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U.S. Supreme Court Update

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U.S. SUPREME COURT UPDATE

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Court Continues to Receive Petitions Challenging MI's Retroactive Repeal of Compact

***45** As last month's JOURNAL went to press, we reported that the U.S. Supreme Court had received five separate petitions for certiorari challenging Michigan's retroactive repeal of its statute enacting the Multistate Tax Compact (the 'Compact')and its three-factor apportionment formula. The Court has now received a sixth petition, this time from DirectTV Group Holdings LLC (Docket No. 16-736) challenging Michigan's retroactive amendment of its tax laws.

The six petitions stem from a September 2015 Michigan Court of Appeals' decision (*Gillette Commercial Operations N. Am. & Subs. v. Dep't of Treasury*, 878 N.W.2d 891 (2015), *cert. pending*,Docket No. 16-697), in which the lower court dismissed several taxpayers' constitutional challenges to Michigan's retroactive repeal of the Compact. Many of those same taxpayers now ask the U.S. Supreme Court to review the constitutionality of the Michiganlaw, which they allege imposes retroactive tax liability for a period of almost seven years.

As we go to press, the Court has also received a new petition for certiorari in *First Marblehead Corp. v. Massachusetts Comm'r of Revenue* (Docket No. 16-777). The petition in *First Marblehead Corp.* was filed by a studentloan financing company challenging Massachusetts's apportionment rules under the state's financial institution excise tax. This marks First Marblehead's second appeal to the U.S. Supreme Court, as the Court previously granted an earlier petition in order tovacate and remand the lower court's original ruling for further consideration in light of the Court's decision in *Comptroller of Treasury of Maryland v. Wynne*, 135 S. Ct. 1787, 191 L. Ed. 2d 813 (2015). On remand, however, the Supreme JudicialCourt of Massachusetts again upheld Massachusetts's application of its apportionment rules, finding that the Commonwealth's rules satisfy the dormant Commerce Clause's 'internal consistency test' as mandatedby the Court under *Wynne.* First Marblehead, along with a related taxpayer, now take issue with the lower court's *Wynne* analysis and petition the Court to again review their appeal.

In addition to the two new petitions for certiorari mentioned above, we also note that a pair of previously reported petitions remain pending before the Court. And since our last column, the Supreme Court has denied five other previously reported petitionsfor certiorari.

****2** Finally, as reported in last month's column, on 10/3/16, 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.' TheCourt 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 for leave to file a billof 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 to MoneyGram's 'officialchecks.' On 12/6/2016, the Court invited the parties to file a stipulation of facts. We look forward to covering this dispute in more detail in a future issue of the JOURNAL. (For more background on thiscase, including a detailed discussion of MoneyGram's 'official checks' and the general priority rules for unclaimed intangible personal property, see U.S. Supreme Court Update, 26JMT 42 (September 2016).)

Court Receives Sixth Petition in MI Multistate Tax Compact Retroactivity Challenges

As reported in last month's column, on 11/21/16, the U.S. Supreme Court received five separate petitions for certiorari from five groups of taxpayers looking to challenge Michigan's retroactive repeal of its statute enacting the Multistate Tax Compact'sthree-factor apportionment formula. (The previously reported petitions are *Goodyear Tire & Rubber Co. v. Michigan Dep't of Treasury* (Docket No. 16-699); *International Business Machines Co. v. Michigan Dep't of Treasury* (DocketNo. 16-698); *Gillette Commercial Operations N. Am. v. Michigan Dep't of Treasury* (Docket No. 16-697); *Skadden, Arps, Slate, Meagher & Flom LLP v. Michigan Dep't of Treasury* (Docket No. 16-688); and *Sonoco Products Co.et. al. v. Dep't of Treasury* (Docket No. 16-687).) On 12/5/16, the Court received a sixth petition in *DirectTV Group Holdings LLC v. Michigan Dep't of Treasury*, Docket No. 16-736, which raisesnearly identical issues.

The six Michigan petitions currently pending before the Court stem from a September 2015 Michigan Court of Appeal's decision (*Gillette Commercial Operations N. Am. & Subs. v. Dep't of Treasury*, 878N.W.2d 891 (2015), *cert. pending*, No. 16-697), in which the lower court reviewed the Michigan Legislature's response to the Michigan Supreme Court's decision in *International Business Machines Corp. ('IBM') v. Michigan Dep't.of Treasury*, 496 Mich. 642, 852 N.W.2d 865 (2014). ***46** Specifically, in *IBM*, the Michigan Supreme Court held that for tax years 2008 through 2010, Michigan's Legislature had not implicitly repealed the Compact's three-factor apportionment formula by enacting its own single-sales factor apportionmentscheme. The court therefore concluded that taxpayers, including IBM, were entitled to use a three-factor apportionment formula for the tax years at issue. In response to the Michigan Supreme Court's ruling, however, the Michigan Legislature expressly repealedthe Compact's apportionment provisions and largely negated the court's ruling by giving the law retroactive effect, beginning January 1, 2008.

****3** Several taxpayers with business operations both within and outside of Michigan (including the taxpayers in the petitions referenced above) challenged the Legislature's actions, and the case eventually reached the Michigan Court of Appeals, which issued itsopinion as *Gillette Commercial Operations N. Am. & Subs. v. Dep't of Treasury.* In *Gillette* (the case giving rise to the current petitions for certiorari), the Michigan Court of Appeals heldthat (1) Michigan was free to repeal the Compact's apportionment provisions and (2) the state's retroactive repeal of the Compact did not violate the Due Process Clauses of either the state or federal Constitutions or Michigan's rules regarding retrospectivelegislation.

Many of those same Michigan taxpayers, including DirectTV Group Holdings, LLC, now challenge the lower court's ruling and ask the U.S. Supreme Court to review the Michigan courts' acceptance of the state's retroactive law change. Specifically, the taxpayersask the Court to consider (1) whether the Compact has the status of a contract that binds its signatory states and (2) whether a state law that imposes a retroactive tax liability for a period of almost seven years violates the Due Process Clause of the U.S.Constitution.

Although the Court has recently denied several other petitions for certiorari in Compact-related challenges (e.g., *Gillette v. California Franchise Tax Board* (Docket No. 15-1442), *cert. denied* 10/11/16 and *Kimberly-ClarkCorp. v. Minnesota Comm'r of Revenue* (Docket No. 16-565), *cert. denied* 12/12/16), the Court appears to be giving greater consideration to the Michigan petitions. The Michigan retroactivity cases, for example, were originally scheduled to appearon the Court's 1/19/17 conference, but on 1/10/17, the justices specifically requested that Michigan respond to the various petitions for certiorari by 2/9/17 (Michigan had previously waived its right to respond). Accordingly, the Court will likely not reviewthe petitions until a conference date later in the Spring. We will, of course, continue to update the projected timeline as any further developments occur.

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Student Loan Financial Firm Asks Court to Review MA's Apportionment Rules

In *First Marblehead Corp. v. Massachusetts (First Marblehead II)*, Docket No. 16-777, ruling below at 475 Mass. 159 (2016), the Supreme Judicial Court of Massachusetts held that Massachusetts's apportionment rules, which allow theCommonwealth, in cases involving taxpayers possessing interests in loans, to assign the taxpayer's property to the location of its commercial domicile, did not violate the dormant Commerce Clause's internal consistency test.

Specifically, First Marblehead Corp. and a related entity, GATE Holdings Inc. (collectively referred to as 'GATE'), were involved in the private student lending business, and on their Massachusetts financial institution excise tax ('FIET')returns, the companies took the position that their property, which consisted of interests in securitized student loans, were serviced entirely outside of Massachusetts and were therefore not allocable to Massachusetts under the property factor of the state'sthree-factor apportionment formula.

****4** The Massachusetts Appellate Tax Board ('Board'), however, rejected GATE's approach, finding, instead, that under the FIET's apportionment rules, as set forth in G.L. c. 63 § 2A, there exists a rebuttable presumption that loan property is assignedto a taxpayer's commercial domicile if the loan is not otherwise assigned to a location where the taxpayer maintains a 'regular place of business.' In the case of GATE, which operated as a holding company, the taxpayer had no 'regular place ofbusiness' either inside or outside of the Commonwealth, and the Board therefore assigned the loans to GATE's commercial domicile—i.e., Massachusetts.

As previously reported in this column, GATE appealed the Board's ruling to the Massachusetts Supreme Judicial Court, but the court affirmed the Board's decision in *First Marblehead Corp. v. Commissioner of Revenue*, 470 Mass. 497, 23 N.E.3d 892(2015) (*First Marblehead I*). GATE then filed a petition for certiorari, asking the U.S. Supreme Court to review the ruling in *First Marblehead I*, and on 10/13/15, the Court granted GATE's petition and vacated and remanded the lowercourt's ruling for further consideration in light of the U.S. Supreme Court's decision in *Comptroller of Treasury of Maryland v. Wynne*, 135 S. Ct. 1787, 191 L. Ed. 2d 813 (2015). ***47** In *Wynne*, the Court invalidated portions of Maryland's personal income tax scheme as violating the dormant Commerce Clause under the 'internal consistency test.' Specifically, in *Wynne*, the Court described the 'internalconsistency test' as a test that 'looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate.' Applyingthis test to Maryland's personal income tax scheme, the Court held that the state's tax laws unconstitutionally discriminated against interstate commerce.

On remand, in *First Marblehead II*, the Massachusetts Supreme Judicial Court considered further whether the Commonwealth's FIET apportionment formula, as applied to GATE, failed the internal consistency test. But, even after specifically consideringthe Supreme Court's *Wynne* decision, the lower court still found that the Massachusetts tax scheme satisfied the requirements of the dormant Commerce Clause.

In affirming its earlier decision, the lower court used a hypothetical illustration to show how if GATE were subject to the same apportionment scheme in another state, the company, which would continue to lack a 'regular place of business' eitherinside or outside of Massachusetts, would remain subject to the presumption that its loan property was properly assigned to its commercial domicile. In other words, because GATE's commercial domicile is Massachusetts, any other state applying Massachusetts'sapportionment rules would also assign the loan property to the Commonwealth. Accordingly, the court held that Massachusetts's FIET apportionment regime, as applied to GATE, 'did not violate the internal consistency test or, more generally, the dormant[C]ommerce [C]lause.'

****5** GATE now asks the U.S. Supreme Court to review Massachusetts's dormant Commerce Clause analysis and asks in its petitions for certiorari (1) 'Whether an apportionment factor reflects a reasonable sense of how income is generated when it disregards theactivities and entities that actually generate the income and instead arbitrarily assigns the income to the commercial

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domicile of an owner of the income-producing entities,‘ and (2) ‘Whether the court below properly followed this Court's precedentswhen it based its conclusion that an apportionment formula was internally consistent on an assumption that other states would apply an apportionment formula different from the formula in the statute it upheld.‘

(For more background on this case, including a detailed discussion of the Massachusetts court's previous ruling, see U.S. Supreme Court Update, 25 JMT 38 (September 2015.)

Petitions Still Pending

The following two petitions remained pending as the JOURNAL went to press.

Florist challenges FL's tax on out-of-state flower sales. On 10/24/16, the U.S. Supreme Court received a petition for certiorari in *American Business USA Corp. v. Florida Dep't of Revenue*, Docket No. 16-567, ruling below as *FloridaDep't of Revenue v. American Business USA Corp*, 191 So. 3d 906 (Fla. 2016). In the case below, the Florida Supreme Court reversed a Florida Court of Appeals decision, in which the lower court held that Florida's tax on flower sales by in-state floristsdelivered to out-of-state customers violated the dormant Commerce Clause of the U.S. Constitution.

American Business USA now challenges the Florida Supreme Court's ruling and asks the U.S. Supreme Court to consider whether ‘a State [can] collect sales tax on out-of-state property ordered over the internet for out-of-state delivery, by relyingon this Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) and the State's connection to the corporation that accepts the order and arranges the sale, or does such a tax violate both the Due Process Clause and dormant CommerceClause of the United States Constitution by imposing a sales tax on the out-of-state transfer of tangible personal property?‘

(For more background on this case, including a detailed discussion of the lower court's ruling, see U.S. Supreme Court Update, 26 JMT 38 (February 2017).)

Court asked whether WA's retroactive application of amendments to the state's B&O tax comports with due process. 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 of an amendment to the state's ‘direct seller's representative‘ exemption under the 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&O taxes paid under protest in the four years prior to the state's amendment.

****6** 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 ***48** 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 Court was originally scheduled to consider Dot Foods' petition during its 1/19/17 conference, but on 1/10/17, the Court rescheduled its conference date, leading some practitioners (including the authors of this column) to speculate that the Justiceshave linked the *Dot Foods* petition with the Michigan Multistate Tax Compact retroactivity cases (discussed above) in order to potentially consider the retroactive tax issue jointly.

(For more background on this case, including a detailed discussion of the Washington Supreme Court's ruling, see U.S. Supreme Court Update, 26 JMT 39 (January 2017).)

Petitions Denied

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The Court has denied the following five petitions.

On 12/12/16, the U.S. Supreme Court denied three petitions for certiorari. First, the Court denied the petition filed in *Direct Marketing Ass'n v. Brohl*, Docket No. 16-267, ruling below at 814 F.3d 1129 (10th Cir. 2016). In the case below, theDMA, which consists of a group of businesses and organizations that market products via remote channels (such as catalogs and the Internet), asked the U.S. Supreme Court to review a ruling by the U.S. Court of Appeals for the Tenth Circuit regarding the constitutionalityof Colorado's notice and reporting requirements imposed on retailers that 'do not collect Colorado 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 doesnot discriminate against or unduly burden interstate commerce.'

Second, the Court also denied the petition for certiorari in *Kimberly-Clark Corp. v. Minnesota Comm'r of Revenue*, Docket No. 16-565, ruling below at 880 N.W.2d 844 (Minn. 2016), in which the Supreme Court of Minnesota ruled that Minnesota wasnot contractually prohibited from repealing the Multistate Tax Compact's three-factor apportionment election from the state's tax laws without also entirely withdrawing from the Compact. Accordingly, the Supreme Court of Minnesota upheld the state's refusalto allow Kimberly-Clark to use the Compact's equally weighted, three-factor apportionment formula during the tax years at issue.

And third, on 12/12/16, the Court also denied the petition for certiorari in *Cornish. v. Town of Brookline*, Docket No. 16-448, ruling below at No. 2016-031 (July 13, 2016). In *Cornish*, the Vermont Supreme Court issued an order affirminga state property tax hearing officer's fair market value assessment of a Vermont property. The property owner had asked the Court to review the Vermont court's decision, alleging that the assessment of his property, which he claimed served as a 'non-profit,faith based, independent [home] school,' violated prior Supreme Court case law, as well as the Equal Protection and Establishment Clauses of the U.S. Constitution.

****7** On 1/9/17, the U.S. Supreme Court denied another two petitions for certiorari. First, in *Self-Insurance Inst. of America v. Snyder*, Docket No. 16-593, ruling below at 827 F.3d 549 (6th Cir. 2016), the Sixth Circuit held that the Michigan HealthInsurance Claims Assessment Act (Mich. Comp. Laws §§ 550.1731-1741; the 'Michigan Act') is not prohibited by the preemption provisions of the Employee Retirement Income Security Act of 1974 ('ERISA ') (29U.S.C. § 1144(a)). The Michigan Act imposes a 1 percent tax, along with various reporting and record-keeping requirements, on all paid claims by carriers and third-party administrators to healthcare providers for services rendered in Michiganfor Michigan residents. The Self-Insurance Institute of America had petitioned the U.S. Supreme Court to review the Sixth Circuit's ruling, asking the Court whether the circuitcourt's decision was contrary to the Supreme Court's precedent announced in *Gobeille v. Liberty Mutual Insurance Co.*, 577 U.S. __ (2016).

Finally, on 1/9/17, the Court also denied a petition for certiorari in *Keller v. Herder Springs Hunting Club*, Docket No. 16-556, rulings below at *Herder Springs Hunting Club v. Keller*, 143 A.3d 358 (Pa. 2016) and *Baileyv. Elder*, 134 A.3d 484 (Pa. 2016). In the two cases below, the heirs of historic owners of subsurface rights beneath two unimproved Pennsylvania properties asked the U.S. Supreme Court to review Pennsylvania's alleged 'unconstitutional taking of privateproperty in violation of the Due Process Clause of the Fifth and Fourteenth Amendments.' Specifically, the petitioners' ancestors had sold their surface interests in the properties at issue but reserved ownership over the subsurface interests. Followingthese partial sales, however, the new surface owners' accrued various tax delinquencies, and the properties were eventually sold at a tax sale. In reviewing the heirs' claims to the subsurface rights, the PennsylvaniaSupreme Court held that because the surface and subsurface rights were rejoined as a result of the tax sale, the heirs no longer possessed any subsurface rights in the property. Moreover, the Pennsylvania Supreme Court specifically noted in its decisions thatthe published notices regarding the tax sales satisfied due process.

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[Dot Foods argues] 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' . . . .

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