



To: Litigation Committee
From: Helen Hecht, MTC General Counsel
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Subject: The Role of the Multistate Tax Commission as *Amicus Curiae*

INTRODUCTION

The Multistate Tax Commission’s Litigation Committee provides a forum for Commission representatives and states’ Attorneys General to discuss issues affecting state tax litigation and to provide advice to Commission’s legal staff on the litigation support and related activities the Commission provides. One such activity is the filing of amicus briefs by the Commission. At the meeting of this committee in July 2014, Commission staff reported on cases pending before the United States Supreme Court and the committee discussed the important state tax issues presented in those cases.

Since July 2014, the Commission has filed amicus briefs in six cases, three before the United States Supreme. This provides us with an opportunity to summarize for the committee the Commission’s reasons for filing amicus briefs, to outline the role of the Commission as amicus curiae supporting the states, and to discuss how that role fits with the Commission’s overall purposes.

THE COMMISSION’S PURPOSES GENERALLY

The states had four purposes in forming the Commission: to facilitate the proper determination of tax liability of multistate taxpayers—including equitable apportionment and settlement of apportionment disputes; to promote uniformity or compatibility; to facilitate taxpayer convenience and compliance; and to avoid duplicative taxation.¹

¹ See the Multistate Tax Compact, Art. I and other foundational documents of the Commission, all of which recite these same goals.

These purposes, and especially the first, establish the Commission's interest in cases involving the authority of states to tax their respective shares of multistate income. One way in which the Commission furthers this interest is by facilitating consultation by state tax commissioners and their attorneys with one another and with Commission staff on litigation matters. This litigation-consulting role may include the filing of amicus briefs in important multistate tax cases in state and federal appellate courts. The Commission has taken on this role for most of its near-50-year history. In its recent history, the Commission has itself filed around three to five briefs per year (most of which have been in the lower courts). The Commission also consults with other state organizations and with states' Attorneys General on the amicus briefs they file.

WHEN DOES THE COMMISSION FILE?

Filing an amicus brief, unlike litigation consulting generally, requires a commitment of significant time and effort and time available to the Commission's staff for such efforts is limited. Also, it is not the place of the Commission to initiate the filing of an amicus brief in a particular case. Therefore, the Commission only considers filing as amicus in cases where the head of the state tax agency involved in the litigation directs a request to the Executive Director. The decision to file a brief is then made by the Executive Director who considers the interests of the Commission and consults with the Executive Committee. (The Commission has, at times in the past, also signed onto the briefs of other organizations or has had outside counsel assist in the drafting of briefs.)

In general, the Commission has an interest in filing an amicus brief in a particular case when: 1) the case has the potential to affect multiple states in a significant way, and 2) the issue is one on which the Commission can bring to bear particular expertise or experience that the parties cannot. The Commission's interest is further heightened when there is an opportunity to address an important issue or question that has not been addressed by the parties or when the potential effect on other states cannot adequately be addressed by the state party in the case.

It generally does not serve the Commission's interest to weigh in as an amicus on questions involving pure state tax policy choices—the kinds of cases that comprise the vast majority of litigation in the lower courts. So the Commission typically limits its involvement to two circumstances—issues of federalism that have a potential impact on state taxing authority, and the taxation of multistate businesses including the interpretation and application of UDITPA. With respect to the former, it is hard to overstate the Commission's commitment

to preserving the authority of state lawmakers to establish their own policies, free from unnecessary and potentially disruptive interference of Congress.²

As for constitutional limits on state taxing authority, the Commission has always asserted that judicial doctrines defining these limits should emanate from established constitutional principles and must also balance the inherent sovereignty of the states. With respect to the taxation of multistate businesses, the Commission has unique expertise that it can bring to the interpretation and application of provisions of UDITPA or similar provisions. Some of this experience comes from the Commission's uniformity efforts.

THE COMMISSION AND THE U.S. SUPREME COURT

The Commission may file briefs in the U.S. Supreme Court supporting the grant of certiorari or on the merits of a case when taken up by the court. A partial list of cases in which the Commission has filed briefs in the U.S. Supreme Court (either in the petition or merits phase, or both) includes the following:

- *Heublein, Inc. v. South Carolina* (filed 1971) – P.L. 86-272 and liquor regulations
- *Japan Line, Ltd. v. County of Los Angeles* (filed 1977) – Foreign Commerce Clause
- *Pennsylvania v. United States Tobacco Company* (filed 1978 urging cert.) – P.L. 86-272
- *Chicago Bridge & Iron Co. v. Caterpillar Tractor Co. (& Ill.)* (filed 1980) – combined filing
- *F.W. Woolworth v. New Mexico* (filed 1982) – business income
- *Shell Oil Company v. Iowa Dep't of Revenue* (filed 1987) – combined filing
- *Franchise Tax Board v. Alcan Aluminium Ltd* (filed 1988) – Tax Injunction Act
- *Wisconsin Dep't of Revenue v. Wrigley* (filed 1991) – P.L. 86-272
- *Quill Corp. v. North Dakota* (filed 1991) - nexus
- *Allied-Signal Inc. v. New Jersey* (filed 1992) – unitary business principle
- *Oregon Dep't of Revenue v. ACF Industries, Inc.* (filed 1992) – preemption (4-R Act)
- *Barclays Bank PLC v. Franchise Tax Board* (filed 1994) – worldwide apportionment
- *Associated Indus. of Missouri v. Lohman* (filed 1993) – Commerce Clause discrimination

² Take, for example, the “4-R Act” which came before the Supreme Court yet again this year in the CXS case that the Court previously grappled with and that has resulted in significant costs to the states, continuous litigation, splits in the federal circuits and substantial uncertainty. This statute is, quite simply, the “poster child” for the harm that federal interference in state taxes can cause. The majority in CSX notes the problem that Congress created not just for the states but also for the courts: “Congress assigned this task to the courts by drafting an antidiscrimination command in such sweeping terms. There is simply no discrimination when there are roughly comparable taxes. If the task of determining when that is so is ‘Sisyphean,’ as the Eleventh Circuit called it, it is a Sisyphean task that the statute imposes.” The dissent was more pointed about the uncertainty states face as a consequence of an ill-conceived federal statute and the inability of courts to clarify it: “We have demanded clarity from Congress when it comes to statutes that ‘se[t] limits upon the taxation authority of state government, an authority we have recognized as central to state sovereignty.’ *Department of Revenue of Ore. v. ACF Industries, Inc.*, 510 U. S. 332, 344–345 (1994). We should demand the same of ourselves when we interpret those statutes. Yet after today’s decision, lower courts, soon to be met with an oyster’s shellful of comparison classes, ante, at 5, will have no idea how to determine when a tax exemption that is not tied to the taxpayer’s status constitutes differential treatment of two taxpayers.

- *General Motors Corp. v. Tracy* (Ohio, filed 1995) – Commerce Clause discrimination
- *Arkansas v. Farm Credit Services* (filed 1997) – Tax Injunction Act
- *Montana v. Crow Tribe* (filed 1997) – federal remedies in state tax matters
- *Hunt-Wesson, Inc. v. Franchise Tax Board* (filed 1999) – Commerce Clause discrimination
- *Director of Revenue v. CoBank ACB* (Missouri, filed 2000) – preemption
- *Tennessee v. J.C. Penney Nat'l Bank* (filed 2000 urging cert) – nexus
- *Texas v. Dow Chemical Co.* (filed 2001 urging cert) – preemption
- *Goldberg v. Ellett* (California, filed 2001 urging cert) – Tax Injunction Act
- *Franchise Tax Board v. Hyatt* (filed 2002) – Full Faith and Credit Clause
- *AT&T Corp. v. Allen* (Oklahoma, filed 2004 urging cert) – sovereign immunity /class actions
- *Hammond v. Coeur D'Alene Tribe* (Idaho, filed 2004 urging cert) – Federal Indian law
- *Richards v. Prairie Band Potawatomi Nation* (Kansas, filed 2004 urging cert) Federal Indian law
- *Kentucky v. Davis* (filed 2007) – Commerce Clause discrimination
- *CSX Transportation, Inc. v. Georgia* (filed 2007) – preemption (4-R Act)
- *Meadwestvaco Corp. v. Illinois Dep't of Revenue* (filed 2007) – unitary business principle
- *Polar Tankers v. City of Valdez* (Alaska, filed 2009) – apportionment generally
- *Levin v. Commerce Energy* (filed 2009) – Tax Injunction Act and comity
- *CSX Transportation, Inc. v. Alabama Dep't of Revenue* (filed 2010) – preemption (4-R Act)
- *Comptroller v. Wynne* (Maryland, filed 2013) – Commerce Clause discrimination
- *Direct Marketing Assoc. v. Brohl* (Colorado, filed 2013) – Tax Injunction Act
- *Alabama v. CSX Transportation, Inc.* (filed 2013) – preemption (4-R Act)

RECENT DEVELOPMENTS IN USE OF AMICUS BRIEFS

No discussion of the use of amicus briefs would be complete without noting the growth in the use of such briefs and the debate over their use. Some scholars have applauded the trend. Fans of amicus briefs note that they can be especially helpful in providing insight into how a decision on a particular question may impact the larger context in which that question is raised. For appellate courts in particular, this information can be valuable, and the parties themselves may not have had the ability to fully explore the larger context. In this sense, the briefs are truly friend-of-the-court briefs, even when they support a particular party.

Others, however, have criticized the growing number of amicus briefs being filed, especially in the Supreme Court. Critics argue that, to the extent the briefs assert facts not proven and rely on information not subject to cross-examination, the briefs short-cut the rules of evidence. Amicus briefs can also be used to advance different legal arguments than those raised by either side—a practice that, at the extreme, is also subject to criticism since the arguments were presumably not fully developed below.

Cynics may be excused for thinking that the role of the amicus brief has been debased to one of simply advocating for a particular side in a contested matter or as an opportunity to advance political or even partisan positions. Only slightly less cynical is the view that there is simply power in numbers (that is, the party with the most briefs wins). Perhaps the only answer to the cynics is that the judgment of whether a brief raises legitimate issues or provides valuable insights will rest, appropriately enough, with the court.

The trend toward and debate over the use of amicus briefs to supplement the briefs of the parties echoes, in some ways, the trend toward and debate over the use of experts to testify to what are, essentially, legal issues. There are differences, no doubt. But one similarity is that, despite the debate, judges generally consider themselves sufficiently sophisticated to distinguish what is helpful from what is purely self-serving. So judges acting as fact-finders will usually allow such expert testimony, although the weight they give it is often unclear. Similarly, an appellate court rarely denies a motion to file an amicus brief, although it is not clear whether the judges (or their clerks) give much weight to those briefs. In general, then, it appears judges themselves would rather have the information provided in these less traditional ways, even if it might also be inherently less reliable.

Another similarity between the two issues is the common wisdom (whether true or not) that if one side is going to use an expert or amici the other side will be at a disadvantage if it does not also. Again, while a cynic might attribute this kind of thinking to a simple numbers game, there are advantages to having amici who can not only file a brief on a particular issue, but help the party being supported in thinking through the larger issues in the case—or even challenge the party as to the best theory or argument. So, more than simply counting briefs, a party will generally benefit from amici who can help the party in making its own case.³

³ Another difference between experts and amici is that the latter generally do not get paid for their opinions. See Rule 29 (c)(5) of the Federal Rules governing amicus briefs which states in relevant part:

Unless the amicus curiae is one listed in the first sentence of Rule 29(a), a statement that indicates whether:

(A) a party's counsel authored the brief in whole or in part;

(B) a party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(C) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person . . .

See also Rule 37 (6) of the U.S. Supreme Court Rules governing amicus briefs which provides: Except for briefs presented on behalf of amicus curiae listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person or entity, other than the amicus curiae, its members, or its counsel, who made such a monetary contribution to the preparation or submission of the brief. The disclosure shall be made in the first footnote on the first page of text.

Both trends in litigation/appellate practice (using experts and amici) may reflect the limitations of the normal trial and appellate processes to effectively grapple with very complicated matters. Litigants are often limited in the ways in which they can advocate for their positions or present their cases, and using experts or amici can sometimes provide an engaging, creative or even dramatic way to cover what are otherwise very esoteric issues. (Both expert opinion reports and amicus briefs can also literally provide additional pages, that might otherwise be limited, in which to cover the issues.) So while it may be that the status of the expert or the amicus also lends some credibility, it is also likely that simply presenting the information in a different way serves to call attention to that information or provide context for it. (It is also worth remembering that while appellate judges are generally very bright and capable, few of them have specialized in state taxes.)

In any case, while the use of amicus briefs is not without some controversy, the practice has undeniable benefits.

WHAT SHOULD AN AMICUS BRIEF SAY?

The National Association of Attorneys General established its Supreme Court Advocacy Center to improve the level of state advocacy before the U.S. Supreme Court. Dan Schweitzer, who has headed up the center since 1996, has explained what makes a good amicus brief. See 5 J. App. Prac. & Process 2 No. 2 (Fall 2003). The brief should not simply duplicate what the briefs of the parties say. Rather, he advises taking advantage of the nature of such briefs—which can be “liberating” to write because the briefs are not subject to strategic constraints and can be bolder or more innovative in their claims. Amicus briefs can be used to amplify an issue, give historical background or respond to a particular argument made by the opponent. Schweitzer sets out a number of approaches the brief can use to highlight the practical consequences of a particular decision, to go father or be more restrained with an argument made by the party, or offer a different legal argument.

It is worth noting the obvious here. It is the nature of a decision in any state tax case that might come before the U.S. Supreme Court that the decision will not just impact the state litigant but its sister-jurisdictions, as well. The amicus briefs filed on behalf of multiple states in such cases will tend to raise the general implications of a particular holding or rule that the Court might create—and rightly so. Moreover, it is easier to raise these general implications in an amicus brief than it is for the party state to raise them in its own brief, which typically must focus more on the particulars of the case at bar. Likewise, it is reasonable for the Court to attribute some substantial value to briefs representing general state concerns—as well as concerns of taxpayer-groups who might be impacted by the decision.

From different surveys of the treatment of amicus briefs by the U.S. Supreme Court, we know that the Court appears to give more weight to the invitation briefs of the U.S. Solicitor General than to any other third-party briefs. But the Court also appears to give some substantial weight to amicus briefs filed by states' Attorneys General. This is understandable especially when the question is one of importance to the states and when the states have adopted a consistent position on the question.⁴ Other organizations, such as the National Governors Association, the National Council of State Legislatures and local government groups may also file amicus briefs in cases before the Court, and their briefs may be influential because they are presumed to represent the position of states generally.

In some high-profile cases in the last two terms, the Court has been flooded with dozens of amicus briefs on both sides. Typically, in tax cases, the number of briefs filed is much more limited. Amici that filed in the three state tax cases this term were:

Comptroller v. Wynne

For the State:

- International Municipal Lawyers Association, et al.
- Multistate Tax Commission

For the Taxpayer:

- American Legislative Exchange Council
- American Association of Attorney-Certified Public Accountants, Inc.
- National Association of Publicly Traded Partnerships
- Maryland Chamber of Commerce
- Chamber of Commerce of the United States of America
- Michael S. Knoll, and Ruth Mason
- Council on State Taxation
- Tax Foundation
- National Federation of Independent Business Small Business Legal Center
- Tax Executives Institute, Inc.
- Tax Economists

⁴ See *Kentucky v. Davis*, 553 U.S. 328 (2008), where the unanimous support of the states as amici is cited by the Court as part of its acceptance of the practice of taxing other states bonds.

Direct Marketing Association v. Brohl

For the State:

- National Governors Association
- States of Illinois, et al.
- Multistate Tax Commission
- Interested Law Professors

For the Taxpayer:

- Institute for Professionals in Taxation
- Tax Foundation
- Chamber of Commerce of the United States of America
- Council on State Taxation
- NFIB Small Business Legal Center

Alabama v. CSX Transportation

For the State:

- American Trucking Associations, Inc.
- Multistate Tax Commission
- Alabama Cities and Counties, City of Mobile, et al
- States of Tennessee, et al
- State & Local Government Organizations

For the Taxpayer:

- Council on State Taxation
- Tax Foundation
- Association of American Railroads

THE COMMISSION'S RECENT AMICUS BRIEFS

The following briefly summarizes the position of the Commission in five briefs filed in recent months:

Comptroller v. Wynne

Issue Addressed by the Brief: Whether Maryland is required to give 100% credit to residents for taxes paid on income sourced to other jurisdictions.

Summary of Position: Never before has the Supreme Court held that the Commerce Clause limits the power of states to tax the income of their own residents. It is not the role of the Commerce Clause to dictate to states how they tax the income of their own residents. Nor are the tests that the Court typically applies to determine discrimination under the Commerce Clause relevant here.

Moreover, had the taxpayers not elected, along with all other shareholders, to have their corporation treated as a pass-through entity for tax purposes, the corporation would have paid tax in multiple states on an apportioned basis each year and the Wynnes would have

paid tax on 100% any distribution (dividend) income. No one suggests this would violate the Commerce Clause. But, because of the election, the corporation was not subject to entity-level tax and, instead, the Wynnes paid tax on an imputed pro-rata share of the corporation's income each year (but not when they received an actual distribution). So despite the fact that Maryland limited the credit available for taxes paid elsewhere, the Wynnes paid less tax in the state because of the election. Furthermore, requiring states to provide credits necessarily implicates a number of questions—whether such credits are required only on the “same” income, for the “same” kinds of tax, earned during the same period, etc.

Direct Marketing Association v. Brohl

Issue Addressed by the Brief: Whether the Tax Injunction Act bars a challenge to the imposition of reporting requirements on sellers related to the collection of use tax.

Summary of Position: The Tax Injunction Act, which bars federal jurisdiction over challenges involving the “levy, assessment or collection” of tax, should be applied when, as here, the state law requirement is essential to the assessment and collection of the tax. The bar established under the Tax Injunction Act was intended to benefit states in the context of the types of taxes that states impose. Different taxes are imposed, assessed and collected in different ways. Requiring sellers to maintain and report information on taxable sales, whether or not those sellers also collect the tax, is essential to the enforcement of the sales tax.

The Court has now ruled in this case, deciding that the TIA does not bar the challenge and remanding the case to the Tenth Circuit to consider whether the case is barred by comity.

Alabama v. CSX Transportation

Issue Addressed by the Brief: Whether imposing the general sales tax on diesel fuel purchased by railroads but not their “competitors” (who pay the fuel tax instead) violates the “4-R Act”. (The taxpayer claimed a refund not for the difference in the two taxes, but for the entire amount of the sales tax paid.)

Summary of Position: First, the proper comparison class is not railroad “competitors” (truckers and water carriers, as asserted by the taxpayer), but the commercial and industrial taxpayers cited in related provisions of the same subsection of the law prohibiting discriminatory property taxes. Even if Congress had intended the comparison class to be something other than commercial and industrial taxpayers and even if Congress had intended that comparison class to be the railroad's competitors, it is also true that truckers and water carriers often transport property for entirely different customers and

often work in concert with railroads to provide multi-modal transportation for the same customers. Second, it is clear from the history of Alabama’s tax system that the state determined to subject fuel only to sales tax or fuels tax, but not both. (Interesting, it also appears that CSX could have chosen to pay the state fuels tax rather than the sales tax.) There is no discrimination in Alabama’s choice to structure its taxes on diesel in this way.

The Court has now ruled in this case, deciding that the 4-R Act allows a flexible determination of the comparison class but also making clear that differential taxation is not the same as discriminatory taxation and the state may justify differential taxation, establishing that it is not discriminatory, by showing (in this case) a tax paid by the railroad is effectively in lieu of the tax paid by the comparison class or by providing other acceptable justification for the treatment.

Montana v. Priceline (In the state Supreme Court)

Issue Addressed by the Brief: Whether the state sales tax imposed on receipts from providing hotel rooms also applies to the receipts of online travel companies (OTC) from booking those rooms.

Summary of Position: Montana imposes a sales tax that is limited to certain transactions including the providing of accommodations, and is imposed on the consumer, and collected by the seller. The district court judge incorrectly treated the state sales tax as imposed on the hotel and only on the price charged by the hotel to the OTC for the room. This conclusion was not supported by Montana law. But more importantly for the Commission’s purposes, the decision violated a fundamental tenet of sales taxation—that the characterization of a transaction for sales tax purposes is based on the customer’s object in entering into that transaction and not on the various activities or elements that make up or give rise to the sale from the seller’s standpoint. As electronic commerce, much of which is not specifically subject to sales tax, continues to grow, this principle is critical to prevent sellers from trying to re-characterize taxable transactions as nontaxable simply because there is a non-taxable electronic or digital component.

Vodafone v. Tennessee (In the state Supreme Court)

Issue Addressed by the Brief: Whether the Tennessee tax commissioner abused his discretion when he used his statutory authority to vary the statutory apportionment formula (from predominant cost of performance to market-sourcing for the sales factor).

Summary of Position: First, the equitable apportionment or variance authority exists for the very purpose of altering the statutory formula. Nor is there support for the claim that the cost-of-performance rule reflected some kind of superseding intent by the legislature to

source sales to their origin as opposed to the market (given that the sales factor itself was intended to reflect the contribution of the market states). Second, the regulation which Tennessee follows (based on a prior version of the Commission’s regulation) does not limit the authority to use the authority only where the circumstance is “unusual” within a particular industry. Third, there are recognized principles for the exercise of the authority—including broad constitutional limitations, respect for established uniformity, the nature and purpose behind different portions of the statutory formula, avoidance of multiple taxation and ease of administration and compliance. The variance in this case easily meets these principles.

CONCLUDING THOUGHTS

There have been suggestions from time to time that the Commission’s support for state sovereignty, a common theme in our amicus briefs, may create conflicts with the Commission’s purpose of promoting uniformity or compatibility in state tax laws. If so, it is clear which of these conflicting principles must win out. The states ceded no sovereignty in creating the Commission. Their choice to follow, or not, uniformity recommendations of the Commission is, like all state tax policy choices, committed to the sound discretion of their legislatures and their administrations. Uniformity, for its own sake, is not much of principle in any case. Rather, uniformity is valuable only if it serves to reduce administrative and compliance burdens, which are undoubtedly important goals. Nor is there any doubt from our continuing uniformity efforts (despite a sometimes uphill battle) that the Commission is devoted to these goals. But state sovereignty is different. The inherent authority of states over their own tax policies generally, and over their fair share of tax on multistate activity in particular, is essential in a federalist system where state governments have the ultimate responsibility for the vast majority of programs and policies that their citizens desire. This is an important case to make and the Commission is uniquely positioned to make it.