



MULTISTATE TAX COMMISSION

## **Multistate Tax Commission Litigation Committee**

Radisson Blu Mall of America

2100 Killebrew Drive

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**Tuesday, April 24, 2018**

### **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 August 1, 2017, when we last reported to this committee, the Commission has filed amicus briefs on behalf of two states. Also, we can now report the results of cases in which we filed briefs prior to August 1, 2017.

#### **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. 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](mailto:bfort@mtc.gov) who will put them in touch with the leadership of that network.

Recently, in the *Wayfair* case, the Federation of Tax Administrators filed a joint brief with the Commission. It appears to be the first time they have joined such a brief. We would like to thank FTA and their leadership for their support.

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 August 1, 2017 (Last Reported) – In Order of Filing**

#### **1. *Franchise Tax Bd. of California v. Hyatt* (U.S. Supreme Court, Docket No. 17-1299) – on petition – Filed April 13, 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: If the Court takes this case, it will be 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.

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

Undecided

Issue: Nexus

Question: Whether *Quill* should be overturned.

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

Loss (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.)

**4. *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.

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

Won

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

Won

Issue: Compact case.