



## **Multistate Tax Commission Litigation Committee**

Galt House Hotel  
140 North Fourth Street  
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### **Staff Report – Amicus Briefs**

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#### **Summary**

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. Since March 14, 2015, when we last reported to this committee, the Commission has filed 13 amicus briefs for 11 different states. Also, we can now report the results of cases in which we filed briefs prior to March 4, 2015. Although the Commission doesn't claim the credit for it, the overall "win-rate" is high.

#### **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.

While the Commission does not allow its briefs to be "ghost written," and seldom signs onto briefs authored by others, it does try to coordinate 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. Sometimes, however, the interests and positions of our organizations diverge, as they did in the DMA case. There, the Commission supported Colorado's cross-petition before the U.S. Supreme Court, asking the Court to reconsider Quill (as did a number of state AGs and academics). In contrast, SLLC opposed the cross-petition and filed a brief (authored by outside counsel) stating that the petition lacked "any semblance of certworthiness." Where there are such disagreements, the Commission is careful to consider the opposing views. (See discussion of that case in the summary below.)

In addition to working with other state groups, we occasionally consult with others who wish to file amicus briefs, especially in front of the U.S. Supreme Court. Commission staff also participate in a network of state DOR and AG attorneys who coordinate and facilitate the filing of joint-state briefs (through individual state AG offices) in state tax-related matters. That network coordinates with the National Association of Attorneys General, which has long helped states in the filing of joint briefs on various issues. Such joint state briefs are at least as valuable (and probably more so) than briefs filed by the Commission. State DOR attorneys who are interested in participating in that network can contact Bruce Fort of the MTC at bfort@mtc.gov who will put them in touch with the leadership of that network.

Finally, the Commission will also provide 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.

### **Amicus Briefs or Results from March 4, 2015 (Last Reported) – In Order of Filing**

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

Undecided

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? (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.)

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

Undecided

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.

**3. *Brohl v. The Direct Marketing Ass’n*, Dkt. No. 16-458 (U.S. Sup. Ct. – on cross-petition) – Filed November 2016**

Denied Both Petition and Cross-Petition

Issues: Discrimination and nexus.

Questions: If the Supreme Court were to grant the DMA’s petition asking it to consider whether the Colorado use tax reporting statute discriminates against interstate sellers, should it also grant Colorado’s cross-petition asking the Court to reconsider Quill? (Because the Court denied the petition, Colorado’s win in the 10th Circuit stands.)

Note: We discussed this case with other amici. A joint state brief was ultimately filed by a number of state AGs and a brief in support of the cross-petition was also filed by leading academics. The State and Local Legal Center (SLLC), which represents the National Governors Association and other related groups, however, opposed the cross-petition and urged the Commission not to file in support. We discussed their concerns with representatives of SLLC and industry groups and others who were aligned with them. We took those concerns into account in filing our brief.

**4. *Renzenberger, Inc. v. New Mexico Taxation and Revenue Dep’t*, Dkt. No. A-0001-CA-2015-34999 (N.M. App. Ct.) – Filed July 2016**

Undecided

Issue: Preemption.

Question: Do provisions of a federal statute 49 U.S.C. § 14505 which prohibit a state from imposing tax on receipts from passengers traveling in interstate commerce by motor carrier prevents the state from taxing intrastate transportation that may be connected with that interstate travel?

**5. *Health Net, Inc. v. Oregon Dep’t of Revenue*, Dkt. No. S063625 (Or. Sup. Ct.) – Filed June 2016**

Undecided

Issue: Compact case.

**6. *Avnet, Inc. v. Washington Dep’t of Revenue*, 187 Wash. 2d 44, 384 P.3d 571 (2016) – Filed March 2016**

Won

Issue: Nexus.

Question: Does the doctrine of dissociation prevent Washington from applying its B&O tax to the receipts of an out-of-state vendor who asserts that its in-state presence is unrelated to the sales made into the state?

**7. *First Marblehead Corp. v. Comm’r of Revenue*, 475 Mass. 159, 56 N.E.3d 132 (2016) – Filed December 2015**

Won

Issue: Internal consistency.

Question: Did the state’s high court properly find in *First Marblehead (I)*, involving application of the state’s financial institutions apportionment rules (taken from the MTC model), that the result complied with the internal consistency test as set out in *Wynne*?

**8. *Kimberly-Clark Corp. & Subsidiaries v. Comm'r of Revenue*, 880 N.W.2d 844 (Minn.) - Filed November 2015**

Won

Issue: Compact Case.

**9. *Crutchfield Corp. v. Testa*, 2016-Ohio-7760 – Filed October 2015**

Won

Issue: Nexus.

Question: Does Quill's physical presence nexus standard apply to Ohio's commercial activity tax?

**10. *Franchise Tax Bd. of California v. Hyatt*, 136 S. Ct. 1277, 194 L. Ed. 2d 431 (2016) – Filed September 2015 (Merits)**

Tie – upholding the lower court

Issue: Sovereign immunity from suit.

Question: Can a resident file a claim for damages in his home-state's courts against the tax agency of another state?

Note: We feel confident that had it not been for the death of Justice Scalia, California would have prevailed in this case.

**11. *Graphic Packaging Corp. v. Hegar*, 471 S.W.3d 138 (Tex. App. Ct. 2015)(Review Granted) – Filed May 2015**

Win

Issue: Compact case.

**12. *Franchise Tax Bd. of California v. Hyatt*, 136 S. Ct. 1277, 194 L. Ed. 2d 431 (2016) – Filed April 2015 (Petition)**

Granted

See 10 above.

**13. *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129 (10th Cir.)(2016) – Filed March 2015**

Win

Issues: Discrimination and nexus.

Questions: Does the Colorado use tax reporting requirement discriminate against out-of-state sellers and does it violate Quill?

**14. *Vodafone Americas Holdings, Inc. & Subsidiaries v. Roberts*, 486 S.W.3d 496 (Tenn. 2016) – Filed February 2015**

Win

Issue: Equitable apportionment.

Question: Does Tennessee's equitable apportionment statute allow it to require the use of market-based sourcing for a mobile telecommunications company?

**15. *Montana Dep't of Revenue v. Priceline.com, Inc.*, 2015 MT 241, 354 P.3d 631 – Filed October 2014**

Win (on the sales tax issue)

Issue: Proper interpretation of sales tax imposition statute.

Question: Does the Montana sales tax look to the components of a transaction or to the primary purpose of the customer in determining how to characterize the transaction for tax purposes. (MTC filed its brief in support of the imposition of the sales tax in a case involving online travel companies and the imposition of both sales tax and lodging taxes.)

**16. *Alabama Dep't of Revenue v. CSX Transp., Inc.*, 135 S. Ct. 1136, 191 L. Ed. 2d 113 (2015) – Filed September 2014 (merits)**

Split – Loss on comparison class & win on justification issue.

Issue: Preemption – 4-R Act.

Questions: What is the proper comparison class for a claim under subsection (b)(4) of the 4-R Act and can a state justify a tax imposed on railroads based on a roughly equivalent tax imposed on competitors.

**17. *Gillette Co. v. Franchise Tax Bd.*, 62 Cal. 4th 468, 363 P.3d 94 (2015) – Filed 2013**

Win

Issue: Compact case.