United States Court of Appeals for the Fifth Circuit

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Fifth Circuit
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Lyle W. Cayce
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No. 20-60146

MoneyGram International, Incorporated, and Subsidiaries,

Petitioner—Appellant,

versus

Commissioner of Internal Revenue,

Respondent—Appellee.

Appeal from a Decision of the
United States Tax Court
Nos. 12231-12 and 30309-12

Before Higginbotham, Costa, and Oldham, *Circuit Judges*.

Gregg Costa, *Circuit Judge*:

The $38 million question is whether MoneyGram International—a "global payment services company"—is a "bank" under the tax code. 26 U.S.C. § 581. If so, then MoneyGram lawfully deducted from its taxes large losses it incurred in writing off mortgage-backed securities during the Great Recession. *See id.* § 582(a). If not, then like all taxpayers other than banks, it could not deduct those losses beyond the amount they offset capital gains. *See id.* §§ 165(g), 166(e). The tax court held that MoneyGram is not a bank because it neither accepts deposits nor makes loans. We need only address

the "deposit" requirement. Because customers do not give MoneyGram money for safekeeping, the most basic feature of a bank is missing. We thus AFFIRM.

I.

MoneyGram offers various money transfer services to individuals and financial institutions. It may be best known for wiring money around the world, but it does not contend those wires or other "money transfers" make it a bank. It contends that two other services do make it a bank: "money orders" and "official check processing."

MoneyGram sells money orders through agents like WalMart or convenience stores. To purchase a money order, a customer gives the agent cash in exchange for a blank money order. The cost is the amount of the money order plus a fee. The customer fills in her name, the name of the recipient, and her signature. She might use the money order to pay bills, send a gift, or make purchases from sellers who do not accept cash. Most recipients present and redeem the money order within ten days of its purchase.

MoneyGram also offers payment processing services to financial institutions, including the processing of "official checks." Official checks include cashier's checks and bank checks. Compared to personal checks, which may bounce, these checks assure payment. Financial institutions both provide these checks to their customers (for example, to close on a home) and use them to pay the institution's own obligations. While the financial institution issues the official checks, MoneyGram processes them. At the end of each business day, the financial institution reports the dollar amount of official checks it issued that day and then transfers that amount to MoneyGram, usually the following morning. When the payee later presents the check for payment, the funds held at MoneyGram are drawn down. In

other words, the financial institution has an account with MoneyGram that depletes and replenishes in a daily cycle based on how many official checks the financial institution issued the day before. Before the first day the financial institution issues official checks, it gives MoneyGram funds "equal to its anticipated average daily volume of official checks," to cover any checks presented for payment before the first daily transfer.

MoneyGram is registered with the Department of the Treasury as a "money services business."[1] On its annual SEC filings, MoneyGram has described itself as a "global payment services company," and its financial statements do not list any bank deposits as liabilities or any loans as assets. On MoneyGram's tax returns both before and after it claimed bank status, MoneyGram classified itself as a "nondepository credit intermediation" business. From 2005 to 2007, MoneyGram's returns further described its business as "payment services/credit agency" and listed its service as "money/wire transfers."

Then, in 2008, despite no meaningful changes in its business, MoneyGram described its activities to the IRS as "banking" and called its products "financial services."[2] There is no evidence that any other money services business has ever claimed to be a bank within the meaning of the Internal Revenue Code. MoneyGram had never done so since its formation in 1940.

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[1] Treasury regulations treat banks and money services businesses as mutually exclusive categories. *See* 31 C.F.R. § 1010.100(d)(7) (defining "bank" as, among other things, any organization chartered under state banking laws "except a money services business"), § 1010.100(ff)(8) ("[T]he term 'money services business' shall not include . . . [a] bank or foreign bank.").

[2] Even on its 2008 return, MoneyGram continued to list the business activity code for "nondepository credit intermediation."

MoneyGram's newly-claimed bank status allowed it to reap a significant tax benefit. In the years leading up to the Great Recession, MoneyGram had invested over four billion dollars in asset-backed securities, including mortgage-backed securities. When the financial crisis hit, MoneyGram had to recapitalize its assets to maintain operation. That resulted in hundreds of millions of dollars in losses on the securities in 2007 and 2008. Claiming "bank" status on its tax returns, MoneyGram deducted the losses against ordinary income. 26 U.S.C. § 582(a). Nonbanks are only able to deduct losses on securities to the extent they offset capital gains, 26 U.S.C. § 165(g)(1), (2)(C), which MoneyGram did not have during the relevant years.

The IRS disagreed with the deductions, determining that MoneyGram was not a bank and assessing tax deficiencies of tens of millions of dollars.[3] MoneyGram unsuccessfully challenged the IRS's decision in tax court. In MoneyGram's first appeal, we rejected aspects of the tax court's definitions of two key terms: "deposit" and "loan." *MoneyGram Int'l, Inc. v. Comm'r*, 664 F. App'x 386, 388 (5th Cir. 2016).

On remand, the tax court again concluded that MoneyGram is not a bank. The tax court determined that MoneyGram did not accept deposits because "[n]either the financial institutions that purchase MoneyGram's official check services nor the consumers who purchase its money orders transfer funds to MoneyGram for the purpose of safekeeping." It also held that MoneyGram did not make loans.

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[3] The deficiencies assessed for 2005–09 exceeded $80 million. Not all of the deficiencies related to MoneyGram's claiming bank status. The parties have since stipulated that $38 million is the bottom-line impact of the tax court's decision that MoneyGram is not a bank.

MoneyGram again appeals.

II.

We review tax court decisions the same way we review district court decisions, so the tax court's grant of summary judgment is reviewed de novo. *MoneyGram*, 664 F. App'x at 389 (citing *Whitehouse Hotel Ltd. P'ship v. Comm'r*, 615 F.3d 321, 330 (5th Cir. 2010); *Deaton v. Comm'r*, 440 F.3d 223, 226 (5th Cir. 2006)).

The Internal Revenue Code defines a bank as:

> a bank or trust company incorporated and doing business under the laws of the United States (including laws relating to the District of Columbia) or of any State, a substantial part of the business of which consists of receiving deposits and making loans and discounts, or of exercising fiduciary powers similar to those permitted to national banks under authority of the Comptroller of the Currency, and which is subject by law to supervision and examination by State or Federal authority having supervision over banking institutions.

26 U.S.C. § 581. As we previously noted, this definition is circular—a bank is a bank—and "not a model of statutory clarity." *MoneyGram*, 664 F. App'x at 389. The definition can be broken down into three requirements: (1) that the entity be a "bank" within the common understanding of the term; (2) that a substantial part of the entity's business consist of deposits, loans, and discounts; and (3) that the entity be subject to state or federal regulation. *See id.* at 390–91.

Our focus is on the first and most fundamental requirement—that the taxpayer be a bank under the common understanding of that term. We previously explained that the "bare requisites" of a traditional bank are:

(1) "the receipt of deposits from the general public, repayable to the depositors on demand or at a fixed time;" (2) "use of deposit funds for secured loans;" and (3) "the relationship of debtor and creditor between the bank and the depositor." *MoneyGram*, 664 F. App'x at 391 (quoting *Staunton Indus. Loan Corp. v. Comm'r*, 120 F.2d 930, 933–34 (4th Cir. 1941)).

It makes sense to start with deposits. "Strictly speaking the term bank implies a place for the deposit of money, as that is the most obvious purpose of such an institution." *Oulton v. German Sav. & Loan Soc'y*, 84 U.S. 109, 118 (1872); *see also Staunton*, 120 F.2d at 933 (quoting multiple dictionary definitions that include accepting deposits as a function of banks); Adam J. Levitin, *Safe Banking: Finance and Democracy*, 83 U. CHI. L. REV. 357, 366 (2016) ("The taking of deposits is what makes a bank a bank.").

And deposits have always been tied up with the need for safekeeping. *Oulton*, 84 U.S. at 118; *see* Levitin, *supra*, at 366 ("Banks' distinctive function is to provide safekeeping for deposits."); Richard A. Lord, *The Legal History of Safekeeping and Safe Deposit Activities in the United States*, 38 ARK. L. REV. 727, 727 (1985) ("Historically, the safekeeping function is perhaps the oldest function in banking."). The first banks accepted "bullion, plate, and the like, for safe-keeping until the depositor should see fit to draw it out for use." *Oulton*, 84 U.S. at 118. Some trace banking back four millennia to Babylonian temples that acted as "safe depositories" for the valuable possessions of community members. *Bank*, ENCYCLOPEDIA BRITANNICA (2019), https://www.britannica.com/topic/bank/Bank-money. Other Mesopotamian locales like royal palaces and private houses also accepted deposits of grain and other valuable commodities for safekeeping. *Id.*

Today customers deposit money in banks rather than grain or gold. But the safekeeping function remains the same. Especially in this time of

negligible interest on deposits, safekeeping helps explain why people put their money in banks rather than under the mattress. *Cf.* GLENN G. MUNN ET AL., ENCYCLOPEDIA OF BANKING AND FINANCE 68, 178, 917 (9th ed. 1993) (describing the protections afforded by checking and savings accounts). Recognizing this foundational aspect of the banking business, we defined "deposits" as "funds that customers place in a bank for the purpose of safekeeping that are repayable to the depositor on demand or at a fixed time." *MoneyGram*, 664 F. App'x at 392 (internal quotations omitted).[4]

MoneyGram argues that both its money-order customers and its official-check customers give it funds for safekeeping. We first consider the money orders.

A.

MoneyGram contends that when a customer buys a money order, the customer is placing funds with MoneyGram for safekeeping, at least until such time as the recipient of the money order presents it for payment. The tax court rejected this argument, likening a money order to the purchase of a gift card rather than a deposit in a bank account. We agree. Although a customer views the money order as a secure way to transfer funds, it does not follow that the purchaser is placing money with MoneyGram for safekeeping.

[4] The tax court had applied these aspects of the definition the first time around but had also required that the funds be held "for extended periods of time." *MoneyGram*, 664 F. App'x at 392. We rejected that durational requirement, which prompted the remand. *Id.* at 392–93.

MoneyGram argues that on remand the tax court reimposed a durational requirement in finding that money order customers do not deposit funds with MoneyGram. As discussed above, however, there is no period of safekeeping at all when it comes to money orders.

See Levitin, *supra*, at 367 (describing the making of secure payments as ancillary to, but distinct from, safekeeping).

In fact, when it comes to money orders, the "purpose of safekeeping" inquiry is getting ahead of things because a money order customer is never keeping its funds with MoneyGram at all. Consider someone who goes to a convenience store to buy a $100 MoneyGram money order that will be used to pay a utility bill. The customer hands over a $100 bill, plus a few more dollars for the fee, to MoneyGram's agent. In exchange, the agent gives the customer a blank money order. At this point, the $100 belongs to MoneyGram (held in trust for the company by the agent). This is largely true of bank deposits too. But unlike a bank that incurs a corresponding liability to the customer who gave it the $100, MoneyGram owes the $100 not to the money order purchaser but to the person or business listed on the payee line. *Cf. Morris Plan Bank of New Haven v. Smith*, 125 F.2d 440, 442 (2d Cir. 1942) (asking whether the obligations of the entity receiving the "deposit" mirror the obligations of a bank to a traditional depositor). As a result, the purchaser of a money order is not keeping its money with MoneyGram.

MoneyGram points out that a customer can list herself as the payee or can return the money order. But even assuming these uncommon occurrences could establish that customers purchase money orders for the purpose of safekeeping, the mechanics of the money order are still inconsistent with safekeeping. When a customer deposits $100 in a bank, she can later withdraw $10, or $50, or the full $100. That is consistent with the notion of safekeeping. *Engel v. O'Malley*, 219 U.S. 128, 136 (1911). It is still the depositor's money, just being held by the bank. But the purchaser of a $100 money order cannot go back to the convenience store and ask for $20 back. Any return is for the full $100 (but not the fee) just like when one receives a full refund for returning a shirt or toaster. This ability to return is a common feature of products. That is the label a MoneyGram executive

used to describe the money orders to a Senate Committee: "just another product [that its agent convenience stores] offer to their customers, like milk or bread." *An Update on Money Services Businesses Under Bank Secrecy and USA Patriot Regulation: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 109th Cong. 74 (2005) (statement of Dan O'Malley, Vice President, MoneyGram Int'l, Inc.). Buying a product is not depositing money for safekeeping. Customers buying a product are doing the opposite of keeping their money; they are spending it.

But MoneyGram wages on in the battle of analogies, comparing its money orders to personal checks. It is true that a money order and a personal check are quite similar. The analogy breaks down, though, because writing a personal check is not turning over money for safekeeping. Look at your bank statement—a check is listed as a withdrawal from the checking account, not a deposit. MUNN ET AL., *supra*, at 250 (9th ed. 1993) (deposit banking includes "receiving deposits" and separately "paying them out by check"). It is the checking account, not the checks themselves, that involves safekeeping. Because the withdrawals from a checking account will rarely correspond 1:1 with the deposits, a checking account usually carries a balance (secured by FDIC insurance, something MoneyGram does not provide for its money orders, which if lost can no longer be used by the purchaser). Checking *accounts* thus serve a safekeeping function, not just a money-transferring one. *Id.* at 179 (listing, among the benefits of checking accounts, removing the risk of losing money and preventing loss of money by robbery). In contrast, a money order purchaser does not have an account with MoneyGram. A money order account would not make sense as there is no

balance to track. In other words, there are no funds being kept with MoneyGram.[5]

Purchasers of money orders are not placing funds with MoneyGram for safekeeping.

B.

Nor are the financial institutions that use MoneyGram to process official checks doing so for the purpose of safekeeping. Those institutions do have an account with MoneyGram. And there is a balance, reflecting the funds banks have transferred to MoneyGram to cover official checks that have been issued but not yet presented for payment. The "first day settlement," which functions as a sort of overdraft protection in the event the bank does not make the required daily payment for checks it has just issued, is also part of the positive balance. MoneyGram claims the first-day-settlement funds are "deposits" as that money is not already obligated to the third-party recipient listed on an issued check.

We recognize that because the financial institution still owns this first-day-settlement money, it is at least "keeping" those funds with MoneyGram.[6] The problem is that a financial institutions is not leaving these funds with MoneyGram for safekeeping; it is doing so to fulfill a contractual requirement of using the check processing service.

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[5] Another reason the check analogy does not work is that funds transferred via personal check belong to the accountholder, but are being held by the bank for safekeeping, until the check clears. In contrast, as explained above, once a money order is purchased MoneyGram owes an obligation only to the person listed on the "payee" line of the money order.

[6] Other than the first-day settlement, the daily payments to MoneyGram are for checks issued the day before, so those funds are not kept by MoneyGram while still belonging to the financial institutions.

MoneyGram compares the financial institution's "account" with MoneyGram to a personal checking account and emphasizes the security of the transaction. But we agree with the tax court that the obligatory nature of the first-day settlement makes it more like a tenant's security deposit or an attorney's retainer. MoneyGram is requiring a financial cushion to guard against nonpayment, just as an attorney does in requiring a retainer before providing legal services. Although money "kept" with the attorney via a retainer may be relatively safe, the client is not giving the attorney that money for safekeeping. As the tax court noted, the client is leaving those funds with the attorney "to satisfy the demand of the other contracting party for assurance of payment." The same is true with the first-day settlement financial institutions give MoneyGram before official checks start to issue.

Fulfillment of a contractual obligation thus explains why financial institutions are leaving funds with MoneyGram. We see no evidence, and more fundamentally no reason, that the financial institutions would be leaving the funds with MoneyGram for safekeeping. As the tax court noted, financial institutions "presumably have ample means of keeping their cash safe." *See also* Levitin, *supra*, at 366 (noting that banks typically "invest in security measures like fireproof vaults, security guards, and computer security systems"). They are not like individuals who put money in a bank because that is safer than leaving cash in a wallet.

In addition to being inconsistent with a safekeeping purpose, the obligatory nature of the first-day settlement means another feature of deposits is missing: the depositor's ability to demand repayment of funds.[7]

[7] Although the tax court did not reach this second element of a "deposit" in its summary judgment order, MoneyGram argued this issue before the tax court. We may affirm on an alternative ground supported by the record and argued below. *Renasant Bank v. St. Paul Mercury Ins. Co.*, 882 F.3d 203, 210 (5th Cir. 2018).

See MoneyGram, 664 F. App'x at 392; MUNN ET AL., *supra*, at 68 ("Checking account deposits are payable on demand."). This is really just another angle of the safekeeping requirement. *Cf. Oulton*, 84 U.S. at 118 (observing that safekeeping involves a depositor leaving a valuable item with a bank "until the depositor should see fit to draw it out for use"). When a depositor voluntarily leaves funds with a bank because that is a safer place to keep the money than under the mattress, the depositor can withdraw the money whenever she likes or, in the case of an instrument like a certificate of deposit, on a date certain. That is not true for the first-day settlement. As long as the financial institution continues to use MoneyGram's check processing service, it cannot get its money (the first-day settlement) back.

The fact that the service MoneyGram is selling—processing of official checks—relates to banking may give this arrangement the veneer of a banking relationship. But in substance MoneyGram is selling a service that just happens to involve checks. Consider someone without a checking account who gives a friend $20 to write a $20 check to pay a bill. The checkwriter will have the $20 for a few days before the check clears. But in handing over a $20 bill, the person gave money to the friend to buy a check, not for safekeeping.

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Examining the substance of MoneyGram's business thus confirms how the company has long described itself on its tax returns: as a "nondepository" institution. And without deposits, MoneyGram cannot be a bank. We AFFIRM the judgment of the tax court.