



MULTISTATE TAX COMMISSION

*Working together since 1967 to preserve federalism and tax fairness*

## **Preliminary Agenda**

### **MTC Litigation Committee Meeting Informational & Training Session for State Attorneys\***

#### **MTC Annual Meeting**

Minneapolis Marriott City Center  
30 South Seventh Street  
Minneapolis, Minnesota 55402

**Monday, July 30, 2007**

- I. **Welcome and Introductions** (1:00 p.m.-1:15 p.m.)
- II. **Public Comment Period** (1:15—1:30)
- III. **Recent Actions by Congress and the U.S. Supreme Court Affecting State Taxation and State Sovereignty (1:30—3:30)**

**A. Congressional Actions** (1:30--2:00): Update on federal legislation affecting state taxes and sovereignty, including Business Activity Tax Simplification Act, the Internet Tax Freedom Act extensions, and the proposed Hotel Intermediaries legislation. Shirley Sicilian, General Counsel, MTC; Bruce Fort, Counsel, MTC.

**B. Actions of the U.S. Supreme Court Since March 2007  
Affecting State Taxation and Federalism (2:00--3:30):**

*Decided:*

*Permanent Mission of India to the United Nations v. New York City*, S.Ct. No. 06-134 (551 U.S. \_\_\_\_, 6/14/07). The U.S. Supreme Court ruled 7-2 that New York City could sue two countries with embassies in that city for \$18 million in unpaid property taxes under the federal Foreign Sovereign Immunity Act, which waives sovereign immunity for actions addressing the rights to immovable property. The Court noted that New York City's tax lien on real property runs with the land and is enforceable against subsequent purchasers, and concluded that a tax lien thus inhibits one of the quintessential rights of property ownership, the right to convey. The Court thus concluded that a suit to establish the validity of a lien implicates rights in immovable property.

---

\* In accordance with the Multistate Tax Commission's public participation policy, the informational and training session is open only to attorneys who represent revenue agencies or associations of revenue agencies. See Section 5(c)(3) of the MTC's public participation policy.

*Hinck v. United States*, No. 06-376 (550 U.S. \_\_\_\_\_, 5/21/07). The U.S. Supreme Court ruled that the Tax Court is the exclusive forum for judicial review of a refusal to abate interest by the IRS. The Court rejected the taxpayer's assertion that Section 6404(h) of the Internal Revenue Code did not prohibit district courts or the Court of Federal Claims from hearing cases involving the abatement of interest.

*Hein v. Freedom From Religion Foundation, Inc.*, No. 06-157 (551 U.S. \_\_\_\_\_, 6/25/07). The U.S. Supreme Court ruled that standing as taxpayers was not sufficient to provide federal court jurisdiction for a challenge under the Establishment Clause to executive branch spending on the administration's Faith Based Initiative. The 5-4 decision limits the earlier standing case *Flast v. Cohen* (1968) to instances where the challenged spending was directly authorized by Congress, as opposed to a broad grant of authority to administrative agencies. The dissent suggested the distinction was meaningless.

*United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 05-1345 (4/30/07), 550 U.S. \_\_\_, 127 S.Ct. 1786. The Supreme Court holds, 6-3, that municipalities may direct all solid waste processing to a public facility without violating the Commerce Clause, distinguishing their earlier holding in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), where the Court held that the dormant Commerce Clause was violated by a flow control ordinance that required all solid waste to be processed at a designated private facility before leaving the municipality. The Court held that "laws that favor the government in such areas, but treat every private business, whether in-state or out-of-state, exactly the same, do not discriminate against interstate commerce for purposes of the Commerce Clause."

*Certiorari Granted:*

*Department of Revenue of Kentucky v. Davis, et ux.*, No. 06-666 (5/21/07). Case below: 197 S.W. 3d 557 (Ky. App. 2006). In the case below, the Kentucky Court of Appeals held that the state's exemption of Kentucky state and local bonds from taxation was facially unconstitutional as it discriminated against holders of other states' bonds in contravention of the Commerce Clause. The court further ruled that the defenses of the classification offered by the Commonwealth, including the market-participant doctrine, did not justify the discriminatory classification.

*CSX Transportation, Inc. v. Georgia State Board of Equalization*, S.Ct. No. 06-1287 (5/29/07). Case below: 472 F.3d 1281 (11<sup>th</sup>. Cir. 2007). At issue is whether the "4-R Act", which provides a limited exception to the tax injunction act to allow railroads to challenge property tax assessments in federal court, allows railroads to challenge valuation methodologies. The 11<sup>th</sup>. Circuit ruled that railroads were not permitted to challenge methodologies, acknowledging a split among the circuits. Rejecting the railroad's alternative appraisal methodology, the court then upheld the assessment using the state's preferred methodology.

*Certiorari Pending:*

*MeadWestvaco Corp. v. Illinois Department of Revenue*, No. 06-1413. Case below: *Mead Corporation v. Department of Revenue*, 861 N.E.2d 1131 (Ill. App. 1<sup>st</sup>. Dist. 1/12/07). In the case below, the Illinois Court of Appeals held that the \$1.056 billion gain on the sale of Lexis/Nexis in 1994 constituted business income under the functional test of business income. Mead disputes the apportionability of the sale proceeds in its petition for certiorari, contending the decision is contrary to *Allied Signal v. Director*, 504 U.S. 768 (1992) and cases from other states' highest

courts. Illinois waived its right to file a response to the Petition for Certiorari. On May 15, 2007, the Court asked Illinois to file such a response.

*General Electric Co. v. New Hampshire*, No. 06-1210 (3/2/07). Case below: 914 A.2d 246 (N.H. 2006). New Hampshire's Supreme Court ruled that a dividends-received deduction limited to dividends from foreign subsidiaries doing business in New Hampshire did not violate the foreign Commerce Clause, citing footnote 23 of *Kraft General Foods v. Iowa*, 505 U.S. 71 (1992). On May 21, 2007, the Court asked the U.S. Solicitor General to submit a brief in the matter.

*Certiorari Denied:*

*Lanco, Inc. v. Director, Division of Taxation*, S.Ct. No. 06-1236. (6/18/07). Case below: 908 A.2d 176 (N.J., 10/12/06). The case below upheld New Jersey's ability to impose its corporate income tax on a Geoffrey-type intangible holding company which lacked a direct physical presence in that state.

*FIA Card Services, N.A. v. Tax Commissioner of the State of West Virginia*, S.Ct. No. 06-1228 (6/18/07). Case below: *MBNA America Bank, N.A. v. Tax Commissioner of the State of West Virginia*, 640 S.E.2d 226 (W.Va., 11/21/06). The case below affirmed West Virginia's assessment of corporate income tax against a bank which issued thousands of credit cards to West Virginia customers but which lacked a physical presence within West Virginia.

*Patel v. City of San Bernardino*, S.Ct. No. 06-1118 (4/02/07). (9th Cir., 11/9/06). The case below reinstated a Section 1983 claim for damages against the city of Bernardino for continuing to collect an occupancy tax for approximately five months after the California Supreme Court had ruled that the tax was unconstitutionally vague. The 9<sup>th</sup>. Circuit held that the Tax Injunction Act prohibited federal court jurisdiction over state tax issues only where the state had provided a plain, speedy and adequate remedy. The Court then found that the plaintiffs were deprived such a remedy for the periods after which the highest court's decision had become final but the city continued to collect the tax.

*Philip Morris USA, Inc. v. Minnesota*, S.Ct. No. 06-633. Case below: 713 N.W.2d 350 (Minn., 5/16/06). In the case below, the Minnesota Supreme Court upheld the state's right to impose a 75 cent-a-pack tobacco health impact fee despite an earlier settlement agreement with various tobacco companies that purported to restrict the state's right to impose additional taxes on cigarettes. The court determined that the economic burden of the health impact fee is required by law to be passed through the distributors and retailers and on to consumers, so that the fee does impose any obligation on signatories to the agreement. In addition, the court cited the common law rule that the sovereign powers of a state cannot be contracted away except in unmistakable terms.

*Brooks v. Vassar*, S.Ct. No. 06-1111. (5/14/07). Case below: 462 F.3d 341 (4th Cir., 9/11/06). Following the Court's 2005 decision in *Granholm v. Heald*, which struck down discriminatory prohibition on internet wine sales, Virginia's amended laws restricting some imports were challenged. The Fourth Circuit Court of Appeals held: (1) the commonwealth's personal import exception, which allows consumers to import one gallon or four liters of wine for personal consumption, does not violate the Commerce Clause, because it does not constitute economic protectionism; (2) the statute restricting Virginia's state-run liquor stores to selling only wine produced by Virginia wineries is valid under the market-participant exception to the Commerce Clause; and (3) the Commerce Clause confers individual rights, allowing plaintiffs to present their substantive claims under 42 U.S.C. 1983.

*Macy's Department Stores, Inc. v. San Francisco*, S.Ct. No. 06-1360 (6/25/07). Case below: 143 Cal. App.4th 1444, 50 Cal. Rptr.3d 79 (Cal. Ct. App., 10/18/06). The California Court of Appeals held that proper remedy for discrimination under the city's "tandem" tax, under which taxpayers were required to compute both a payroll tax and a gross receipts tax and pay the higher amount, was limited to refunding the difference a taxpayer operating in multiple jurisdictions would have to pay over a taxpayer operating in only one jurisdiction. The taxpayer had argued that all taxes collected under an unconstitutional system should be refunded.

**IV. Closed Session for Information and Training for State Tax Attorneys (3:30—5:00)**

**Tuesday, July 31, 2007**

**V. Closed Session for Information and Training for State Tax Attorneys,  
Continued (9:00—5:00).**

**VI. New Business (4:30—5:00)**

**VII. Adjourn (5:00 Tuesday, July 31, 2007)**

*Additional information on this meeting and agenda may be secured from Shirley Sicilian, Multistate Tax Commission, 444 North Capitol Street, NW, Suite 425, Washington, D.C. 20001-1538, telephone: (785) 312-9779, ssicilian@mtc.gov.*