

**IN THE SUPREME COURT OF OHIO**

FNB, INC.	)	Appeal from the Ohio Board
	)	of Tax Appeals
Appellant,	)	
	)	Board of Tax Appeals
-vs-	)	Case No. 2018-323
	)	
JEFFREY A. McCLAIN,	)	
TAX COMMISSIONER OF OHIO	)	
	)	
Appellee.	)	

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**NOTICE OF APPEAL OF APPELLANT, FNB, INC.**

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Jeffrey A. McClain, Tax Commissioner of Ohio

## **NOTICE OF APPEAL OF APPELLANT, FNB, INC.**

Appellant, FNB, Inc. (“FNB”), hereby gives notice of its appeal as of right, under R.C. 5717.04, to the Ohio Supreme Court from the Decision and Order of the Board of Tax Appeals (“Board”) entered on April 14, 2020 in *FNB, Inc. v. Jeffrey A. McClain, Tax Commissioner of Ohio*, BTA Case No. 2018-323. A true copy of the Board’s Decision and Order being appealed is attached hereto as Exhibit A.

### **INTRODUCTION**

This case concerns FNB’s refund claims for Financial Institutions Tax (“FIT”) it paid for the 2014 and 2015 report years. FNB is an Ohio corporation and is the parent holding company of The First National Bank of Dennison, a national bank with its principal office in Ohio (the “Bank”). In accordance with R.C. Chapter 5726, FNB filed consolidated FIT reports in 2014 and 2015 (“FIT Reports”). At that time, the FIT afforded a credit [R.C. 5726.51] to Ohio-chartered banks, equal to the regulatory fees such banks paid to the Ohio Division of Financial Institutions (the “Credit”). The Credit was not available to national banks like the Bank.

Upon FNB’s inquiry, the Office of the Comptroller of the Currency (“OCC”) opined “that the imposition of the FIT on a national bank with its principal office in Ohio is not authorized under federal law” because it “does not treat a national bank ‘as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located.’” OCC Interpretive Letter No. 1155, September 17, 2015 (the “OCC Interpretive Letter”). Based on the OCC Interpretive Letter, FNB filed refund claims for the FIT it paid on its FIT Reports. Citing the OCC Interpretive letter, Ohio repealed the Credit effective December 22, 2015. 2015 Sub.H.B.No. 340; *see also* Ohio Legislative Service Commission’s Final Analysis for 2015 Sub.H.B.No. 340. Nevertheless, the Tax Commissioner issued a Final Determination

denying FNB's FIT refund claims. On appeal, the Board remanded the case to the Tax Commissioner for further consideration as directed by the Board's Decision and Order.

The Board's Decision and Order ignored several non-constitutional bases dictating that (a) the FIT was void and unenforceable as applied to FNB, and (b) as such, FNB is entitled to a full refund of all FIT paid on its FIT Reports. The Board failed to make any ruling on the non-constitutional bases that demonstrate the Credit rendered the FIT void and unenforceable as applied to FNB. Yet, the Decision and Order remanded the matter to the Tax Commissioner to consider a partial refund to FNB limited by the calculation of a tax credit not provided by statute.

In its appeal to the Board, FNB also asserted that the FIT violated several clauses of the United States Constitution. While the Board did not have the authority to make constitutional determinations, this Court does have such authority and jurisdiction.

#### **ERRORS TO BE REVIEWED AND PROPOSITIONS OF LAW PRESENTED**

FNB complains of the following errors in the Board's Decision and Order and sets forth propositions of law concerning constitutional questions over which this Court has jurisdiction:

1. The Board erred by failing to apply FNB's non-constitutional arguments which demonstrate, individually and collectively, that the FIT was unenforceable and void as applied to the Bank (a nationally-chartered bank) because the FIT plainly exceeded Ohio's authority to tax national banks under 12 U.S.C. 548, therefore violating federal law.<sup>1</sup>

2. The Board erred by failing to find that the FIT is void and unenforceable as applied to the Bank based on statutory construction alone, in that: (a) Ohio's power to tax national banks derives from, and is limited by, 12 U.S.C. 548; and (b) on its face the FIT

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<sup>1</sup> References in this Notice of Appeal to the "FIT" refer to the FIT as constituted before the Credit was repealed in December 2015.

(specifically, the Credit) exceeded Ohio's authority under 12 U.S.C. 548 with respect to taxation of the Bank (a nationally-chartered bank).

3. The Board erred by refusing to exercise its authority to determine that Ohio lacked the authority to impose the FIT on the Bank based on the FIT's clear conflict with controlling federal law (12 U.S.C. 548).

4. The Board erred by refusing to defer to the OCC's reasonable interpretation that "[b]ecause the FIT is inconsistent with 12 U.S.C. § 548, it is the opinion that the imposition of the FIT on a national bank with its principal office in Ohio [like the Bank] is not authorized under federal law." *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

5. The Board erred by remanding this matter to the Tax Commissioner with instructions to issue less than a full refund to FNB of all FIT paid on its FIT reports, because the evidence and argument presented to the Board established that the FIT violated federal law while the Credit was in place and Ohio therefore had no authority to impose the FIT on FNB for the 2014 and 2015 report years.

6. The Board erred when it exceeded its authority under R.C. 5703.02 and asked the Tax Commissioner to exceed his authority under R.C. 5703.05 by remanding this matter to the Tax Commissioner to "determine whether FNB paid any annual assessments or fees substantially similar to those paid by Ohio banks for which a credit would be allowed," and if so, "calculate the appropriate credit and grant the appropriate refund," without any statutory basis.

7. The FIT violated the Supremacy Clause of the United States Constitution on its face and as applied to FNB, in that: (a) in 12 U.S.C. 548 Congress expressly limited the taxation of national banks—i.e., "...a national bank shall be treated as a bank organized and existing

under the laws of the State...within which its principal office is located”; and (b) former R.C. 5726.51 granted a credit to Ohio-chartered banks that was not available to national banks like the Bank; thus, on its face former R.C. 5726.51 conflicts with 12 U.S.C. 548, rendering it void. As such, FNB is entitled to a full refund of all taxes paid under the void FIT in 2014 and 2015.

8. The FIT violated both the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the Equal Protection Clause of Article I, Section 2 of the Constitution of the State of Ohio on its face and as applied to FNB because: (a) the FIT afforded a discriminatory credit [R.C. 5726.51] to Ohio-chartered banks that was not available to nationally-chartered competitors; and (b) as a result, nationally-chartered banks (like the Bank) were taxed at a higher rate than competing Ohio-chartered banks; thus, the FIT impermissibly granted an unfair and unequal tax advantage to Ohio-chartered banks. As such, FNB is entitled to a full refund of all taxes paid under the void FIT in 2014 and 2015.

9. The FIT violated the Dormant Commerce Clause of the United States Constitution on its face and as applied to FNB because the credit under R.C. 5726.51—which was only available to Ohio-chartered banks and not nationally-chartered banks—impermissibly created an economic advantage for Ohio-chartered banks over competing nationally-chartered banks. As such, FNB is entitled to a full refund of all taxes paid under the void FIT in 2014 and 2015.

10. The FIT violated the Due Process Clauses of the Fifth and the Fourteenth Amendments to the United States Constitution on its face and as applied to FNB because: (a) Ohio only had the power to tax nationally-chartered banks under 12 U.S.C. 548; and (b) the FIT exceeded Ohio’s power to tax since it granted the Credit to Ohio-chartered banks but not nationally-chartered banks, in plain violation of 12 U.S.C. 548; thus, Ohio had no power to

impose the FIT on the Bank (a nationally-chartered bank) for periods when the Credit was in place, and collecting and retaining such tax payments from FNB constitutes an impermissible seizure and confiscation of FNB's property. As such, FNB is entitled to a full refund of all 2014 and 2015 FIT taxes that were improperly collected and retained by the Ohio Department of Taxation.

Respectfully submitted,

/s/ Leigh A. Maxa

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### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 13th day of May, 2020, a copy of the foregoing *Notice of Appeal of Appellant, FNB, Inc.* was served via certified U.S. mail under S.Ct.Prac.R. 3.11(C)(2), with a courtesy copy sent via electronic mail, upon the following:

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### **CERTIFICATE OF FILING**

Appellant, FNB, Inc., hereby certifies to the Ohio Supreme Court, through its undersigned counsel, that this *Notice of Appeal of Appellant, FNB, Inc.* was filed with the Ohio Board of Tax Appeals via its electronic filing system on this 13th day of May, 2020.

/s/ Leigh A. Maxa

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# EXHIBIT A



**OHIO BOARD OF TAX APPEALS**

FNB, INC., (et. al.),	)	
	)	
Appellant(s),	)	CASE NO(S). 2018-323
	)	
vs.	)	
	)	
JEFFREY A. MCCLAIN, TAX	)	(FINANCIAL INSTITUTIONS
COMMISSIONER OF OHIO, (et.	)	TAX)
al.),	)	
	)	DECISION AND ORDER
Appellee(s).	)	

**APPEARANCES:**

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Entered Tuesday, April 14, 2020

Mr. Harbarger, Ms. Clements, and Mr. Caswell concur.

Appellant FNB, Inc. appeals a final determination of the Tax Commissioner, denying refund applications for financial institutions tax (“FIT”) for tax years 2014 and 2015. This matter is now considered upon the notice of appeal, the transcript certified by the BOR pursuant to R.C. 5717.01, the joint stipulations of fact, the record of the hearing before this board, and the parties’ written argument.

FNB is an Ohio corporation and is the parent company of the First National Bank of Dennison, a nationally chartered commercial bank with five offices, and TuscValley Financial, consumer finance company with one location. FNB filed FIT returns for tax years 2014 and 2015, in which it did not claim a credit for Ohio-chartered banks provided by R.C. 5626.51. This credit allowed any bank organization chartered under Ohio law to claim a credit “equal [to] the sum of the annual assessments such bank organizations paid during the taxable year to the division of financial institutions pursuant to Title XI of the Revised Code and the schedule of fees published by the division.” This credit was repealed beginning tax year 2016. FNB filed applications for the full refund of all taxes paid for 2014 and 2015 claiming that the imposition of FIT on a national bank with its principal office in Ohio is not authorized under federal law. Alternatively, FNB claimed that it should be refunded the amount it would have received for the credit. The commissioner denied the requests and the present appeal ensued.

It is undisputed that FNB did not qualify for the credit provided by R.C. 5626.51 based on a plain reading of the statute. Instead, FNB maintains that the credit was void and unenforceable pursuant to federal law and the Constitution. FNB argues that because it exceeded its authority to tax FNB as if it were a state-chartered bank, the FIT must be struck down and the full amount it paid for tax years 2014 and 2015 should be refunded. In the alternative, FNB asked for a refund in the amount that it would have received had it benefited




from the credit granted to state-chartered banks. The commissioner asserts that this board lacks the authority to grant the relief sought by FNB, which would effectively modify, repeal, or ignore an existing statutory provision and would require a constitutional analysis to invalidate the FIT scheme.

We agree with the commissioner that this board lacks authority to reach the merits of FNB's constitutional issues. This board's role in cases involving a purely constitutional challenge is limited to receiving evidence. See *MCI Telecommunications Corp. v. Limbach*, 68 Ohio St.3d 195 (1994); *Cleveland Gear Co. v. Limbach*, 35 Ohio St.2d 229 (1988). As such, we decline to strike down the FIT in its entirety or grant FNB a full refund. Therefore, we receive all properly presented evidence into the record in order to leave those for any reviewing court.

Nevertheless, we find merit to FNB's argument that it should receive the benefit of a credit to which it would have been entitled had it been chartered under Ohio, rather than federal, law. 12 U.S.C. 548 requires that for purposes of state tax law, such as the FIT, "a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located." Therefore, if the credit granted by former R.C. 5626.51 applied to FNB, then it should be granted the credit to the extent it would have if it were chartered under Ohio law. The commissioner failed to make the determination as to whether FNB would be eligible for such a credit, and for that reason we must reverse his decision. Because he failed to make that determination, however, we must remand the matter to the commissioner in order to consider this issue.

Accordingly, it is the decision of this board, that the matter must hereby be remanded to the commissioner. On remand, the commissioner must first determine whether FNB paid any annual assessments or fees substantially similar to those paid by Ohio banks for which a credit

would be allowed. If the answer is to the affirmative, then the commissioner should calculate the appropriate credit and grant the appropriate refund.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Harbarger		
Ms. Clements		
Mr. Caswell		

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.



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Kathleen M. Crowley, Board Secretary