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Supreme Court Update

SUPREME COURT UPDATE - STATE AND LOCAL TAXES

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***33** This column focuses on current challenges before the U.S. Supreme Court that involve state and local tax matters, including four new petitions for certiorari involving: (1) a Commerce Clause challenge to Washington's business and occupation ('B&O') surtax on specified financial institutions; (2) a Tax Injunction Act challenge involving Texas' 'sexually oriented business' fee, which is a $5-per-customer charge on businesses that serve alcohol to patrons of live nude entertainment; and (3) a federal immunity challenge to the imposition of New York's mortgage recording tax on mortgages issued by New York State federal credit unions. Also, covered are new briefs filed in matters discussed in the March 2022 issue of JTAX, including (4) the First Amendment challenge to the City of Cincinnati's municipal billboard tax; and (5) the multistate challenge to the $10,000 cap on the state and local tax deduction. Finally, this column discusses the denial of the petition filed in (6) *Ferrellgas Partners, L.P. v. Director, Division of Taxation* (Docket No. 21-641).

1. Commerce Clause Challenge to Washington B&O Surtax on Specified Financial Institutions

In *Washington Bankers Association, et al. v. Washington, et al.* (Docket No. 21-1066), Petitioners, Washington Bankers Association and American Bankers Association are two non-profit banking associations (the 'Associations '). Petitioners filed a petition for writ of certiorari asking the U.S. Supreme Court to review and overrule the Supreme Court of Washington's Commerce Clause decision. Specifically, in the ruling below, in *Washington Bankers Association, et al. v. Washington, et al.*, 198 Wash.2d 418 (Sept. 30, 2021), the Supreme Court of Washington affirmed and upheld the Superior Court of Washington's ruling that Washington's B&O surtax on 'specified financial institutions' did not violate the U.S. Dormant Commerce Clause (as well as Petitioners standing to sue).

History of the surtax

In 2019, the Washington Legislature enacted Substitute House Bill 2167 ('SHB 2167') imposing an additional 1.2 percent B&O tax (the 'Surtax') on 'specified financial institutions.'[1] (The law was effective January 1, 2020).[2] Under the law, 'specified financial institutions' are 'member[s] of a consolidated financial institution group that reported on its consolidated financial statement for the previous calendar year [global] annual net income of at least $1 billion dollars.'[3] As noted by the Washington Supreme Court, '[a]ny financial institution, regardless of whether it is physically located in or out of state, that meets this threshold must pay the increased tax rate.' In other words, although the additional Surtax is applied to in-state earnings, it is triggered by the global net income of the entire affiliated financial group, regardless of how little revenue the taxpaying institution generates in Washington. The stated purpose of the legislation was to address certain findings made by the lawmakers, described by the lower court as follows: 'The legislature found that despite the economic success of Washington ***34** industry, Washington families still struggle to meet basic needs while at the same time carrying the burden of funding schools and essential services. *Id.* The disparity in wealth affects middle and low income earners. *Id.* To address these disparities, the legislature concluded 'those wealthy few who have profited the most from recent economic expansion can contribute to the essential services and programs all Washington families need.' *Id.*'

****2** Prior to the enactment of SBH 2167, financial institutions were subject only to the base B&O tax at a rate of 1.5% of the gross income they earned on their business in the state. (The B&O tax is an excise tax on gross income imposed for the 'privilege of doing business' in Washington, and as noted by the court below, '[a]pportionment allows states [like Washington] to tax the part of an interstate transaction that takes place within the state.') The Washington Supreme Court highlighted in its decision, the fact that '[f]or the first three months of [2020], the State received $34 million in revenue from 153 financial institutions, including three Washington-based taxpayers.'

Procedural history

Before the Surtax became effective, the Associations 'challenged the increased tax rate in a declaratory action on behalf of their members,' arguing that the Washington B&O Surtax on specified financial institutions violates the Commerce Clause of the U.S. Constitution. The Washington trial court agreed, holding that the 1.2% surtax 'discriminates against out-of-state-businesses both in effect and purpose in violation of the commerce clause.' Washington appealed the trial court decision seeking review of the trial court's decision that the Washington B&O Surtax violates the Dormant Commerce Clause.

Washington Supreme Court decision

The Supreme Court of Washington begins its decision by discussing the U.S. Commerce Clause. 'The commerce clause grants Congress the authority to regulate commerce with foreign nations, and among the several states, and with the Indian tribes. U.S. Const. art. I, § 8, cl. 3.' Per the lower court, courts have read a negative or 'dormant' aspect of the Commerce Clause: '[i]mplicit in this affirmative grant of power is the negative or 'dormant aspect' of the clause: states intrude on this federal power when they enact laws that unduly burden interstate commerce.' The Supreme Court of Washington further explains that '[r]egulating interstate commerce is the purview of the federal government, but states retain the authority to regulate matters of local concern, including the power to impose and collect taxes on commerce related to that state.'

As many of our readers know, the Supreme Court established a four-part test in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed 2d 326 (1977), to determine whether a state's tax is constitutional under the Commerce Clause. Per the lower court, under *Complete Auto Transit,* to pass constitutional muster, the tax must be "(1) 'applied to an activity with a substantial nexus with the taxing State,' (2) 'fairly apportioned,' (3) nondiscriminatory with respect to interstate commerce, and (4) 'fairly related to the services provided by the state.'"[4] The Washington Supreme Court made clear that the sole issue before it was whether the B&O Surtax on specified financial institutions satisfies the third prong of Complete Auto - whether it is nondiscriminatory with respect to interstate commerce. The lower court explains that 'a tax may be discriminatory on its face, in purpose, or by having the effect of unduly burdening interstate commerce.'[5] And, furthermore, the lower court states that '[d]iscrimination means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.' As noted by the lower court, if the tax is discriminatory on its face, in effect, or in purpose, then the law is per se invalid. If the law is not per se invalid, 'but has mild disparate effects and potential neutral justifications, the law is generally analyzed under *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed. 2d 174 (1970).'

****3** The Washington Supreme Court first addresses whether the Surtax is facially discriminatory. The lower court 'agree[s] with the trial court that the tax is facially neutral' because '[a] facially discriminatory law textually identifies out-of-state persons or entities and grants them unfavorable treatment.' Here, the lower court finds that the Surtax is imposed on '*any* financial institution meeting the $1 billion consolidated net income threshold. ' Therefore, because the Washington Supreme Court concludes that 'the statute does not distinguish between in-state and out-of-state taxpayers, it does not facially discriminate against interstate commerce.'

The Washington Supreme Court next addresses whether the Surtax has a discriminatory effect. The lower court concludes that the Surtax does not have a discriminatory effect because '[c]ontrary to the Associations argument, disproportionate economic effect on taxpayers does not render a tax discriminatory. The Supreme Court has routinely upheld state statutes against discriminatory effect claims when such laws mainly and even *solely* apply to out-of-state interests.' The lower court observes that the Surtax's imposition is on resident and nonresident institutions alike, and thus the Supreme Court's decisions in *Commonwealth Edison Co. v. Montana* and *Exxon Corp. v. Governor of Maryland,* are instructive in upholding the tax.[6] Specifically, the lower court finds that '*[a]ll* financial institutions operating in-state that generate net income of $1 billion pay the challenged B&O tax. Additionally, the burden of the tax depends on net ***35** income just as the burden in *Commonwealth Edison* depended on the amount of coal consumed - that is, something other than a distinction between in-state and out-of-state consumers.' The Supreme Court of Washington also concludes '[t]hat the tax is borne primarily by out-of-state institutions is of no moment [under U.S. Supreme Court precedent].' Additionally, the Washington Supreme Court explains that 'the effect of the challenged tax [] does not shift the competitive balance in favor of local interest' because 'the tax offers not such clear competitive advantage to local financial institutions; rather, qualifying Washington-based institutions must pay the same increase tax rate as out-of-state institutions.' Also, the lower court analyzes and concludes that the Surtax satisfies the Commerce Clause's internal consistency test, which looks to whether multiple taxation would occur if every other state adopted the same law.

Next, the Washington Supreme Court addresses whether the Surtax has a discriminatory purpose. The Washington Supreme Court concludes that the Surtax does not have a discriminatory purpose because it was enacted 'to address disparities in wealth and income and to fix Washington's regressive tax code, the legislature imposed the increased tax rate on the 'wealthy few who have profited the most from recent economic expansion' and 'can contribute to the essential services and programs all Washington families need.'" The lower court also finds that the *Pike* Balancing Test is unnecessary in this case because '*Pike's* balance test is triggered 'only' when the challenged law discriminates against interstate commerce in practice.' Nevertheless, in an effort to be complete, the Washington Supreme Court addresses the Associations arguments and concludes that the challenged Surtax satisfies the *Pike* balancing test. Specifically, the lower court provides the following *Pike* analysis. Before the trial court, the Associations argued that 'the tax fails *Pike* for three reasons: (1) the legislature's finding on national wealth and income disparity is not a legitimate *local* interest and reorganizing the tax burden has 'nothing whatever to do with' wealth disparity or personal wealth, (2) the effect on interstate commerce is not incidental because it imposes higher costs on institutions that will influence investments and pricing decisions, and (3) the local benefits could have been achieved through a less restrictive alternative.' In addressing the first part of the *Pike* balancing test, the Washington Supreme Court determined that '[t]he Association offers no persuasive evidence that lawmakers did not rationally believe a progressive tax would, in some measure, address income and wealth disparity. In addressing the second part of the *Pike* balancing test, the Washington Supreme Court concluded that 'economic hardship alone is insufficient to invalidate a law because the commerce clause protects markets, 'not taxpayers as such."' In addressing the third and final part of the *Pike* balancing test, the Washington Supreme Court found that while there were alternative means of generating additional revenue, 'levying further taxes on entities less able to pay than those wealthy few is contrary to the legislature's goal of changing the state's regressive tax code.'

****4** *Question presented:* 'Does a law that is triggered by a proxy for participating in interstate commerce and that burdens out-of-state entities almost exclusively violate the Dormant Commerce Clause?'

2. Tax Injunction Act Challenge to Texas' 'Sexually Oriented Business' Fee

In *Glenn Hegar, Comptroller of Public Accounts of the State of Texas v. Texas Entertainment Association, Inc.* (Docket 21-1258), Petitioner Glenn Hegar, Comptroller of Public Accounts of the State of Texas, petitions for review of the Court of Appeals for the Fifth Circuit's decision that Texas' ‘sexually oriented business‘ fee (the ‘SOBF‘) is a regulatory fee, rather than a tax, and thus, the Tax Injunction Act does not preclude federal court jurisdiction over the case.

The Tax Injunction Act (‘TIA‘) bars federal courts from enjoining ‘the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.‘[7] As explained by the Fifth Circuit Court of Appeals, ‘[w]hether the TIA precludes federal court jurisdiction in this case is dependent on whether the SOBF is considered a tax or a regulatory fee. If the $5 levy is a tax, the TIA bars federal court jurisdiction.‘

The SOBF

Effective January 1, 2008, Texas enacted a ‘sexually-oriented business‘ fee (‘SOBF‘). The SOBF ‘impos[es] a $5-per-customer charge on businesses that serve alcohol in the presence of ‘nude’ entertainment.‘ A ‘sexually oriented business‘ is defined as ‘a nightclub, bar, restaurant, or similar commercial enterprise that: (A) provides for an audience of two or more individuals live nude entertainment or live nude performances; and (B) authorizes on-premises consumption of alcoholic beverage.‘[8] The statute defines the term ‘nude‘ as ‘entirely unclothed‘ or ‘clothed in a manner that leaves uncovered or visible through less than fully opaque clothing any portion of the breasts below the top of the areola of the beasts, if the person is female, or any portion of the genitals or buttocks.‘[9]

Fifth Circuit TIA decision

The Fifth Circuit affirmed the District Court's decision, ruling that the SOBF was a regulatory fee and not a tax. The Fifth Circuit looked to an earlier Fifth Circuit decision, *Neinast v. Texas,*[10] where the circuit court ‘stated that a fee: is imposed (1) by an agency, not the legislature; (2) upon those it regulates, not the community as a whole; and (3) for the purpose of defraying regulatory costs, not simply for general revenue-raising purposes. ‘ Applying the *Neinast* factors, the Fifth Circuit ‘conclude[s] that the SOBF is a fee, not a tax, such ***36** that the TIA does not defeat jurisdiction.‘

First, the circuit court makes clear that it is ‘undisputed that the SOBF was imposed by the legislature‘ and ‘although [it] agrees with the district court that this fact moved the assessment on the spectrum closer to a classic tax, it [finds that] it is not dispositive.‘ The Fifth Circuit states that [i]n enacting the SOBF, the Texas legislature used the word ‘fee‘ instead of ‘tax‘ within the statute itself, stating that the purpose of the law ‘relat[ed] to the imposition and use of a fee on certain sexually oriented businesses and certain programs for the prevention of sexual assault‘ and ‘[a]lthough labels may not be dispositive, the statutory text actually chosen by the legislature is the best yard stick of the legislature's intent.‘

****5** With respect to the second *Neinast* factor, the Fifth Circuit looked to the magistrate judge's recommendation that the district court adopted, which concludes that the text of the law made clear that ‘the SOBF was imposed solely on sexually[] oriented businesses that allow alcohol consumption, as opposed to the public at large.‘ The Fifth Circuit concludes that ‘such a limited scope of activity weighs in favor of the SOBF's classification as a fee, not a tax, because the vast majority of the community at large is unaffected by the SOBF.‘

Finally, with respect to the third *Neinast* factor, the Fifth Circuit finds that ‘the SOBF clearly serves a regulatory purpose.‘ The circuit court concludes that the SOBF ‘serves both direct and indirect regulatory aims, ‘ including: (1) ‘the fee raises the costs of sexually oriented businesses that provide an audience of two or more with live nude entertainment and authorizes consumption of alcohol on the premises‘ (2) ‘requires these businesses to conform with recordkeeping requirements‘; and (3) ‘funds raised by the SOBF are distributed to a sexual assault program fund, not general revenue.‘

Question presented: The Texas Comptroller argues in its petition for writ of certiorari that the Fifth Circuit's TIA holding conflicts with decisions of three circuit courts and also conflicts with eight other circuits' approach to distinguishing taxes from fees. The Comptroller presents the following question to the Court: '[W]hether, under the TIA, a state revenue measure is a tax if it raises public revenue, notwithstanding a regulatory purpose, as three circuits would hold; if the measure lacks corresponding administrative benefits, as eight circuits would hold; or only if it serves no regulatory purposes at all, as the Fifth Circuit has held.'

3. Federal Immunity Challenge to New York's Mortgage Recording Tax

In *O'Donnell & Sons, Inc. v. New York State Department of Taxation and Finance* (Docket No. 21-1245), a family-owned home builder and member of TEG Federal Credit Union, requests the Court to review a lower court's decision that mortgages issued by New York State federal credit unions are not exempt from the imposition of the New York State mortgage recording tax.

The Supreme Court, Appellate Division, Second Department, New York, found that it was bound by a decision of the Court of Appeals of New York, *Hudson Va. Fed. Credit Union v. New York State Dept. of Taxation and Fin.,*[11] where New York's highest court found 'based on principles of statutory interpretation and the legislative history of the Federal Credit Union Act, mortgages issued by New York State federal credit unions are not exempt from the imposition of the New York State mortgage recording tax.'

Question presented: 'Whether the Federal Credit Union Act - which exempts federal credit unions 'from all taxation' other than taxes on credit unions' real property and tangible personal property, 12 U.S.C. § 1768 - prohibits the imposition of a state tax on the recording of federal credit union mortgages.'

4. Briefs Filed in First Amendment Challenge to Cincinnati's Billboard Tax

****6** On December 14, 2021, the City of Cincinnati ('Cincinnati') filed a petition for writ of certiorari to review the constitutional conflict between the highest courts of two states, Maryland and Ohio.[12] The Supreme Court of Ohio held in *Lamar Advantage GP Company, L.L.C. v. City of Cincinnati,*[13] that the City of Cincinnati's billboard tax violated the First Amendment of the U.S. Constitution, reaching the opposite conclusion as the Maryland Court of Appeals did in *Clear Channel Outdoor, Inc. v. Director, Department of Finance of Baltimore City,* Case No. 24-C-18-001778 (Md. 2021), which case is also currently before the Court on a petition for writ of certiorari.[14]

Brief of Lamar Advantage GP Company, LLC

On February 25, 2022, Lamar Advantage GP Company, LLC ('Lamar Advantage') filed a brief in response to Cincinnati's petition for writ of certiorari. In its opening statement, Lamar Advantage argues that the Ohio Supreme Court's decision was correct and in light of the circuit split, the Court should grant certiorari and rule on the merits. Specifically, Lamar Advantage argues that the Ohio Supreme Court 'correctly applied this Court's precedents and invalidated a municipal tax singling out billboards [...]. It's brief notes, '[a]s the court recognized, the First Amendment's protections require the application of heightened scrutiny to a tax targeting a single speech platform or a small group of speakers, and the city's sole stated interest in raising revenue cannot justify such a tax.' Lamar Advantage also argues that in rejecting the Maryland Court of Appeals' conclusion in *Clear Channel Outdoor, Inc. v. Director,* ***37** *Department of Finance of Baltimore City*,[15] the Ohio Supreme Court followed this Court's precedents, which have established that 'the threat of censorship, chilled expression, and viewpoint discrimination are present when the government singles out *any* publication medium for a special burden, whether or not the medium is part of the traditional press (emphasis in original).'

Lamar Advantage's first argument: the lower court correctly followed the Court's precedents

Lamar Advantage argues that the decision below is correct. Specifically, it argues that the ‘Ohio Supreme Court correctly concluded that Cincinnati's tax is subject to strict scrutiny because it singles out a small group of publishers for a special burden, for no purpose other than to raise general revenues.‘ Lamar further maintains that the Ohio Supreme Court ‘reached that conclusion through a faithful application of th[e] Court's precedents governing selective taxation of the press.‘ Lamar Advantage reviewed a long line of the U.S. Supreme Court's precedents, arguing that ‘this Court has recognized that the liberty of the press is not confined to newspapers and periodicals and that the press includes every sort of publication which affords a vehicle for information and opinion.'‘[16] Lamar Advantages uses this line of cases to reason that the Supreme Court has consistently protected ‘against the targeted burdening of a wide variety of speakers and speech platforms,‘ and that it ‘fit[s] comfortably within th[e] Court's expansive conception of the press.‘[17] Lamar Advantages acknowledges that while the government ‘may subject speech platforms to generally applicable taxes without running afoul of the First Amendment,‘ targeted taxation of a single speech platform or a small group of speakers ‘raises concerns that strike at the heart of the First Amendment.‘[18] After outlining the intent of the original Framers of the United States Constitution in drafting the First Amendment, Lamar Advantage suggests that ‘the core First Amendment problem with selective taxation of a speech platform is the limitation of free expression and flow of information vital to an informed public opinion.‘

****7** After discussing the factual framework for the U.S. Supreme Court's decision in *Minneapolis Star*[19] and *Arkansas Writer's Project*,[20] Lamar Advantage describes the principles upon which the Court has consistently invalidated state taxes that target a single speech platform or a small group of speakers. It also cites to and relies on, *Leathers v. Medlock*,[21] where the U.S. Supreme Court ‘identified three distinct characteristics of a tax, each of which triggers heightened scrutiny: (1) when a tax singles out the press; (2) when it targets a small group of speakers; and (3) when it discriminates on the basis of the content of taxpayer speech. ‘ Using this framework, Lamar Advantage argues that ‘Cincinnati's billboard tax was unconstitutional [...] because it singled out protected speakers and speech publishers for a special burden without an adequate justification.‘

Lamar Advantage's second argument: the question presented is important and timely and warrant's the Court's review and affirmation

Lamar Advantage believes that the decision reached by the Ohio Supreme Court is correct. However, Lamar Advantage asks this Court to review the question presented as ‘there is now an unambiguous conflict between state courts of last resort on an important question of First Amendment law.‘ Lamar Advantage argues that the Supreme Court's review is timely and necessary because ‘[i]f left unresolved, other municipalities facing budget deficits may choose to implement similar taxes, significantly increasing the substantial risk that government will censor and chill expression [...] under the guise of raising revenue. ‘ Furthermore, it argues that an expansive definition of ‘the press‘ is of particular importance ‘[a]s technological innovation spawns ever more varied speech platforms‘ and lower courts ‘navigate the contours of free-speech protections for new media.‘ As state and local governments are searching for additional sources of much-needed revenue, allowing municipalities to adopt a narrowed interpretation of ‘the press‘ and exclude certain platforms ‘would cabin the First Amendment and deprive non-traditional publishers of the protection from government censorship rightfully afforded under the Constitution.‘

Cincinnati's Reply Brief

On March 16, 2022, Cincinnati filed a reply brief. In its reply brief, Cincinnati agrees with Lamar that certiorari should be granted to address the merits of the billboard tax. Specifically, Cincinnati argues that there is a clear conflict between appellate courts given the recent decision by the Maryland Court of Appeals that upheld the denial of Clear Channel's request for refunds of Baltimore City excise taxes paid on the privilege of exhibiting outdoor advertising displays in the City.[22] In support of its contention that the billboard tax at issue should not be subject to review under strict scrutiny, Cincinnati argues that ‘billboard owners who rent tier signs do not function as members of the traditional (or non-traditional) press, and Cincinnati's tax on those who engage in this commercial activity raises no speech-suppression concerns.‘

Cincinnati's first argument: lower courts are in direct conflict on an important First Amendment issue

****8** The highest courts in Maryland (Maryland Court of Appeals)[23] and Ohio (Ohio Supreme Court)[24] ‘squarely disagree on the constitutionality of billboard excise taxes‘ which has created an unambiguous conflict. In arguing that the highest level of First Amendment protection is unjustified, Cincinnati highlights the U.S. Supreme Court's decision in *Regan v. Taxation with* ***38** *Representation of Washington*,[25] stating that ‘the government enjoys especially broad latitude in creating classifications and distinctions in tax statutes, including when the taxes apply differently to different speakers.‘ After describing that each form and mean of communication is unique, Cincinnati suggests that ‘the principles articulated for the traditional press cannot be mechanically transposed to billboards - or, for that matter, any other evolving form of media.‘

Cincinnati's second argument: the Ohio Supreme Court erred in holding that the billboard tax is unconstitutional

Cincinnati argues that billboards are not members of the traditional press because ‘[b]illboards are large-scale advertising vehicles that largely serve commercial interests and rarely generates their own content and can be regulated based on their distinctive noncommunicative features.‘ Thus, the City argues that Supreme ‘Court's cases involving taxes on the traditional press therefore do not definitively answer the question presented in th[e] case, which concerns taxation of those who exercise the privilege of renting signs for a profit.‘ Also, Cincinnati argues that the Supreme Court ‘has held that the government may legitimately regulate or even ban commercial billboards without triggering heightened First Amendment scrutiny, citing *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 501 (1981). Lastly, Cincinnati argues that Lamar Advantages claims are ‘equally unfounded when evaluated under th[e] Court's First Amendment cases about taxes on particular members of the media.‘

5. Briefs Filed in Multistate Challenge to SALT Cap

Brief of the U.S. in Opposition

On March 9, 2022, the U.S. government filed its brief in opposition to the petition for writ of certiorari filed by the States of Connecticut, Maryland, New Jersey and New York (the ‘Petitioner States‘) in *State of New York et. al. v. Yellen* (Docket No. 21-279), where it argues that the New York Court of Appeals correctly concluded that Congress did not exceed its broad authority over taxation by placing a $10,000 limit on the amount of state and local taxes that individual taxpayers may deduct from their incomes. The U.S. government sets forth three primary arguments.

First, the government maintains that ‘no constitutional provision compels Congress to provide any SALT deduction, let alone a deduction of a particular amount.‘ The government further argues that the Court of Appeals correctly rejected the Petitioner States argument that ‘a comprehensive SALT deduction is constitutionally required to avoid ‘interfere[nce] with the states' ability to decide whether and how to levy and collect their own taxes.‘ In this regard, the government maintains that ‘petitioners have not demonstrated how the 2017 cap on the deduction unconstitutionally undermines their state sovereign authority over fiscal matters or their ability to raise revenue.‘

****9** Second, the government argues that the New York Court of Appeals correctly rejected the Petitioner States argument that the 2017 Act's limitation on the SALT deduction impermissibly coerces the Plaintiff States to alter their tax policies in violation of the Tenth Amendment. Per the government, ‘Petitioners point to nothing in the 2017 Act's SALT-deduction limitation that commandeers the state legislative process by compelling States to adopt any particular federal program. Like every other federal tax law, the Act alters the financial consequences of a variety of economic activities and choices. And, viewed in isolation, the newly imposed qualitative limit on the SALT deduction may increase the federal tax liability of certain individuals who reside in the petitioner States. But those consequences do not dictate what if any measures States should take to address their own tax policy. At most, the 2017 Act provides an ‘incentive[]’ for States to avoid certain policies. *New York*, 505 U.S. at 166.‘

Third, the government maintains that this case is not a suitable vehicle to address the merits, because judicial review is precluded for two reasons: (1) the Petitioners have not suffered an injury sufficient to confer standing; and (2) the Anti-Injunction-Act bars this action because Congress has forbidden federal courts from entertaining lawsuits seeking to enjoin the collection of taxes.

Reply Brief of New York, Connecticut, Maryland and New Jersey

On March 23, 2022, the Plaintiff States filed their Reply Brief. The Plaintiff States argue that '[c]ontrary to Respondents' arguments, the long and unbroken lineage of the SALT deduction for property and income taxes reflects a constitutional mandate, not a policy choice.' They argue that the 'Respondents fail to address the extensive historical evidence supporting [the Plaintiff States] position,' as well as 'improperly minimize the cap's impermissibly coercive effects and fail to address evidence showing that the purpose of the cap was to pressure politically favored States into changing their taxation and spending policies.' The Plaintiff States also reject the government's argument that judicial review is precluded. Specifically, they argue '[a]s the Court of Appeals correctly found, Petitioners asserted sufficient injury-in-fact based on the loss of a specific stream of tax revenue from the SALT deduction cap, namely tens of millions of dollars of real estate transfer taxes.' In addition, they argue that the Court of Appeals 'correctly determined that the Anti-Injunction Act does not bar suit because Petitioners have no other mechanism to assert their constitutional claims and suits ***40** by individual taxpayers would not sufficiently vindicate the States' sovereign injuries.'

The Plaintiff States assert that certiorari is warranted 'to resolve a novel and important constitutional question that was decided incorrectly below.' In this regard, the Plaintiff States point out that the Court's rules do not require the existence of a circuit split to grant certiorari. The Plaintiff States also argue that 'Respondents are equally incorrect in contending that the federal income taxing power is absolute and, therefore, that a SALT deduction in any form is a matter of congressional grace rather than a constitutional requirement.' The Plaintiff States further argue that 'Respondents erroneously disregard Congress's deliberate intent to target Petitioner States, and they inaccurately minimize the economically coercive effect of the SALT deduction cap.'

6. Petitions Denied

****10** *Commerce Clause challenge to New Jersey's Per Partner Filing Fee: Ferrellgas Partners, L.P. v. Director, Division of Taxation* (Docket No. 21-641), cert. denied Apr. 4, 2022, asked '[w]hether a levy that raises revenue for a State's general fund, and that is not restricted to the in-state activities of the levy-payor, may be characterized as a locally focused regulatory fee and thus be imposed without regard to whether it is internally consistent.' N.J.S.A. 54A:8-6(b)(2)(A) required each entity classified as a partnership for federal income tax purposes that has more than two owners and any income derived from New Jersey sources to pay a filing fee of $150 for each owner with an interest in the entity, up to a maximum of $25,000, when filing its information partnership tax return. The Tax Court concluded that the New Jersey statute did not violate the Dormant Commerce Clause, was not discriminatory facially or in practical effect, and satisfied the burden-benefit balancing test set forth in *Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970).

The Court denied the Petition on April 4, 2022.

Footnotes

1 Laws of 2019, Ch. 420, Section 2; Wa. Rev. Code 82.04.29004.

2 Id.

3 Wa. Rev. Code 82.04.29004.

4 *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

5 *State v. Heckel*, 143 Wash. 2d 824 (2001).

6 *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978).

7 28 U.S.C. 1341.

8 Tex. Bus. & Com. Code 102.051(2).

9 Tex. Bus. & Com. Code 102.051(1).

10 *Neinast v. Texas*, 217 F.3d 275 (5th Cir. 2000).

11 20 N.Y.3d 1, 13, 956 N.Y.S.2d 425, 980 N.E.2d 473.

12 *City of Cincinnati Ohio v. Lamar Advantage GP Company LLC* (Docket No. 21-900).

13 No. C-180675, 2020-Ohio-3155, __ N.E. 3d __ (2021).

14 See discussion of challenge to Maryland's billboard tax in 136 JTAX 33 (March 2022).

15 247 A.3d 740 (Md. 2021), petition for cert. pending, No 21-219 (filed Aug. 12, 2021).

16 *See e.g., Lovell v. City of Griffin*, 303 U.S. 444 (1938).

17 *See e.g., Vermont Society of Association Executives v. Milne*, 779 A.2d 20 (Vt. 2001).

18 *Arkansas Writers' Project Inc. v. Ragland*, 481 U.S. 221 (1987).

19 *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983).

20 481 U.S. 221 (1987).

21 499 U.S. 439 (1991).

22 *Clear Channel Outdoor, Inc. v. Director, Department of Finance of Baltimore City*, 247 A.3d 740 (Md. 2021), petition for cert. pending, No 21-219 (filed Aug. 12, 2021).

23 Id.

24 *Lamar Advantage GP Co., LLC v. Cincinnati,* No. 2020-0931, 2021 WL 4201656.

25 461 U.S. 540 (1983).

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