



MULTISTATE TAX COMMISSION

Multistate Tax Commission Litigation Committee

Tuesday, July 24, 2018

The Boston Westin Waterfront

425 Summer Street

Boston, Massachusetts

Staff Report – Amicus Briefs

Helen Hecht, General Counsel

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 April 24, 2018, when we last reported to this committee, we can now report the results of three cases in which we filed briefs prior to April 24, 2018.

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 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.

Latest Results – 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

Granted

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.

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.

Won

Issue: Nexus

Question: Whether *Quill* should be overturned.

3. Commissioner of Revenue v. Associated Bank, Dkt. No. A17-0923 (Minnesota Sup. Ct.) – Filed July 2017

Won

Issue: Section 18 equitable apportionment authority.

Question: Can Minnesota use its Section 18 authority to vary the apportionment of a financial institution, which must use special industry rules, and its wholly owned LLCs, which use the general allocation and apportionment formula even though they hold loans made by their parent.