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U.S. SUPREME COURT UPDATE

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Court Receives Petition in Kentucky Fuel Tax Refund Case

***42** In this issue of the JOURNAL, we review the Kentucky Department of Revenue's recent petition for certiorari in *Kentucky Department of Revenue v. Bulk Petroleum Corporation* (Docket No. 15-569). In its petition, Kentuckyseeks review of an opinion of the U.S. Court of Appeals for the Seventh Circuit, which held that an unlicensed gasoline distributor was entitled to refunds of Kentucky fuel tax that it paid to its upstream suppliers for fuel that was delivered to customersoutside Kentucky. The federal court had jurisdiction because the case arose in the context of a bankruptcy.

In addition to this new petition, the Court has also received Respondent's Brief from the taxpayer in *California Franchise Tax Board v. Hyatt* (Docket No. 14-1175). In *Hyatt*, the California Franchise Tax Board has asked the Courtto review whether principles of immunity and comity shield the Board from a multi-million dollar lawsuit in a Nevada court. As reported in our last column, the Supreme Court set 12/7/15 as the date for oral argument in this case.

At press time, we still await a date for oral argument in *Nebraska v. Parker* (Docket No. 14-1406), in which the Court has agreed to hear a challenge by a Nebraska village, several of its residents, and the state, to an Eighth Circuit ruling,which held that the village must comply with tribal liquor license and taxing regulations that impose a 10 percent sales tax on all liquor sales made on the Omaha Indian Reservation.

Finally, as we go to press, three previously reported petitions remain pending before the Court, and the Court has denied three petitions previously covered in this column.

Kentucky Challenges Federal Court's Ruling on Fuel Tax Refund

In *Kentucky Department of Revenue v. Bulk Petroleum Corporation*, Docket No. 15-569, petition for cert. filed 10/29/15, ruling below as *Bulk Petroleum Corporation v. Kentucky Department of Revenue*, 796 F.3d 667 (7thCir. 2015), the U.S. Court of Appeals for the Seventh Circuit held that Bulk Petroleum Corporation (‘Bulk‘) was entitled to a refund of Kentucky gasoline or special fuel taxes (‘Fuel Tax‘) paid on fuels delivered outside the state.

****2** In its petition, the Kentucky Department of Revenue (KDOR) argues that Kentucky's Fuel Tax did not place the legal incidence of the Fuel Tax on Bulk—who, during the relevant times, was an unlicensed dealer—but on Bulk's suppliers. Accordingly,Kentucky argues that Bulk was not a 'taxpayer' for purposes of Kentucky's Fuel Tax and, therefore, Bulk was not entitled to a refund under the state's tax statutes.

If you are wondering how the Seventh Circuit—which has appellate jurisdiction over the federal courts of Illinois, Indiana and Wisconsin—found itself resolving questions about Kentucky Fuel Tax, it is worth noting that Bulk initiated the proceedingsbelow when it sought bankruptcy protection under Chapter 11 in the Eastern District of Wisconsin. As part of its bankruptcy proceeding, Bulk filed a claim against the KDOR, seeking a refund of the Fuel Tax.

Thus, on appeal, the Seventh Circuit was forced to look beyond its usual jurisdiction and examine Kentucky's taxation scheme. Hence, the following opening sentence of the Seventh Circuit's opinion: 'In this case, we find ourselves in the unusual positionof needing to sort out questions relating to the way in which the Commonwealth of Kentucky taxes gasoline.'

Kentucky's fuel tax regime.

Like many states, Kentucky imposes an excise tax on all 'gasoline and special fuel *received* in this state.' (Ky. Rev. Stat. Ann. § 138.220(1)(a))(emphasis added). Relevant to the issues before the court below, this tax is 'paidby the dealer receiving the gasoline or special fuel' and the tax 'may be added to the selling price charged by the dealer or other person paying the tax.' (Ky. Rev. Stat. Ann. § 138.220(1)(e)).

Pursuant to Kentucky law, gasoline distributors that hold a valid license may self-assess and remit Fuel Taxes owed to the state. Holders of a license also have the benefit of remitting the Fuel Tax to the KDOR one month after the time when fuel is received. (See Ky. Rev. Stat. Ann. § 138.240.) As explained by the court, this enables licensed dealers to 'reconcile on a monthly basis the gasoline 'received' for statutory purposes within Kentucky (taxable gasoline) and the gasoline 'received'outside of Kentucky (fuel on which no tax is due).'

In contrast, unlicensed gasoline distributors, are required to pay Fuel Tax to their suppliers, and such suppliers remit the Fuel Tax to the State Treasurer. Because Kentucky law sets forth a presumption that all gasoline delivered within the state is destinedfor use within the state, the supplier must collect and remit tax on all fuel sold to the distributor, even if such fuel is distributed to stations outside the state.

Bulk's Kentucky gas purchases as unlicensed dealer.

***43** Bulk was a 'large regional gasoline distributor and gas station owner with approximately 58 gas stations in Kentucky.' Until October 30, 2006, Bulk held a license from Kentucky as a gasoline and special fuels dealer, but the KDOR revoked Bulk's licenseon October 31, 2006, after it asked Bulk to post additional security and Bulk failed to do so. Bulk then continued its operations without a license in the state until August 3, 2007.

****3** During its time as an unlicensed dealer, Bulk continued to purchase gasoline from the Louisville fuel terminals of two Kentucky suppliers—Marathon and BP. These suppliers included Kentucky Fuel Tax on Bulk's invoices. And, as discussed above, thesesuppliers had to collect the Fuel Tax on all of the gasoline purchased by Bulk and processed in Kentucky, notwithstanding that Bulk was going to ship some of the gasoline to Indiana and Tennessee. After collecting the Fuel Tax from Bulk, Marathon and BP remittedthe revenue to the state.

Seventh Circuit deems Bulk a Kentucky taxpayer entitled to a refund.

Based on the fact that certain quantities of the gas that Bulk purchased as an unlicensed dealer were shipped to customers outside of Kentucky, the company sought a refund for the Fuel Tax it paid to its suppliers related to these purchases. However, theKDOR denied Bulk's refund claims.

The KDOR agreed that it did not have the right to tax fuel shipped out of state, but the Department responded to Bulk's refund claim by stating, 'Only a licensed dealer is allowed to purchase product without the Kentucky tax for export.' Essentially,the KDOR argued that Bulk never paid any Fuel Tax while unlicensed, but rather Marathon and BP paid the Fuel Tax, and Bulk should seek its refund from those suppliers rather than from the State of Kentucky.

The central question before the Seventh Circuit was, therefore, how Bulk's status as an unlicensed dealer impacted its status as a taxpayer under the Fuel Tax statute. Or, put differently, whether the requirement that Bulk prepay the Fuel Tax to its suppliersduring its time as an unlicensed dealer had the effect of making the suppliers the 'taxpayers' for purposes of obtaining a refund. The Seventh Circuit disagreed with the KDOR, holding that, pursuant to Kentucky law, the legal incidence of the FuelTax is on the receiving party (i.e., the party receiving the gasoline in the state), regardless of who collects the tax, and Bulk was the receiving party.

Question presented.

'[W]hether the court below failed to apply this Court's precedent for determining the incidence of a state fuel tax developed in such cases as *American Oil Co.* v. *Neill*, 380 U.S. 451 (1965), *Gurley v.Rhoden*, 421 U.S. 200 (1975) and *Wagnon v. Prairie Potawatomi Nation*, 546 U.S. 95 (2005), with respect to the State of Kentucky's gasoline and special fuels tax of KRS 138.220(1) and instead effectively resurrected the discarded rule of *PanhandleOil Co. v. State of Mississippi ex. Rel. Knox*, 277 U.S. 218 (1928), and its progeny to the incorrect result.'

California Inventor Files Brief in Pending State Sovereignty Case

As reported in our last column, the Supreme Court set 12/7/15 as the date for 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). On 10/23/15, the Court receivedthe Respondent's Brief, which likely offers a preview of the arguments to come.

****4** 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 California Franchise Tax Board ('FTB').The decision, however, was not a complete victory for the FTB.

Despite the FTB's claims that all of Hyatt's causes of action were barred under principles of discretionary-function immunity and comity, the Nevada high court affirmed the district court's findings that the FTB committed fraud and intentional inflictionof emotional distress in its audit of Hyatt. Accordingly—although the damages imposed against the FTB were significantly reduced by the Nevada court—the FTB was unable to escape all liability.

In its petition for review, the FTB presented three questions for review: '[1] Whether the federal discretionary-function immunity rule, 28 U.S.C. § 2680(a),is categorically inapplicable to intentional torts and bad-faith conduct; [2] Whether Nevada may refuse to extend to sister States haled into Nevada courts the same immunities Nevada enjoys in those courts; [and 3] Whether *Nevadav. Hall*, 440 U.S. 410 (1979), which permits a sovereign State to be hauled into the courts of another State without its consent, should be overruled.'

As reported in previous columns, the Supreme Court has agreed to review the second and third questions, and, as mentioned above, on 10/23/15, Hyatt filed his Respondent's Brief, arguing that California is not protected from suit in Nevada courts. Accordingto Hyatt, states do not have sovereign immunity as a matter of right. Instead, Hyatt frames sovereign immunity as a matter of comity (i.e., as a principle dependent on the consent of a home state) and argues that from the time of the country's founding, 'Statesdid not, and do not, have immunity as of right in each others' courts.'

Hyatt also notes that 'the Court has already rejected the [FTB's] immunity-as-of-right argument in *Nevada v. Hall*, 440 U.S. 140 (1979) . . . and the [FTB] offers no 'special justification' for suddenly dispensingwith that established precedent.' Accordingly, Hyatt asks the Court to affirm the judgment of the Nevada Supreme Court. (For more background on this case, including a detailed discussion of the underlying audit, see U.S. Supreme Court Update, 25JMT 40 (July 2015).)

Awaiting Oral Argument Date in Nebraska Tribal Sales Tax Dispute

As reported in our last column, on 10/1/15, the Court agreed to hear a challenge by a group of Nebraska alcoholic beverage dealers operating in or around the village of Pender, Nebraska, in *Nebraska v. Parker*, Docket No. 14-1406, ruling belowas *Smith v. Parker*, 774 F.3d 1166 (8th Cir. 2014). The U.S. Court of Appeals for the Eighth Circuit affirmed a lower court's ruling that the beverage dealers (who are joined by the Village and the state) must comply with tribal taxing provisionsthat impose a 10 percent sales tax on the purchase of alcoholic beverages.

****5** The tax at issue applies only to sales on tribal land, and the courts below found that because the Omaha Indian Reservation had not been diminished by an 1882 Act of Congress, the Village of Pender ***44** remained located on Omaha tribal land and, thus, the taxapplied to liquor sales in the village. This case will allow the Court to determine whether Congress intended to diminish the boundaries of the Omaha Indian Reservation in Nebraska when it enacted an 1882 Act that ratified an agreement for the sale of Omahatribal lands to non-Indian settlers. As we go to press, we still await the Court's scheduling of oral arguments. (For more background on this case, see U.S. Supreme Court Update, 25 JMT43 (January 2016).)

Petitions Still Pending

The following three petitions remained pending as the Journal went to press.

Due Process challenge to CA's unclaimed property laws. In *Taylor v. Yee*, Docket No. 15-169, petition for cert. filed 8/5/15, ruling below at 780 F.3d 928 (9th Cir. 2015), a group of Californiataxpayers ask the Court to review the constitutionality of California's Unclaimed Property Law (Cal. Civ. Proc. Code §§ 1300, et seq.; 'UPL') on an as-applied basis. The U.S. Court of Appeals for the Ninth Circuit held that the CaliforniaController did not violate the Due Process Clause in administering the UPL. Specifically, it found that the taxpayers failed to sufficiently state an as-applied claim to support their argument that the Controller failed to provide constitutionally adequatenotice for the transfer of property under the UPL on a pre-escheat basis by failing to obtain information from all available state databases.

In their petition for certiorari, the taxpayers cite to the Supreme Court's recent decision in *Horne v. Department of Agriculture*, in which the Court held that the U.S. Government had violated a group of raisin growers' constitutional rightsunder the Takings Clause of the Fifth Amendment by requiring growers to set aside a certain portion of their raisins for government use without offering just compensation.

The taxpayers ask the Court whether, in light of that decision, the Ninth Circuit's ruling should be remanded for further proceedings. Alternatively, the taxpayers ask the Court to consider whether the UPL violates the Due Process Clause because it allegedly'deprives owners of their property without affording constitutionally adequate notice.' (For more background on this case, including a discussion of the current notice requirements under California's UPL, see U.S. Supreme Court Update, 25JMT 41 (November/December 2015).)

NV energy company challenges denial of a refund for use tax paid under a facially unconstitutional tax statute. In *Sierra Pacific Power Company v. Nevada*, Docket No. 15-25, petition for cert. filed 7/2/15, ruling below at 338 P.3d1244 (Nev. 2014), the Nevada Supreme Court, in an en banc opinion, held that two subsidiaries of NV Energy, Inc. were not entitled to refunds for use taxes paid under an admittedly unconstitutional tax provision.

****6** According to the Supreme Court of Nevada, the energy companies were not entitled to refunds for use taxes paid under the statute because they did not show the tax, as actually assessed, discriminated against interstate commerce. Specifically, the court foundthat the energy companies paid no higher tax than their competitors and that while an exemption granted under the statute was unconstitutional, the tax itself was not.

NV Energy asks the U.S. Supreme Court to review the Nevada court's holding. Specifically, NV Energy asks the court to consider whether 'a state court violate[s] the federal Due Process rights of a taxpayer to 'meaningful backward-lookingrelief' and a 'clear and certain remedy' for the exaction of an unconstitutional tax . . . by holding that even though a challenged tax scheme facially violates the dormant Commerce Clause, an affected taxpayer is not entitled to a refund absent proofthat an in-state competitor benefited from the discriminatory tax scheme.'

On 11/16/15, the Nevada Department of Revenue filed its brief in opposition, asking the Court to reject the petition and arguing that the state is not required to provide a refund for a use tax that violated the dormant commerce clause unless a taxpayercan prove harm. (For more background on this case, see U.S. Supreme Court Update, 25 JMT 41 (November/December 2015).)

ERISA preemption provision challenge to MI health insurance tax. In *Self-Insurance Institute of America, Inc. 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 U.S. Court of Appeals for the Sixth Circuit affirmed a district court's ruling that the Michigan Health Insurance Claims Assessment Act (Mich. Comp. Laws §§ 550.1731-1734; the 'Michigan Act')—whichimposes 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 Michigan for Michigan residents—is not prohibited byERISA's preemption provision (29 U.S.C. § 1144(a)).

As explained by the Sixth Circuit in its decision upholding the Michigan Act, one of the purposes of ERISA is 'to provide a uniform regulatory regime over employee benefit plans.' Accordingly, 'ERISA contains a broad preemption provision that'supersede[s] any and all State laws insofar as they . . . *relate* to any employee benefit plan' that falls under the regulation of ERISA. (29 U.S.C. §1144(a))' (emphasis added). The Sixth Circuit interpreted this standard to mean that '[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.'

In the proceedings below, the Self-Insurance Institute of America, Inc. ('SIIA ') argued that the Michigan Act has an impermissible connection with employee benefit plans inasmuch as the Michigan Act: '(1) interferes with the administration ofthe plans; (2) imposes administrative burdens in addition to those prescribed by ERISA; and (3) interferes with the relationships between ERISA-covered entities.' The Sixth Circuit disagreed with all three of SIIA's contentions, however.

****7** In its petition for review, SIIA argues that '[t]he circuit court invoked a strong presumption against the preemption of state taxing powers to read [ERISA's preemption provisions] narrowly despite Congress's deliberate choice ofpreemptive language whose breadth has been repeatedly emphasized by this Court, and Congress's express recognition that ERISA can and does preempt state tax laws.' Accordingly, SIIA argues (as it did in the proceedings below) that the Supremacy Clauseof the U.S. Constitution (art. VI, § 2) and ERISA's preemption provision, prohibit the application of the Michigan Act to ERISA-covered entities. (For more background on this case, including a detailed discussion of the circuit court's response to SIIA'sspecific claims, see U.S. Supreme Court Update, 25 JMT 45 (May 2015).)

Petitions Denied

***45** The Court denied review in the following previously reported petitions.

DIRECTV, LLC v. Massachusetts Department of Revenue, Docket No. 14-1499, petition for cert. denied 11/2/15, ruling below at 25 N.E.3d 258 (Mass. 2015) and ***DIRECTV, Inc. v. Roberts***, Docket No. 14-1524, petition forcert. denied 11/2/15, ruling below at No. M2013-0167-COA-R3-CV (Tenn. 2015). DIRECTV and DISH Network, two providers of direct broadcast satellite services (the 'satellite providers'), petitioned the Supreme Court to review the question of whetherbusinesses are 'similarly situated' for Commerce Clause purposes if they directly compete in a relevant market.

In the two rulings below, both the Massachusetts Supreme Judicial Court and the Tennessee Court of Appeals found that because of varying regulatory schemes, the satellite providers were not similarly situated to cable providers. The satellite providers weretherefore unable to show that the states' tax schemes discriminated against satellite providers in violation of the dormant Commerce Clause.

Cleveland Board of Review v. Hillenmeyer, Docket No. 15-435, petition for cert. denied 11/9/15, rulings below as *Hillenmeyer v. Cleveland Board of Review*, N.E.3d (Ohio 2015) and *Saturday v. Cleveland Board of Review*,33 N.E.3d 46 (Ohio 2015). The City of Cleveland Board of Review asked the Court to review two decisions issued by the Ohio Supreme Court, in which the court held that Cleveland's application of its 'games-played' apportionment method used to determinetaxable wages of nonresident professional athletes violated the Due Process Clause of the U.S. Constitution when applied to National Football League players. Under the 'games-played' apportionment method, Cleveland taxed the income earned by nonresidentathletes based on a fraction, the numerator of which was the total number of games that occurred within the City over a denominator equal to the total number of games played everywhere.

In contrast to the 'games-played' method, most other cities and states that tax professional athletes on a portion of their income do so on the basis of all 'duty days,' not just games. The Ohio Supreme Court struck down the 'games-played'method, finding that the resulting tax reached income related to services that were performed outside of Cleveland and, thus, the city's tax was extraterritorial and unconstitutional.

****8** The Seventh Circuit disagreed with the KDOR, holding that, pursuant to Kentucky law, the legal incidence of the Fuel Tax is on the receiving party (i.e., the party receiving the gasoline in the state), regardless of who collects the tax.

Hyatt frames sovereign immunity as a matter of comity (i.e., as a principle dependent on the consent of a home state).

Nebraska v. Parker will allow the Court to determine whether Congress intended to diminish the boundaries of the Omaha Indian Reservation in Nebraska when it enacted an 1882 Act that ratified an agreement for the sale of Omaha tribal landsto non-Indian settlers.

The taxpayers [in *Taylor v. Yee*] ask the Court to consider whether California's UPL violates the Due Process Clause because it allegedly 'deprives owners of their property without affording constitutionally adequate notice.'

SIIA argues that the Supremacy Clause of the U.S. Constitution and ERISA's preemption provision, prohibit the application of the Michigan Act to ERISA-covered entities.

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