



Volume 17 Number 2

June 2010

State Tax Return

COMMERCE ENERGY CASE UPDATE: STATE TAXPAYERS' ACCESS TO FEDERAL COURT NARROWS, BUT SELDOM-USED SIDE DOORS REMAIN AJAR

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In a May 3, 2010, metaphorical Statement Concerning the Supreme Court's Front Entrance, Justices Breyer and Ginsburg expressed regret that the U.S. Supreme Court has decided to close public access to the Court's iconic bronze front doors.¹ Soon, Supreme Court visitors will no longer be able to climb the Court's forty-four marble steps to enter under the famous words, "Equal Justice Under Law." Instead, the public entrance will be through a side door.

Unfortunately for Commerce Energy, the justices did not have the same regret to closing the federal court doors on its claims of discriminatory state taxes. On June 1, 2010, in an opinion written by Justice Ginsburg, the Court distinguished its decision in *Hibbs v. Winn*² and ruled that comity bars Commerce Energy's federal court challenge to Ohio's tax scheme.³ Still, the Court did not lock all federal trial court doors for all state tax matters, even though Justice Kennedy views the Court's rationale *Hibbs v. Winn*⁴ as "doubtful," Justices Thomas and Scalia "remain 'skeptical' of the Court's decision in *Hibbs*," and Justice Alito is "doubtful about the Court's ability to distinguish *Hibbs*."⁵ For now, federal courts doors should remain open for unusual complaints challenging state tax provisions, including those by "financially disinterested 'third parties'" where "only one remedy would redress the plaintiffs' grievance."⁶

Perhaps of significance in *Commerce Energy* was the fact that "the District Court [had] 'decline[d] to exercise jurisdiction' as a matter of comity" and the Supreme Court expressed concern over the taxpayer's attempt to seek "federal-court aid in an endeavor to improve their competitive position."⁷ The Court noted in its citation to *Sinochem*, that a "federal court has

¹ See <http://www.supremecourt.gov/orders/journal/jnl09.pdf>, at p. 831.

² 542 U.S. 88 (2004).

³ *Levin v. Commerce Energy, Inc.*, No. 09-223, slip op. (June 1, 2010), <http://www.supremecourt.gov/opinions/09pdf/09-223.pdf>.

⁴ 542 U.S. 88 (2004).

⁵ *Commerce Energy*, slip op., concurring opinions (Kennedy, J., concurring at 1; Thomas, J., concurring at 1; and Alito, J., concurring at 1).

⁶ See *Commerce Energy*, slip op. at 15; n.12.

⁷ *Id.* at 3, 16.

flexibility to choose among threshold grounds for dismissal.”⁸ Thus, the case was not viewed as an inappropriate situation for exercising the courtesy of comity.

Expect to see more state-related cases filed in federal court. As predicted, “the doctrine of comity [is] unlikely to be defined by a ‘bright-line rule.’”⁹



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⁸ Id. at 17 (parenthetical describing *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U. S. 422, 431 (2007)).

⁹ See Charolette Noel and Bryan D. Lammon, *Will U.S. Supreme Court, in Levin v. Commerce Energy, Expand or Restrict State Taxpayer’s Access to Federal Forum?*, Tax Management Multistate Tax, Vol. 18, No. 4 (April 23, 2010).