No. 09-223

IN THE
Supreme Court of the United States

RICHARD A. LEVIN, TAX COMMISSIONER OF OHIO,
Petitioner,
v.

COMMERCE ENERGY, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF OF MULTISTATE TAX COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

JOE HUDDLESTON,
Executive Director
SHIRLEY SICILIAN,
General Counsel
Counsel of Record

MULTISTATE TAX
COMMISSION
444 N. Capitol Street,
N.W. Suite 425
Washington, D.C. 20001
202-624-8699

December 30, 2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

BRIEF OF MULTISTATE TAX COMMISSION as *AMICUS CURIAE* IN SUPPORT OF PETITIONER[1]

INTEREST OF THE AMICUS CURIAE

Amicus curiae Multistate Tax Commission respectfully submits this brief in support of Richard A. Levin, Tax Commissioner of Ohio. The decision of the Sixth Circuit in this case should be reversed. The federal district court should not have exercised original jurisdiction to entertain the Taxpayer's request under the "dormant" commerce clause, U.S. Const. Art. 1, § 8, for injunctive and declaratory relief pertaining to the application of three major Ohio taxes.

The Commission is the administrative agency for the Multistate Tax Compact, which became effective in 1967. *See, United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452 (1978) (upholding the validity of the Compact). Today, forty-seven states and the District of Columbia are members of the Commission.[2] The purposes of the Compact

---

[1] No counsel for any party authored this brief in whole or in part. Only *amicus* Multistate Tax Commission and its member states through the payment of their membership fees made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any particular member state, other than the State of Ohio. Finally, this brief is filed with the consent of the parties.

[2] *Compact Members*: Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. *Sovereignty Members*: Georgia, Kentucky, Louisiana, Maryland, New Jersey,

are to: (1) facilitate proper determination of state and local tax liability of multistate taxpayers, including equitable apportionment of tax bases and settlement of apportionment disputes, (2) promote uniformity or compatibility in significant components of tax systems, (3) facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration, and (4) avoid duplicative taxation. *Multistate Tax Compact*, Art. I. States' adoption of the Compact was critical to preserving the sovereignty the states enjoy with respect to taxation of interstate commerce. *See, H.R. Rep.* No. 89-952, Pt. VI, at 1143 (1965) *and Interstate Taxation Act: Hearings on H.R. 11798 and Companion Bills before Special Subcommittee on State Taxation of Interstate Commerce of the House Commission on the Judiciary*, 89th Cong., 2d Sess. (1966) (illustrating the depth and scope of Congressional inquiry into the potential for federal preemption as a means of increasing state corporate income tax uniformity). Preserving state tax sovereignty under our vibrant federalism remains one of the main purposes of the Compact and the Commission.

The Commission's interest in this case arises from our purpose of preserving the states' authority to determine their own tax policies within federal constitutional and statutory limitations, and in protecting that authority from federal interference beyond what is expressed by the Constitution or by Congress. The Sixth Circuit's expansive interpretation of the federal district courts' original jurisdiction to include consideration of state tax matters arising from the dormant

---

and West Virginia. *Associate Members*: Arizona, Connecticut, Florida, Illinois, Iowa, Indiana, Maine, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Wisconsin, and Wyoming.

commerce clause would result in unprecedented interference with state sovereignty in contravention of Acts of Congress, and federalist principles.

SUMMARY OF ARGUMENT

The Tax Injunction Act should be interpreted to bar not just federal cases where taxpayer is seeking to enjoin state tax assessments, but any federal case where a post-deprivation refund or retroactive assessment of a favored class is available in state court and would be a complete remedy. Furthermore, because equity relief is broad and intrusive, this Court's precedent supports deference to state courts in any case where equity relief is requested, even if not barred by the Tax Injunction Act.

ARGUMENT

I. The Tax Injunction Act Bars Federal District Court Jurisdiction in State Tax Cases Alleging Discrimination Under the Dormant Commerce Clause.

Congress' enactment of the Tax Injunction Act (TIA) barred federal district courts from enjoining "the assessment, levy, or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the Courts of such state." 28 U.S.C. § 1341. The 6th Circuit determined that the TIA did not apply to bar federal courts from granting the declaratory and injunctive relief requested in this case. That determination was drawn from *Hibbs* v. *Winn,* 542 U.S. 88 (2004). *Commerce Energy, Inc. v. Levin*, 554 F.3d 1094 (6th Cir., 2009).

In *Hibbs*, plaintiffs claimed the state violated the first amendment of the United States Constitution by allowing an income tax credit for contributions to non-profit organizations that awarded educational scholarships and tuition grants to children attending private schools. The Court found that the TIA did not bar "[t]hird-party suits [that are] not seeking to stop the collection (or contest the validity) of a tax *imposed on plaintiffs*… ." 542 U.S. at 90, *referencing McGlotten* v. *Connally*, 338 F. Supp. 448, 453-454 (DC 1972)(challenging income tax exemptions for fraternal orders that excluded non-whites), and *Tax Analysts and Advocates* v. *Shultz*, 376 F. Supp. 889, 892 (DC 1974)(permitting challenge to I.R.S. determination that certain contributions to political candidates could be deducted in computing federal tax liability.).

But *Hibbs* is distinguishable from a dormant commerce clause discrimination case. In a dormant commerce clause discrimination case, the plaintiffs are taxpayers, not "third parties" in the sense that term was used in *Hibbs.* The state tax statutes that these taxpayers complain of are imposed upon them, and it is precisely this imposition that forms the basis for the taxpayers' complaint – that the imposition, in particular the imposition relative to other taxpayers, is discriminatory under the dormant commerce clause. A taxpayer contesting its "relative" tax liability is, in all senses relevant to the TIA, contesting its own tax liability.

This distinction is relevant because of the difference in remedies that are available when the offense that must be cured is a discriminatory tax imposition on commercial interests rather than a deprivation of a civil right. In *Associated Industries of Missouri v. Lohman,* 511 U.S. 641, 654 (1994), this Court made clear that under the dormant commerce clause "equality for the purposes of the flow of commerce is measured in dollars and cents, not legal abstraction", *quoting*, *Halliburton Oil Well Cementing Co. v. Reilly,* 373 U.S. 64, 70 (1963). In *McKesson Corp. v.*

Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation, 496 U.S. 18 (1990), this Court explained that in cases where a tax is invalid because it discriminates, the spectrum of possible remedies includes pre-deprivation relief (including injunctions to halt either the discriminatory benefit or the discriminatory harm), or post-deprivation relief. 496 U.S. at 36-37. Possible post-deprivation relief includes refunds (to the harmed taxpayer), assessments (against the benefited competitors), or some combination of both:

> Florida may reformulate and enforce the [tax] during the contested tax period in any way that treats petitioner and its competitors in a manner consistent with the dictates of the Commerce Clause … More specifically, the state may cure the invalidity of the [tax] by refunding to petitioner the difference between the tax it paid and the tax it would have been assessed were it extended the same rate reductions that its competitors actually received…the State may assess and collect back taxes from petitioner's competitors… Finally, [the State may also cure through] a combination of a partial refund to petitioner and a partial retroactive assessment of tax increases on favored competitors … .

McKesson Corp., 496 U.S. at 40-41.

Thus, in any dormant commerce clause case where a state can cure the alleged constitutional defect in its taxing system through a combination of refunds or assessments against the favored parties, there is a "plain, speedy and efficient remedy" available in the state courts, precluding federal court intervention under the TIA. 28 U.S.C. § 1341.

Allowing such claims to proceed in federal court may actually restrict the range of remedies which may have been available under state law. In *Reynoldsville Casket Co., et al. v. Hyde,* 514 U.S. 749 (1995), this Court recognized "a particular kind of constitutional violation…[that] depends, in critical part, upon differential treatment of two similar classes of individuals, [where] one might cure the problem either by similarly burdening, or by similarly unburdening, both groups." *Reynoldsville,* 514 U.S. at 755.

While a taxpayer may request specific forms of relief that would not reduce the public fisc, that request should in no way operate to eliminate otherwise available remedies that may better serve the public interest. Yet this elimination of remedies is exactly what would happen if, by limiting its requested relief, a taxpayer could maintain original jurisdiction in federal district court, where, in recognition of important federalism and comity principles, Congress has limited the relief that the federal courts can provide. Lawful remedies that a state court, and ultimately a state legislature, may feel are in the public interest would be off the table.

By contrast, no such restriction of remedies resulted from exercising original federal jurisdiction in cases such as *Hibbs*. The deprivation of plaintiffs civil rights caused by the state's First Amendment violation in *Hibbs,* and the kinds of harms identified in other cases cited in *Hibbs* where the federal court jurisdiction was upheld despite the TIA, could not be cured through a post-deprivation refund to plaintiffs or other state tax remedies. That is, these harms could not be cured through state tax remedies, such as refunds or injunctions against assessments, that were not available at the federal level. The plaintiffs in *Hibbs* were concerned that the state was impermissibly promoting religion by granting credits for payments to "school tuition organizations" established to fund schools that provided "religious instruction" as part of the curriculum or which conditioned admission on the basis of "religious affiliation." 542 U.S. at 94-95. The plaintiffs sought to end that practice in order to make more money available for public purposes, including education. *Id.* at 99-100. Since the plaintiffs sought to end what they viewed as impermissible state support of religious activity, even a tax refund equal to the credit received by other taxpayers would not have made them whole. *See also, Moton* v. *Lambert*, 508 F. Supp. 367, 368 (N.D. Miss. 1981) (challenge to tax exemptions for racially discriminatory private schools may proceed in federal court); *Franchise Tax Board of California* v. *United Americans for Public Schools*, 419 U. S. 890 (1974) (summarily affirming district-court judgment striking down state statute that provided income-tax reductions for taxpayers sending children to private schools).

The simple fact that a taxpayer can fashion a remedy request into one that is not barred by the TIA should not allow the taxpayer to cut off other, state-available remedies that may better serve the public interest. Where a statute's unconstitutional effects can be completely cured by the full range of available state tax remedies, the case cannot proceed in federal court under the TIA. Thus, the TIA should be interpreted to bar not just cases where the taxpayer requests an injunction of state taxes (or its equivalent, post-deprivation refunds), but to bar any case where such remedies would be compensatory and are available.

This interpretation is valid under the specific language of the TIA. In a dormant commerce clause discrimination case, with monetary remedies available in state court, a federal injunction of a credit against the benefited party would necessarily "restrain" the state from, alternatively, enjoining the assessment of the tax against the burdened party. Where there are alternative, complete remedies available in state courts, Congress can not have intended that TIA be interpreted to short-circuit the potential application of these remedies through a taxpayer's narrow pleading of the relief sought in federal court.

The TIA applies in dormant commerce clause discrimination cases. Any state tax case claiming discrimination under the dormant commerce clause directly concerns the imposition of a tax upon a taxpayer. And, regardless of the taxpayer's requested relief, the possible remedies in such a case should include an injunction against the collection of that tax or the allowance of refunds under state law. The language of the TIA supports this interpretation.

II. Even if Jurisdiction is Not Barred by the Tax Injunction Act, the Federal Court Should Defer Consideration of State Tax Cases Alleging Discrimination Under the Dormant Commerce Clause in Accordance with Principles of Comity.

If the TIA does not bar this case, principles of federalism and comity should. Even though the district courts are courts of both law and equity, equitable relief is extraordinary relief that should not be issued where an adequate and complete remedy exists at law:

> This withholding of extraordinary relief by courts having the authority to give it is not a denial of the jurisdiction which Congress has conferred on the federal courts … on the contrary, it is but a recognition that the jurisdiction conferred on the federal courts embraces suits in equity as well as law, and that a federal court of equity, which may in an appropriate case refuse to give its special protection

> to private rights when the exercise of its jurisdiction would be prejudicial to the public interest, *should stay its hand in the public interest when it reasonably appears that private interests will not suffer*. 'It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states.'

Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 297-298 (1943) (internal citations omitted).

As far back as 1871, Congress and this Court "have shown an aversion to federal interference with state tax administration. The passage of the TIA is one manifestation of this aversion." *National Private Truck Council v. Oklahoma Tax Commission*, 515 U.S. 582, 586 (1995). *See, Dows v. Chicago,* 11 Wall. 108 (1871); *See, also, Matthews v. Rogers,* 284 U.S. 521 (1932); *Fair Assessment in Real Estate Association, Inc., et al., v. McNary, et al.,* 454 U.S. 100 (1981); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943). In cases under the dormant commerce clause alleging discrimination against private commercial interests, "[a]n actual refund or other retroactive adjustment of the tax burdens between TP and its favored competitors can bring about the *nondiscrimination* that 'prompt injunctive relief would have achieved." *McKesson,* 496 U.S. at 43 (emphasis added).

Where, as in this case, complete remedies are available in state courts, principles of comity counsel that a federal district court should stay its hand. There is no need for special protection of these private rights through intrusive equity remedies, and the exercise of federal original jurisdiction would be highly prejudicial to the public interest. Where a state has adopted particular tax structures with particular remedies allowed for contested taxes, those structures should be allowed to operate. The State of Ohio's brief thoroughly illustrated its considerable public interests in these structures and remedies. We emphasize, without repeating, those interests here.

CONCLUSION

The decision of the Sixth Circuit in this case should be reversed.

Respectfully submitted,

JOE HUDDLESTON,
Executive Director
SHIRLEY SICILIAN,
General Counsel
Counsel of Record
MULTISTATE TAX COMMISSION
444 N. Capitol Street, N.W.
Suite 425
Washington, D.C. 20001
202-624-8699