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COMMENTS

TAXATION OF NATIONAL BANKS: A NOVEL APPROACH IN THE NEW MEXICO COURTS*

Since the days of *McCulloch v. Maryland*¹ and *Owensboro National Bank v. City of Owensboro*,² national banks have been regarded as immune from state and local taxation except as authorized by Congress.³ Recently, in *First National Bank of Santa Fe v. Commissioner*,⁴ (hereinafter cited as *Santa Fe*) the Court of Appeals of New Mexico seemingly departed from this traditional viewpoint in holding that the New Mexico gross receipts tax was properly imposed upon fees received by a national bank for performing data processing services for other banks.

To reach this conclusion, the court relied on two basic—and somewhat novel—arguments. The court reasoned that the rendering of data processing services is outside the scope of the banking powers specified in 12 U.S.C. § 24 and therefore the receipts are not immune from taxation under 12 U.S.C. § 548.⁵ Additionally, the court felt that since the tax was shifted by the Santa Fe bank to the four banks using the services, the users are the “real taxpayers,” and therefore no burden has been imposed on a national bank.

To facilitate analysis, the court’s arguments will be discussed in three sections, beginning with a discussion of the arguments that the Santa Fe bank is not the “real taxpayer.” The second major section of this comment questions whether data processing activity is outside the scope of powers authorized to national banks, and the final section is concerned with the court’s conclusion that receipts from activities outside the scope of national bank authority are not immune from state taxation.

I.

INCIDENCE OF THE TAX

The “legal incidence” test has been sanctioned by the United

*First National Bank of Santa Fe v. Commissioner, 80 N.M. 699, 460 P.2d 64 (1969).

1. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

2. *Owensboro National Bank v. City of Owensboro*, 173 U.S. 644 (1899).

3. Justice Black, speaking for the court in *Agricultural Bank v. Tax Comm’n*, 392 U.S. 339, 340 (1968), cited *McCulloch* and noted that “A long line of subsequent decisions by this Court has firmly established the proposition that the States are without power, unless authorized by Congress, to tax federally created, or, as they are presently called, national, banks.”

4. *First National Bank of Santa Fe v. Commissioner*, 80 N.M. 699, 460 P.2d 64 (1969).

5. *Id.* at 701, 460 P.2d at 70.

States Supreme Court. Under this test, a state may tax the federal government or its instrumentalities if the *legal incidence* of the tax is on an entity other than the federal government.⁶ A most illustrative application of this doctrine is found in *Colorado National Bank of Denver v. Bedford*,⁷ in which the Supreme Court upheld a tax on the bank's services of renting safe-deposit boxes. The Court held that the bank's immunity should not preclude the state from imposing the tax since the tax was added as a "separate and distinct item," and the bank was required to pass the tax to the user of the services.

The New Mexico court cited *Colorado National Bank* as authority for their holding the Santa Fe bank liable for the tax.⁸ The Santa Fe bank had entered into contracts with the four "user" banks to collect from them the amount of the gross receipts tax assessed; but the Santa Fe bank was obligated to refund the amount collected for the tax, if their appeal to the courts proved successful. From this arrangement, the court inferred that the burden would not rest on a national bank and that "the four users are in fact the taxpayers."⁹ This ruling is seemingly justified by language in *Colorado National Bank, supra*, quoted in the New Mexico opinion:

The person liable for the tax, primarily, cannot always be said to be the real taxpayer. The taxpayer is the person ultimately liable for the tax itself. The funds which were received by the State came from the assets of the user, not from those of the federal instrumentality, the bank. . . .¹⁰

This language suggests that the Supreme Court of the United States will not invalidate a tax on services rendered by a national bank, if the bank is not the "real taxpayer." The test for whether the bank is the taxpayer is not supplied in this language, but the court makes it plain that the test is not satisfied merely by showing that

6. The "legal incidence" test is discussed in a comment in 43 Notre Dame Lawyer at 448-49. The author cites language in *National Bank of Detroit v. Department of Revenue of the State of Michigan*, 340 Mich. 573, 66 N.W.2d 237, 239 (1954), as a good illustration: "Since the legal incidence of the tax does not fall on the purchaser of merchandise but rather on the retailer, such purchaser, in legal contemplation, is not the taxpayer even though the economic burden may be shifted to him." Examples from non-banking areas are found in *Curry v. United States*, 314 U.S. 14 (1941), *Alabama v. King & Boozer*, 314 U.S. 1 (1941), and *James, State Tax Comm. v. Dravo Contracting Co.*, 302 U.S. 134 (1937).

7. 310 U.S. 41 (1940).

8. *First National Bank of Santa Fe v. Commissioner*, 80 N.M. 699, 704, 460 P.2d 64, 68-69 (1969).

9. *Id.* at 705, 460, P.2d at 70. The court also noted that the Santa Fe bank could lawfully collect the tax from the users under New Mexico statutes [N.M. Stat. Ann. § 72-16A-6 (Repl. 1961, Supp. 1969)], and that it is a common practice, although not an obligation, for "the person responsible for the tax to pass it on to the buyer or lessee."

10. 310 U.S. at 52, cited by the New Mexico court in *First National Bank of Santa Fe v. Commissioner*, 80 N.M. at 704, 460 P.2d at 69 (1969).

the national bank *may* pass the tax on to the user. In the same paragraph quoted by the New Mexico court, a stricter standard is set forth:

The Colorado Supreme Court holds the user is the taxpayer. The determination of the state court as to the incidence of the tax has great weight on us and *when it follows logically the language of the act* as here, is controlling. As the user directly furnishes the funds for the tax, *not as an ultimate consumer with a transferred burden but by § 12 of the act as the responsible obligor*, we conclude the tax is upon him not upon the bank. (Emphasis added.)¹¹

It is clear that the New Mexico court was satisfied with considerably less than a showing that the "user" is the "responsible obligor" under the tax act. The language of the New Mexico statute authorizing the gross receipts tax seems to state plainly where the obligation rests: the tax is "imposed on *any person engaging in business* in New Mexico."¹² (Emphasis added.) It would seem, therefore, that a determination that the incidence of the tax is on the "four users" does not "logically follow the language of the act,"¹³ unless the contractual provisions between the parties or the "common practice" of passing the tax to the buyer are somehow read into the statute.¹⁴ Either approach seems to overlook the plain meaning of the language, and sets the stage for problems which apparently were not anticipated by the court.

According to the contract, the "users" were to repay the Santa Fe bank for any tax *lawfully* assessed on account of the rendering of the services. Thus, the parties agreed that the issue of lawfulness of the tax must be determined before the liability of a "user" is established. If the contract is "read in," therefore, it is clear that the burden has not shifted until the tax has been held lawful. As Judge Spiess points out, the New Mexico court has said in effect that the tax is lawful because the burden has shifted, but the burden only shifts when the tax is lawful!¹⁵ Moreover, if the court is forced to rely on the

11. 310 U.S. at 52-53.

12. N.M. Stat. Ann. § 72-16A-4 (Repl. 1961, Supp. 1969).

13. That such determination can be challenged is evidenced by the Agricultural bank case, *supra* note 3. The Massachusetts Supreme Court held themselves bound by the lower court's determination that the tax was on the vendor and not on the bank. On appeal, the United States Supreme Court ruled that the essential question before the Court was "On whom does the incidence of the tax fall?" A sales tax which was required to be passed to the consumer was held invalid as applied to sales to a national bank.

14. *First National Bank of Santa Fe v. Commissioner*, 80 N.M. 699, 705, 460 P.2d 64, 70 (1969). It is not clear whether the court based its decision on the contractual arrangement or the "common practice." To parties seeking to avoid tax liability on a given transaction there would be little difference, however, since they could always include in their agreement a provision to shift the tax to the buyer.

15. See Chief Judge Spiess's dissent, *id.* at 705, 460 P.2d at 70, 71.

contractual provisions as the basis for their holding it would seem that tax liability could be avoided entirely, if the parties do not specify that the buyer is to compensate the seller for any tax imposed. The logical application of this reasoning would allow the tax liability to be eliminated entirely by a contract provision always placing the burden upon the immune party.¹⁶

Although it is not likely that the "contractual provision" or "common practice" reasoning would be applied to all other factual situations which logically fall within the bounds of the *Santa Fe* decision, it is not clear that "extreme results" will be avoided. In the present case, one of the four "user" banks is a national bank;¹⁷ thus, it is clear that whether the incidence of the tax falls upon the "seller" or the "buyer" of the services, a national bank is being taxed. The court has made no attempt to avoid this "extreme" result by ruling that the "user" national bank is not liable for the tax. Were they to do so, the tax liability of any federal instrumentality buyer in New Mexico would be open to question. The court notes that it is a "common practice" to pass the tax on to the buyer, even though the buyer is a federal instrumentality.¹⁸ If this means that the buyer is generally considered the taxpayer since he ultimately pays the tax, sales to federal instrumentalities should not be taxed. The future may bring a reluctance by the court to rigidly apply this part of its holding. The most reasonable approach is to disregard the "common practice" discussion as dicta, and to enforce contractual provisions which shift the burden of the tax only if they would not result in an avoidance of tax which would otherwise be properly imposed.

II.

SCOPE OF ACTIVITY

The New Mexico court sets out a test for immunity, based on "whether the activity or service is reasonably related or incidental to the accomplishment of its bank functions."¹⁹ If this is a valid test, it becomes vitally important to determine whether rendering data processing services to other banks is within the scope of a national bank's powers.

The powers granted to national banks are specified in 12 U.S.C. §

16. If a federal instrumentality sells under a contract which does not require the buyer to repay the tax, but buys under a contract which provides that the buyer must repay the seller for any tax imposed, this reasoning would dictate that the tax would be upon neither transaction.

17. Listed among the stipulated facts is the finding that "the Bank entered into contracts with four unaffiliated banks (three state and one national) . . ." *First National Bank of Santa Fe v. Commissioner*, 80 N.M. 699, 701, 460 P.2d 64, 65 (1969).

18. *Id.* at 705, 460 P.2d at 70.

19. *Id.* at 702, 460 P.2d at 67.

24, including "incidental powers."²⁰ There has not been a clear indication from the United States Supreme Court of the general scope of these powers,²¹ nor has any court yet specifically ruled whether a national bank exceeds its power by performing data processing services for others.²²

Since the New Mexico court was not compelled by precedent to decide that the services rendered were within a national bank's powers, a ruling that the services were outside the scope of the Santa Fe bank's powers could legitimately follow. Although the court's opinion contains no detailed discussion of the factors which led to that conclusion, the court's holding clearly assumes that the bank has exceeded its power. Only in this way was the court able to distinguish *Santa Fe* from the long line of cases holding national banks immune from local taxation. According to the court, "none of these cases involved the question of a tax upon fees or charges made by a national bank for commercial services performed outside the scope of its banking powers as authorized by Congress."²³

A plausible argument can be made to support the conclusion that the Santa Fe bank was acting outside its authorized scope.²⁴ As noted by the court, 12 U.S.C. § 24 enumerates the powers granted to a national bank, and data processing is not among the powers listed. The status of powers not enumerated is not always clear, but

20. Congress has granted a national bank the power "To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24(7) (1940).

21. One commentator notes that although the "incidental powers" became part of the federal statutes in 1864, "the Court has never really focused on the intent of Congress" in including this language. R. Beatty, *What are the Legal Limits to the Expansion of National Bank Services?*, 86 Banking L.J. 3, 19.

22. In *Arnold Tours, Inc. v. Camp*, 408 F.2d 1147 (1st Cir. 1969), the court noted that the authorities are not in agreement on this issue, but no attempt was made to resolve it. The court's holding was restricted to the question of "standing," reversing district court rulings that an independent data processing company has no standing to challenge whether a national bank may perform data processing services. The appellate court declined to examine a bank's powers to enter into the data processing business: "We leave the resolution of this conflict to future determination."

23. *First National Bank of Santa Fe v. Commissioner*, 80 N.M. 699, 701, 460 P.2d 64, 66 (1969). A good review of the cases which have held national banks immune is found in a comment in 1969 Utah L. Rev. 352.

24. The New Mexico court in *First National Bank of Santa Fe v. Commissioner*, 80 N.M. 699, 701, 460 P.2d 64, 66 (1969), relied on three facts to support its conclusions: "The fact that the enumerated powers of a national bank do not include the performance of such services for other banks, the fact that the Bank Service Corporations are expressly empowered to perform such services for banks, and the fact that Congress has not limited the taxation by a state of Bank Service Corporations, indicates [sic] to us that Congress does not intend that the performances of these services may not be taxed by a state." The court, thus, seems to assume that powers not specifically enumerated by Congress are necessarily outside the scope of authorization and therefore outside the scope of immunity which Congress has conferred.

the United States Supreme Court has said that "... the measure of their [national banks] powers is the statutory grant; and powers not conferred by Congress are denied . . ." ²⁵

It is also possible to argue that by enacting the Bank Service Corporation Act,²⁶ Congress has entirely precluded national banks from furnishing data processing services. By this act, Congress authorized banks to unite by forming a separate data processing corporation. As a separate entity, a Bank Service Corporation can purchase data processing equipment and utilize it according to the combined needs of the incorporating banks, thus providing the opportunity for small banks to take advantage of the faster, more efficient means of handling their business by utilizing equipment which they probably could not afford on their own. By express provision these Bank Service Corporations are prohibited from engaging in "any activity other than the performance of bank services for banks."²⁷ The history of this provision clearly shows that Congress enacted it to protect private data processing firms from competition.²⁸ In *Arnold Tours, Inc. v. Camp*,²⁹ the court indicated that the prohibition against engaging in non-bank business "would be largely illusory" if a bank member of the corporation could solicit business on its own and pass it to the Bank Service Corporation. The court went on to say that large banks which are not members of any Bank Service Corporation should likewise be prohibited "or the equalizing effect of the Bank Service Corporation Act would be lost."³⁰

The better argument, however, probably is that data processing activities are within the scope of the bank's "incidental" powers,

25. *Texas and Pacific Railway Co. v. Pottorff*, 291 U.S. 245, 253 (1934). In accord with this principle are *City of Marion v. Sneed*, 291 U.S. 262 (1934), and *Downey v. City of Yonkers*, 309 U.S. 590 (1940).

26. 12 U.S.C. §§ 1861-65 (1962).

27. 12 U.S.C. § 1864 (1962).

28. The bill initially allowed Bank Service Corporations to engage in non-banking business (up to 50% of their total volume could be non-banking business), but an amendment was deemed necessary "because the banks could use their own personnel, charge merely out-of-pocket cost, and the unfair competition could drive businesses now offering this kind of service to the wall." 108 Cong. Rec. 22031 (1962) (remarks of Senator Proxmire). See also 2 U.S. Code Cong. & Ad. News 3878 (1962).

The National Society of Public Accountants was "very much opposed" to the original bill because of the likelihood that Bank Service Corporations would, in an attempt to utilize their equipment fully, take business from accounting firms. 108 Cong. Rec. 16499 (1962). Senator Robertson, who sponsored the bill, was opposed to the amendment limiting Bank Service Corporations to only banking activities; and his statement of acquiescence leaves no doubt as to the reason for its enactment: "... the acceptance of this amendment will carry out the recommendations of the accountants." 108 Cong. Rec. 22099 (1962).

29. 408 F.2d 1147 (1st Cir. 1969).

30. *Id.* at 1153.

consistent with rulings of the Comptroller of the Currency.³¹ The provisions of 12 U.S.C. § 24 set out the "classic banking functions," but nowhere do we find a specific grant for the day-to-day functions which national banks perform. Looking to case law for an indication of the breadth of these day-to-day, or "incidental" powers, we find that the concern of the Supreme Court with regard to incidental banking activity is not that competition may result, but whether engaging in the activity would result in a substantial risk to the bank.³² In the absence of a substantial risk to the bank, there seems to be no tendency to narrowly restrict a national bank in its incidental activities.³³ If commercial banks, in general, engage in an activity, it is not likely that national banks will be precluded from engaging in the same type of activity.³⁴ This principle seems reasonable when applied to the facts of the *Santa Fe* case. Since other commercial banks are free to engage in data processing for their customers, to hold that national banks cannot do likewise places national banks at a competitive disadvantage. It would be a questionable policy that would enforce certain discrimination merely because the alternative raises the *possibility* that other private business *might* be injured.³⁵ A more reasonable approach is to allow national banks to compete, legitimately, with other banks, until it is shown that current supervision is unable to prevent national banks from taking unfair advantage of their federal status.

31. Beatty, *supra* note 21, at 5 reports that 3500, Comptroller's Manual for National Banks, U.S. Treasury Department states: "Incidental to its banking services, a national bank may make available its data processing equipment or perform data processing services on such equipment for other banks and bank securities."

32. In *First National Bank of Charlotte v. National Exchange Bank of Baltimore*, 92 U.S. 122, 127 (1875), the Court said that the incidental powers are "such as required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently."

33. In *Franklin National Bank v. New York*, 347 U.S. 373, 377 (1954), the Court held that national banks may advertise, under their incidental powers, stating: "We cannot believe that the incidental powers granted to national banks should be construed so narrowly as to preclude the use of advertising in any branch of their authorized business."

34. Beatty, *supra* note 21, at 19, after carefully reviewing cases dealing with the scope of a national bank's "incidental powers," concluded that "... an activity which is reasonably related to the traditional activity of commercial banks will be approved, even if, in itself, it represents a totally new function. A significant limitation is usually imposed on this rather permissive standard; however, the new activity must not entail any substantial risk to the bank."

35. Nowhere in the history of the Bank Service Corporation Act is there an indication that Congress felt that the private accounting firms needed protection from national banks themselves. National banks are primarily engaged in banking, not data processing. They are subject to the Comptroller's supervision; and, as the report of the committee indicates, Congress relies on the Comptroller to insure that national banks do not use their privileged status unfairly. 2 U.S. Code Cong. & Ad. News, 3878 (1962).

III. LOSS OF IMMUNITY

Federal instrumentalities established by Congress are initially presumed to be wholly immune from state control, unless contrary intent is demonstrated.³⁶ This presumption is of minimal effect, however, when Supreme Court interpretations indicate that some control is permissible. As noted by the New Mexico court, tax immunity is an area in which some control by the state is permitted. In general, immunity has been narrowly restricted, and doubts have been resolved in favor of imposing the tax.³⁷ The difficulty arises, however, when this "general" principle is applied to the *specific* question of taxation of national banks.

The provisions of 12 U.S.C. § 548 grant states the power to tax national banks in four ways,³⁸ and the overwhelming case authority has made it clear that the states have no power to tax national banks

36. Department of Employment v. United States, 385 U.S. 355, 360 (1966).

37. Bank of Commerce v. Tennessee, 104 U.S. 493 (1882) cited in the court's opinion in First National Bank of Santa Fe. v. Commissioner, 80 N.M. 699, 702, 460 P.2d 64, 67 (1969).

38. 12 U.S.C. § 548 reads:

State taxation—The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of such state coming into competition with the business of national banks; Provided, that bonds, notes, or other evidences of indebtedness in the hands of individuals not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in the case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon merchantile, manufacturing, and business corporations doing business within its limits: Provided, however, That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals may include in such individual incomes dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on

outside these statutory provisions.³⁹ A vigorous attack on the doctrine was recently repelled by the Supreme Court. In the course of the opinion, the Court made it plain that the grant of taxing power to the states is exclusive,⁴⁰ and that this interpretation is not to be changed without Congressional action.⁴¹ Since there is nothing in the language of § 548 which might be interpreted as granting states the power to tax national banks on their ultra vires activities, and the states are without power to reach the assets of national banks through taxation unless § 548 authorizes them to do so, it follows that engaging in activities outside the scope of the banking function should not subject a national bank to a tax from which it would otherwise be immune.

The interpretation that § 548 grants the *only* means for a state to tax national banks results in discrimination against state banks,⁴² since they must pay a tax which their national counterparts do not. Moreover, this interpretation has long been recognized as less than logical.⁴³ It has withstood vigorous attacks, however, and as the law now stands, national banks are regarded as *totally* immune from state tax, except as provided in 12 U.S.C. § 548.⁴⁴

condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations. . . .

2. The shares of any national banking association owned by nonresidents of any State shall be taxed by the taxing district or by the State where their association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such non-resident shareholders.

3. Nothing herein shall be construed to exempt the real property. . . .

39. Among the stronger cases are: *Agricultural Bank v. State Tax Comm'n*, 392 U.S. 339 (1968); *Des Moines Bank v. Fairweather*, 263 U.S. 103 (1923); and *Owensboro National Bank v. City of Owensboro*, 173 U.S. 664 (1899). For a thorough review of the cases holding national banks immune from state taxation, see 1969 *Utah L. Rev.* 352.

40. *Agricultural Bank v. State Tax Comm'n*, 392 U.S. 339, 343 (1968).

41. "Because of § 548 and its legislative history, we are convinced that if a change is to be made in state taxation of national banks, it must come from the Congress, which has established the present limits." *Id.* at 346. The history of 12 U.S.C. § 548 is set out in detail in R. Risks and B. Polichar, *The Taxation of National Banks and Bank Fixtures: Inequitable Methods, Unpredictable Law*, 40 *S. Cal. L. Rev.* 669 (1967).

42. "The status of sales to national banks is likely to prove a major bone of contention. . . . If the national banks are entitled to purchase data processing equipment free of any sales tax burden, their competitive position vis a vis their state chartered rivals is greatly enhanced." 13 *Vill. L. Rev.* 399, 405 n. 42 (1968).

43. Chief Justice Marshall recognized that the states possessed some powers to tax national banks without running afoul of the Constitution: "This opinion does not deprive the States of any resources which they originally possessed." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 at 436 (1819). Roger Traynor has criticized the theory that the states derive their power to tax national banks from a Congressional grant, noting that this would mean that "Congress has granted a power which is by the Constitution delegated exclusively to the federal government or prohibited to the states by that instrument." *National Bank Taxation in California*, 17 *Calif. L. Rev.* 83, 88 (1928).

44. According to one commentator, "The effect of the *Agricultural Bank* holding that

Existing law shows a reluctance to separate national bank activities necessary to their federal function from those which are not,⁴⁵ and all functions are therefore immune from state tax. This reluctance is necessary, in many instances, since a distinction would be arbitrary and unrealistic. In *Santa Fe*, however, the distinction can easily be made. The activity of the Santa Fe bank is probably not outside the scope of its banking powers, but it is clearly defined and reasonably separable from the federal functions of the bank. Had the parties in *Santa Fe* formed a Bank Service Corporation, the separate entity thus created would have been subject to the tax.⁴⁶ The fact that they chose not to do so should not preclude the imposition of a tax which would otherwise be proper.

CONCLUSION

The holding of the New Mexico court that the gross receipts tax was properly imposed since the national bank was not the "real taxpayer" does not fare well under close analysis. As noted previously, the court seems to torture the plain meaning of the statutory language and to provide for tax avoidance possibilities which have not previously existed in New Mexico. Moreover, the "shifting of the burden" argument does not adequately solve the problem presented by the fact of this case that one of the "user" banks was a national bank. If the burden has been shifted to the "users," as the court says, it is clear that the "user" *national* bank is being taxed.

The proposition that performing data processing services for other banks is outside the scope of a national bank's power has some merit. The weight of authority would oppose restriction, however, when such activity is commercially sound and perhaps necessary for efficient, competitive national bank operations. The only contrary views arise in settings where the prime concern is "unfair competition." Since no one in this case claimed that the function of rendering data processing services is in itself harmful, it would seem unfair to conclude that national banks are now prohibited from rendering data processing services for other banks. It should be noted that the New Mexico court did not specifically rule that the Santa Fe bank could

the statute is not now subject to judicial interpretation is to make absolute the presumption of total federal immunity of national banks." Comment, 1969 Utah L. Rev. 352.

45. In *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 758 (1824), Chief Justice Marshall ruled that the private operations could not be separated from the governmental functions since the "authority to participate in private profit-making activities created a method of engrafting life upon the skeleton."

46. *Arizona State Tax Comm'n v. First Bank Building Corp.*, 5 Ariz. App. 594, 429 P.2d 481 (1967), *Commissioner of Banks v. Chase Securities Corporation*, 298 Mass. 285, 10 N.E.2d 472 (1937).

no longer perform such services, but only that the receipts from this type of activity are taxable. The holding could therefore be limited to its facts, and it should not be taken as authority for the proposition that national banks cannot render data processing services for other banks.⁴⁷

The major holding of the court that activities which are not specifically enumerated in 12 U.S.C. § 24 are taxable seems contrary to existing law; however, it is possible that the approach taken by the New Mexico court might be the way to crack the shell of immunity which now surrounds national banks. To hold that national banks cannot perform data processing services for other banks is probably unduly restrictive; however, taxing these activities seems to do no more than to place national banks on equal competitive ground with state banks and with "ordinary" taxpayers. Congress has clearly prescribed the method for banks to unite to accomplish their data processing function.⁴⁸ The only method authorized by the statutes provides for the formation of a separate entity which would not be immune from state taxation, since the statutory immunity runs only to national banks. The fact that banks do not follow the authorized procedure should not allow them to claim an immunity to which they would not be entitled had they followed the rules laid down by Congress. The best approach, therefore, is to hold that transactions in which a national bank furnishes data processing services to "user" banks are not immune from taxation, not because national banks do not have authorization to render data processing services, but because transactions of this type are authorized by Congress in statutes which do *not* grant tax immunity.

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47. Even if national banks are precluded from engaging in "the data processing business," it does not follow that the Santa Fe bank is barred from serving *other banks*. Since small banks can lawfully form a Bank Service Corporation to process their data, it is clear that the prohibition in 12 U.S.C. § 1864 will never serve to protect private accounting firms from competition if the customers are banks. Thus, since it cannot be said that the Santa Fe bank is competing with private accounting forms, the major force of the *ultra vires* argument is diminished.

48. 12 U.S.C. §§ 1861-65 (1962).