following Joint Stipulation of Facts:

1. [Ally Financial Inc. (hereafter “the Parent”)] filed consolidated Financial Institution Excise Tax (“FIET”) returns for the 2012 through 2014 Return Years on Department Form ET-1C.

¹ All Taxpayers in these consolidated appeals will be referred to herein as the “Taxpayer.”

2. Parent amended the original FIET returns for the 2012 through 2014 Return Years by filing amended returns on Form ET-1C (the “2012–2014 Amended Returns”). Parent asserts that the original returns are attached in part for all Return Years, except for 2012, where Parent has attached the return as last adjusted for federal changes, in addition to the amended return for that year.

3. Parent filed FIET returns for the 2015 through 2020 Return Years on Department Form ET-1C....

4. The Parent owns 100% of the ownership interests of [IB Finance Holding Company, LLC, (hereafter “the Intermediate HC”)].

5. Intermediate HC owns 100% of the ownership interest of [Ally Bank (hereafter “the Bank”)].

6. The Parent included no proforma returns on Form ET-1 for Intermediate HC in the consolidated returns of Parent for the return years 2012–2018. Intermediate HC was not included in the Affiliations Schedule, Schedule AS to Form ET-1C, by Parent for any of the return years 2012-2018.

7. A proforma return on Form ET-1 for Intermediate HC was included in the consolidated returns by Parent for the return years 2019–2020. Intermediate HC was included on the Affiliations Schedules, Schedule AS, for return years 2019-2020.

8. For the 2019–2020 return years, Parent did not apportion any income or loss to Alabama for Intermediate HC on the consolidated returns it filed.

9. Through a letter dated July 23, 2020, the Department issued a determination (the “Determination”) for the 2012 through 2016 Return Years....

10. The Parent on behalf of itself and its subsidiaries filed a timely appeal for tax years 2012 through 2016 to challenge the results of the Determination pursuant to Ala. Code §40-2A- 8(b).

11. The Department entered Preliminary Assessments against Bank for the 2017 and 2018 Return Years on October 13, 2020 (the “Preliminary Assessments”) for the following tax amounts:

Return Year Preliminary FIET Assessment

2017 \$1,480,530

2018 \$2,187,951

Total \$3,668,481

....

12. The Department provided Bank with a schedule attached to the Preliminary Assessments noting that Parent had NOLs on a separate entity basis after the 2018 Return Year....

13. Bank timely filed petitions for review challenging the Preliminary Assessments.

14. Following a hearing on the appeals from the Preliminary Assessments, on February 24, 2021, the Department entered Final Assessments (the "Final Assessments") against Bank for the 2017 and 2018 FIET Return Years in the tax amounts of \$1,480,530 and \$2,187,951 respectfully. The Final Assessments also included penalty and interest.

15. Bank timely filed an appeal from these two Final Assessments with the Tribunal.

16. The Parent filed a petition for refund on the amended consolidated tax return for the 2019 Return Year.

17. The Department denied the refund by Ala. Code §40-2A-7(c)(3).

18. Parent timely filed an appeal with the Tribunal challenging the denial of the petition for refund.

19. The Parent filed a petition for refund for the 2020 Return Year.

20. The Department denied the refund by Ala. Code §40-2A-7(c)(3).

21. Parent timely filed an appeal with the Tribunal challenging the denial of the petition for refund.

22. There are no jurisdictional or administrative defects in the Department's assessment process, the Department's denial of net operating losses, the Department's refund denial process or in the appeals taken by the Parent that prevent the Tribunal from reaching the merits of this appeal for the Periods in Issue.

23. Parent, for the Periods at Issue was a Delaware corporation, headquartered in Michigan and registered to do business in Alabama with the Alabama Secretary of State.

24. Parent for the Periods at Issue was a registered bank holding company under the Bank Holding Company Act of 1956, as amended (12 U.S.C. § 1841 et. seq.).

25. Intermediate HC, for the Periods at Issue, was a Delaware limited liability company, headquartered in Michigan.

26. Intermediate HC elected to be taxed as an association under Treas. Reg. § 301.7701-3.

27. Intermediate HC was a registered bank holding company under the Bank Holding Company Act of 1956, as amended.

28. Bank was a Utah state bank, registered to do business in Alabama with the Alabama Secretary of State.

29. On the pre-adjustment FIET returns prepared by the Parent for the 2012 through 2020 Return Years, Parent reported losses that were generated by Parent and reported them as available to be allocated to Bank in the following amounts:

Return Year Parent Losses

2012 \$17,908,711

2013 \$15,614,912

2014 \$43,427,036

2015 \$13,520,725

2016 \$13,630,320

2017 \$6,907,439

2019 \$9,937,686

2020 \$6,491,151

30. After audit adjustments, the Department determined that Parent's losses were not allocatable to Bank because the group of Parent and Bank were not qualified to file together on a consolidated basis. The Department determined Parent and Bank were not qualified to file together on a consolidated basis because as structured they failed both the Ownership and the Filing tests under Ala. Code §40-16-3(b). The adjustment was to separate Bank and Parent and allow (increase) Parent's current losses as net operating loss carryforwards on a separate entity basis. Additionally, the Department made adjustments for federal RAR adjustments, amended Form 1120X adjustments, adjusted for inclusion of the treasury dividends and also adjustments to include the single member LLCs in income and apportionment. As adjusted, the Parent's losses ... were as follows:

Return Year Parent Loss

2012 \$12,586,990

2013 \$6,979,012

2014 \$24,438,996

2015 \$361,779

2016 \$1,601,716

2017 \$991,912

2018 NA

2019 \$9,873,179

31. The Taxpayers initially appealed from the Department's inclusion of income and apportionment factors of the single member limited liability companies owned by Parent and Bank with those entities for tax purposes. Parent and Bank are no longer contesting the disregarded entity adjustments.

32. Ala. Code §40-16-3(b), which allows for qualified corporate groups to file FIET returns on a consolidated basis was added to the FIET statute by Acts 1978, No. 78-840. Ala. Code §40-16-3(c) provides that financial institution members of a controlled group may elect to file on a consolidated basis if the members meet both the Ownership Test and the Filing Test.

33. The Ownership Test for the Periods in Issue was:

OWNERSHIP TEST. Includable financial institutions connected through stock ownership with a common parent corporation, which financial institutions are includable corporations if:

a. Stock possessing at least 80 percent of the voting power of all classes of stock and at least 80 percent of each class of the nonvoting stock of each of the includable corporations (except the common parent corporation) is owned directly by one or more of the other includable corporations; and

b. The common parent owns directly stock possessing at least 80 percent of the voting power of all classes of stock and at least 80 percent of each class of the nonvoting stock of at least one of the other includable corporations.

34. The Filing Test for the Periods in Issue was:

FILING TEST. In order to be eligible for this election, each member must be a financial institution as defined in Section 40-16-1 and be required to file an excise tax return.

35. Acts 2019, No. 2019-284 (the “Financial Institution Excise Tax Reform Act of 2019”) made changes to Alabama’s financial institution excise tax. In one part, it amended Ala. Code §40-16-3(c)(2), describing the “filing test” for filing a consolidated FIET return, but the change was not material. In another part it changed the “ownership test” to read as follows, effective for tax years beginning after December 31, 2019:

OWNERSHIP TEST. Includable financial institutions connected through stock ownership with a common parent corporation are includable corporations if:

a. Stock possessing at least 80 percent of the

voting power of all classes of stock and at least 80 percent of each class of the nonvoting stock of each of the includable corporations (except the common parent corporation) is owned directly or indirectly, applying the attribution rules of 26 U.S.C. § 318, by one or more of the other includable corporations; and

b. The common parent owns directly or indirectly, applying the attribution rules of 26 U.S.C. § 318, stock possessing at least 80 percent of the voting power of all classes of stock and at least 80 percent of each class of the nonvoting stock of at least one of the other includable corporations.

Discussion

Section 40-16-3(b), Ala. Code 1975, provides, in pertinent part: “Qualified corporate groups, as in this chapter defined, shall have the option to file one excise tax return on a consolidated basis or to file separate returns.”

The issue in this appeal is whether the Parent, the Intermediate HC, and the Bank meet the statutory requirements, i.e., the filing test and ownership test, to file a consolidated return so that the losses of the Parent may offset profits of the Bank. I first address whether the Parent, the Intermediate HC, and the Bank met the filing test to file on a consolidated basis.

As previously stated, the filing test is as follows:

FILING TEST. In order to be eligible for this election, each member must be a financial institution as defined in Section 40-16-1 and be required to file an excise tax return.

Section 40-16-1(1) defines “financial institution” as:

Any person, firm, corporation, and any legal entity whatsoever doing business in this state as a national banking association, bank, banking association, trust company, industrial or other loan company or building and

loan association, and such term shall likewise include any other institution or person employing moneyed capital coming into competition with the business of national banks, and shall apply to such person or institution regardless of what business form and whether or not incorporated, whether of issue or not, and by whatsoever authority existing. The common parent corporation of a controlled group of corporations eligible to elect to file a consolidated excise tax return, in accordance with Section 40-16-3, shall be considered a financial institution if such parent corporation is a registered bank holding company as defined by the Bank Holding Company Act of 1956, as amended....

The former Administrative Law Division explained:

§ 40-16-3(a) requires “[e]very financial institution, as in this chapter defined,” to file an Alabama FIET return.... [T]o be a financial institution for FIET purposes, the entity must be doing business in Alabama. [See Ala. Code 1975, § 40-16-1(1), defining “financial institution” as: “[a]ny person, firm, corporation, and any legal entity whatsoever doing business in this state as a national banking association, bank, banking association, trust company, industrial or other loan company or building and loan association” (emphasis added)].] Consequently, only financial institutions doing business in Alabama are required to file Alabama FIET returns.

AT&T Corporation v. State of Alabama Department of Revenue, 05-403, (Admin. Law Div. 06/30/2006). Here, the Intermediate HC was not doing business in this state.

The Taxpayer points out, though, that § 40-16-1(1) also provides an alternative definition for “financial institution.” Specifically, section 40-16-1(1) states: “The common parent corporation of a controlled group of corporations eligible to elect to file a consolidated excise tax return, in accordance with Section 40-16-3, shall be considered a financial institution if such parent corporation is a registered bank holding company as defined by the Bank Holding Company Act of 1956, as amended.”

The Taxpayer contends that the Intermediate HC is the common parent of the Bank.

However, the Taxpayer is not seeking to file a consolidated return for only the Intermediate HC and the Bank. Instead, its goal is to have the Parent and the Bank file together on a consolidated basis. If the Intermediate HC is added to the group with the Parent and the Bank, the Intermediate HC is not the common parent of the controlled group; the Parent is the common parent. Therefore, the Intermediate HC does not qualify under the filing test to file as a part of a consolidated group.

I next turn to whether the Parent and the Bank meet the ownership test to file a consolidated return together, even in the absence of the Intermediate HC.

As previously stated, the ownership test provides:

OWNERSHIP TEST. Includable financial institutions connected through stock ownership with a common parent corporation, which financial institutions are includable corporations if:

- a. Stock possessing at least 80 percent of the voting power of all classes of stock and at least 80 percent of each class of the nonvoting stock of each of the includable corporations (except the common parent corporation) is owned directly by one or more of the other includable corporations; and
- b. The common parent owns directly stock possessing at least 80 percent of the voting power of all classes of stock and at least 80 percent of each class of the nonvoting stock of at least one of the other includable corporations.

In this case, the Parent owns 100 percent of the Intermediate HC; however, the Parent does not directly own the Bank.² As stated, the Intermediate HC is not includable under the filing test because it does not meet the statutory definition of a

² The parties recognize that the statute has now been amended to reference direct or indirect ownership; however, neither party contends that that amendment was retroactive.

“financial institution.” Therefore, the Parent may not file on a consolidated basis with the Intermediate HC. Because the Parent does not directly own the Bank, the Parent and the Bank do not meet the ownership test to file a consolidated return.

Based on the foregoing, I conclude that the Revenue Department correctly determined that the Taxpayers did not meet the statutory requirements in place at the relevant times to file on a consolidated basis. Therefore, the Revenue Department’s adjustments to net operating losses for return years 2012 through 2016 are upheld. The Revenue Department’s denial of the requests for refunds for return years 2019 and 2020 are upheld. The final assessments of financial institution excise tax against the Bank for return years 2017 and 2018 are upheld. Judgment is entered against the Taxpayer and in favor of the Revenue Department in the following amounts: for 2017, \$1,724,680.22; for 2018, \$2,483,058.25; plus additional interest that continues to accrue from the date of the entry of the final assessments until the liabilities are paid in full.

This Final Order may be appealed to circuit court within 30 days, pursuant to Ala. Code 1975 § 40-2B-2(m).

Entered May 13, 2024.

/s/ Leslie H. Pitman
LESLIE H. PITMAN
Associate Tax Tribunal Judge

lhp:ac

cc: Matthew Setzer, Esq.
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