AMERIS BANK f/k/a SOUTHLAND BANK 24 2ND AVENUE SE MOULTRIE, GA 31768,	§	STATE OF ALABAMA ALABAMA TAX TRIBUNAL
Taxpayer,	§	DOCKET NO. BIT. 16-255
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

The Revenue Department assessed Southland Bank for financial institution excise tax ("FIET") for 2002 through 2005 and the short year ending 2/28/06, and American Banking Company for the short year ending 12/31/06 and 2013. Ameris Bank ("Taxpayer"), the successor to Southland Bank and American Banking Company, appealed the final assessments to the Tax Tribunal pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. The case was submitted on a joint stipulation of facts and briefs. Attorneys David Willoughby, Dan Lane, Bruce Ely, and Jimmy Long represented the Taxpayer. Assistant Counsel Ralph Clements represented the Revenue Department.

The Taxpayer received dividends from Southland Real Estate Holdings, Inc. ("Southland"), a majority-owned subsidiary of the Taxpayer, during the years in issue. The Taxpayer deducted the dividends on its Alabama FIET returns for those years pursuant to Code of Ala. 1975, §40-16-1(2)g. That statute allows a financial institution a FIET deduction for "[t]he amount received as dividends from a corporation organized and existing under the laws of the State of Alabama. . . ."

The Department reviewed the returns and disallowed the dividends received deduction in each year. The Department's initial position, as set out in its Answer, at 2, was as follows:

> The Department's position before this Tribunal is that (I) the Bank is not entitled to the dividends received deduction because the REIT from which the dividends were received is not a "corporation" under Alabama law, and (II) that both the REIT and the Bank are necessary components of the Financial Institution commonly known as Ameris Bank (the "Taxpayer"), and because the Financial Institution Excise Tax is levied upon Financial Institutions and not individual persons or corporations, the payment of dividends from the REIT to the Bank are disregarded for tax purposes as intra-company transfers.

The Department subsequently dropped its second contention that Southland and the Taxpayer are a single financial institution, and that the dividends paid by Southland to the Taxpayer should be disregarded for tax purposes as intra-company transfers. Consequently, the sole remaining issue is whether Southland, as a REIT, can also be a corporation, and vice versa, under Alabama law.

The following relevant facts were stipulated by the parties:

> 2. For the tax years ended 12/31/1999 through 2/10/2006, the Taxpayer was an Alabama banking corporation known as Southland Bank and commercially domiciled in Dothan, Alabama. Effective as of February 10, 2006, Southland Bank merged with and into Ameris Bank (f/k/a American Banking Company), a Georgia banking corporation commercially domiciled in Moultrie, Georgia.
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> 3. Southland Real Estate Holdings, Inc. ("Southland") was duly formed in the State of Alabama on July 8, 1999, by the filing of Articles of Incorporation with the Secretary of State of Alabama pursuant to the Alabama Business Corporation Act.
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> 4. Although at all times at issue in the above-styled appeal, Southland was a majority-owned subsidiary of the Taxpayer, of which the Taxpayer owned all the outstanding common stock, at no such time was Southland wholly owned by the Taxpayer, as at all such times at least 100 individuals also owned preferred stock of Southland.
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> 5. At all times at issue in the above-styled appeal, Southland was a "real estate investment trust" as that term is defined in Internal Revenue Code § 856(a) ("REIT").

> 6. At all times at issue in the above-styled appeal, Southland filed federal income tax returns as a qualified REIT under the Internal Revenue Code.
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> 7. At all times at issue in the above-styled appeal, Southland filed Alabama corporate income tax returns as a qualified REIT in accordance with Ala. Code §10A-10-1.21.
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> 8. The Taxpayer did not file a consolidated FIET return including Southland or any other affiliate for any of the tax years at issue in the above-styled appeal.
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> 9. Without regard to the issue of whether dividends received by the Taxpayer from Southland are deductible for purposes of the FIET under Ala. Code § 40-16-1(2)g., there is no dispute as to the amount of the dividends received and claimed as deductions on the Taxpayer's annual FIET returns for the tax years at issue in the above-styled appeal.
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> 14. The Department has not issued an administrative rule, public notice or other public announcement regarding the issue of whether a "financial institution" under the FIET statute must include the assets and income of a REIT subsidiary in its FIET return and FIET tax base in order to meet the statutory definition of a "financial institution."

The parties subsequently submitted the following additional stipulation of fact:

> 1. The Taxpayer's Alabama REIT subsidiary, Southland Real Estate Holdings, Inc., has never received deposits at any time at issue in the above-styled appeal.

As discussed, §40-16-1(2)g allows a financial institution subject to Alabama's FIET to deduct dividends received "from a corporation organized and existing under the laws of the State of Alabama." The parties have stipulated that the Taxpayer received dividends from Southland, and that Southland was a REIT in the subject years. The case thus turns on whether Southland, as a REIT, was also a "corporation organized and existing" under Alabama law in those years. If so, the deduction must be allowed.

The Department argues that because Southland is a REIT, it cannot also be a corporation under Alabama law. It further asserts that Southland's Articles of Incorporation

specify that "[t]he Corporation's activities shall be limited in such manner to qualify for and maintain status as a real estate investment trust. . . ." It thus contends that because Southland elected to be treated as a REIT in the subject years, it must be recognized as a REIT and not a corporation for tax purposes. "When an entity makes the election to be taxed as a REIT . . . it elects to be treated by the tax law as something different than an ordinary corporation . . ., although state law may still regard the entity as a corporation (or an LLC), the tax law deems the entity to be what it has elected to be, regardless of the actual form." Department's Reply Brief at 5, 6.

Finally, the Department claims that because Southland is allowed to deduct its dividends paid out in a tax year for income tax purposes pursuant to IRC 26 U.S.C. §857(b)(2)(B), if the Taxpayer is also allowed to deduct the dividends received from Southland for FIET purposes, the Southland income will escape taxation. "In effect, the same income has been deducted twice, and therefore no state-level tax will have been imposed at all. This cannot be what the law intends, and the presumption should be heavy that the legislature did not intend an absurd result." (emphasis in the original) Department's Reply Brief at 7.

The parties stipulated that Southland was formed in Alabama in 1999 pursuant to the Alabama Business Corporation Act, Code of Ala. 1975, §10-2B-1.01 et seq. Section 10-2B-1.40(4) of that Act defined "corporation" as "a corporation for profit, . . . incorporated under or subject to the provisions of this chapter." The Taxpayer also submitted a certified document dated May 16, 2016 from the Alabama Secretary of State's office showing that Southland was still existing under Alabama law as of the above date. Consequently, because Southland was organized as a corporation under Alabama law, i.e., the Alabama

Business Corporation Act, and existed under Alabama law during the years in issue, the Taxpayer is entitled to deduct the dividends received from Southland under the plain, unambiguous language of §40-16-1(2)g.

The Department's claim that because Southland is a REIT, it cannot also be a corporation, is a red herring. The deduction applies if the entity that pays the dividends, Southland in this case, is a corporation organized and existing under Alabama law. If that criteria is satisfied, the deduction must be allowed. As discussed, Southland was organized under Alabama law in 1999, and was existing under Alabama law during the years in issue. The deduction clearly applies by the plain language of the statute. End of analysis. The fact that Southland elected to operate and be taxed as a REIT for federal and Alabama income tax purposes is irrelevant. And contrary to the Department's claim, federal and Alabama law both clearly envision that a REIT can also be a corporation.

The Alabama Real Estate Investment Trust Act was enacted in 1995 pursuant to Acts 1995, No. 95-628. That Act, at §10-13-2(1), defined a "Real Estate Investment Trust" as "[a]n unincorporated trust or association . . . or an entity that otherwise complies with the provisions of 26 U.S.C. §§856 to 858, inclusive, of the U.S. Internal Revenue Code. . . ."[1] Section 856(a) plainly specifies that "[f]or purposes of this title, the term 'real estate investment trust' means a corporation, trust, or association. . . ." A REIT can thus also be a corporation, and vice versa, for both federal and Alabama purposes.

The Alabama Secretary of State requested an opinion from the Alabama Attorney General in 1997 as to whether a foreign REIT could conduct business in Alabama. In

[1] A substantively identical definition of a REIT is now found at §10A-10-1.02(1).

Opinion 1997-116, the Attorney General concluded that a foreign REIT could conduct business in the State. Importantly, the Opinion also found that a REIT may also be a corporation under Alabama law.

> A REIT may be organized as a corporation, a trust, or an unincorporated association. IRC § 856(a). If the REIT is organized as a foreign corporation and transacts business in Alabama, the REIT must comply with the foreign corporation provision of the [ABCA]. If the REIT is organized as an Alabama corporation, the REIT must comply with the provisions of the ABCA applicable to Alabama corporations. The REIT Act principally refers to trust, but includes within the definition of a REIT any entity that complies with the provisions of IRC §§ 856 to 858. *Id.*, §10-13-2(1). Thus, a corporate REIT is also subject to the provisions of the REIT Act.

Ala. Att'y Gen. Op. 1997-116, at 2.

The Department concedes in its Pretrial Brief, at 4, that "[t]he definition of a REIT incorporated in Alabama's code (I.R.C. §856) provides that a real estate investment trust is 'a corporation, trust, or association' meeting several conditions." It then argues, however, that the corporation, trust, or association cannot be a financial institution, which includes "a bank," see §582(c)(2)(A)(i). "Bank" is defined at §581 as "a bank or trust company . . ., a substantial part of the business of which consists of receiving deposits and making loans."

The Department stipulated that Southland did not receive deposits during the years in issue. It nonetheless asserts that Southland is a bank, as defined above, because it made loans in the subject years. It argues that the phrase "receiving deposits and making loans" should not be conjunctive, and that conducting either activity is sufficient to qualify Southland as a bank. The Department asserts that, "despite the use of the word 'and' to join these two activities, that the word's use here is not conjunctive; that is, that receiving deposits and making loans are examples of activities that make an entity a bank, but not that each and every activity in the description is required." Department's Reply Brief at 3. I

disagree.

The language of the statute is clear. To qualify as a bank pursuant to §581, a substantial part of the entity's business must consist of both receiving deposits and making loans. The disjunctive conjunction "or" cannot be substituted for the conjunctive conjunction "and" used in the statute.[2] Southland thus clearly is not a bank that is prohibited from being a corporate REIT pursuant to §856(a)(4).

I recognize the Department's contention that because Southland, as a REIT, is allowed to deduct the dividends it paid to the Taxpayer for income tax purposes, if the Taxpayer is also allowed to deduct the dividends received for FIET purposes, no State tax will be paid on Southland's income. The Alabama Supreme Court has held, however, that if a taxpayer qualifies for a tax deduction under Alabama law, the deduction must be allowed. *Ex parte Sonat, Inc.*, 752 So.2d 1211 (Ala. 1999).

In *Sonat*, the company deducted for income tax purposes a $185 million dividend it had received from a subsidiary ("SODI") in 1988. At the time, Code of Ala. 1975, §40-18-35(a)(4) allowed a deduction for dividends received from certain affiliated corporations; provided, that the net income of the payor corporation was taxable in Alabama.

SODI's sole activity in Alabama was the leasing of a workstation to another company in Birmingham for $145 a month. The parties stipulated that SODI was qualified to do business and was doing business in Alabama in the subject year.

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[2] The Alabama Supreme Court has held that "courts are at liberty in ascertaining the intent (of a statute) to hold that the disjunctive conjunction 'or' and the conjunctive conjunction 'and,' sometimes carelessly used, are interchangeable, to discover the intent of the writing." *In re Opinion of the Justices*, 41 So.2d 559, 563 (Ala. 1949). There is no indication, however, that the conjunctive "and" used in §581 was "carelessly used" or otherwise unintended.

The Department disallowed the dividends received deduction and assessed Sonat accordingly. On appeal, the circuit court found that because Sonat qualified for the deduction under the plain language of the statute, it must be allowed.

The Department appealed to the Court of Civil Appeals, which reversed, holding that while the deduction "may fall within the letter of §40-18-35(a)(14), it falls well outside its spirit and intent. . . ." *Alabama Department of Revenue v. Sonat, Inc.*, 752 So.2d 1206, 1210 (Ala. Civ. App. 1997).

The Taxpayer appealed to the Alabama Supreme Court, which held that because Sonat technically qualified for the deduction, it must be allowed, regardless of the motivation or result. The Supreme Court quoted the circuit court's Order and Opinion, which reads in pertinent part as follows:

> The Department urges the Court to find that Sonat and SODI entered into the lease of the office workstation for the sole purpose of qualifying its dividends for the deduction under § 40-18-35(a)(14). The Department asks the Court to apply the federal tax doctrine of 'substance over form' and to disregard the lease so as to deny Taxpayer the dividends received deduction. The Court agrees with the Department that it seems likely that the primary, if not the sole, purpose of the SODI/SNG lease was to qualify Sonat for the dividends received deduction. Even if this were the sole purpose of the lease, that does not make it a 'sham' nor does it mean that the transaction should be disregarded. The Court finds that whatever the motivation, the lease was 'real,' the workstation was located in Alabama, and the rent was paid. Under the unambiguous language of the applicable statutes, the Court has concluded that this was a legal method available to the Taxpayer to diminish its Alabama income tax liability.
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> SODI is a wholly owned subsidiary corporation of Sonat. SODI is taxable in Alabama upon its net income; that is, its gross income from sources within Alabama, less its legal deductions. SODI is qualified to do business in Alabama and does business in Alabama. It derives income from property located in Alabama. The dividends SODI pays its parent corporation, Sonat, are therefore deductible by Sonat under Ala. Code (1975) § 40-18-35(a)(14). This result is mandated by the unambiguous language of the statutes and the motivation of the Taxpayer in entering into the lease arrangement is not

> relevant. If this is not the intended result, then the legislature should amend the statute.
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> The best statement this Court has found of Alabama law concerning the right of a taxpayer to take advantage of legal methods of tax avoidance was written in 1938 and is still valid law:
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> > This taxpayer has simply and only set itself up in conformity to the law and proposes to pay the taxes which the law says are payable when so set up. The State cannot complain when the tax payer resorts to a legal method available to him to compute his tax liability. The State is now saying to him that although you did what we said you could do with a certain result, that result is more beneficial to you than we intended. This court cannot change the law as thus made by our Constitution and statutes.
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> > Every corporation was created as a legal method of avoiding a personal liability of its stockholders, or to have the benefit of some other law enacted for the purpose of stimulating such a business enterprise. It seems that it is more to the discredit of the State to seek to withdraw such benefits after they have been accepted and acted upon, than to those who thus act in reliance upon their effective operation.
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> State v. Pullman[-Standard Car] Mfg. Co., 235 Ala. 493, 179 So. 541 (1938)

Sonat, 752 So.2d at 1215, 1216.

The Supreme Court then agreed with the circuit court's rationale, holding that the motive for SODI renting the workstation in Alabama was irrelevant.

> The Department further argues that SODI's workstation lease was made for the purpose of qualifying Sonat for the deduction under § 40-18-35(a)(14) and thereby avoiding the payment of Alabama income tax by both Sonat and SODI. However, the motivation for the workstation lease does not affect the deductibility of the SODI dividend under § 40-18-35(a)(14). "A taxpayer may resort to any *legal* method available to it in an effort to diminish the amount of its tax liability." *West Point Pepperell, Inc. v. State Dep't of Revenue*, 624 So. 2d 579, 582 (Ala. Civ. App. 1992), writ quashed as improvidently granted, 624 So. 2d 582 (Ala. 1993) (citing *State v. Pullman-Standard Car Mfg. Co.*, 235 Ala. 493, 179 So. 541 (1938)). Regardless of the purpose of the workstation lease, the fact remains that it was a bona fide lease--the workstation was situated in Alabama and rent was paid to SODI for its use.

Sonat, 752 So.2d at 1219.[3]

[3] For a similar holding, see *HMN Fin., Inc. v. Comm'r of Revenue*, 782 N.W.2d 558, 2010 Minn. LEXIS 243 (May 20, 2010). In that case, a bank holding company, HMN Financial, owned all of the stock of a bank, HF Bank. HF Bank in turn incorporated Home Federal REIT, or HF REIT. The above captive REIT structure greatly reduced HMN Financial's Minnesota tax liability. The Commissioner of Revenue ignored the REIT structure because, according to the Commissioner, it lacked economic substance and a business purpose.

The Minnesota Supreme Court first found, and HMN did not dispute, that the REIT structure was motivated solely by tax avoidance. It nonetheless held that because HMN had complied with Minnesota's laws in creating the REIT structure, it must be recognized and allowed. The Court held in pertinent part, as follows:

> The Commissioner cites a number of our cases for the proposition that he has the broad authority to tax according to substance rather than form. But none of these cases embraces the radical position that the Commissioner may disregard statutes that allow certain business structures favorable tax treatment. Rather, those cases emphasize the proper role of our court to construe the relevant statutes to determine if a taxpayer is in compliance with those statutes. (footnote omitted) If Minnesota statutes allow a favorable tax treatment, neither our court nor the Commissioner has the power to disregard those statutes and impose a different tax treatment. And, if we conclude a taxpayer has complied with the relevant statutes, that ends our analysis. *See Stretar Masonry Co. v. Comm'r of Revenue,* 518 N.W.2d 29, 32-33 (Minn. 1994). Here, we conclude that HMN complied with the relevant tax statutes.
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> It is evident that the Commissioner disfavors the tax treatment HMN received. He has attacked the validity of that tax treatment from every conceivable angle. But the fact remains that HMN complied with the tax statutes in structuring its business, and those statutes, as they existed during the relevant tax years, allowed the favorable tax treatment HMN received.
> We hold that neither Minnesota statutes nor case law grants the Commissioner the power to disregard HMN's business structure in assessing HMN's taxes. When a business with all of the relevant tax statutes, that business is subject to tax in accordance with those statutes. Here HMN's captive REIT structure complied with relevant statutes during the tax years at issue, and HMN is subject to the taxation only as laid out in those statutes. Therefore, we hold that the tax court erred when it concluded that the Commissioner possessed both statutory and common law authority to disregard HMN's captive REIT structure despite the fact that HMN complied with relevant tax statutes in structuring its business and reporting its income.

HMN Fin., 782 N.W. 2d at 570-571.

Southland was no doubt incorporated as a REIT in 1999 because of the favorable tax advantages afforded REITs by federal and Alabama law. The incorporators were well within their legal rights to do so. A taxpayer is entitled to arrange or organize its business affairs so as to take advantage of all legal means of reducing its tax liability. *Gregory v. Helvering*, 293 U.S. 465, 55 S. Ct. 266 (1935)

The Department argues that the FIET dividends received deduction at §40-16-1(2)g. was enacted in 1935, and that the drafters could not have envisioned the advent of REITs that are allowed to deduct their paid out dividends. "The structure set up by the FIET is not designed to operate with corporations that may deduct their dividends." Department's Reply Brief at 6. But the fact that the legislators that passed the FIET statutes in 1935 could not have envisioned the advent of REITs is irrelevant.

The Alabama Legislature is presumed to know the law, and the effect a newly enacted statute may have on existing law. "It is a familiar principle of statutory construction that the Legislature, in enacting new legislation, is presumed to know the existing law." *Ex parte Fontaine Trailer Co. and Ex parte International Truck & Engine Corp. v. Parker*, 854 So.2d 71, 83 (Ala. 2003), quoting *Blue Cross & Blue Shield of Alabama, Inc. v. Nielsen*, 714 So.2d 293, 297 (Ala. 1998). It consequently must be presumed that when the Legislature enacted the Alabama Real Estate Investment Trust Act, Acts 1995, No. 95-628, in 1995, it knew that for FIET purposes, a financial institution could deduct dividends received from corporations organized and existing under Alabama law. It must further be presumed that the Legislature was aware that the 1995 Act defined a REIT, at §10-13-2(1), to include entities that complied with I.R.C. §856, i.e., corporations. Consequently, it must

be presumed that the Legislature was aware that dividends paid to a financial institution by a corporate REIT incorporated and existing under Alabama law could be deducted by the REIT for income tax purposes, and also by the financial institution for FIET purposes pursuant to §40-16-1(2)g.

Knowing the above consequences of enacting the REIT Act in 1995, the Legislature could have amended the §40-16-1(2)g. deduction so as to exclude from the deduction dividends paid by corporate REITs organized and existing under Alabama law. The Legislature elected not to, and the Department is now asking the Tribunal to so amend the statute by judicial fiat. It is the role of the Alabama Legislature to amend a statute, not the courts. As held by the Alabama Supreme Court in *Parker v. Hilliard*, 567 So.2d 1343 (Ala. 1990):

> In the area of statutory construction, the duty of a court is to ascertain the legislative intent from the language used in the enactment. When the statutory pronouncement is clear and not susceptible to a different interpretation, it is the paramount judicial duty of a court to abide by the clear pronouncement. See *Ex parte Rodgers*, 554 So.2d 1120 (Ala. 1989), and *East Montgomery Water, Sewer & Fire Protection Authority v. Water Works and Sanitary Sewer Bd. Of the City of Montgomery*, 474 So.2d 1088 (Ala. 1985). Courts are supposed to interpret statutes, not to amend or repeal them under the guise of judicial interpretation.

Parker, 567 So.2d at 1346.

The final assessments in issue are voided. Judgment is entered accordingly.

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

Entered February 9, 2017.

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BILL THOMPSON
Chief Tax Tribunal Judge

bt:dr
cc: Ralph M. Clements, III, Esq.
David D. Willoughby, Esq.
Dan F. Laney, Esq.
Bruce P. Ely, Esq.
James E. Long, Jr., Esq.