Apportionment

Time Runs Out on High Court Appeal for Texas Tax Compact Case

A Texas high court ruling that the Multistate Tax Compact isn’t binding on member states is the law of the land after the March 22 appeals window to the U.S. Supreme Court came and went without a challenge.

“I am happy to see that a lawyer did not take money for tilting at windmills,” Richard D. Pomp, the Alva P. Loiselle Professor of Law at the University of Connecticut School of Law, told Bloomberg Tax.

The case amounted to “nothing that would be cert-worthy” for the federal courts, he said.

“There has to be a substantial federal question for the court to get interested or a split among the circuits, and you had really neither here,” Pomp said. “This would have been a total waste of money for the client.”

A December 2017 Texas high court ruling against Graphic Packaging found the Multistate Tax Compact isn’t binding on member states and not in violation of constitutional provisions.

The Texas Legislature is permitted to disregard the compact’s three-factor apportionment provisions and enforce a separate statutory apportionment formula for franchise tax purposes, according to the opinion written by Justice John Phillip Devine.

“What this all means is that the Texas Supreme Court has had the last word on the issues presented,” said Pomp. “It is the end of the road for the taxpayers.”

Court ‘Should Take Cases’ The absence of an appeal from the Georgia-based Fortune 1000 company may be explained by the U.S. Supreme Court’s apparent lack of appetite for compact cases, Joseph Bishop-Henchman, executive vice president at the Tax Foundation, told Bloomberg Tax.

“The Supreme Court should take these cases, but they’re not going to because they already passed on taking Gillette and Kimberly-Clark,” Bishop-Henchman said in a March 22 email.

Other compact election disputes have emerged in several states—and have been largely unsuccessful for the companies. The U.S. Supreme Court denied several petitions for review after state supreme courts ruled against the involved taxpayers, including Gillette Co.’s appeal out of California, Kimberly-Clark Corp.’s appeal from a Minnesota Supreme Court decision, and multiple appeals arising out of Michigan involving companies such as IBM Corp., Gillette, Goodyear Tire & Rubber Co., and DirectTV Group Holdings.

Central to the Texas case was Graphic Packaging Corp.’s 2008 and 2009 Texas franchise tax report filings, which used the single-factor gross receipts formula found in Texas Tax Code 171.106(a) to apportion the company’s taxable margin.

The company later recalculated those taxes and also computed its 2010 tax using the compact’s three-factor apportionment election—allowing “an equally-weighted, three-factor apportionment formula based on a business’s sales, property, and payroll.” The Texas Comptroller denied Graphic Packaging’s refund requests, contending that Section 171.106 of the Tax Code requires apportionment of the margin with the gross-receipts fraction.

Millions of dollars in tax payments were at stake for Graphic Packaging. Had the state Supreme Court ruled in the company’s favor, other businesses that have contributed an estimated $4 billion to $6 billion annually likely would have celebrated.

Damage Done The finality of the Texas ruling amounts to another lump taken by the Multistate Tax Compact, Bishop-Henchman said.

“There’s been a lot of damage to the Compacts Clause over the years, including these state rulings that you can call it a compact but you can’t enforce it and the state can change it unilaterally,” he said.

All told, Bishop-Henchman said recent disinterest at the federal level and recent state decisions speak to an increasingly defanged clause.

“The states agree to do or not do certain things so long as they are a member of the compact,” Bishop-Henchman said. “Back in 1978, the Court in U.S. Steel said compacts don’t need congressional consent, which took away an important check on state powers.

“Now these unchallenged state decisions that say compact provisions can be unilaterally changed by a state while remaining a compact member. Compacts can serve an important role but will now mostly be ignored because of these interpretations,” he continued.

Neither counsel for Graphic Packaging nor spokespersons for the company responded to requests for comment.

An appeal from the company had yet to surface on the desk of the state’s general counsel as of late afternoon of the March 22 deadline, a spokesman for the Texas State Comptroller’s office told Bloomberg Tax.

The case is Graphic Packaging Corp. v. Hegar, Tex., No. 15-0669, 12/22/17.

BY PAUL STINSON