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U.S. Supreme Court Update

U.S. SUPREME COURT UPDATE

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U.S. Supreme Court to Review Unclaimed Property Rules

***39** On 10/3/16, a few days into its new term, the U.S. Supreme Court agreed to review a dispute between Delaware and several other states as to which states have priority rights for claiming MoneyGram's uncashed ‘official checks.‘ As previously reportedin this column, the Court originally received two separate filings in this case—*Delaware v. Pennsylvania and Wisconsin* (motion for leave to file a bill of complaint filed 5/26/16) and *Arkansas et. al. v. Delaware* (motion forleave to file a bill of complaint filed 6/9/16). The Court has now consolidated the two filings as *Arkansas v. Delaware* and has agreed to let multiple states file a complaint asking the Court to address the proper priority rules applicable toMoneyGram's ‘official checks.‘

More specifically, as outlined in the states' original filings, the parties disagree as to whether MoneyGram's official checks are properly classified as third-party bank checks (which would be subject to the federal common-law priority rules establishedin *Texas v. New Jersey*, 379 U.S. 674 (1965)) and therefore escheat to MoneyGram's state of incorporation—Delaware—or, alternatively, whether the checks are more akin to money orders (which would be subject to special statutory priorityrules under the Federal Disposition of Abandoned Money Order and Traveler's Check Act of 1974) and escheat to the state of purchase. (For more background on this case, including a detailed discussion of MoneyGram's ‘official checks‘ and the generalpriority rules for unclaimed intangible personal property, see U.S. Supreme Court Update, 26 JMT 42 (September 2016).)

In this issue of the JOURNAL, we also cover a new petition for certiorari filed with the Court. *Dot Foods, Inc. v. Washington Dep't of Revenue* (Docket No. 16-308), asks the Court to review the constitutionality of Washington'sretroactive application of an amendment to the state's business and occupation tax.

As we go to press, we also note that one previously reported petition (*Direct Marketing Ass'n v. Brohl* (Docket No. 16-267)) remains pending before the Court. Moreover, the Court has denied certiorari in four other previously reported petitions(and one brand new petition), including the petition filed in *Gillette v. California FTB*, a closely watched case, where the California Supreme Court held that the Multistate Tax Compact does not qualify as a binding reciprocal agreement. In thehope that the Court may reconsider its refusal to address the binding nature of the Multistate Tax Compact, on 10/20/16, the Court received a new petition for certiorari from Kimberly-Clark Corp., arguing that the Court should accept its petition and overturna Minnesota Supreme Court ruling, which held that the Multistate Tax Compact does not create a contractual obligation prohibiting states from unilaterally repealing provisions of the MTC from their tax laws. Welook forward to covering this petition in more detail in the next issue of the JOURNAL.

Court Asked If Retroactive Application of Amendment to Wash.'s B&O Tax Comports with Due Process

****2** In *Dot Foods, Inc. v. Washington Dep't of Revenue*, Docket No. 16-308, ruling below at 372 P.3d 747 (Wash. 2016), the Washington Supreme Court held that the Washington Department of Revenue's ('Department') retroactive application ofan amendment to an exemption under the state's business and occupation ('B&O') tax comported with the Due Process Clause of the U.S. Constitution. Accordingly, the Court denied a refund claim by Dot Foods, an Illinois-based food reseller, for B&Otaxes paid under protest in the four years prior to the state's amendment.

Dot Foods now petitions the U.S. Supreme Court for review, arguing that the Court has 'never endorsed a retroactive period of more than a year or two—that is, a period covering the year preceding the legislative session in which the law was enacted'—andasking the Justices 'whether, or under what circumstances, imposing additional tax beyond the year preceding the legislative session in which the law was enacted violates due process.'

The 'direct seller's' exemption to the B&O tax.

According to the court below, Washington's B&O tax is imposed on all businesses for 'the act or privilege of engaging in business activities' within the state. Prior to 2010, however, former RCW 82.04.423(1)(d) (1983) exempted certain out-of-statesellers from the B&O tax if they made 'sales in this state exclusively to or through a direct seller's representative.' This exemption to the B&O tax was enacted by the Washington Legislature in 1983. As explained in Dot Food's petition forcertiorari, '[f]rom 1983 through 1999, the Washington Department of Revenue . . . granted this exemption to out-of-state businesses so long as their in-state representatives did not solicit the sale of products in permanent retail establishments.'Dot Foods further noted how 'in 1997, the Department issued a letter ruling to Dot Foods expressly ***40** stating that Dot Foods qualified for the tax exemption at issue' but '[i]n late 1999,the Department reversed its position on the meaning of [this] state law.'

As set forth in the ruling below, '[i]n 2009, we [the Washington Supreme Court] decided *Dot Foods I*, which held that the Department's revised interpretation of RCW 82.04.423 was contrary to the statute's plain and unambiguouslanguage. *Dot Foods I,* 166 Wn. 2d at 920-21. We concluded that 'Dot [Foods] remains qualified for the B&O tax exemption to the extent its sales continue to qualify for the exemption.'' And, '[i]n April 2010,the legislature amended former RCW 82.04.423 in direct response to our decision in Dot Foods I.' According to the Washington Supreme Court, the amendment 'retroactively narrowed the scope of RCW 82.04.423(2) and prospectively repealed the direct seller'sexemption.'

In the wake of *Dot Foods I*, Dot Foods filed a refund claim for B&O taxes paid from May 2006 through December 2007, a period extending beyond the periods directly at issue in *Dot Foods I.* The Department, however, denied Dot Foods'refund claim based on its retroactive application of the 2010 amendment to the direct seller's exemption. Dot Foods then challenged the Department's refund denial, arguing that the state's retroactive application of the B&O tax amendment violated the principlesof collateral estoppel, separation of powers, and due process. Only Dot Foods' due process claims are included in its petition for certiorari filed with the Court.

Wash. Sup. Court finds no due process violation in retroactive application of B&O amendment.

****3** According to the Washington Supreme Court, 'the U.S. Supreme Court set forth the due process standard for retroactive tax legislation in *United States v. Carlton*, 512 U.S. 26 (1994)' when the Court announced that the 'due processstandard to be applied to tax statutes with retroactive effect . . . is the same as that generally applicable to retroactive economic legislation. ' That is, the statute must be 'supported by a legitimate legislative purpose furthered by rational means.'Applying the *Carlton* 'rational basis standard,' the Washington Supreme Court held that 'retroactive application of the 2010 amendment at issue here does not violate due process.'

First, the court noted that the 2010 amendment serves legitimate legislative purposes. According to the court, 'the legislature identified the prevention of 'large and devastating revenue losses' as the primary purpose for narrowing the scope ofRCW 82.04.423.' And this, according to the court, 'is the same legislative intent that the Supreme Court recognized as a legitimate purpose in *Carlton.*' The court also recognized the legislature's secondary goal of 'restoringparity between different classes of taxpayers,' and concluded that '[i]t is clear that the amendment to RCW 82.04.423 serves a legitimate legislative purpose under our case law.'

Next, the court found that the 2010 amendment was rationally related to the legislature's legitimate purpose for amending the law. The court rejected Dot Foods argument that 'the purported 27-year retroactivity period is 'irrational on its face.''Although the court acknowledged that 'it is true that the 2010 amendment theoretically dates back to the enactment under the plain language of section 402 and section 1704, Laws of 2010,' it concludes that 'the actual retroactive application ofthe amendment is necessarily limited by the particularities of this case as well as the applicable statute of limitations.' Thus, according to the court, the 'retroactivity period as applied to Dot Foods is only four years.'

The court further stated that 'there is no temporal limitation on retroactivity.' And, '[w]hile there are certainly constitutional limitations on how far back laws may reach,' according to the court, 'whether the length of aretroactivity period breaches [the limits of constitutionality] should be determined by a qualitative analysis of the law, not solely by a quantitative measurement of time.' Under this standard, the court held that 'the actual retroactiveeffect of the amendment as applied to Dot Foods is rationally related to the legislature's legitimate, stated purpose of 'prevent[ing] the loss of revenues resulting from the ***41** expanded interpretation of the exemption.' Accordingly, the WashingtonSupreme Court denied Dot Foods' due process challenges and held that Dot Foods was therefore not entitled to a refund of the B&O taxes it paid in the years immediately prior to the 2010 amendment.

Question presented.

****4** In its petition for certiorari, Dot Foods asks the Supreme Court 'whether, or under what circumstances, imposing additional tax beyond the year preceding the legislative session in which the law was enacted violates due process.'

Several briefs amicus curiae have been filed in support of the Supreme Court granting certiorari in this case.

Petition Still Pending

The following petition remained pending as the JOURNAL went to press.

DMA alleges Colo.'s requirements unconstitutionally discriminate against and unduly burden interstate commerce.

In *Direct Marketing Ass'n v. Brohl*, Docket No. 16-267, petition for cert. filed 8/29/2016, ruling below at 814 F.3d 1129 (10th Cir. 2016), the DMA—a group of businesses and organizations that market products via remote channels, such ascatalogs and the Internet—asks the U.S. Supreme Court to review a ruling by the U.S. Court of Appeals for the Tenth Circuit regarding the constitutionality of Colorado's notice and reporting requirements imposed on retailers that 'do not collectColorado sales tax.'

In the Tenth Circuit's ruling, the circuit court held that Colorado's law 'does not violate the dormant Commerce Clause because it does not discriminate against or unduly burden interstate commerce.' The Tenth Circuit's decision reversed an earlierfederal district court's ruling, which granted DMA's motion for summary judgment regarding the unconstitutionality of Colorado's notice and reporting obligations and enjoined the Colorado Department of Revenue ('CDOR ') from enforcing the law. DMA nowpetitions the U.S. Supreme Court to review the circuit court's ruling, alleging that, by finding the Colorado law did not discriminate against interstate commerce, the Tenth Circuit wrongly relieved Colorado of its heavy burden of justifying, under the 'strictestscrutiny,' the 'patent discrimination' of the state's notice and reporting requirements.

DMA's petition for certiorari stems from a 2010 Colorado law requiring remote retailers selling to in-state customers to comply with a number of notice and reporting obligations intended to improve the state's use tax collections. On 3/3/15, the U.S. SupremeCourt previously held that the Tax Injunction Act ('TIA ') does not bar federal courts from hearing DMA's challenge (*see Direct Marketing Ass'n v. Brohl*, 135 S. Ct. 1124 (2015) ('*Brohl I*')). The Court, however, didnot address the merits of DMA's claim.

In its current petition for certiorari, DMA presents the following questions for review:

1. 'Whether a state statute that imposes regulatory obligations that apply, as a matter of law, solely to out-of-state companies, but does not use 'language explicitly identifying geographical distinctions' in its text discriminates againstinterstate commerce?'

2. 'Whether the Tenth Circuit erred in adopting a 'comparative burdens' test for discrimination, under which the burden of regulatory requirements imposed solely on out-of-state retailers may be offset by different obligations imposed on in-stateretailers?'

****5** 3. 'Whether the Tenth Circuit erred in concluding that out-of-state retailers that do not collect Colorado sales tax are 'not similarly situated' to their direct in-state competitors who collect Colorado sales tax?'

(For more background on this case, including a detailed discussion of the latest Tenth Circuit ruling, see U.S. Supreme Court Update, 26 JMT 42 (November/December 2016).)

Petitions Denied

The Court has denied four previously reported petitions and one brand new petition.

On 10/3/16, the Supreme Court denied Rite Aid's petition in

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Rite Aid Corp. v. Huseby**,** Docket No. 16-36, rulings below at *Rite Aid Corp. v Haywood*, 130 A.D.3d 1510 (N.Y. 4th Dep't 2015), *lv. to appeal denied*, 26 N.Y.3d 915 (2016) and *Rite Aid Corp. v.Huseby*, 130 A.D.3d 1518 (N.Y. 4th Dep't 2015), *lv. to appeal denied*, 26 N.Y.3d 916 (2016). In the cases below, Rite Aid Corporation ('Rite Aid') appealed two rulings from the NewYork State Appellate Division Fourth Department. In its rulings, the Fourth Department (with one dissent) reversed a trial court's reduction of the assessed property values of several parcels containing Rite Aid's retail drugstores. According to the FourthDepartment, the lower court, in reducing the assessed value of the properties, was wrong to accept Rite Aid's expert appraisals, as those appraisals improperly excluded 'the recent sale of the subject propertyas well as readily available comparable sales of national chain drugstore properties in the applicable [net lease national drugstore] submarket.' Rite Aid claimed that it was 'a violation of the national drugstore taxpayer's constitutionalright of Equal Protection for the Appellate Division Fourth Department to reverse the trial court and reinstate the taxpayer's assessments which were based on the value of above market leases encumbering their stores, when all other taxpayers are assessedbased on the value of their real property alone.'

Also on 10/3/16, the Court denied a Maryland property owner's petition for certiorari in ***Pickett v. City of Frederick*****,** Docket No. 16-105, ruling below at Case No. 0759, Maryland Court of Special Appeals, October 6, 2015, 2015 WL5117649. Allan Pickett, a Maryland resident, had asked the U.S. Supreme Court to review a ruling of the Court of Special Appeals of Maryland in which the court affirmed a lower court's judgment permanently foreclosing Mr. Pickett's right to redeem propertyfollowing a tax sale. In his petition for certiorari, Mr. Pickett alleged that because the trial judge who issued the lower court's judgment foreclosing his right of redemption had also presided over an earlier condemnation mediation between Mr. Pickett andthe City

of Frederick, the judge's involvement in the redemption case posed an ‘unconstitutional risk of bias‘ that violated his right of due process of law under the Fourteenth Amendment of the U.S. Constitution.

On 10/11/16, the Court denied the petition for review in ***Huang v. City of Los Angeles*****,** Docket No. 15-1507, ruling below at 2016 WL 683269 (9th Cir. 2016). In the case below, the U.S. Court of Appeals for the Ninth Circuit largelyaffirmed a district court's ruling that (1) certain business taxes assessed by the City of Los Angeles, as well as penalties added thereto for delinquent payment, qualify as ‘taxes‘ under the Tax Injunction Act, such that the lower federal court lackedsubject matter jurisdiction to hear a taxpayer's claim, and (2) that the Tax Injunction Act also deprived the lower court of jurisdiction to hear the taxpayer's challenge to the methods by which the City of Los Angeles obtains information during its audits.The taxpayer, Roger Huang, a general partner of a partnership that owns an apartment building near Dodger Stadium, argued that the Ninth Circuit had failed to follow the Supreme Court's recent precedent as announcedin *Direct Marketing Ass'n v. Brohl*, 135 S. Ct. 1124 (2015) (discussed above), which, according to Huang, held that ‘the Tax Injunction Act does not bar federal jurisdiction for challenges to the methods by which the government gathers theinformation it uses to calculate tax liability.‘

****6** Also on 10/11/16, the Court denied Gillette's petition in ***Gillette v. California Franchise Tax Board*****,** Docket No. 15-1442, ruling below at 363 P.3d 94 (2015). In its petition for certiorari, Gillette, along with several other corporatetaxpayers, asked the Court to review a decision by the California Supreme Court, in which California's highest court held that the Multistate Tax Compact does not qualify as a binding reciprocal agreement. The California ruling was the latest development inthe protracted litigation involving various states' attempts to override aspects of the Compact. As stated above, on 10/20/16, the Court received a new petition for certiorari from Kimberly-Clark Corp., arguing that the Court should overturn a Minnesota SupremeCourt ruling, which held that the Multistate Tax Compact does not create a contractual obligation prohibiting states from unilaterally repealing provisions of the MTC from their tax laws.

Finally, on 10/31/16, the Court denied the petition for review filed just over a month before in ***Brown v. Pennsylvania Dep't of Revenue,*** Docket No. 16-337, ruling below at No. 839 C.D. 2015 (Pa. Commw. Ct., Dec. 23, 2015), *petitionto appeal denied*, No. 66 MAL 2016 (Pa., May 9, 2016), in which the Commonwealth Court of Pennsylvania affirmed a ruling by the Pennsylvania Court of Common Pleas of Montgomery County, which dismissed Samuel Brown's (‘Brown‘) 42 U.S.C. § 1983(‘Section 1983‘) complaint against the Pennsylvania Department of Revenue (‘Department‘). Brown's Section 1983 claim sought injunctive and declaratory relief as well as monetary damages against the Department alleging that it violated hisfederal constitutional rights by imposing a realty transfer tax on his assignment of ownership rights in a property located in Trappe, Pennsylvania. According to the Pennsylvania Commonwealth Court, the lower courtproperly dismissed Brown's complaint on the grounds that (1) Brown's sole legal basis for his suit was Section 1983, which, as a federal statute, was not an appropriate basis for the complaint since Brown failed to exhaust the ‘adequate state statutoryremedies available‘ to him, and (2) Brown's current suit was barred under principles of claim preclusion, as Brown had previously brought several earlier suits against the Department and therefore had ‘already litigated and lost the issue of whetherthe Department may impose a realty transfer tax‘ on his transfer of property.

The Court . . . has agreed to let multiple states file a complaint asking the Court to address the proper priority rules applicable to MoneyGram's ‘official checks.‘

Dot Foods now petitions the U.S. Supreme Court for review, arguing that the Court has ‘never endorsed a retroactive period of more than a year or two . . . .‘

DMA's petition for certiorari stems from a 2010 Colorado law requiring remote retailers selling to in-state customers to comply with a number of notice and reporting obligations . . . .

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