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U.S. Supreme Court Update

U.S. SUPREME COURT UPDATE

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Closing of the Term

***41** As the U.S. Supreme Court's 2016 term came to a close, the Justices are set to review a dispute between Delaware and several other states as to which states have priority rights to claiming abandoned, uncashed MoneyGram ‘official checks.‘ The cases are *Delaware v. Pennsylvania et. al.*, Case No. 220145, and *Arkansas et. al. v. Delaware*, Case No. 220146. During the summer recess, the Honorable Pierre N. Leval, of the U.S. Court of Appeals for the Second Circuit, continues his role as Special Master, coordinating the taking of evidence and making reports. (The Court typically assigns original jurisdiction disputes—cases such as disputes between states that are first heard at the U.S. Supreme Court level—to a special master to conduct what amounts to a trial court proceeding.)

Since our last issue of the JOURNAL, the Court has received two petitions for certiorari involving state and local taxes. The first, *Reynolds v. Bethel Park School Dist.* (Docket No. 16-1403) asks whether a Pennsylvania sheriff's sale of property should be set aside for lack of notice in violation of the taxpayer's due process rights. The second, *Washington State Dep't of Licensing v. Cougar Den* (Docket No. 16-1498), addresses whether the Yakama Nation Treaty of 1855's ‘right to travel‘ provision precludes the State of Washington from imposing fuel taxes on a Yakama Nation corporation that transports fuel from Oregon into the State of Washington to the Yakama Indian Reservation, where it is ultimately sold.

As this issue of the JOURNAL went to press, three previously reported petitions remained pending and two previously reported petitions for certiorari were denied.

Pennsylvania's Sheriff Sale and Due Process Notice Rights

On 3/13/2017, the Court received a new petition for certiorari in *Reynolds v. Bethel Park School District,* Docket No. 16-1403, ruling below at *Bethel Park School Dist. v. Reynolds*, No. 2618 (Pa. Commw. Ct. 2016), appeal denied, Pa. S. Ct., in which the Commonwealth Court of Pennsylvania held that the taxpayer, Reynolds, was not entitled to set aside the sherriff's sale of his property based on inadequate notice.

Pennsylvania property taxes and the sheriff's sale.

****2** As explained by the court below, the Petitioner, Reynolds, undisputedly failed to pay real estate taxes on his property located in Bethel Park, Pennsylvania (the 'Property'), for the periods 1987-1989 and 1991-2005. As a result, in May 2006, Bethel Park School District (the 'District') filed a writ of scire facias sur tax claim against the Property (A 'writ of scire facias is a writ authorized to be issued as a means of enforcing payment of a municipal claim out of the real estate upon which such claim is a lien.') After Reynolds defaulted on several repayment plans, the District filed a writ of execution and served notice of a sheriff's sale with an original sale date of November 4, 2013.

The sale was postponed several times at the request of both Reynolds and the District, primarily because payments were being made on the delinquency. As a result of lack of communications (and payments) from Reynolds after August 2014, however, the District sent a letter to the property address and the tax bill mailing address by certified mail and U.S. first class mail on January 8, 2015, advising Reynolds that the property would be sold at a sheriff's sale scheduled for May 4, 2015, unless payments on the delinquency were made. When no payments were received from Reynolds, the property was sold to a third party at the sheriff's sale on May 4, 2015.

Reynolds filed a petition in trial court to set aside the sheriff's sale asserting that he failed to receive proper notice of the May 4, 2015 sale. The trial court denied Reynolds' petition and an appeal was made to the Commonwealth Court of Pennsylvania.

Commonwealth Court finds adequate notice and lack of violation of due process.

The Pennsylvania Commonwealth Court affirmed the trial court's order that the sheriff's sale should not be set aside. The court found that multiple notification letters were sent to both the property address and the tax mailing address by U.S. first class mail and certified mail, which were 'signed for and received on January 10, 2015.' Such letters were sent within the 30-day time period set forth by statute. (Section 602 of the Real Estate Tax Sale Law requires, inter alia, that notice be given to the owner of the property by certified mail at least 30 days before the sale. 72 Pa. Cons. Stat. § 5860.602.) The court also noted that counsel for Reynolds agreed during oral argument that notice of the sheriff's sale had been provided. On this basis, 'given all of the above' the court found that there was 'ample evidence to support the trial court's decision to deny the Petition because Reynolds ***42** was provided with adequate notice of the sheriff sale and there was no violation of due process.'

The Commonwealth Court also distinguished the case cited by Reynolds, *Jones v. Flowers,* 547 U.S. 220 (2006), in support of his argument that there was inadequate notice. As explained by the court, in *Jones*, the commissioner mailed two letters to the property owner via certified mail attempting to notify him of his tax delinquency and the fact that his property would be sold if he did not pay his taxes. Both certified mail letters were returned unopened and marked unclaimed. Since the commissioner took no additional steps to notify the owner of the sale, the U.S. Supreme Court held that the notice provided by the commissioner was inadequate. As noted above, given that 'the record clearly indicates that notice of both the initial and the May 4, 2015 sheriff sales were mailed to Reynolds via certified mail, and that both notices were signed for and received,' the Commonwealth Court determined that '*Jones* does not support Reynolds'argument that the District failed to provide him with adequate notice.'

****3** On December 13, 2016, Reynolds appeal to the Pennsylvania Supreme Court was denied.

Question presented.

Reynolds asks the Court: 'Whether the Sherriff's sale was in violation of the Due Process Clause of the Constitution of the United States due to lack of notification?'

Washington Asks Court to Overturn Yakama Nation 'Right to Travel' Without Taxation Victory

On 6/14/17, the Court received a new petition for certiorari in *Washington State Dep't of Licensing v. Cougar Den, Inc.*, Docket No 16-1498, ruling below at 188 Wash. 2d 55 (Wash. 2017), in which the Supreme Court of Washington held that the Yakama

Nation 'tribe[] w[as] entitled under [the Yakama Nation] [T]reaty to import fuel without holding [an] importer's license and without paying state fuel taxes.'

The Yakama Indian Nation and the Yakama Nation Treaty of 1855.

As explained by the court below, the 'Yakama Indian Reservation is a federally recognized Indian tribal reservation located within the state of Washington. ' And, '[o]utside an Indian reservation, Indian citizens are subject to state tax laws, '[a]bsent express federal law to the contrary,'' such as a treaty.

Article III of the Yakama Nation Treaty of 1855 states in relevant part: '[I]f necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured them; as also the right, in common with citizens of the United States, to travel upon all public highways. ' (Treaty with the Yakamas, 12 Stat. 951, 952-953 (1855) (hereinafter, the 'Right to Travel').

In 2013, Cougar Den, a Confederated Tribes and Bands of the Yakama Nation corporation (fuel company), owned by a Tribal member, began transporting fuel from Oregon to the Yakama Indian Reservation. The company sold such fuel to businesses located on Tribal land and owned by Tribal members. The Washington Department of Licensing (the 'Licensing Department') issued tax assessments on the imported fuel ($3.6 million of taxes, penalties and fees for hauling the fuel across state lines) and Cougar Den refused to pay, arguing that the imposition of the tax violated its Right to Travel under the Yakama Nation Treaty of 1855.

As explained below, Cougar Den appealed the assessments and an Administrative Law Judge held in an order that the assessment was 'an impermissible restriction under the treaty.' The Licensing Department appealed the order and the Director of the Licensing Department reversed the Administrative Law Judge's order. Cougar Den appealed to the Yakima County Superior Court, which reversed ***43** the Director's order and 'held that the taxation violated the tribe's right to travel.' The Licensing Department appealed the Yakima County Superior Court's decision and the Washington Supreme Court granted review.

Washington Supreme Court's interpretation of the treaty.

The Washington Supreme Court noted that '[t]here is no dispute that the taxes and licensing requirements would apply if the treaty provision does not apply here.' The court further explained that the U.S. Supreme Court's rule of treaty interpretation requires that 'Indian treaties must be interpreted as the Indians would have understood them.' The court concluded that '[t]he Department's interpretation of the treaty provision ignores the historical significance of travel to the Yakama Indians and the rule of treaty interpretation established by the United States Supreme Court.' The court specifically noted that '[i]n ruling in Cougar Den's favor, both the ALJ and the Yakima County Superior Court based their decisions on the history of the right to travel provision of the treaty, relying on the findings of fact and conclusions of law from *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997),'in particular the depiction in the record of a 'tribal culture whose manner of existence was dependent on the Yakamas' ability to travel.'

****4** The Washington Supreme Court reviewed several decisions by the U.S. Court of Appeals for the Ninth Circuit that addressed the Right to Travel, including *United States v. Smiskin,* 487 F.3d 1260 (9th Cir. 2007). *Smiskin* involved the seizure of 4,205 cartons of unstamped cigarettes by the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives, from Tribal Members' residences. The Tribal Members were charged with violating the federal Contraband Cigarette Trafficking Act (CCTA), under which it is 'unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute or purchase contraband cigarettes.' 18 U.S.C. § 2342(a).

As explained by the court below, the State of Washington requires wholesalers to affix either a tax-paid or tax-exempt stamp to cigarette packaging prior to sale. Individuals other than licensed wholesalers can transport unstamped cigarettes if they have

given notice to the Washington Liquor Control Board in advance of the transportation. Since the Smiskins did not provide notice to Washington prior to transporting the unstamped cigarettes, the government alleged that such cigarettes were unauthorized under state law, and, therefore, the Smiskins' possession and transportation of the contraband cigarettes violated the CCTA.

The Ninth Circuit held that the Smiskins were not required to notify anyone prior to transporting goods to market because the treaty ‘expressly intended that the Yakamas would retain their right to travel outside reservation boundaries, *with no conditions attached.*‘ As observed by the Washington Supreme Court, ‘[t]he [lower] court noted the ‘tremendous importance’ of the right to travel provision and refuse[d] to draw what would amount to an arbitrary line between travel and trade.‘ Finding the *Smiskin* case to be ‘nearly identical‘ to the *Cougar Den* case, the Washington Supreme Court affirmed the decision of the Yakima County Superior Court, recognizing that the Right to Travel precludes taxation.

As stated by the Washington Supreme Court, ‘[h]ere travel on public highways is directly at issue because the tax was an importation tax. The fact that the tax is imposed at the border and assessed regardless of whether Cougar Den uses the highway is immaterial because, in this case, it was impossible for Cougar Den to import fuel without using the highway.‘ The court also rejected the state's argument that applying the Ninth Circuit's reasoning ‘would lead to ‘unimagined and unintended preemption of fundamental state powers,’‘ on the basis that ‘[i]n interpreting the treaty, we are bound to read the provisions as the Tribe understood them. As noted, the right to travel provision appears to be unique to the Yakama and Nez Perce tribes [the only two tribes with the highway provision].‘ Accordingly, the court, in effect, advised the state to look to Congress, stating: ‘If the State has concerns about this treatyprovision, only Congress can revise or restrict the provisions, not this court.‘

Question presented.

****5** The Washington State Department of Licensing presents the following question for the Court: ‘Whether the Yakama Treaty of 1855 creates a right for tribal members to avoid state taxes on off-reservation commercial activities that make use of public highways.‘

Petitions Still Pending

The following three petitions for certiorari remained pending before the Court as this issue of the JOURNAL went to press.

City of West Hollywood, Calif., files response in building permit fee case. On 3/15/17, ***44** the Court received a petition for certiorari in *616 Croft Avenue LLC v. City of West Hollywood*, Docket No. 16-1137, ruling below at 3 Cal. App. 5th 621 (Cal. Ct. App. 2016). In the petition, a group of California property developers ask the U.S. Supreme Court to consider whether a West Hollywood ordinance that requires builders to either sell/rent a portion of newly developed housing units at below-market rates, or, alternatively, to pay an ‘in lieu‘ fee that is used to fund the construction of other low-income housing violates the Takings Clause of the Fifth Amendment of the U.S. Constitution.

In the case below, the developers chose to pay the in-lieu fee, but the developers faced significant delays in their construction schedule such that when they requested their final building permits in 2011, the city's proposed in-lieu fee payment had nearly doubled from what the city had proposed at the time of their original application. The developers eventually paid the fees ‘under protest,‘ and later sued the city, alleging, in part, that the fees were both facially unconstitutional and also unconstitutional as applied to their permit application under the Fifth Amendment's ‘unconstitutional conditions doctrine,‘ which, the developers argue, is set out in two U.S. Supreme Court cases: *Dolan v. City of Tigard*, 512 U.S. 374 (1994) and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

In their petition for certiorari, the developers argue that the ordinance ‘imposes the fee automatically as a condition on the approval of a building permit, without any requirement that [West Hollywood] show that the project creates a need for low-cost housing.‘ The developers therefore ask the Court whether ‘a legislatively mandated permit condition is subject to scrutiny

under the unconstitutional conditions doctrine as set out in [*Nollan* and *Dolan*].' On 4/25/17, the Court requested a response to the developers' petition. This response, a brief in opposition was filed on 6/26/17. (For more background on this case, including a detailed discussion of the West Hollywood ordinance and the lower court's ruling, see U.S. Supreme Court Update, 27 JMT 43 (June 2017).)

W. Va. seeks ruling on requiring S&U tax credits for taxes paid to neighboring cities and counties. On 4/17/17, the Court received a petition for certiorari in *Steager v. CSX Transportation*, Docket No. 16-1251, ruling below at 238 W. Va. 238 (2016), in which the Commissioner of the West Virginia State Tax Department (the 'Commissioner') asks whether a state must credit out-of-state sales taxes against its in-state use taxes or, alternatively, whether the state can satisfy the requirements of the dormant Commerce Clause by other means, such as apportioning a use tax to reach only intrastate activity.

****6** In the ruling below, the Supreme Court of Appeals of West Virginia held that the dormant Commerce Clause required that the Commissioner offer CSX Transportation ('CSX'), an operator of an interstate rail transportation system, full credit against its West Virginia use tax obligations for the sales taxes CSX paid on motor fuel to *both* other states and to the subdivisions of those other states. Specifically, the Supreme Court of Appeals applied the four-pronged *Complete Auto* test (*see Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)) and found that if the Commissioner were to credit only taxes paid to other states (and not taxes paid to subdivisions of those states), West Virginia's use tax would fail both the fair apportionment and discrimination prongs of the *Complete Auto* test.

Arguing that the West Virginia Supreme Court of Appeals' decision 'exacerbates [an] existing split among state courts of last resort about whether a State must credit out-of-state sales taxes against use taxes or whether it can satisfy the dormant commerce clause by other means,' the Commissioner presents two questions for review in his petition for certiorari:

1. Does the dormant commerce clause require a State that imposes a fairly apportioned use tax to also credit sales taxes paid to other States?

2. Does the dormant commerce clause require a State that does not impose county or municipal use taxes to provide a credit for sales taxes paid to other States' counties or municipalities?

The Court has distributed this petition for conference for September 25, 2017, when it returns for the 2017 term. (For more background on this case, including the lower court's review of the four-pronged *Complete Auto* test, see U.S. Supreme Court Update, 27 JMT 42 (July 2017).)

Comity barred Ga. property owners from challenging local fee in federal court. On 5/8/17, the Court received a petition for certiorari in *Homewood Village LLC v. Unified Government of Athens-Clarke County Georgia*, Docket No. 16-1361, ruling below at 2017 WL 491151 (11th Cir. 2017) in which a group of Georgia property owners sought to challenge an Athens-Clarke County ordinance, which imposed a fee on certain property owners to fund the county's stormwater management program. The property owners ***45** claim that the fee violates their rights under the Takings Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The property owners first brought their challenge against the fee in Georgia federal district court. The county initially sought to have the case removed from federal court under the Tax Injunction Act ('TIA'), but the lower court held that the TIA did not deprive the court of subject matter jurisdiction. According to the district court, the county ordinance imposing the stormwater charge constitutes a user 'fee,' not a 'tax,' and, thus, the TIA did not deprive federal courts of jurisdiction over claims that the fee was unconstitutional. Nevertheless, the lower court noted that '[i]t is sometimes appropriate to dismiss an action in federal court due to comity concerns even when the Tax Injunction Act does not deprive the court of subject matter jurisdiction.' According to the lower court, this was one such case.

****7** Specifically, the district court noted that, under the principle of comity, federal courts should be 'reluctant to interfere in the fiscal operations of state and local governments and must be particularly sensitive to avoid such interference when the dispute involves a constitutional challenge to a state or municipal tax or fee and an adequate remedy exists in state court. ' In the present case, the court held that the relief sought by the Georgia property owners—*i.e.*, a declaratory judgment preventing Athens-Clarke County from collecting the stormwater management fee from the petitioners—would require, 'through a federal judicial mandate, that Athens-Clarke abandon the fee system and fund the [stormwater] program in another way.' This, according to the court, is 'precisely the type of federal judicial interference that raises comity concerns that counsel in favor of federal court abstention.'

On appeal, the U.S. Court of Appeals for the Eleventh Circuit reviewed the district court's abstention decision for 'an abuse of discretion' and held that it could not conclude that the district court abused its discretion in abstaining from deciding the merits of the claims asserted. Accordingly, the circuit court upheld the lower court's dismissal of the petitioners' claims due to concerns over comity between federal courts and state governments.

In their appeal to the U.S. Supreme Court, the petitioners raise two questions for review. First, they ask, '[w]hen a district court dismisses a complaint for comity is the standard of appellate review de novo or abuse of discretion or something in between, as some Circuits have held, in conflict with the Eleventh Circuit?' And, second, the petitioners ask, '[d]oes a municipality's potential loss of user-fee revenue constitute an exceptional circumstance that requires a district court to abstain based on comity from exercising its virtually unflagging obligation to hear and decide a case over which it has undoubted jurisdiction?'

The Court has distributed this petition for conference for September 25, 2017, when it returns for the next term. (For more background on this case see U.S. Supreme Court Update, 27 JMT 39 (August 2017).)

Petitions Denied

On 6/12/17, the Court denied review in *Diversified Ingredients, Inc. v. Ohio State Tax Commissioner*, Docket No. 16-1266, ruling below at 846 F.3d 994 (8th Cir. 2017), in which the U.S. Court of Appeals for the Eighth Circuit affirmed a lower court's ruling that the Tax Injunction Act deprived the lower federal district court of subject matter jurisdiction to hear a Missouri corporation's challenges to the Ohio Commercial Activity Tax.

Also, on 6/19/17, the Court denied review in *R.J. Reynolds Co., as Successor in Interest to Lorillard Tobacco Co. v. Michigan Department of Treasury*, Docket No. 16-1260, the latest unsuccessful taxpayer challenge stemming from the Michigan Court of Appeal's 2015 decision in *Gillette Commercial Operations N. Am. & Subs. v. Michigan Dep't of Treasury,* 878 N.W.2d 891 (Mich. Ct. App. 2015), *cert. denied,* Docket No. 16-697, involving Michigan's retroactive withdrawal from the Multistate Tax Compact and its three-factor apportionment formula for calculating corporate franchise taxes.

****8** The Commonwealth Court of Pennsylvania held that the taxpayer was not entitled to set aside the sherriff's sale of his property based on inadequate notice.

The Washington Department of Licensing issued tax assessments on the imported fuel and Cougar Den refused to pay, arguing that the imposition of the tax violated its Right to Travel under the Yakama Nation Treaty of 1855.

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