



MULTISTATE TAX COMMISSION

Multistate Tax Commission Litigation Committee

Embassy Suites Denver Downtown Convention Center

1420 Stout Street

Denver, Colorado 80202

Wednesday, April 24, 2019

Staff Report – Amicus Briefs

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The Commission's legal staff spends 15-20% of their time on appellate-related activity, primarily drafting amicus briefs. This Litigation and Executive Committees provide the staff with direction.

Amicus Briefs - General Policies

Amicus brief requests go to the Executive Director. If the request is from a state, it must come from or be explicitly approved by the tax agency head. (On rare occasions, the Commission receives a request from a litigant other than a state.) The Commission does not file in every case in which it receives a request, but all requests are evaluated using the same general criteria:

- Whether the case implicates important Commission interests (see Compact, Art. I);
- Whether positions taken are consistent with Commission and member state policies;
- Whether there is an opportunity for the Commission to say something useful; and
- Whether staff schedules permit spending the necessary time.

Outside of its amicus briefs, the Commission routinely provides other assistance to states with appellate issues including providing multistate information, reviewing briefs, putting attorneys in touch with others who can provide research and support, etc.

New Developments

While the Commission does not generally allow its briefs to be “ghost written,” and seldom signs onto briefs authored by others, it has adjusted this policy in the past year to accommodate the number of briefs in which it is asked to participate. In August of 2018, the MTC contracted with Sheldon Laskin to write the brief in *Cougar Den*, discussed below. Sheldon is now retired, but was previously counsel at the MTC, and he possessed specialized knowledge about Indian law.

In addition, the MTC has coordinated with other state organizations, such as the National Governors Association and the Nation Conference of State Legislature, etc., through the State and Local Legal Center (SLLC), which files amicus briefs on their behalf. Also, in the last two years, the Federation of Tax Administrators has joined two of the Commission's briefs—*Cougar Den* and *Wayfair*.

During this fiscal year, MTC staff has been proactive about organizing [prior briefs](#) on our website and strategizing joint state briefs. As part of this effort, MTC staff has created and distributed a monthly SALT Court Report, which highlights state and federal cases that are likely to have an impact on state tax administration. State attorneys are invited to submit a “featured case” if they would like to seek input or amicus briefs from other states. This is related to another systemic change: in prior years, the MTC has helped coordinate an amicus group to seek and produce state amicus briefs. However, the sporadic nature of these briefs means periodic or routine meetings aren’t very productive. Instead, when MTC staff receives a request to feature a case, it will assist with coordinating strategy and meetings among the states that wish to participate.

Amicus Briefs or Results from April 24, 2018 (Last Reported) – In Order of Filing

***Robert C. Steiner & Wendy Steiner-Reed v. Utah State Tax Commission* (Utah Supreme Court, Case No. 20180223-SC – Filed November 21, 2018**

Undecided

Issue: Credits

Question: Whether Utah’s individual income tax comports with both the dormant interstate Commerce Clause and the dormant foreign Commerce Clause of the U.S. Constitution, notwithstanding the fact that Utah’s tax does not allow its residents to apportion their income and does not provide a credit for national and substantial taxes their residents pay to foreign jurisdictions.

***Department of Revenue of the State of Colorado and Michael Hartman, in his official capacity as the Executive Director of the Department of Revenue of the State of Colorado, v. Oracle Corporation and Subsidiaries.* (Colorado Supreme Court No. 2018SC3) – Filed August 13, 2018**

Undecided

Issue: Statutory Construction

Question: 1. Whether a holding company that has no foreign property, payroll, or operations is exempt from Colorado taxation under the “Water’s Edge” exemption (§39-22-303(8), (12)(c)).
2. Whether section 39-22-303(6) authorizes the Department to allocate a domestic holding company’s income to its corporate parent to “clearly reflect” the parent’s income and “avoid abuse.”

***Alabama Department of Revenue, et al. v. CSX Transportation, Inc.* (U.S. Supreme Court, Docket No. 18-447; Cross Appeal Docket No. 18-612) – Filed Nov 08 2018**

Undecided

Issue: Preemption

Question: Under 49 U.S.C. § 11501(b)(4), when can a State justifiably maintain a sales-and-use tax exemption for fuel used by vessels to transport goods interstate without extending the same exemption to rail carriers?

***Franchise Tax Bd. of California v. Hyatt* (U.S. Supreme Court, Docket No. 17-1299) – on petition and on the merits – Filed April 13, 2018 and September 18, 2018**

Undecided

Issue: Sovereign immunity.

Question: Whether the Court should overturn *Nevada v. Hall* which abrogates state sovereign immunity and allows plaintiffs to bring a number of different types of claims in state court against the officials of another state, including tax claims against state tax enforcement agencies and officials?

NOTE: This is the third time the case has come before the Court. The last time, the Court took briefing and heard arguments on the question above, but because of the death of Justice Scalia, the Court ended up equally split on the issue.

***Washington State Department of Licensing v. Cougar Den, Inc.* (U.S. Supreme Court, Docket No. 16-1498) – Filed Aug 16 2018**

Lost

Issue: Preemption

Question: Whether the Yakama Treaty of 1855 creates a right for tribal members to avoid state taxes on off-reservation commercial activities that make use of public highways.

***South Dakota v. Wayfair* (U.S. Supreme Court, Docket No. 17-494) – on petition and on the merits – Filed November 2, 2017 and March 5, 2018.**

Won

Issue: Nexus

Question: Whether *Quill* should be overturned.

***CSX Transportation, Inc. v. Alabama Dep't of Rev., et al*, Dkt. No. 17-11705-G (11th Cir.) – Filed June 2017**

Lost (But a win on the compensatory tax argument.)

Issue: Preemption.

Question: Under the 4-R Act's "another tax that discriminates" provision—can a state justify granting a sales tax exemption to truckers for fuel purchases while imposing the sales tax on fuel purchased by trains by showing that truckers pay a roughly equivalent fuel tax on fuel purchases, or does the fact that fuel taxes are spent on roads prevent the state from justifying the differential treatment? And can railroads make a claim under the provision without showing actual injury? Does the compensatory tax doctrine apply? Is there any justification for exempting fuel used by water carriers? (This is the third time the 11th Circuit is hearing this case, where CSX asserts it is entitled to a refund of all tax paid on fuel.)

***Utah State Tax Comm'n v. See's Candies, Inc.*, Dkt. No. 20160910-SC (Utah Sup Ct.) – Filed May 2017**

Lost

Issue: Sec. 482-type authority.

Question: Can Utah use its separate § 482-type authority to disallow intercompany deductions for amounts paid by a retailer to a related entity to use trademark property transferred by that retailer to

that related entity, or is the state bound to follow federal regulations which arguably do not provide for disallowing such deductions?

Note: There has been some discussion of whether the position taken by the Commission in this case conflicts with its SITAS program—which focusses on assisting states with evaluating transfer-pricing and related issues. But as we explained in our brief, even the federal government does not rely solely on transfer-pricing to address intercompany issues (for example, under § 367(d), transfers of intangibles to foreign subsidiaries is not given tax-free treatment). The real issue in this case is whether IRS regulations control how state law is to be applied—even though there may be important differences between the federal and state systems. This is a significant issue for state tax administrators.