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In the

Supreme Court of the United States

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BOSTON, ET A:.,

Appellants,

V.

STATE TAX COMMISSION, ET AL.,

Appelles.

No. 77-334

Washington, D.C.
March 21, 1978

Pages 1 thru 31

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IN THE SUPREME COURT OF THE UNITED STATES

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BOSTON, ET AL., Appellants,	:	
v.	:	No. 77-334
STATE TAX COMMISSION, ET AL., Appellees.	:	

Washington, D. C.

Tuesday, March 21, 1978

The above-entitled matter came on for argument at 1:17 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the Supreme Court
WILLIAM J. BRENNAN, JR., Associate Jus-ice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

CHESTER M. HOWE, ESQ., Gaston Snow & Ely Bartlett, One Federal Street, Boston, Massachusetts 02110; on behalf of the Appellants

S. STEPHEN ROSENFELD, ESQ., Assistant Attorney General of Massachusetts, One Ashburton Place, Boston, Massachusetts 02108; on behalf of the Appellees

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 77-334, First Federal Savings and Loan Association v. State Tax Commission.

Mr. Howe, you may proceed whenever you are ready.

ORAL ARGUMENT OF CHESTER M. HOWE, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. HOWE: Mr. Chief Justice, and may it please the Court:

We start with the uncontested proposition that federal savings and loan associations are federal instrumentalities. As such, they may be taxed only as Congress authorizes us. The Congressional authorization appears in Title 12, U.S.C., section 1465(h).

QUESTION: What you really mean is federal instrumentalities for that limited purpose, they are not federal instrumentalities in the use of that term as it is used under the Federal Tort Claims Act, for example?

MR. HOWE: They are, as that phrase is used, I believe, in the national banking cases.

QUESTION: It is a narrow instrumentality, not a broad one?

MR. HOWE: I would agree with that, Your Honor.

The congressional authorization appears in section 1464(h) and it provides in pertinent part that no state shall

impose any tax on federal associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed on similar local mutual or cooperative thrift and home financing institutions.

This is a case of first impression which should determine the extent to which Congress has authorized state taxation of federal associations.

In 1966, Massachusetts elected to tax federal associations. The tax as imposed by measured by a deposit element and by an income element. The statute is now challenged on the grounds that it conflicts with 1464(h) because it discriminates against federal associations and also because it violates federal constitutional provisions.

I propose to address four issues presented in our brief. The first is that the state statute exempts entirely all Massachusetts credit unions from the tax. The exemption is discriminatory if state credit unions are similar to federal associations within the meaning of 1464(h). The largest credit unions in Massachusetts are functionally similar though not identical in both powers and purposes and in operations of federal associations.

The next two issues which I would like to address is whether the tax is a franchise tax or whether the commerce clause is violated. Both arise from one statutory defect, and that is that the statute has no apportionment provision. As a

result, all income earned outside of Massachusetts by federal associations is taxed by the commonwealth. Federal associations had earned during the years that we have statistics about a third of their income from states other than Massachusetts. The associations are a part of a national housing program and necessarily do a large out-of-state business. Other states provide a variety of benefits upon federal associations through their recording facilities and in other ways.

The statute makes no attempt to exclude from the tax base the benefits conferred by the other states. By definition, a franchise tax measures only the value of the benefits conferred by the taxing state. Massachusetts goes beyond that. It fails to limit its tax base in any way.

The commerce clause parallels the franchise tax issue. Again, no apportionment is provided for income earned outside the commonwealth. The risk here is one of double taxation on the federal associations which ought to be prohibited by the commerce clause.

The final and perhaps most important issue is that the state court found that the income measure of the tax discriminates against federal associations. The discrimination is caused by the deduction from income for required additions to surplus. All thrift institutions have that kind of requirement. The terminology may vary from institution to

institution, but they are called guaranteed funds, surplus, r something equivalent to that.

The state court finding of discrimination is clearly accurate, it should be dispositive of the case; however, the state court excused the discrimination on the grounds that its source was the federal regulatory agency which regulates the amount of the reserve requirements of federal associations.

The court also said that the associations had failed to show a competitive, a substantial competitive disadvantage. Neither justification is valid.

This case arises as a result of a declaratory judgment by the Massachusetts Supreme Judicial Court. The record consists of stipulated facts in an affidavit. The court upheld the state statute against all challenges presented. It was the second time that the state statute had been before a court.

In 1973, the Court of Appeals for the First Circuit held the deposits element of the tax to be invalid as against the federal associations on the grounds that it was discriminatory against them under 1464(h). The basis of the holding was that in general the mortgage deduction loans which were a deduction from the deposits element were applicable solely to the state institutions. Out-of-state loans were not deductible and the greatest impact of that limitation was against the federal associations.

The Court of Appeals abstained from adjudicating the income element of the tax on the grounds of comity, indicating that there was an adequate remedy in the state court.

Beginning with the credit union issue, the state court found that credit unions are in fact mutual thrift and home financing institutions. However, it concluded that they were not similar. The court said, "The test for similarity is not what each type of institution might do but rather what each does in fact."

The association so urged that the standard adopted is erroneous. The test is otherwise in other tax cases. Since 1935, this Court's leading decision in Morrissey v. Commissioner, the character of an institution has been determined by its powers, not by what it does in fact, but by what it might do. The basis of the holding is that an institution may exercise the powers granted to it fully at any time.

In the national bank taxing cases involving a statute related to 1464(h), the test is also based upon powers. For example, in the Mercantile Bank of New York case, the sole emphasisfor testing similarity between New York trust companies and national banks was the respective powers.

QUESTION: Could I interrupt you with one question?

MR. HOWE: Surely.

QUESTION: Supposing you had a thousand state savings and loan institutions and credit unions, all which were taxed

at the same rate as the federal, and then the State of Massachusetts granted an exemption to say two or three institutions so that they would not be taxing all of the similar institutions but just 97 percent of them. Would that require them to repeal the tax on the federal? Is there a requirement that all similar institutions be taxed?

MR. HOWE: As I read 1464(h), I would think that would be the answer, Your Honor.

QUESTION: It just says the rate can't be higher than that imposed on other similar local units, and there is a tax on state savings and loans, and the rate on the federal is the same. What is it that says that they must -- that every similar state agency must be subjected to the tax?

MR. HOWE: Well, if I can try to answer it by assuming that all such institutions, state institutions that you are describing earned exactly the same level of income as did all federal associations, excepting for the two or three that are exempt.

QUESTION: Right.

MR. HOWE: The rate of tax in the aggregate on the state institutions would be lesser perhaps by a relatively small amount but nevertheless in the aggregate lesser.

QUESTION: I see. So you say they have to be taxed, all of those that are similar --

MR. HOWER: That's correct.

Interestingly, the state court failed to respond to these precedents and the State Tax Commission has equally failed to address them.

QUESTION: So if you prevail in this, the state could not collect the tax from the federal institutions at all for the use --

MR. HOWE: For the years in question, that would be the answer, Your Honor. But on that score, I might note that the federal associations have been challenging the tax from the outset on the grounds that it is discriminatory. It isn't something that comes out of the woodwork late in the day.

Referring to the statutory differences which exist, they tend to be trivial. For example, a credit union may mortgage up to 90 percent of the value on an individual home, as compared to 80 percent by an S&L. A credit union may invest a total of 80 percent of all of its assets including surplus in the mortgage field, as compared to 95 percent for federal associations of deposits only. So that while the figures are 15 percent apart, they in fact are closer.

The maximum loan on an individual residence is $50,000 for a credit union, whereas it is $55,000 for a savings and loan association.

QUESTION: Incidentally, were these similarities, I gather is what you are arguing, true when section 11 was enacted? That was in '66.

MR. HOWER: There have been continuing changes, Your Honor, even beginning with --

QUESTION: Well, what were they in '66?

MR. HOWER: I believe the limitations, the individual limitation for a federal association in '66 was $40,000 per home. The total assets --

QUESTION: And what was it for credit unions?

MR. HOWE: For credit unions?

QUESTION: Yes.

MR. HOWE: The appendix includes the rate that was involved --

QUESTION: That's all right, don't waste your time with it.

MR. HOWE: Thank you.

QUESTION: Was it about the same?

MR. HOWE: About the same, yes.

QUESTION: So any changes since '66 have paralleled one another, have they?

MR. HOWE: They tended to escalate presumably reflecting the fact that everything costs more.

QUESTION: To the same degree for each?

MR. HOWE: If you are asking that in terms of percentages, I am not able to answer the question, Your Honor.

QUESTION: Amounts.

MR. HOWE: If I may answer it in terms of comparability,

yes, but not by dollar amounts.

QUESTION: I take it that withdrawals, there being a great deal less liquidity in the employees' association, what did you --

MR. HOWE: The credit union?

QUESTION: -- the credit union, the typical credit union is not intended to have the kind of liquidity that a federal savings and loan has?

MR. HOWE: I am not sure if I understand the term "liquidity."

QUESTION: If they invest 95 percent of their assets in mortgages, they aren't going to be able to respond to their depositors very rapidly, are they?

MR. HOWE: The federal associations, Your Honor, the 95 percent applies to federal associations. There is, however, a regular --

QUESTION: There is a waiting period for withdrawals, isn't there, on all of them?

MR. HOWE: Generally speaking, 90 days. As far as the S&L's are concerned, however, there is a liquidity requirement independent which is not in any way incorporated into the tax statute.

The state court in fact did note that there were statutory differences and commented that the primary area was in the details of the loans that might be made and in the

lending powers. Beyond that, it made no judgment. For the larger credit unions, the percentage of mortgage loans made begins to approximate the percentage of the loans made by federal associations. There were 99 credit unions with over $2 million in assets each in 1973, and that $2 million figure is important because the powers of credit unions are scaled according to their size. At the $2 million level, the powers that I have been addressing are with the credit unions. Below that, the loan provisions are lesser.

Of the 99, that group invested $330 million of their assets in mortgage loans. Twenty of that group had more than 50 percent and 10 of that group had over 60 percent of their assets in mortgage loans.

The major difference which exists between the two kinds of entities is the federal associations invest almost exclusively in mortgage loans; whereas credit unions do a substantial personal loan business. They invested approximately 43 percent of their assets in personal loans; nevertheless, other conceivably similar institutions invest substantial portions of their assets in non-real estate loans. And by way of example, the state savings banks in 1972 invested over 35 percent of their assets in corporate securities, a power which the federal associations do not have. State savings banks are conceded to be similar.

In considering this question of similarity, it should

be remembered that differences must exist if similarities can exist between entities. Similarity denotes difference, and without differences there would be identity, if we don't have differences we would either have only credit unions or only federal savings and loan associations.

The state courts which have considered this issue in the past have failed to recognize that simple proposition. They have universally permitted very minimal differences to be the basis for the exemption of credit unions.

Unlike the state court, the Tax Commission emphasizes differences in lending powers to support the finding of dissimilarity. To proper assess this contention, it should be remembered that Congress intended to protect federal associations from discriminatory tax treatment. If a state institution has powers greater than those of the federal associations, the local institution has an advantage, an economic advantage.

The broader lending powers conferred upon the credit unions provide them with that kind of advantage; adding tax exemption adds to their competitive advantage. In substance, the Tax Commission would have the Court believe that the credit union, with over $65 million in assets, with larger investment powers, needs special protection by way of tax exemption. Stating the proposition demonstrates its invalidity.

Both the State Tax Commission and the state court also assert that the preference for personal loans imposed on

credit unions is a limitation with significance. In fact, it really adds a power to credit unions that federal associations do not have, and in any event it is not restrictive. Any credit union which invests in accordance with its tatutory powers -- that is, for example, up to the 80 percent on mortgage loans -- cannot validly be criticized. The Commission cites no case or regulatory proceeding to show that the statutory language regarding personal loans has ever been enforced. That fact in itself indicates that there is no validity in the distinction.

QUESTION: Whose burden is it to show whether that language in a conceivably existing statute or regulation has been enforced, on the person seeking to sustain the validity of the tax or on the person who seeks to invalidate the tax?

MR. HOWE: Proof of a negative seems to be somewhat difficult, Your Honor.

QUESTION: Yes.

MR. HOWE: I haven't found one, and that may be simply inadequacy, but absent that I don't know what kind of proof might exist. Presumably the state would have better records than, at least in the regulatory area than would be available to us.

QUESTION: But it is your view that burden should be on the state and not on you?

MR. HOWE: If they have that data, yes, Your Honor.

QUESTION: Well, how do we know whether they have that data or not?

MR. HOWE: It would be a simple matter to make it available, I would assume, if they do have it. I don't know that there are any records kept. We find none.

QUESTION: Mr. Howe, I reveal my stupidity, but are there federally-chartered credit unions as well as state-chartered?

MR. HOWE: There are and in a number of states. There is only one federal savings and loan association in Massachusetts.

QUESTION: Are the federally-chartered credit unions subject to tax?

MR. HOWE: In the commonwealth?

QUESTION: Well, either under any -- yes, in the commonwealth.

MR. HOWE: In 1966, the commonwealth chose to tax federal associations, yes.

QUESTION: Wasn't there a sovereign immunity problem in taxing them? Why do they need a special exemption for savings and loans and not for credit unions?

MR. HOWE: There is no exemption for credit unions either. In 1934 Congress specifically authorized states to tax not only federal credit unions but, of course, their own institutions.

QUESTION: I see. So a federally-chartered credit union in Massachusetts would be subject to and could be taxed by the state, by the State of Massachusetts?

MR. HOWE: It is. That is the statute that I initially quoted. The congressional authorization is contained in 1464(h).

QUESTION: And covers both credit unions and savings and loans?

MR. HOWE: It covers all similar institutions. It specifically covers federal savings and loan associations and all similar institutions.

QUESTION: So to put them all together, the State of Massachusetts taxes state and federal savings and loans and federal credit unions, but not state credit unions?

MR. HOWE: It does not tax -- the state does not tax federal credit unions.

QUESTION: It does not tax federal credit unions?

MR. HOWE: That's correct, Your Honor. It makes a great point of that at one point in their brief, and I would like to address that.

One other point on the standard of proof that the state court imposed on us with respect to credit unions. They required proof of competition for the same kinds of investors and borrowers, without indicating the character of the proof that might be required. It seems to us that the proof

obviously must be made on the basis of class, based upon purposes and powers. It cannot require an individual survey data type of thing dealing with age, sex, religion, wealth or whatever. It seems to me that it would have to be and typically has been in the national banking cases on the basis of what the institution is designed to do. And in that regard both entities have similarly insured deposits levels and the mortgage lending powers we have already discussed.

Here again, if the investors and borrowers are different for the two classes of entities, the state court and the State Tax Commission have failed to show what those differences may be.

QUESTION: And you say again the burden of proof is on them rather than on you?

MR. HOWE: No, I don't say that precisely, Your Honor. I say that from our point of view the standard which we are employing, that is of powers and purposes, where the deposit levels generally are $33,000 in the one instance and going up to $66,000 for a joint account, versus the $40,000 level of insured deposits for federal associations, are so comparable as to incline toward the same type of depositor.

If there is something that indicates that that conclusion is incorrect, the state hasn't brought it forward.

QUESTION: You say in effect that they have made an argument and you disagree with their argument?

MR. HOWE: The point I make, Your Honor, is that we say that the powers and purposes indicate that the classes are identical because of the similarity. If there is proof that that proposition is incorrect, it has not come forward, and that burden rests on the state.

Regarding the legislative history, the State Tax Commission relied heavily on the fact that the federal taxing policy toward federal and state credit unions supports their position. We believe that the reliance is misplaced and the reason is that the federal legislation began in 1934. At that time, a federal credit union was empowered to make loans with a maturity of not over two years, and the maximum loan by a credit union could issue was $200. In 1951, which is when federal credit unions became taxable -- excuse me, when savings and loan associations became taxable under Title 26, the Internal Revenue Code, the maximum maturity for loans for federal credit unions was only three years. The differences in powers and purposes of the federal credit unions and federal savings and loan associations clearly justified the federal difference in treatment in taxation.

Federal credit unions continue to be exempt from tax for federal purposes. States, however, have been empowered to tax federal credit unions from the outset. If taxed, however, they had to be taxed at a rate not greater than that imposed on local banking institutions. The fact that Congress linked

federal credit unions with banking institutions establishes that the federal credit unions were considered to be like banking institutions and not some unique kind of entity.

The Massachusetts tax policy, on the other hand, began in 1966, thirty-two years after federal credit unions were first created. In doing so, it was obligated in 1966 to make the comparison between federal sssociations and credit unions to see whether at that time they were similar. There is no point in comparing credit unions as they existed in 1934 and federal associations as they existed in 1966.

Moreover, our view is that 1464 ought to be read to impose a continuing obligation on states to maintain a non-discriminatory tax on federal associations. That is the whole function of 1464, when compared to all similar institutions. If a local entity is to have its tax exemption continue, the exemption must be reexamined each time there is a substantive change in the powers of either federal associations or the local entity. It is not something that can be once looked at and then forgotten. An exemption from tax not discriminatory in its origins may become so over time.

Finally and most importantly --

QUESTION: Mr. Howe, that is to say if in 1966 there may have been a basis for concluding that the state credit unions were dissimilar and therefore did not have to be taxed although federal institutions could, that might change since

'66 and the two become similar, is that it?

MR. HOWE: That's correct, and it clearly has since 1934, Your Honor.

QUESTION: It gets back to what I asked you earlier. How about '66, what was the situation in '66?

MR. HOWE: The jurisdictional statement in the record contains the --

QUESTION: Well, did you regard them then as similar?

MR. HOWE: Yes, I did, Your Honor.

QUESTION: And were they taxed in '66?

MR. HOWE: In '66, Massachusetts began taxing federal associations.

QUESTION: But it did not tax --

MR. HOWE: It chose not to tax its own credit unions and it continues to exempt them.

QUESTION: That is what I --

MR. HOWE: Yes, Your Honor.

QUESTION: And you say they should have taxed them then and taxed them continuously --

MR. HOWE: And continue to tax them currently.

QUESTION: And not having done so, they can't tax you?

MR. HOWE: That's correct, Your Honor. Perhaps the most important aspect of the statutory history is what President Carter has asked the Congress to do. The President

has said in his message to the Congress on January 21 of this year, "Credit unions are tax exempt, yet their powers and functions are defined so broadly that the term 'credit union' can include financial institutions that are functionally identical to a savings and loan association. The tax exemption provides them with an unfair advantage over their competitors." That is precisely what we have been saying since 1966.

The federal statutory and legislative history, rather than supporting the State Tax Commission, clearly establishes credit unions to be similar banking institutions, nearly identical to federal savings and loan associations. There is no justification for the exemption of tax for the credit unions.

The next two subjects can be handled together, and briefly, I hope, and they arise because the state statute provides for no apportionment for income earned outside the commonwealth. The failure to apportion is fatal, in our view. The two simple propositions are presented here, and the first is definitional.

The state court labeled the tax a franchise tax and, of course, 1464(h) permits a franchise tax. The real question is is it a franchise tax within the meaning of 1464(h), and the answer, it seems to me, is a clear no. By definition, a franchise tax must measure only the value of the privileges conferred by the taxing state. Here Massachusetts taxes the

entire value of the federal franchise, without regard to the benefits conferred by other states, and the other states do confer substantial benefits.

Federal associations are part of the national housing program. One of the functions they serve in that is to put mortgage loans out throughout the nation.

QUESTION: Your client is domiciled in Massachusetts, isn't it?

MR. HOWE: The principal offices of all of the federal associations are in Massachusetts, Your Honor.

MR. CHIEF JUSTICE BURGER: Your time has expired, Mr. Howe. You may finish your sentence, if you have a thought that is escaping us.

MR. HOWE: The failure to permit other states to tax on that basis for the benefits they confer, Massachusetts taxing all of them it seems to me violates section 1464(h) by imposing effectively a double tax, although there is no such present double tax.

MR. CHIEF JUSTICE BURGER: Mr. Rosenfeld.

ORAL ARGUMENT OF S. STEPHEN ROSENFELD, ESQ.,

ON BEHALF OF THE APPELLEES

MR. ROSENFELD: Mr. Chief Justice, and may it please the Court:

I wish to argue three points on behalf of the Commonwealth this afternoon. First and primarily, as it turns out,

credit unions are not similar to the appellant associations, either as the word "similar" was intended by Congress in 12 U.S.C., section 1464(h), or under the current facts as presented in the record in this case.

My second argument will be that the Massachusetts tax is neutral and fair and nondiscriminatory under the standards of 12 U.S.C. 1464(h); and, finally and briefly, that the tax does not intrude upon interstate commerce.

For purposes of the whole argument, I wish to emphasize these elements: What Massachusetts is attempting to do with this tax is to have the appellant associations' domiciliary corporations contribute their fair share to support the costs of government. The acts of Congress which authorize tax taxation of federal institutions such as this and national banks plainly support that state tax policy. Additionally, the appellants have presented no independent substantive federal policy which is violated on supremacy clause grounds by the state tax in question. Given the fact that Congress and this Court have accorded state tax policy-making broad discretion, we believe that the appellant associations come to this appeal with a heavy burden of persuasion.

I am going to turn initially to the tax treatment of credit unions which the appellants have emphasized in their oral argument today. The appellants say that by treating credit unions differently, Massachusetts has violated federal

law because in their view credit unions are similar to federal savings and loan associations as the word "similar" is used in section 1464(h). This is not the case, however.

Credit unions are not included in the state tax, that is true, but they are not similar either as a matter of congressional intent, the primary standard for this Court, or as a matter of current actual fact.

Appellant made no argument about congressional intent at all in the brief they presented to this Court, and they could not. The legislative history to the Home Owners' Loan Act, and it was the Home Owners' Loan Act that established savings and loan associations and also enacted 1464(h), the federal statute in question -- that Federal Home Owners' Loan Act and the legislative history to it presented in our brief makes plain that the 73rd Congress did not intend credit unions to come within the definition of the word "similar."

What the Congress had in mind was state savings and loan associations, state savings banks and state cooperative banks. It is interesting to note that the very same Congress which enacted the Home Owners' Loan Act was the Congress that enacted the Federal Credit Union Act creating federal credit unions for the first time. The Federal Credit Union Act was enacted one year later, in 1934.

The Congress which had created savings and loan associations, one year later, in establishing federal credit

unions, established a wholly different, wholly separate regulatory structure for federal credit unions which differ significantly from the Federal Home Loan Bank Board and federal savings and loan associations, not assigning its view that similarity was its view of credit unions.

Finally, in terms of congressional intent, what Massachusetts has done is tax the franchise of savings and loan associations and, while not taxing the franchise of credit unions, follows almost exactly the tax policy that Congress itself has chosen for purposes of federal income tax. Congress has always exempted all credit unions, state and federal, from the federal income base tax, but has since 1951 imposed a federal corporate income tax on federal savings and loan associations, including appellants.

It would be anomaolous to say that the state is precluded from adopting the same kind of taxing policy in terms of supporting its cost that Congress itself has chosen in imposing the federal income tax.

One additional point, my brother suggested that federal credit unions were subject to taxation by the states. In fact, I believe that is not true. The citation is 12 U.S.C., section 1768, and suggests -- the language is that federal credit unions, their property, et cetera, shall be exempt from all taxation now or hereafter imposed by the United States or by any state, territorial or local taxing authority. It appears

clear to us that the Congress views credit unions, federal and state, as different and subject to different forms of taxation than federal savings and loan associations.

Turning now to the record in this case and the actual facts, putting aside for the moment congressional intent, we believe that appellants have not shown similarity in fact. In addressing similarity, we believe it is a comparison between classes of institutions that should be paramount, rather than picking a single institution from one class and seeing whether it may bear some similarity to a single institution from another class. And in looking at the classes of institutions in question, the facts are these:

Credit unions are very small. They are tightly limited in their membership by state statute to those who have a common bond in either employment, affiliation or residence. They have far less assets than the appellants, and their mandate, their mandate by state statute is to emphasize the small personal loans to its members.

QUESTION: What does affiliation mean in the state statute?

MR. ROSENFELD: It could mean religious affiliation, club affiliation, and social --

QUESTION: Could it just mean affiliation with the credit union?

MR. ROSENFELD: No, it could not. As I said, the

mandate is to emphasize small personal loans, and it is noteworthy that this is an activity that is virtually shunned by the federal associations. On the other side, 60 percent of the credit unions have no real estate lending activity whatsoever. And as far as the remaining 40 percent of the credit unions are concerned, appellants have not shown that their loans are at all competitive with the federal associations' much larger and far more pervasive real estate lending activity. And they couldn't show competition because the credit union loans are once again limited to their members. Credit unions simply cannot go out on a general market and seek to compete with other institutions who lack the kind of limits that credit unions have. The facts, in short, are against the arguments that appellants are making, and they do not support excusing appellants altogether from state tax, as they would have this Court do.

At bottom, the argument here that appellants present is one on tax policy. The fact is, as appellants have suggested with their statement from President Carter, they said policy debate that is now going on between the legislative and executive branches, and Massachusetts believes that this Court should resist an attempt to draw the judiciary into the debate.

I would like to now turn just briefly, because appellant has not raised this issue in their oral argument, to the question of discrimination between federal associations on

the one hand and the state's treatment of those state entities which they do tax under section 1464(h). These are state savings banks and state cooperative banks. The question is whether Massachusetts has unfairly favored local savings institutions somehow at the expense of the federal associations.

The vital facts are these: The statute, Mass. General Laws, Chapter 63, section 11, is neutral on its face. The rate of the tax is the same for the federal and state institutions, the types of deductions are identical, and the appellants offer nothing apart from the face of the statute to suggest that it was passed, enacted as a hostile or unfriendly act towards the federal institution, and these are the words that this Court has used in assessing the question of discrimination.

As far as the appellants' factual proof goes, they have made no showing of discrimination or disproportionate in result between the taxing of federal and state institutions. Chiefly, they have made no showing that their actual tax burden in dollars and cents is any heavier proportionately than the tax burden of state institutions. And under the decisions of this Court, the failure to show a difference in impact, practical impact on account of the state tax is fatal to their case.

The appellants, while they don't present evidence of actual tax impact, do present some evidence about the amount of their deductions under the state tax as compared with their

total assets, and they present ratios comparing the amount of their deductions with total assets and compare that ratio to the ratio for state institutions. Well, that ratio has no approximate relationship to actual tax burden about which the record is silent. But even looking at the ratios which are presented, there is no clear pattern disfavoring the federal institutions. What those ratios of federal and state institutions show is that in some years the state's institutions did enjoy a proportionately or comparatively greater deduction than the federal institutions, but in other years the reverse is the case. In three of the years presented by the appellants, it was the federal institutions which enjoyed a greater ratio, a greater benefit from the deduction, using the ratio evidence that they presented and relied on.

Finally, on this question of discrimination, this Court's decisions under section 1464(h) and the companion provision permitting state tax on national banks, 12 U.S.C. 548, this Court's decisions under both of those sections leave no doubt in our view that the state tax is valid. Those decisions require fairness and even-handedness on the states. Appellants have shied away from these principles and instead their argument demands rigid mathematical equality between state and federal institutions.

Following their analysis, no deduction which had a disparate result or even the potential for a disparate result,

no matter how small, could stand under the principle of discrimination which they advance. In our view, following this Court's more practical standard of fairness, the appellants' claim of discrimination falls short.

Finally, I would like to turn to the question of whether or not the state tax intrudes impermissively on interstate commerce under the principles laid down by this Court under the commerce clause. We believe that on this issue, the appellants do not have law or evidence on their side. There is no direct evidence whatsoever of the extent of income that the appellants derive from interstate commerce. The record is bare on how many borrowers, real estate mortgage borrowers live out of state, and there is no evidence on how many of these loans were culminated out of state.

However, we do know this: We do know that every one of the appellants have all their offices in Massachusetts, and therefore all of the processing of the loans, all of the monitoring of the loans and all of the receiving of the loans goes on in Massachusetts.

What we believe the record thus establishes are two independent bases under the commerce clause principles for the tax that Massachusetts has imposed. The first relies on the fact that Massachusetts is the state of domicile for the appellant associations, and under this Court's decision a strong presumption exists in favor of a state's right to demand

a support and contribution in the costs of government when that demand is made by the home state of the corporation. And second, quite apart from domicile, putting domicile aside, the record shows in this case a close connection between the taxing state, Massachusetts, and the activities and income upon which the Massachusetts tax is levied.

As a final point under the commerce clause, appellants raise the specter of multiple taxation, but they simply have no foundation in our view for arguing that interstate commerce is in jeopardy of multiple taxation and the burden that would flow therefrom. There is no overlapping tax that exists right now, and it would be strange, we believe, to strike down this current justified tax on the basis that in the future some state with a lesser claim and a lesser right might impose some tax burden or might stake a claim to a tax burden on some portion of appellant's income. In our view, this is thin ice for a constitutional challenge to a state tax, and we believe therefore for this reason and other reasons that I have presented, the reasons the commonwealth has presented in its brief, that the state tax should stand and the judgment of the court below should be affirmed.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 2:04 p.m., the above-entitled case was submitted.]

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