26-JUN J. Multistate Tax'n 40

Journal of Multistate Taxation and Incentives
****1**
June, 2016

U.S. Supreme Court Update

U.S. SUPREME COURT UPDATE

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Court Upholds Boundaries of Nebraska Indian Reservation

***40** On 3/22/16, the U.S. Supreme Court upheld a ruling by the U.S. Court of Appeals for the Eighth Circuit in *Nebraska v. Parker* (Docket No. 14-1406). In agreeing with the lower court, the U.S. Supreme Court held that an 1882 Act of Congress hadnot diminished the lands of the Omaha Tribe of Nebraska. Accordingly, taxpayers located on the Tribe's land (including the Nebraska village that brought the petition before the Court) remain subject to the Tribe's liquor license and taxing regulations, includinga 10 percent sales tax on all liquor sales made on the Indian Reservation.

In affirming the lower court's holding, the Court held that the Eighth Circuit had properly applied the so-called '*Solem* diminishment test,' which helps courts decide if and when a federal land surplus act has diminished tribal lands.We look forward to covering this decision in greater detail in the next issue of the JOURNAL.

In this issue, we discuss the Court's two most recent petitions for certiorari in cases involving state and local taxes. The first, *Sprint Nextel Corp. v. New York* (Docket No. 15-1041), asks the Court to consider whether New York's law, whichimposes sales tax on interstate mobile voice service when it is bundled with other services, conflicts with federal law —the Mobile Telecommunications Sourcing Act, and is, therefore, preempted. The petition is the latest chapter in the New York AttorneyGeneral's New York False Claims Act complaint against Sprint Nextel, which is based on Sprint's alleged under-collection of New York taxes on the company's fixed-rate mobile voice plans.

The second petition, *Seminole Tribe of Florida v. Stranburg* (Docket No. 15-1064), asks the Court to consider whether Florida's gross receipts utility tax qualifies as an impermissible direct tax on a federally recognized Indiantribe. The U.S. Court of Appeals for the Eleventh Circuit held that although the utility tax may be, and often is, passed on to customers, there is no legal requirement that utility providers pass through the tax. Accordingly, the court held that the legalincidence of Florida's utility tax falls on non-Indian utility companies (not the Seminole Tribe) and is, therefore, a permissible tax.

****2** Finally, we note that on 3/7/16, the Court granted the pending petition for certiorari in *Self-Insurance Institute v. Snyder* (Docket No. 14-741), only to vacate the judgment and to remand the case back to the U.S. Court of Appeals for the SixthCircuit for further consideration in light of *Gobeille v. Liberty Mutual Insurance Co.*, 577 U.S. ____ (2016).

Sprint Nextel Asks Court to Review NY Preemption Decision

In *Sprint Nextel Corp. v. New York*, Docket No. 15-1041, petition for cert. filed 2/18/16, ruling below as *People v. Sprint Nextel Corp.*, 26 N.Y.3d 98 (2015), Sprint Nextel Corporation ('Sprint') asks the Court to reviewa decision by the New York State Court of Appeals, in which New York's highest court held that: '(1) the New York Tax Law imposes sales tax on interstate voice service sold by a mobile provider along with other services for a fixed monthly charge; (2)the statute is unambiguous; (3) the statute is not preempted by federal law (the Mobile Telecommunications Sourcing Act, 4 U.S.C. 123(b) ('MTSA')); (4) the [New YorkState] Attorney General's complaint sufficiently pleads a cause of action under the New York False Claims Act (FCA) (State Finance Law § 187 et seq.); and (5) the damages recoverable under the FCA are not barred bythe Ex Post Facto Clause of the United States Constitution.'

Background.

As explained by the New York Court of Appeals, New York's FCA applies to any person who 'knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to ' the government.And although the FCA did not originally apply to false tax claims, the New York Legislature amended the law in 2010 'to cover 'claims, records, or statements made under the tax law' in certain circumstances.'

As noted by the Court of Appeals in the decision under review, 'the amendment was designed to 'provide an additional enforcement tool against those who file false claims under the Tax Law,' and thus 'deter the submission of false tax claims'while also 'provid[ing] additional recoveries to the State and to local governments.'' (citing the letter submitted by the New York Department of Taxation and Finance, that was a part of the Bill Jacket).

Following the amendment, in 2011, a private litigant filed suit against Sprint under the FCA. In 2012, New York's Attorney General ('AG') filed a superseding complaint, which converted the suit into a civil enforcement action by the AG.

As set forth in the New York Court of Appeals decision, 'the AG's complaint, as relevant here, alleges that section 1105(b)(2) of the New York Tax Law ***42** requires the payment of sales taxes on the *full amount* of fixed periodic charges for wirelessvoice services sold by companies like Sprint to New York customers.' The court further explained that the complaint 'further alleges that section 1111(l) permits wireless providers to 'treat separately for sales tax purposes certain componentsof a bundled charge for mobile telecommunications services, so long as the charges are *not* for voice services.''

****3** Additionally, the court noted that '[t]he complaint asserts that Sprint violated the Tax Law by failing to collect sales tax on the portion of its flat-rate charge that was attributable to interstate and international voice services.' And,the court provided that the complaint 'further alleges that 'Sprint's decision to unbundle its plans sold for a fixed monthly charge' was driven by its desire to gain an advantage over its competitors by reducing the amount of sales taxes it collectedfrom its customers and, thereby, appearing to be a low-cost carrier.' Furthermore, the Court of Appeals decision states, 'according to the AG, the percentages of the flat-rate charges that Sprint allocated to interstate and international calls werecompletely arbitrary.'

The New York Court of Appeals decision further explains that '[i]n support of its allegations that Sprint knowingly submitted false tax statements, the AG cites a Tax Department guidance memorandum published before the 2002 amendments [toNew York's Tax Law] became effective, which states that the sales tax is to be applied in the manner that the AG now advocates.' And, that the 'AG points out that Sprint adhered to this guidance until July 2005, when it changed its tax practices.'

The Court of Appeals also notes that the 'AG further alleges that Sprint disregarded the statements of a Tax Department field auditor and enforcement official advising Sprint in 2009 and 2011, respectively, that its sales tax practice was illegal, andthat it disregarded the fact that other major wireless carriers, unlike Sprint, did not break their fixed monthly charges for voice services

into intrastate and interstate subparts for sales tax purposes, but instead collected and paid sales tax on the fullfixed periodic charge for voice services.‘

Sprint moved to dismiss the AG's complaint. However, the New York Supreme Court denied the motion. On appeal, the Appellate Division unanimously affirmed the denial of Sprint's motion to dismiss and certified the following question to the Court of Appeals:‘Was the order of the Supreme Court, as affirmed by . . . this Court, properly made?‘

New York Tax Law.

Section 1105(b) of the New York Tax Law, imposes tax on ‘(1)[t]he receipts from every sale, other than sales for resale, of the following . . . (B) telephony and telegraphy and telephone and telegraph service of whatever nature except interstateand international telephony and telegraphy and telephone and telegraph service and except any telecommunications service the receipts from the sale of which are subject to tax under paragraph two . . . . (2) The receipts from every sale of mobile telecommunicationsservice provided by a home service provider, other than sales for resale, *that are voice services, or any other services that are taxable under subparagraph (B) of paragraph one of this subdivision*, sold for a fixed periodic charge(not separately stated), whether or not sold with other services.‘ (emphasis added).

****4** At issue is the meaning of the phrase ‘or any other services that are taxable under subparagraph (B) of paragraph one of this subdivision.‘ As explained by the Court of Appeals, ‘Sprint contends that this language excepts from sales tax its bundledcharges from interstate and international calls.‘ The AG, however, ‘asserts that all mobile calls are subject to tax under paragraph (b)(2), unless separately stated on the customer's bills.‘

The New York Court of Appeals explained that ‘the phrase ‘any other services that are taxable under subparagraph (B)’ must refer to services other than ‘voice services.’ Accordingly, it is unambiguous that Tax Law § 1105(b)(2) imposestaxation on all voice services sold for a fixed periodic charge, including the interstate and international calls at issue here.‘ One dissenting judge disagreed, noting that section 1105(b) is ‘murky at best.‘

Court of Appeals found New York's law not preempted by MTSA.

As set forth in the New York Court of Appeals decision, Section 123(b) of the MTSA provides: ‘If a taxing jurisdiction does not otherwise subject charges for mobile telecommunications service to taxation and if these charges are aggregated with and notseparately stated from charges that may be subject to taxation, then the charges for nontaxable mobile telecommunications services may be subject to taxation unless the home service provider can reasonably identify charges not subject to such tax, charge,or fee from its books and records that are kept in the regular course of business.‘

The Court of Appeals explained in its decision that ‘this bundling provision expressly opens by respecting and incorporating state authority, rather than restricting it.‘ It further noted in its opinion that ‘Section 123(b) anticipates disaggregationonly of charges ‘not otherwise subject . . . to [state] taxation.’‘ And, ‘[b]ecause the New York Tax Law imposes a tax on the entire amount of the fixed monthly charge for voice services, there is no exemption for any interstateand international component that would even trigger section 123(b)'s exception here.‘

Moreover, the court was unable to locate any other provision of the MTSA that would prohibit state taxation of interstate and international calls. Instead, the court noted the fact that ‘Congress eliminated this distinction in light of advances in mobiletelecommunications technology‘ and that ‘Section 117(b) of the MTSA allows for the taxation of *‘[a]ll charges for mobile telecommunications services* . . . subject to tax . . . by the taxing jurisdictions whoseterritorial limits encompass the customer's primary place of use, regardless of where the mobile telecommunication services originate, terminate, or pass through.’‘ Accordingly, the New York Court of Appeals held that ‘the AG's interpretation of theNew York Tax Law [wa]s not preempted by the federal MTSA.‘

Question presented.

***44** Sprint now asks the U.S. Supreme Court to review the preemption issue: 'Whether New York law, which imposes sales tax on interstate mobile voice services only when it is bundled with other services, conflicts with the Mobile Telecommunications SourcingAct, 4 U.S.C. 123(b), and is therefore preempted.'

Seminole Tribe of Florida Challenges State Utility Tax

****5** In *Seminole Tribe of Florida v. Stranburg*, Docket No. 15-1064, petition for cert. filed 2/19/16, ruling below at 799 F.3d 1324 (11th Cir. 2015), the U.S. Court of Appeals for the Eleventh Circuit held that federal law prohibits and preemptsFlorida's commercial rent tax (the 'Rental Tax') from being imposed on the Seminole Tribe's leases of reservation land, but that Florida's tax on the gross receipts of utility service providers (the 'Utility Tax') does not violate federal Indianlaw because the legal incidence of the tax falls on the utility company not the Seminole Tribe.

The Seminole Tribe of Florida now petitions the High Court to review the circuit court's ruling with regard to the Utility Tax, arguing that the lower court 'erroneously concluded that the legal incidence of the Utility Tax is on the utility companyrather than on the Tribe' and therefore erroneously found the Utility Tax to be a permissible tax on the Tribe's activities.

Florida's Utility Tax.

As explained by the court below, Florida imposes a tax on the 'gross receipts from utility services that are delivered to a retail consumer' in Florida. The Utility Tax, which is contained in Chapter 203 of the Florida Statutes (Fla. Stat. §203.01 *et seq.*)—a chapter devoted exclusively to gross receipts taxes—provides that the 'tax is imposed upon every person for the privilege of conducting a utility . . . , and each provider of the taxable services remains fullyand completely liable for the tax, even if the tax is separately stated as a line item or component of the total bill.'

The Utility Tax statute does, however, permit utility providers (at their discretion) to elect to itemize the tax separately on their bills, and when companies make such an election, consumers are required to 'remit the tax' to the utility companyas part of the total bill. In its petition to the U.S. Supreme Court, the Seminole Tribe references this elective pass-through and argues that when utility providers separately itemize the Utility Tax, the legal incidence of the tax falls on the consumer.

Eleventh Circuit held legal incidence of tax falls on non-Indian utility companies.

The Seminole Tribe, like other utility customers in Florida, paid the Utility Tax as a component of its utility bills during the years at issue. The Tribe then, however, applied to the Florida Department of Revenue for a refund of the amount of the tax paid,which was denied.

Following its refund denial, the Tribe filed a federal complaint against the Florida Department of Revenue, seeking declaratory and injunctive relief. The district court, which heard the Tribe's complaint and reviewed Florida's right to impose the UtilityTax, found the tax to be impermissible as applied to the Seminole Tribe on its reservation. The district court reasoned that 'the legal incidence of the Utility Tax fell on the Tribe, not the utility company, and federal law generally prohibits taxingIndians for on-reservation activities. ' On appeal, however, the Eleventh Circuit reversed the lower court's ruling, noting that the legal incidence of the Utility Tax fell on the non-Indian utility companies and, therefore, did not violate the 'tenetsof federal Indian law.'

****6** In examining the legal incidence of the Utility Tax, the Eleventh Circuit looked to *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1994), a case in which the U.S. Supreme Court announced that '[t]he initial and frequentlydispositive

question in Indian tax cases . . . is who bears the legal incidence of a tax.‘ According to the circuit court's opinion, the U.S. Supreme Court has ‘specifically rejected a test that would focus on economic realities, finding that legalincidence provided a predictable and certain test for state taxing authorities.‘

As stated above, the Florida Utility Tax statute expressly permits utility providers to elect to itemize and pass-through the tax. But, according to the court below, this provision does not create a ‘*requirement* from the legislature to passthe tax through to the consumer, and it is the *requirement* that matters. ‘ The court acknowledged that many utility providers do pass the Utility Tax on to customers.

But, according to the court's decision, a ‘recognition that a tax may, or even likely will be passed through to a consumer is not the same as mandating that the tax be passed through. To shift the legal incidence to a consumer, *Chickasaw Nation* insistsdthat any pass-through be mandatory.‘ And ‘[d]espite the Tribe's emphasis on the inevitability of pass-through,‘ the court reasoned that ‘at the end of the day, there is simply nothing in the Florida scheme requiring a utility to passthe tax along to its customers.‘

The circuit court also dismissed the Tribe's attempts to liken the Utility Tax, which is a gross receipts tax, to a sales tax. Citing to *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995), the court noted that the U.S. Supreme Courtrecognizes that sales and gross receipts taxes are distinguishable based on the legal incidence of the tax. And, as relevant to the Utility Tax here, ‘Florida has embraced this distinction by labeling the Utility Tax as a gross receipts tax and codifyingit in a separate chapter . . . from Florida's sales taxes.‘

Moreover, the court noted that while Florida has ‘expressly codified that the sales tax must be passed-through to, and be paid by, the consumer,‘ the same could not be said about the Utility Tax. Thus, the Utility Tax was not akin to a sales tax.(The court also noted that the State of Florida could not pursue customers for unpaid Utility Tax amounts, while it could pursue purchasers for unpaid sales taxes.)

The circuit court's opinion did acknowledge that the district court's analysis was valid in certain respects, but the court concluded that the ‘‘fair[est]' interpretation of Florida's Utility Tax statute as written and applied demonstratesthat the state intended the legal incidence of the tax to fall on the utility company.‘

And further determined that federal law does not preempt Florida's Utility Tax.

***46** The district court, having concluded that the legal incidence of the Utility Tax impermissibly fell on the Tribe, did not examine whether federal law preempted the tax. The circuit court, however, having reached an opposite conclusion on the legal incidenceof the tax examined whether federal law preempts imposition of the Utility Tax. Specifically, the circuit court applied the Supreme Court's preemption test as announced in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). In applyingthe so-called ‘*Bracker* inquiry,‘ the Eleventh Circuit determined that ‘the Utility Tax does not violate federal law.‘

****7** According to the Eleventh Circuit, the question of whether the Utility Tax is preempted by federal law is ‘ultimately a question of congressional intent.‘ And although the court acknowledged that an ‘express congressional declaration of preemptionis not required,‘ the court discerned no ‘pervasive federal interest or comprehensive regulatory scheme covering on-reservation utility delivery and use sufficient to demonstrate a congressional intent to preempt state taxation of a utility provider'sreceipts derived from on-reservation utility service.‘ Accordingly, the court concluded that the Tribe failed to ‘establish that Florida's Utility Tax is generally preempted as a matter of law in this case.‘

Question presented.

The Tribe now asks the U.S. Supreme Court to decide '[w]hen a utility provider exercises a state-law right to expressly pass a utility tax to a federally recognized Indian tribe for utility services delivered to the tribe's reservation andthe tribe is therefore legally obligated to pay the tax, is the tax an impermissible direct tax on the tribe?'

Court Remands MI Health Insurance Tax Preemption Appeal

On 3/7/16, the High Court granted the pending petition for certiorari in *Self-Insurance Institute v. Snyder*, Docket No. 14-741, petition for cert. filed 12/18/14, ruling below at 761 F.3d 631, 59 EBC 1406 (6th Cir. 2014). The Court, however,merely vacated the judgment and remanded the case back to the U.S. Court of Appeals for the Sixth Circuit for further consideration in light of *Gobeille v. Liberty Mutual Insurance Co.*, 577 U.S. ____ (2016).

In *Gobeille*, the Court held that the Employee Retirement Income Security Act ('ERISA') preempts parts of a Vermont law requiring certain entities, including health insurers, to report payments relating to health care claims and otherhealth information to a state agency for compilation in an all-inclusive health care database. In *Self-Insurance Institute v. Snyder*, the U.S. Court of Appeals for the Sixth Circuit originally affirmed a federal district trial court's ruling thatthe Michigan Health Insurance Claims Assessment Act (Mich. Comp. Laws §§ 550.1731-1734; the 'Michigan Act')—which imposes a 1 percent tax, along with various reporting and record-keeping requirements, on all paid claims by carriersand third party administrators to healthcare providers for services rendered in Michigan for Michigan residents—is not prohibited by ERISA's preemption provision (29 U.S.C. § 1144(a)).

The Sixth Circuit will now revisit its holding in light of new Supreme Court precedent. (For more background on this case, including a detailed discussion of the circuit court's response to SIIA's specific claims, see U.S. Supreme Court Update, 25JMT 45 (May 2015).)

Court Set to Decide State Sovereignty Case

As noted in a previous column, the High Court, on 12/7/15, heard oral argument in *Franchise Tax Board of the State of California v. Hyatt*, Docket No. 14-1175, ruling below at 335 P.3d 125 (Nev. 2014). The Court is, therefore, nowset to rule on the scope of sovereign immunity between states.

****8** More specifically, the Court is considering whether the California Franchise Tax Board (the 'FTB') is immune from a civil suit brought by a Nevada taxpayer in Nevada state court. Although the Court previously addressed a similar issue in *Nevadav. Hall*, 440 U.S. 410 (1979), finding that sovereign immunity is not absolute when it comes to states vis-a-vis other states, California has asked the Court to revisit that holding and to find that Nevada has overstepped its jurisdiction.

In the case below, the Supreme Court of Nevada largely reversed a jury award of $139 million in tort damages and $250 million in punitive damages awarded in favor of inventor Gilbert P. Hyatt in his lawsuit against the FTB. The decision of the lower court,however, was not a complete victory for the FTB. Specifically, the Nevada court found that not all of Hyatt's causes of action were barred under principles of discretionary-function immunity and comity.

Instead, the Nevada high court affirmed the lower court's findings that the FTB committed fraud and intentional infliction of emotional distress in its audit of Hyatt. And although the damages imposed against the FTB were significantly reduced, the NevadaSupreme Court ruled that the FTB was not immune from suit in Nevada state court and was therefore unable to escape all liability. (For more background on this case, including a detailed discussion of the underlying audit of Mr. Hyatt, see U.S. Supreme CourtUpdate, 25 JMT 40 (July 2015).)

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