THOMSON REUTERS
CHECKPOINT

29-JUN J. MULTISTATE TAX'N 41

Journal of Multistate Taxation and Incentives
****1**
June, 2019

U.S. Supreme Court Update

Copyright (c) 2019 RIA

U.S. SUPREME COURT UPDATE

DEBRA S. HERMAN is a partner and KELLY DONIGAN is an associate in the New York City office of the law firm Hodgson Russ LLP.

Court Rules in Favor of Taxpayers in Two Cases and Welcomes Two New SALT Petitions

***41** On February 20, 2019, the U.S. Supreme Court issued its decision in *Dawson v. Steager* (Docket No. 17-419), holding in favor of the taxpayer and deciding that a West Virginia statute violates the intergovernmental tax immunity doctrine. Then, on March 19, 2019, in *Washington State Dep't of Licensing v. Cougar Den, Inc.*, (Docket No. 16-1498), the Court ruled in favor of the Yakama Nation and concluded that the Yakama Nation's right to travel on public highways under the Yakama Nation Treaty of 1855 was burdened by Washington State's fuel tax and, therefore, the fuel tax was preempted by the treaty. We will cover the Court's ruling in *Washington State Dep't of Licensing v. Cougar Den, Inc.*, in more detail in our next issue.

In addition to issuing these two opinions, the Court is set to rule on two previously reported cases involving state and local tax matters: *Franchise Tax Board of Calif. v. Hyatt* (Docket No. 17-1299) and *North Carolina Dep't of Rev. v. The Kimberly Rice Kaestner 1992 Family Trust* (Docket No. 18-457). We covered the oral arguments in the former case in our last issue. As this issue of the JOURNAL went to press, the Court recently had heard oral arguments in the *North Carolina Dep't of Rev. v. The Kimberly Rice Kaestner 1992 Family Trust* case. We will cover the oral arguments in that case in our next issue.

The Court has also received two new petitions for certiorari: *Ashland Specialty Co. Inc. v. Steager* (Docket No. 18-1053) and *Espinoza, et al. v. Montana Dep't of Rev.* (Docket No. 18-1195). Six additional petitions remain pending: *Alabama Dep't of Rev. v. CSX Transportation Inc.* (Docket Nos. 18-447 and 18-612); *Fielding et. al. v. Commissioner of Rev., Minn.* (Docket No. 18-664); *Illinois Central Railroad Co. v. Tenn. Dep't of Rev.* (Docket No. 18-866); *Baskins v. Okla. Tax Comm'n* (Docket No. 18-807); and *Mitchell v. Tulalip Tribes of Washington* (Docket No. 18-970).

The Court also continues its review of a dispute between Delaware and several other states concerning which states have priority rights to claim abandoned, uncashed MoneyGram ‘official checks.‘ The MoneyGram cases set for review are *Delaware v. Pennsylvania et. al.*, Case No. 220145, and *Arkansas et. al. v. Delaware*, Case No. 220146. As previously reported, the Court has assigned the Honorable Pierre N. Leval, of the U.S. Court of Appeals for the Second Circuit, as Special Master in these cases, tasked with coordinating the taking of evidence and making reports. We will continue to update readers as more details become available.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

W.V. Law Violates Intergovernmental Tax Immunity Doctrine

****2** On February 20, 2019, the U.S. Supreme Court issued its decision in *Dawson v. Steager* (Docket No. 17-419). Justice Gorsuch delivered the opinion for a unanimous Court, holding that the West Virginia statute exempting from state taxation the pension benefits of certain state and local law enforcement officers, but not the federal pension benefits of a retired federal marshal, violates the intergovernmental tax immunity doctrine, as codified by federal statute.

As the Court describes, Dawson worked as a deputy U.S. Marshal in West Virginia. Dawson was enrolled in FERS, a federal retirement plan, and sought a West Virginia exemption for all of his FERS income. Under West Virginia law, unlike certain state law enforcement retirees who may exempt all of their state retirement benefits from taxable income, Dawson was entitled to exempt only a portion of his FERS income. The West Virginia Supreme Court of Appeals held that this distinction did not violate the doctrine of 'intergovernmental tax immunity.' Instead, the state high court held the exemption at issue merely gives a benefit to 'a very narrow class of former state and local employees, and that benefit was not intended to discriminate against former federal marshals.'

In his petition for certiorari, Dawson asked the U.S. Supreme Court to consider: 'Whether this Court's precedent and the doctrine of intergovernmental tax immunity bar states from exempting groups of state retirees from state income tax while discriminating against similarly situated federal retirees based on the source of their retirement income.' The U.S. Supreme ***42** Court did not, however, grant certiorari with respect to Dawson's question, but instead granted certiorari limited to the issue presented by the Solicitor General in an amicus curiae brief in which the Solicitor General argued that '[t]he West Virginia Supreme Court of Appeals misapplied the doctrine of intergovernmental tax immunity' and that, '[u]nder the test articulated in *Davis v. Michigan Department of the Treasury*, 489 U.S. 803 (1989), the court should have asked whether the State's inconsistent tax treatment of former federal and state law-enforcement officers 'is directly related to, and justified by, significant differences between the two classes.'' The West Virginia Supreme Court of Appeal's application of a 'totality of the circumstances' analysis, the Solicitor General argued, 'is inconsistent with *Davis* and with this Court's other intergovernmental tax immunity decisions.'

Ultimately, the U.S. Supreme Court decided that West Virginia was wrong and violated 4 U.S.C. §111. Section 111, which codifies the intergovernmental tax immunity doctrine, states that the United States has consented to state taxation of the 'pay or compensation' of 'officer[s] or employee[s] of the United States,' but only if the 'taxation does not discriminate against the officer or employee because of the source of the pay or compensation.' Following the standard set forth in *Davis*, the Court confirmed that '[a] State violates Section 111 when it treats retired state employees more favorably than retired federal employees and no 'significant difference between the two classes' justifythe differential treatment.'

****3** In the present matter, Justice Gorsuch concluded, there were not any 'significant differences' between Dawson's former responsibilities and those of the tax-exempt state law enforcement retirees. To Gorsuch, and the rest of the Court, it does not matter that most West Virginia retirees who were not law enforcement, and some who were law enforcement, received the exact same treatment as Dawson. Instead, the Court made clear that there is no exception to the intergovernmental tax immunity doctrine for de minimis discrimination.

Thus, because West Virginia was unable to demonstrate 'significant differences' between Dawson's 'powers and duties' as a U.S. Marshal and the responsibilities of the state law enforcement officers who were able to claim an income tax exemption, the U.S. Supreme Court unanimously held that West Virginia's statute unlawfully discriminated against Dawson.

Wholesaler Challenges Penalty Imposed for Selling Delisted Cigarettes in W.V.

On February 6, 2019, the U.S. Supreme Court received a new petition for certiorari in *Ashland Specialty Co., Inc. v. Steager*, Docket No. 18-1053, ruling below at 818 S.E.2d 827 (W.V. 2018). The Court has been asked to review a West Virginia Supreme Court of Appeals decision concluding that a penalty imposed on a taxpayer for selling brands of cigarettes that were not on the

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

West Virginia Tax Commissioner's list of cigarettes that could be lawfully sold in West Virginia was not an abuse of discretion, should not be canceled or reduced, and does not violate the Excessive Fines Clause of the West Virginia Constitution or the Eighth Amendment of the U.S. Constitution.

Master Settlement Agreement and corresponding legislation.

As explained by the West Virginia Supreme Court of Appeals, in 1998, West Virginia, along with 45 other states, the District of Columbia, Puerto Rico, and four U.S. territories, established a Master Settlement Agreement (‘MSA ‘) with certain participating U.S. cigarette manufacturers. The MSA, ‘obligates these manufacturers, in return for a release of past, present, and certain future claims against them . . . to pay substantial sums to the State (tied in part to their volume of sales).‘ Non-participating manufacturers are those that did not enter into the MSA and, thus, are not required to pay annual sums to the settling states.

In 1999, in an effort to offset the competitive advantage this gave to manufacturers who did not enter into the MSA and to prevent such manufacturers from frustrating the purpose of the MSA, West Virginia enacted legislation that requires cigarette manufacturers who are not part of the MSA, but whose cigarettes are sold in West Virginia, to make annual deposits into escrow accounts for cigarettes sold in West Virginia ‘intended to pay a judgment or settlement resulting from a claim brought against the manufacturer by the State or a West Virginia resident.‘

***43** In 2003, West Virginia enacted complementary legislation to strengthen its ability to enforce the escrow provisions that apply to manufacturers and distributors. The legislation included: (1) requiring the West Virginia Tax Commissioner to maintain an online directory of the name and brands of all cigarette manufacturers authorized to sell their product in the state (‘the List‘); and (2) only permitting cigarettes on the List to be sold legally in the state. Importantly for this matter, the statute states that the West Virginia Tax Commissioner ‘may‘ penalize a person who sells cigarettes into West Virginia that is not found on the List by, among other things, imposing a civil penalty ‘in an amount not to exceed the greater of five hundred percent of the retail value of the cigarettes or five thousand dollars . . . .‘

Illicit sales and lower court opinions.

****4** Ashland Specialty Co., Inc. (‘Ashland‘), the petitioner in this matter, is a distributor (not a cigarette manufacturer) that distributes cigarettes to convenience stores in West Virginia and other states. In late 2008, Ashland fired their long-time manager tasked with overseeing the List and receiving the West Virginia Tax Department's e-mail updates to the List. His replacement quickly resigned from his role, which resulted in Ashland having no in-house employees receiving the Tax Commissioner's e-mail update on cigarettes approved for sale in the state. By May 2009, Ashland was unaware that GP and GP Galaxy Pro cigarettes had been taken off the List and were forbidden from sale in West Virginia. Ashland continued to sell GP and GP Galaxy Pro cigarettes into West Virginia and reported those sales to the West Virginia Tax Commissioner. By September 2009, Ashland realized its error and ceased sales of the illicit cigarettes. In August 2012, the West Virginia Tax Commissionerautomatically assessed Ashland $159,396—the maximum 500% penalty of the cigarettes' retail value.

Ashland timely appealed the assessment and prevailed at the administrative law judge level. However, on appeal at the circuit court, the decision of the administrative law judge was reversed. Ashland appealed to the West Virginia Supreme Court of Appeals, which affirmed the circuit court's decision. Specifically, the Supreme Court of Appeals held: (i) the Tax Commissioner's imposition of the $159,396 penalty was ‘both supported by substantial evidence and based on reason, and thus, was neither arbitrary nor capricious;‘ (ii) the Tax Commissioner's ‘failure to provide notice to distributors of the delisting of a brand of cigarettes from the approved sale list did not constitute ‘reasonable cause’ to excuse the distributor's unlawful distribution of 12,230 packs of delisted cigarettes‘; and (iii) the ‘penalty was not grossly disproportionate to the gravity of the offense under either the State Constitution's Excessive Fines Clause, or the Eighth Amendmentto the Federal Constitution.‘

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

The Eighth Amendment provides that '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' Over two decades ago, in *U.S. v. Bajakajian*, 524 U.S. 321 (1998), the U.S. Supreme Court articulated a standard for evaluating whether a fine was excessive, holding a punishment unconstitutional if it is 'grossly disproportionate' to the underlying offense. 'Following the United States Supreme Court's decision in *United States v. Bajakajian*,' the West Virginia Supreme Court of Appeals followed factors identified in another case, *Dean v. State,* 736 S.E.2d 40 (W.V. 2012) (a case that it found instructive to this matter, notwithstanding that that case involved civil forfeiture, rather than civil penalty), which applied the following four factors to conclude that the penalty was not grossly disproportionate: (1) the amount of the forfeiture and its relationship to the authorized penalty; (2) the nature and extent of the criminal activity; (3) the relationship between the crime charged and other crimes; and (4) the harm caused by the charged crime.

****5** Ashland, in its petition for certiorari, argues that the state court should have applied the criteria used in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) to evaluate gross disproportionality of civil monetary penalties. Those factors include: (1) the degree of the defendant's reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the defendant's actions; and (3) the sanctions imposed in other cases for comparable misconduct.

Questions presented.

Ashland now asks the U.S. Supreme Court to consider the following questions:

***44** 1. 'Was the penalty grossly disproportionate to the offense and unconstitutional under the Eighth Amendment's Excessive Fines Clause and *United States v. Bajakajian?*'

2. 'In the light of the myriad criteria currently employed by state and federal courts to evaluate gross disproportionality, should the Court resolve the multiple splits and affirmatively adopt factors, like those in *Cooper Industries v. Leatherman*, to decide whether a civil monetary penalty is grossly disproportionate to the underlying offense?'

Challenge to Mont. Tax Credit Program's Limit on Aid to Religious Schools

On March 12, 2019, the U.S. Supreme Court received a new petition for certiorari in *Espinoza, et al. v. Montana Dep't of Rev.*, Docket No. 10-1195, ruling below at 393 Mont. 446 (2018). The U.S. Supreme Court has been asked to review a decision of the Montana Supreme Court, which held that the Montana tax credit program for qualified education contributions violates Article X, §6, of the Montana Constitution.

Montana scholarship tax credit limited to non-religious schools.

Article X, §6, of the Montana Constitution, entitled 'Aid prohibited to sectarian schools' prohibits aid used 'for any sectarian purpose or to aid any . . . school . . . controlled in whole or in part by any church, sect, or denomination.' On May 8, 2015, the Montana Legislature enacted a tax credit scholarship program 'to provide parental and student choice in education.' The program attempts to accomplish this goal by providing a modest tax credit—up to $150 annually—to individuals and businesses who donate to private, nonprofit scholarship organizations. Scholarship organizations then use the donations to give scholarships to families who wish to send their children to a private school and recipients can use the scholarships at any 'qualified education provider.'

Although originally defined by statute to include virtually all private schools in Montana, the Montana Department of Revenue enacted an administrative rule that changed the definition of 'qualified education provider' to exclude any organization 'owned or controlled in whole or in part by any church, religious sect, or denomination.' The change in the definition is known as 'Rule 1.' Because about 69% of Montana private schools are religiously affiliated, Rule 1 had the effect of limiting choices for recipient families.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

****6** Petitioners, all low-income mothers who rely on the scholarships to send their children to Stillwater Christian School, a non-denominational private school, brought suit that Rule 1 is unconstitutional. Petitioners made three principle arguments: (1) Rule 1 is ultra vires because the Legislature intended the scholarship program to include both religious and nonreligious schools; (2) Article X, §6, of the Montana Constitution does not apply to the program because it only applies to public funds; and (3) even if Article X, §6, does apply to the program, such an application would violate the Freedom of Religion and Equal Protection Clauses of the U.S. Constitution.

Lower courts' decisions.

After hearing the merits, the trial court ruled in favor of Petitioners and issued a preliminary injunction against enforcement of Rule 1, holding it was likely both ultra vires and unconstitutional under the U.S. Constitution.

On December 12, 2018, in a 5-2 decision, the Montana Supreme Court reversed the lower court decision. First, the Montana Supreme Court held that the program's inclusion of religious options was unconstitutional under Article X, §6, of the Montana Constitution. (Or, stated differently, 'the tax credit violated state constitution's prohibition on aid to sectarian schools.') The court determined that by providing a dollar-for-dollar credit against taxes owed to the state, the Legislature is the entity providing aid to sectarian schools in direct violation of the Montana Constitution. The court added that religious education is a 'rock on which the whole [church] rests, and to render tax aid to [a religious school] is indistinguishable . . . from rendering the same aid to the Church itself.'

Next, the Montana Supreme Court held that the inclusion of religious schools was not severable from the rest of the scholarship program. In making this decision, the court noted that 'there is no mechanism within the [program] to identify where the secular purpose ends and the sectarian begins' or when the tax credit is indirectly paying tuition at a religious school. Therefore, the entirety of the scholarship program was held invalid. The application of Rule 1 did not solve this problem, the court held, because 'it exceeded the Legislature's ***45** grant of rulemaking authority when it enacted the rule in question.'

Lastly, the Montana Supreme Court summarily rejected Petitioners' claim that interpreting Article X, §6, of the Montana Constitution to prohibit scholarships for children at religious schools violated the Freedom of Religion and Equal Protection Clauses. The Montana Supreme Court noted that although 'an overly-broad analysis of [§6] could implicate free exercise concerns . . . this is not one of those cases.'

Question presented.

'Does it violate the Religion Clauses or Equal Protection Clause of the United States Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools?'

Petitions Previously Granted

****7** At the time of this writing, we await decisions in two matters that have been argued before the Court.

California sovereign immunity case.

As previously reported, the Court heard oral arguments on January 9, 2019, in *Franchise Tax Bd. of Cal. v. Hyatt.* The Franchise Tax Board (the 'FTB') has asked the Court to answer the question it agreed to decide in *Hyatt II:* 'whether *Nevada v. Hall* should be overruled.'

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

As summarized in the decisions below, the Nevada Supreme Court held that the California FTB was not entitled to immunity from intentional and bad-faith tort claims brought by a former California resident, Gilbert Hyatt. The granting of certiorari marks the latest in a long-running saga between Hyatt and the FTB stemming from the agency's attempt to collect approximately $10 million in taxes on patent licensing fees earned by Hyatt in the 1990s. Following an audit, in which the FTB determined Hyatt to be a California resident, Hyatt sued the FTB in Nevada state court, claiming that the FTB's abusive investigation techniques cost him business opportunities and inflicted emotional distress. The Nevada Supreme Court eventually largely reversed a jury award of tort damages and punitive damages awarded to Hyatt. Citing to *Nevada v. Hall*, 440 U.S. 410 (1979), however, which held that the U.S. Constitution does not grant states sovereign immunity from suit in the courts of other states, the Nevada Supreme Court rejected the FTB's claim of complete immunity. Ultimately, the U.S. Supreme Court affirmed Nevada's decision in *Franchise Tax Bd. of Cal. v. Hyatt (Hyatt I)*, 538 U.S. 488 (2003).

After another round at the Nevada Supreme Court, which held that the FTB was liable for fraud and intentional infliction of emotional distress, the FTB sought review once again in the U.S. Supreme Court. The Court granted certiorari for the second time, agreeing to consider two questions: (1) whether the Nevada Supreme Court erred by failing to apply to the FTB the statutory immunities available to Nevada agencies, and (2) whether the U.S. Supreme Court's prior decision in *Nevada v. Hall*, 440 U.S. 410 (1979), should be overruled.

In its second decision, *Franchise Tax Bd. of Cal. v. Hyatt (Hyatt II)*, 136 S. Ct. 1277 (2016), the Court held that, with regard to California's first claim, the Full Faith and Credit Clause does not 'permit[] Nevada to award damages against California agencies under Nevada law that are greater than it could award against Nevada agencies in similar circumstances.' As to California's second question, however, the Court, in the wake of Justice Antonin Scalia's death, spilt 4-4 on whether *Hall* should be overruled.

On remand from *Hyatt II*, the Nevada Supreme Court followed the high court's instructions and held that the FTB was entitled to the benefit of Nevada's statutory damages cap and instructed the trial court to enter a damages award for fraud within the cap of $50,000. The FTB again asked the U.S. Supreme Court to grant certiorari, arguing that 'under our federal system, an agency of one State may not (absent its consent) be sued in the courts of another State. ' Specifically, the FTB asks the Court to finally answer the question it agreed to decide in *Hyatt II:* 'whether *Nevada v. Hall* should be overruled.'

North Carolina challenges application of Due Process Clause to trust taxation.

****8** In *North Carolina Dep't of Rev. v. The Kimberly Rice Kaestner 1992 Family Trust*, Docket No. 18-457, ruling below at 814 S.E.2d 43 (N.C. 2018), the North Carolina ***46** Supreme Court held that the North Carolina Department of Revenue did not establish the minimum contacts necessary to satisfy the principles of due process required to tax an out-of-state trust.

North Carolina now asks the U.S. Supreme Court whether 'the Due Process Clause prohibit[s] states from taxing trusts based on trust beneficiaries' in-state residency.' As noted above, we will discuss the oral arguments that were held on April 16, 2019, in the next issue of the JOURNAL.

Pending Petitions

In addition to the previously granted petitions, six petitions remain pending before the Court: *Alabama Dep't of Rev. v. CSX Transportation Inc.* (Docket Nos. 18-447 and 18-612); *Fielding et. al. v. Commissioner of Rev., Minn.* (Docket No. 18-664); *Illinois Central Railroad Co. v. Tenn. Dep't of Rev.* (Docket No. 18-866); *Baskins v. Okla. Tax Comm'n* (Docket No. 18-807); and *Mitchell v. Tulalip Tribes of Washington* (Docket No. 18-970).

Alabama seeks to end decades old dispute over railroad fuel taxes.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

In *Alabama Dep't of Rev. v. CSX Transportation, Inc.,* Docket No. 18-447, ruling below at *CSX Transportation, Inc. v. Alabama Dep't of Rev.,* 888 F.3d 1163 (11th Cir. 2018), the U.S. Supreme Court is asked to review the Eleventh Circuit's holding that the Alabama sales tax, which applies to diesel fuel purchases by rail carriers but not diesel fuel purchases by motor or water carriers, constitutes a tax that impermissibly discriminates against rail carriers under §11501(b)(4) of the Railroad Revitalization and Regulatory Reform Act of 1976 (the '4-R Act').

Alabama is asking the U.S. Supreme Court to consider the following question in what could be the third round of the state's dispute with CSX: 'Under 49 U.S.C. §11501(b)(4), when can a State justifiably maintain a sales-and-use tax exemption for fuel used by vessels to transport goods interstate without extending the same exemption to rail carriers?'

CSX files a conditional cross-petition.

On November 9, 2018, CSX filed a conditional cross-petition for certiorari with the Court (Docket No. 18-612) should the Court grant Alabama's petition, discussed above. CSX asks the Court to review the motor carrier portion of the Eleventh Circuit's holding. The question presented is as follows: 'Whether, as the Eleventh Circuit held, Alabama's imposition of a motor fuels tax used by the interstate motor carriers sufficiently justifies Alabama's imposition of a facially discriminatory sales and use tax on railroad diesel fuel, notwithstanding decisions of the Court and at least one state supreme court.'

Challenge to Minnesota's resident trust provision.

In *Fielding et. al. v. Commissioner of Rev., Minn.*, Docket No. 18-664, ruling below at 916 N.W.2d 323 (Minn. 2018), the U.S. Supreme Court has been asked to review a Minnesota Supreme Court decision that held Minnesota's resident trust classification violated both the federal and Minnesota Due Process Clauses, as applied to four Minnesota trusts, because (1) the state lacks sufficient contacts with the trusts, and (2) there is no rational relationship between the income the state seeks to tax and the protections and benefits conferred by the state.

****9** Minnesota is asking the U.S. Supreme Court to consider the following question: 'Does the Due Process Clause prohibit states from imposing incomes taxes on statutory 'resident trusts' that have significant additional contacts with the state, but are administered by an out-of-state trustee?' Minnesota has asked the Court to combine the case with the previously granted and reported *Kimberly Rice Kaestner 1992 Family Trust* case.

Commerce Clause challenge to 'Oklahoma headquarters' requirement.

On December 19, 2018, the U.S. Supreme Court received a petition for certiorari in *Baskins v. Oklahoma Tax Comm'n*, Docket No. 18-807, ruling below at OK Ct. App., Case No. 115,947 (May 9, 2018). The U.S. Supreme Court is asked to review an Oklahoma Court of Appeals decision affirming an Oklahoma Tax Commission decision that held the 'Oklahoma Headquarters' requirement of Okla. Stat. tit. 68, §2358(F) does not violate the dormant Commerce Clause of the U.S. Constitution.

The question before the U.S. Supreme Court is: 'Does the Oklahoma Capital Gains Deduction tax scheme as set forth in 68 O.S. 2011, § 2358(F) as applied to Randolph S. Baskins and Beverly J. Baskins violate the Commerce Clause of the United States Constitution?'

Tennessee sales and use tax on diesel purchases by railroads is challenged.

On January 2, 2019, the U.S. Supreme Court received a petition in ***47** *Illinois Central Railroad Co. v. Tenn. Dep't of Rev.,* Docket No. 18-866, ruling below at 748 Fed. Appx. 26 (6th Cir. 2018). The Court is asked to review a decision by the Sixth

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

Circuit holding that Tennessee did not violate the U.S. Constitution by imposing a sales tax on the fuel purchases of railroad carriers while exempting the fuel purchases of motor carriers.

Federal law, 49 U.S.C. §11501(b)(4), prohibits states from imposing a tax 'that discriminates against a rail carrier.' From 2006 through mid-2014, Tennessee taxed railroads' purchase or use of diesel fuel at 7% of the retail price. Because railroads paid 7% sales tax on every purchase, their effective tax rate per gallon of diesel fuel fluctuated depending on its price. In contrast, motor carriers competing with railroads are exempt from sales and use taxes on diesel fuels; instead, they pay a fixed diesel tax of 17 cents per gallon on fuel they consume in Tennessee. In July 2014, Tennessee enacted a new tax scheme that effectively repealed the sales and use tax on railroads' diesel fuel purchases and now subjects railroads to the same per-gallon diesel fuel as the state levies on motor carriers.

Illinois Central sued the Tennessee Department of Revenue in 2010, claiming that Tennessee's sales and use taxes discriminated against railroads under the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. §11501(b) (the '4-R Act') because the state exempted motor carriers from certain taxes. While the case was on appeal, after the district court ruled in favor of Illinois Central, the U.S. Supreme Court issued a ruling on a similar tax scheme in *Ala. Dep't of Rev. v. CSX Transp., Inc.* ('*CSX II*'), 135 S. Ct. 1136 (2015) (as reported above, a petition for review of this matter is once again pending before the U.S. Supreme Court). In *CSX II*, the Court held that 'an alternative, roughly equivalent tax is one possible justification that renders a tax disparity nondiscriminatory.' Following the Court's decision, the Sixth Circuit remanded the case back to the district court to determine whether Tennessee's tax on motor carriers was 'roughly equivalent' to its tax on railroads.

****10** The district court granted summary judgment in favor of Tennessee, finding, among other reasons, that the state sufficiently justified its tax on railroad diesel fuel because Illinois Central and motor carriers paid alternative, roughly equivalent taxes. (*See Ill. Cent. R.R. Co. v. Tenn. Dep't of Rev.*, 2017 WL 1347269 (M.D. Tenn. Apr. 12, 2017)). Appealing to the Sixth Circuit, Illinois Central argued that, rather than comparing the two tax rates, courts 'should apply the compensatory tax doctrine —which is a negative commerce clause test for scrutinizing in-state and out-of-state taxes.' The Sixth Circuit disagreed with Illinois Central's argument. Instead, the Sixth Circuit followed the Eleventh Circuit's lead, that is, 'agree[ing] with the Eleventh Circuit that taxes are roughly equivalent if they impose similar rates.' (*See CSX Tansp., Inc. v. Ala. Dep't of Rev.*, 888 F.3d 1163 (11th Cir. 2018)). To that end, the Sixth Circuit determined that between 2007 and June 2014, the railroads' and motor carriers' tax rates differed by between less-than-half-of-one cent and approximately five cents per gallon. The railroads paid a higher rate in 2008 and again from 2011 through June 2014, but the motor carriers paid a higher rate in every other year. Therefore, the Sixth Circuit held, the taxes were roughly equivalent and did not violate the 4-R Act.

Illinois Central now asks the U.S. Supreme Court to consider 'whether Tennessee's tax on railroad fuel discriminates against railroads under 49 U.S.C. §11501(b)(4)?'

Non-Indian landowners challenge Tulalip Reservation excise tax.

On January 23, 2019, the U.S. Supreme Court received a petition in *Mitchell v. Tulalip Tribes of Wash.*, Docket No. 18-970, memorandum below at 740 Fed. Appx. 600 (9th Cir. 2018). The Court is asked to review a Ninth Circuit decision that affirmed the dismissal of Petitioners complaint under the doctrine of tribal sovereign immunity. The Petitioners, who reside within the boundaries of the Tulalip Indian Reservation in Snohomish County, Washington, challenged a 1% tax imposed on the transfer of real property within the boundaries of the Indian Reservation, asserting that the tax created a cloud upon their title which rendered the title unmarketable.

The question before the Court is: 'Does sovereign immunity bar the federal courts' consideration of a declaratory judgment action to determine whether Respondent Tribes can exercise regulatory/taxing authority over real property owned in fee by Petitioners non-Indians, pursuant to allotments that were authorized by the Tribes' treaty with the United States?'

The Court made clear that there is no exception to the intergovernmental tax immunity doctrine for de minimis discrimination.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

The Court has been asked to review a penalty imposed on a taxpayer for selling brands of cigarettes that were not on the West Virginia Tax Commissioner's list of cigarettes that could be lawfully sold in West Virginia.

****11** The Court has been asked to review a decision which held that the Montana tax credit program for qualified education contributions violates the Montana Constitution.

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

THOMSON REUTERS
CHECKPOINT