



Pennsylvania Tax Reports

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BANK TAX VALUE EXCLUDES VALUE OF OUT-OF-STATE PREDECESSOR

The Commonwealth Court en banc, with one dissent, held that the value of a post-merger bank for Bank Shares Tax purposes cannot be calculated by including the value for a prior year of a predecessor bank that was not taxable in Pennsylvania. *First Union National Bank v. Commonwealth*, No. 181 F.R. 2002 (Pa. Commw. Feb. 2, 2005).

The tax base of the Bank Shares Tax is essentially net worth as reported to regulatory authorities. The value is calculated by adding the net worth for the current and five preceding years and dividing by six, thus providing a stabilized moving average of values. In the tax year, First Union was the survivor of the merger of three banks, one of which never did business in Pennsylvania. A statutory provision provides that in the case of the combination of institutions, the value for each of the six years includes the values of all predecessor institutions. 72 P.S. § 7701.1(c). Nonetheless, the court held that the taxpayer's net worth for the current year could not be calculated by including the net worth of the out-of-state predecessor bank for those years in which the predecessor bank had no contact with Pennsylvania. The court rested its decision on the statutory definition of an *institution*, which excludes a bank that does not do business in Pennsylvania. Thus, the statutory combination provision could not be read to include the value of an out-of-state bank because an out-of-state bank was not an institution. The court did not reach the taxpayer's argument that inclusion in the tax base of the net worth of an institution that was not present in Pennsylvania in prior years violated the Due Process and Commerce Clauses of the U.S. Constitution.

It is not clear from the opinion whether the Commonwealth argued that it is not inappropriate to include the value of a predecessor that did not do business in Pennsylvania, since the averaging formula does not impose a tax for prior years, but is designed to stabilize the taxable value in the current year.

In a footnote, the court held that certain arguments were waived by the Commonwealth because they were not raised below. The court did not discuss Rule 1571(e) of Appellate Procedure, which provides that the Commonwealth may raise any question on review if it gives 20 days written notice to the petitioner prior to trial.