# PUBLIC NOTICE AND AGENDA
## MTC Litigation Committee Meeting

**Tampa Riverwalk Hotel**
**Tampa, Florida**
**March 15-16, 2005**

**I. Welcome and Introductions**

**II. Public Comment Period**

**III. Executive Committee Liaison Report and Commentary**

**IV. Report of the Executive Director**

**V. U.S. Supreme Court Cases on State Taxes and Federalism since July, 2004.**

**Supreme Court Decisions**

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- ***Commissioner v. Banks,*** U.S. Supreme Ct. No. 03-892, January 24, 2005. When a litigant's recovery constitutes income (there from an employment discrimination suit), that income includes the portion of the recovery paid to the attorney as a contingency fee. Under the anticipatory assignment of income doctrine, a taxpayer cannot exclude an economic gain from gross income by assigning it in advance to another party. http://supct.law.cornell.edu/supct/html/03-892.ZS.html

**Certiorari Granted, Decisions Pending**

- ***Granholm v. Heald***, S.Ct. No. 03-1116 and ***Michigan Beer & Wine Wholesalesrs Ass'n v. Heald***, S.Ct.. No. 03-1120, (Below: *Heald v. Engler*), 342 F.3d 517 (6th Cir. 8/28/03) http://pacer.ca6.uscourts.gov/cgi-bin/getopn.pl?OPINION=03a0308p.06) The 6th Circuit has held a state regulatory scheme which prohibited direct shipment of alcoholic beverages from out-of-state wineries, but allowed direct shipment from in-state wineries, was unconstitutional because 1) the regulation violated the dormant commerce clause and, 2) the state could not show that the regulation advances the "core concerns" of the 21st amendment, (promoting temperance, ensuring orderly market conditions, and raising revenue), and that there were no reasonable nondiscriminatory alternative means of advancing those "core concerns." The decision is consistent with holdings in the 4th, 5th, and 11th Circuits; and inconsistent with decisions in the 2nd and 7th Circuits which have held similar state regulations to be within the ambit of the 21st amendment.

The Court also granted cert in ***Swedenburg v. Kelly***, 358 F.3d 223 (2nd Cir., 2/12/04) http://caselaw.lp.findlaw.com/data2/circs/2nd/029511p.pdf, S.Ct. No. 03-1274. 1) The state taxing scheme that allowed in-state, but not out-of-state, wine producers to ship directly to retail customers was constitutional because, consistent with the analysis followed by the 7th circuit, it was within the ambit of the 21st amendment and allowed licensed wineries, whether in-state or out-of-state, direct access to the market provided they established a physical presence in the state. The two-step analysis followed by the 4th, 5th, 6th, and 11th circuits, whereby a statute which facially violated the commerce clause could be saved only if it advanced a "core concern" of the 21st amendment, was rejected because it unnecessarily limited the authority delegated to the states by the 21st amendment. 2) Nor was the Privileges and Immunities Clause violated, because the scheme "operate[d] without regard to residency and [did] not provide [state] residents with advantages unavailable to nonresidents." 3) Statutory prohibition of all commercial speech pertaining to the sale of alcoholic beverages directed to state consumers by unlicensed entities was a violation of the 1st Amendment.

The Court limited certiorari in these cases to the question of whether "a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violates the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment." The Court heard argument on December 7, 2004 and reportedly most Justices did not appear favorable to the state position.

- ***Sherrill, N.Y. v. Oneida Indian Nation of New York,*** 337 F.3d 139 (2nd Cir., 7/21/03), http://caselaw.lp.findlaw.com/data2/circs/2nd/017795p.pdf
  S.Ct. No. 03-855. In July of 2003, the 2nd Circuit Court of Appeals held that property set aside as reservation land in the late 18th century, later sold to non-members, but reacquired by the Oneida Indian Nation of New York in open-market transactions in the 1990's, was not subject to taxation because, where the federal government had never changed the reservation status of the land, the Oneidas purchases reestablished the properties as reservation land. Argument heard 1/11/05.

- ***American Trucking Association, Inc. v. Michigan Public Service Commission*** (below: *Westlake Transportation, Inc. v. Michigan Public Service Commission*), 662 N.W.2d 784 (Mich. Ct. App., 3/11/03), http://caselaw.lp.findlaw.com/data2/michiganstatecases/appeals/031103/18281.pdf, S.Ct. No. 03-1230. Michigan imposes annual fee requirements on motor carriers of $100 for an interstate certificate of authority to operate; $100 administrative fee for interstate operators; and a $10 registration fee for carriers registered outside the state. Various companies challenged these fees as preempted by the Single State Registration System set out in the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), and in violation of the Commerce Clause. The Michigan Court of Appeals upheld all fees, holding

the in-state annual fee was regulatory not registration and therefore not preempted, the $10 fee was authorized by statute and the $100 fee on interstate operators was subject to commerce clause strictures but was only an incidental burden. On 1/14/05, the Court granted the petitions for certiorari filed in ***American Trucking Association***, No. 03-1230, and ***Mid-Con Freight Systems***, No. 03-1234, limited to the following questions: (1) "Whether the $100 fee upon vehicles conducting intrastate operations violates the Commerce Clause of the United States Constitution;" and (2) "Whether the $100 fee upon vehicles operating solely in interstate commerce is preempted by 49 U.S.C. §14504."

- ***FCC v. Brand X Internet Services***, 345 F.3d 1120 (9th Cir., 10/6/03), http://caselaw.lp.findlaw.com/data2/circs/9th/0270518p.pdf S.Ct. No. 04-281. The FCC ruled that cable broadband Internet access service was an interstate information service and not a cable service, and that there was no separate offering of telecommunications service and therefore was not regulated as a common carrier. The Ninth Circuit reversed in part holding that the service had elements of both an information service and a telecommunications service and was therefore subject to regulation. The Court granted cert. on 12/3/04 here and in a companion case of ***National Cable & Telecommunications Ass'n v. Brand X Internet Services***, S.Ct. No. 04-277.

- ***Richards v. Prairie Band Potawatomi Nation*** 379 F.3d 979 (10th Cir., 8/11/04) http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=10th&navby=case&no=033218, S.Ct. No. 04-631. The Tenth Circuit noted that the Kansas fuel tax was amended to impose the tax off reservation on the distributor's receipt of gasoline but nevertheless applied the balancing-of-interests test of *White Mountain Apache Tribe v. Bracker* purportedly because the statute permitted the distributor to pass on the tax. Kan. Stat. Ann. § 79-3409 ("Every distributor paying such tax or being liable for the payment shall be entitled to charge and collect an amount, including the cost of doing business that could include such tax on motor vehicle-fuels . . . sold or delivered by such distributor, as part of the selling price.") The court held that the fact that the tribal retail gas station was proximate to a tribal casino tipped the scale in favor of tribal interests and required the finding that "the Nation's fuel sales as an integral and essential part of the Nation's on-reservation gaming enterprise." Petition for cert. filed 11/5/04. MTC amicus brief filed 11/24/04. Cert. granted 2/28/05.

**Certiorari Pending**

- ***Klingler v. Director, Missouri Dept. of Revenue***, 366 F.3d 614 (8th Cir., 5/3/04), http://caselaw.lp.findlaw.com/data2/circs/8th/032345p.pdf S.Ct. No. 04-585. Klingler brought suit under the Title II of the federal Americans with Disabilities Act against the Missouri Department of Revenue claiming that the $2 fee charged for handicapped parking placards violated the ADA, on the basis that a state may not charge the disabled for measures taken to provide nondiscriminatory treatment required by the ADA. The federal district court dismissed on the

basis of Eleventh Amendment immunity, but the Eighth Circuit reversed on *Ex Parte Young* grounds, allowing plaintiffs to seek declaratory and injunctive relief but not monetary damages. On remand, the district court determined that the fee violated the ADA and granted declaratory and injunctive relief. The Eighth Circuit reversed again on "straightforward" constitutional grounds rather than "difficult and complex" statutory grounds. The circuit court framed the question as whether the application of the ADA to the regulated activity in the case at hand was a legitimate exercise of congressional power under the Commerce Clause and citing *Lopez* and *Morrison*, ruled that it was not because the collection of the fee did not substantially affect interstate commerce. Perhaps if the Heart of Atlanta Motel simply had a nickel surcharge for blacks instead of barring them altogether it wouldn't have substantially affected interstate commerce? Petition for cert. filed 11/28/04.

**Certiorari Denied**

- ***Hammond v. Coeur d'Alene Tribe***, 384 F.3d 674 (9th Cir., 8/19/04), http://caselaw.lp.findlaw.com/data2/circs/9th/0235965p.pdf S.Ct. No. 04-624. In *Goodman Oil Co. v. State Tax Comm'n*, the Idaho Supreme Court ruled that Idaho's fuel tax was imposed on the tribal retailer or its customer and was invalid absent specific authorization by Congress. The Idaho legislature then amended the tax to make explicit its intention that the tax be imposed on the distributor and to impose the tax on the distributor. The Ninth Circuit held that regardless of the express intent of the Legislature, the determination of where the incidence of the tax lies is a federal issue concluding that the tax was still imposed on the tribal retailer and that the Hayden-Cartwright Act's reference to "Military and other reservations" was ambiguous and therefore did not provide the unmistakably clear authorization for this tax on a tribal entity for an on-reservation transaction. Petition for cert. filed 11/5/04. MTC amicus brief filed 12/21/04. Cert. denied 2/28/05.

- ***Nextel West Corp. v. P.J.'s Concrete Pumping Service, Inc.***, 803 N.E.2d 1020 http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=il&vol=app/2004/2021219&invol=3 (Ill. App. Ct., 1/27/04), S.Ct. No. 04-263. This class action against a provider of cellular telephone service alleged the provider knowingly collected taxes from customers that did not live in municipalities that imposed such taxes. The case is similar to the recent ***AT&T v. Allen***. The Appellate Court of Illinois affirmed certification of a class of customers living in Illinois and sixteen other states. Petition for cert. denied 11/1/04.

- ***Macy's East, Inc. v. Commissioner of Revenue***, 808 N.E.2d 1244 (Mass., 5/27/04), http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=ma&vol=sjcslip/sjcMay04w&invol=1 S.Ct. No. 04-252. In 2002, the Massachusetts Appellate Tax Board ruled that the net operating losses of companies merged into a surviving corporation could not be used by the surviving corporation in a later tax year. The board dismissed claims that the regulation violated the Bankruptcy Code and the Supremacy, Commerce, Due Process and Equal Protection Clauses of the

federal constitution. The Supreme Judicial Court of Massachusetts affirmed ruling the taxpayer had failed to prove that it qualified for a deduction under the statute. Petition for cert. denied 11/1/04.

- ***Moran v. Hibbs*** (below: *Kerr v. Killian*), 84 P.3d 446 (Ariz., 2/13/04), http://www.supreme.state.az.us/opin/pdf2004/CV_03_0110_PR_corr.pdf S.Ct. No. 03-1495. Arizona taxes mandatory retirement contributions differently depending on whether the employer "picks up" required contributions, i.e., whether the contributions were taxed (as federal employees' were) or not (as state and local employees' were not). In response to allegations that the state's personal income tax illegally discriminated against federal employees under *Davis v. Michigan*, the Arizona Supreme Court in the sixth court decision on the subject (citing the Grateful Dead for the "long strange trip" that brought the case to this point) ruled that the differential treatment was based on whether the employer picked up the contribution or not, not on the federal or state and local source of pay. Petition for cert. denied 10/4/04.

- ***Ward v. South Carolina***, 590 S.E.2d 30 (S.C. Supreme Ct., 12/8/03), S.Ct. No. 03-1304. Legislation which repealed tax exemption for state retirees and increased benefits did not violate the doctrine of intergovernmental tax immunity with respect to federal employees because there was no direct correlation between the two actions and even if there were, there was no discrimination in taxation based on the source of the compensation. Petition for cert. denied 10/4/04.

## VI. New Business

## VII. Closed Session for Information and Training for State Tax Attorneys

## VIII. Adjourn

Additional information on this meeting and agenda may be secured from René Blocker, Multistate Tax Commission, 444 North Capitol Street, NW, Suite 425, Washington, D.C. 20001-1538, telephone: (202) 624-8699, fax: (202) 624-8819, rblocker@mtc.gov.