

## FNB (SORTA) WINS ABILITY TO CLAIM REGULATORY ASSESSMENT CREDIT AGAINST FINANCIAL INSTITUTION TAX AT BOARD

APRIL 16, 2020



DEBORA D. MCGRAW, JD, CPA, LLM  
MEMBER



RICHARD C. FARRIN, JD  
MEMBER

On April 14, 2020, the Ohio Board of Tax Appeals ("Board") rendered its decision in *FNB, Inc. v. McClain*, No. 2018-323. At issue was the regulatory assessment credit for Ohio-chartered banks formerly available in R.C. 5726.51 for the 2015 and 2014 tax years. The credit allowed an Ohio-chartered bank to claim a credit for the regulatory assessments paid to the Ohio Superintendent of Financial Institutions ("Ohio regulator"). FNB, Inc. was a nationally-chartered bank, which do not pay assessments to the Ohio regulator. As a national bank, FNB, Inc. paid regulatory assessments to the Office of the Comptroller of the Currency ("OCC"). FNB, Inc. argued that because R.C. 5726.51 limited the credit to state-chartered banks it violated 12 U.S.C. 548, a federal provision that requires that a state treat a national bank headquartered in the state the same for state tax purposes as a state-chartered bank, and that FNB, Inc. was therefore entitled to a full refund of the entire amount of tax it paid for the years at issue. Alternatively, FNB, Inc. argued that to avoid violating 12 U.S.C. 548, R.C. 5726.51 had to be read as allowing FNB, Inc. to claim the credit. We previously wrote about this issue in [Ohio Refund Opportunity for Federal and Non-Ohio Chartered Financial Institutions](#), July 28, 2016.

The Board agreed with the Tax Commissioner's argument that constitutional issues were outside the Board's jurisdiction and can be ruled upon only in an appeal to the Ohio Supreme Court or a court of appeals. However, it determined that R.C. 5726.51 must be read consistent with 12 U.S.C. 548 to allow FNB, Inc. to claim the credit. The Board concluded that because of its limited jurisdiction it would not strike down the statutory provision nor would it grant FNB, Inc. the credit. Instead, it reversed the Tax Commissioner's decision and

remanded the case back to the Tax Commissioner for a determination of whether FNB, Inc. paid any annual assessments or fees substantially similar to those paid by the Ohio banks for which a credit would be allowed. While presumably the regulatory assessments or fees FNB, Inc. paid to the OCC would be substantially similar to the regulatory fees a state-chartered bank would have paid the Ohio regulator, the Tax Commissioner may argue otherwise and the case may eventually be appealed back to the Board.

Any financial institutions that have a waiver for these tax years may consider filing a protective refund claim. Many financial institutions filed protective refund claims and are awaiting the results of the litigation. There are other cases currently pending at the Board raising similar challenges to R.C. 5726.51.

If you would like to further discuss the *FNB* case or any other state and local tax matter, please contact Deb McGraw, Rich Farrin or one of our other ZHF professionals at 614-326-1120.

# ZAINO HALL & FARRIN LLC

ATTORNEYS AT LAW

[WWW.ZHFTAXLAW.COM](http://WWW.ZHFTAXLAW.COM)

614-326-1120

855-770-1120 (toll-free)

**RON AMSTUTZ**

(non-attorney professional)  
614-782-1545(Direct)  
330-347-3533 (Mobile)  
[ronamstutz@zhfconsulting.com](mailto:ronamstutz@zhfconsulting.com)

**DAN DODD**

614-782-1554 (Direct)  
740-973-5930 (Mobile)  
[dandodd@zhfconsulting.com](mailto:dandodd@zhfconsulting.com)

**STEPHEN K. HALL**

614-349-4812 (Direct)  
614-284-1253 (Mobile)  
[shall@zhftaxlaw.com](mailto:shall@zhftaxlaw.com)

**PHILLIP L. LAWLESS**

(non-attorney professional)  
614-349-4821 (Direct)  
614-565-6098 (Mobile)  
[plawless@zhftaxlaw.com](mailto:plawless@zhftaxlaw.com)

**BRAD W. TOMLINSON**

(non-attorney professional)  
614-349-4818 (Direct)  
[btomlinson@zhftaxlaw.com](mailto:btomlinson@zhftaxlaw.com)

**JENNIFER R. TURNER**

(non-attorney professional)  
614-782-1642 (Direct)  
502-594-9297 (Mobile)  
[jturner@zhftaxlaw.com](mailto:jturner@zhftaxlaw.com)

**THOMAS M. ZAINO**

614-349-4810 (Direct)  
614-598-1596 (Mobile)  
[tzaino@zhftaxlaw.com](mailto:tzaino@zhftaxlaw.com)

**RICHARD S. BITONTE**

(non-attorney professional)  
614-782-1555  
[rbitonte@zhfconsulting.com](mailto:rbitonte@zhfconsulting.com)

**RICHARD C. FARRIN**

614-349-4811 (Direct)  
614-634-3130 (Mobile)  
[rfarrin@zhftaxlaw.com](mailto:rfarrin@zhftaxlaw.com)

**DEREK K. HEYMAN**

614-349-4814 (Direct)  
(614) 353-0878 (Mobile)  
[dheyman@zhftaxlaw.com](mailto:dheyman@zhftaxlaw.com)

**DEBORA D. MCGRAW**

614-349-4813 (Direct)  
614-595-5560 (Mobile)  
[dmcgraw@zhftaxlaw.com](mailto:dmcgraw@zhftaxlaw.com)

**JOHN R. TRIPPIER**

(non-attorney professional)  
614-349-4815 (Direct)  
614-203-4173 (Mobile)  
[jtrippier@zhftaxlaw.com](mailto:jtrippier@zhftaxlaw.com)

**JASON W. WALKER**

(non-attorney professional)  
614-349-4817 (Direct)  
916-533-1626 (Mobile)  
[jwalker@zhftaxlaw.com](mailto:jwalker@zhftaxlaw.com)