

Journal of Multistate Taxation and Incentives

2020

Volume 30, Number 08, November/December 2020

Columns

U.S. Supreme Court Update, Journal of Multistate Taxation and Incentives, Nov/Dec 2020

U.S. SUPREME COURT UPDATE

U.S. Supreme Court Update

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Briefs Filed in Oklahoma Ad Valorem Preemption Challenge

Respondent and Petitioners filed briefs in *Rogers County Bd. of Tax Roll Corrections v. Video Gaming Technologies Inc.* (Docket No. 19-1298). In this case, the U.S. Supreme Court has been asked to review a decision of the Oklahoma Supreme Court that held that the local ad valorem tax on electronic gaming equipment (i.e., slot machines) owned by a non-Indian company and leased to a business entity of a federally recognized Indian tribe for use exclusively on tribal land in gaming operations is preempted. The Oklahoma Supreme Court based its decision on the “comprehensive nature of [the Indian Gaming Regulatory Act's] regulations on gaming, the federal policies which would be threatened, and County's failure to justify the tax other than as a generalized interest in raising revenue.”

Still pending before the Court is *Great Lakes Minerals, LLC v. Ohio, et. al.* (Docket No. 20-24), ruling below at 597 S.W.3d 169 (Ky. 2019), involving state sovereign immunity, comity and the availability of declaratory or injunctive relief in a company's home state when another state seeks to impose its taxing jurisdiction. We also continue to await the issuance of the Special Master's Reports in the MoneyGram cases: *Delaware v. Pennsylvania*, 220145 and *Arkansas et al. v. Delaware*, 220146. These cases involve a dispute between Delaware and several other states

concerning which states have priority rights to claim abandoned, uncashed MoneyGram “official checks”.

Rogers County Board of Tax Roll Corrections v. Video Gaming Technologies, Inc.

In *Rogers County Board of Tax Roll Corrections v. Video Gaming Technologies, Inc.* (Docket No. 19-1298), ruling below at Okla. S. Ct. Docket No. 117491 (12/17/2019), Rogers County Board of Tax Roll Corrections, the Petitioner, challenges the Oklahoma Supreme Court's decision and presents the following question in its writ of certiorari:

Whether a generally applicable state ad valorem tax, as assessed against personal property owned by a non-Indian, out-of-state corporate entity and leased to a tribe for use in its casino operations, is preempted by the Indian Gaming Regulatory Act and the Court's “particularized inquiry” balancing test, see *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), where the tax does not infringe on any federal regulatory purpose contained in the IGRA, the tax does not interfere with any tribal sovereignty interests, and the tax supports relevant and important government interests, such as law enforcement, schools and health services.

As readers may recall, Video Gaming Technologies, Inc. (“VGT”) asserted below that the imposition of the local ad valorem tax on its gaming equipment is preempted by the Indian Gaming Regulatory Act (“IGRA,” 25 U.S.C. § § 2701-2721 (2018)) and Indian Trader Statutes, and federal case law.

The Oklahoma Supreme Court observed that “the location of property on tribal trust land is not a *per se* bar to taxation because the legal incidence of the ad valorem tax falls on the non-Indian lessor, not on [the Cherokee] Nation. When a state or county seeks to impose a nondiscriminatory tax on non-Indians on tribal land, there is no rigid preemption rule, rather we must apply a flexible analysis to determine if taxation is proper.” As such, the court determined that it must apply what is often referred to as the “Bracker balancing test,” a reference to the U.S. Supreme Court's decision in White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980). The Oklahoma Supreme Court further explained that “[c]ourts must perform a 'particularized examination of the relevant state, federal, and tribal interests' which is not controlled by standards of preemption from other areas of law.” *Ramah Navajo School Bd.*, 485 U.S. at 838 102 S.Ct. 3394 ; *Bracker*, 448 U.S. at 143-44 100 S. Ct. 2578 . Moreover, the court made clear that “[t]he county seeking to impose a tax on non-Indians on tribal land must be able to identify regulatory functions or services the county performs to justify the assessment – interest in raising revenues is not enough.” *Bracker*, 448 U.S. at 148-49 100 S. Ct. 2578 .

The Oklahoma Supreme Court examined the IGRA and explained that it “was intended to expressly preempt the field in the governance of gaming activities on Indian lands.” S. Rep. 100-446 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3076. It also provides that “Congress adopted IGRA in 1988 to provide for the operation and regulation of gaming by Indian Tribes” and notes that “IGRA's purpose included regulation from corrupting influences, ensuring the tribe is the primary beneficiary of the operation, and assuring that gaming is conducted fairly and honestly, by both operator and players.” 25 U.S.C. § 270225 U.S.C. § 2702.

The Oklahoma Supreme Court performed its *Bracker* analysis of the ad valorem tax, in three parts: (1) “look[ing] to the comprehensiveness of the federal regulations in place, in the light of the broad underlying policies and notions of sovereignty in the area; (2) consider[ing] the number of policies underlying the federal scheme which are threatened; and (3) determin[ing] if the state is able to justify the tax other than as a generalized interest in raising revenue.”

Overall, under this *Bracker* analysis, the justices concluded that the “ad valorem taxation of gaming equipment here is preempted.”

Brief of Respondent in Opposition

In the introductory statement of its Brief in Opposition, Respondent, Video Gaming Technologies, Inc. (or “VGT”), made clear that Supreme Court precedent “mandates a ‘particularized inquiry into the nature of the state, federal and tribal interests at stake,’” and that the Oklahoma Supreme Court “properly applied that settled [*Bracker*] balancing test here.” *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). VGT further commended the lower court's reliance “on a series of case-specific facts and circumstances in reaching [its] conclusion under the *Bracker* test, including: (i) the fact that Oklahoma law authorizes seizure of gaming equipment from tribal casinos as a remedy for nonpayment of the tax; (ii) Respondents defended the tax based only on a generalized interest in revenue raising, without providing any regulatory services to VGT, the Cherokee Nation, or the casino; and (iii) the burden of the tax would ultimately fall on the Cherokee Nation.” According to the brief, “Petitioners do not dispute that *Bracker* supplies the proper analysis for determining whether a state or local law is preempted in these circumstances, or that the Oklahoma Supreme Court applied that analysis here.” Instead, VGT maintains that “this case is about whether the Oklahoma Supreme Court reached the correct result, not whether that court applied the correct legal test.”

VGT also distinguished the facts presented here from those in *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013) a principal case relied on by Petitioners in which “the Second Circuit determined that ad valorem taxation on gaming equipment was not preempted by IGRA,” stressing also that this Court's decision warrants “additional percolation before review by [the] Supreme Court” given the scarcity of cases on point. According to Respondent, unlike in the case presented, the court in *Mashantucket* did not consider a state-law seizure remedy, nor was it

presented with the myriad of “use exemptions or computational factors [which] would weigh in favor of preemption.” Moreover, Respondents assert that the court in *Mashantucket* distinctly “weighed against preemption the fact that the local government there had established a number of services provided throughout the Indian reservation benefiting the tribe, its members, and the casino, including emergency services and road maintenance.” The court in *Mashantucket* also did not consider what the Petitioners refer to as a “*de minimis* tax burden” and whether it would defeat preemption. VGT also adds that the court in *Mashantucket* did not benefit from a later-issued opinion by the Supreme Court of the United States in *Bay Mills* (a recent U.S. Supreme Court case involving IGRA preemption), which “figured prominently” in the Oklahoma Supreme Court's analysis. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 134 S. Ct. 2024 188 L. Ed. 2d 1071 (2014).

Lastly, Respondent urged the court to dismiss Petitioners' request for the court's review on a “different question” – whether “a *de minimis* property tax imposed on the non-Indian owner of gaming equipment” is preempted. According to VGT, the *de minimis* question proposes a categorical exception which is “unfaithful to *Bracker* and unworkable.” To this end, Respondent notes first that Petitioners did not raise the question in its state-court briefing and therefore the question falls outside of the Court's certiorari jurisdiction. Furthermore, Respondent asserts that the *de minimis* “exception” is merely a proposed categorical rule which is “ill-defined and unworkable,” and “factually and legally dissimilar” from the cases in which the Petitioners draw from for support.

Reply Brief in Support for Petitioners

Petitioners' argument in a nutshell is as follows: “The *Bracker*-balancing test is 'nebulous' and mires state efforts to regulate on reservation lands in significant uncertainty, guaranteeing that many efforts will be deemed permissible only after extensive litigation, if at all.” *McGirt v. Oklahoma*, 140 S. Ct. 2452 2501 (2020) (Roberts, C.J. dissenting). Given the increase in Indian gaming around the nation, and “in light of the significant conflict in case law created by the Oklahoma Supreme Court's decision,” Petitioners argue that “state and local governments need clarity on the nature and scope of their authority with respect to non-Indians under the IGRA and *Bracker*.”

As expected by Respondent, Petitioners raised *Mashantucket*, and urged the court to recognize “a direct conflict in the interpretation of the IGRA and the Court's *Bracker* balancing test in the context of a nominal ad valorem tax on gaming equipment.” Petitioners proceed by replying to Respondent's multiple attempts to distinguish *Mashantucket* calling Respondent's “seizure remedy” a “strawman argument used to support a theoretical invasion of 'tribal sovereignty' in a case where a tribe is not even a party,” and noting that the property taxes at issue were based on “property ownership, and not use,” and therefore this Court should not be concerned by the presence of use exemptions. Petitioners continue, adding that the Oklahoma Supreme Court's

decision, if upheld, will “cause real and measurable harm to county governments all throughout Oklahoma.”

The brief also maintains that other cases “show that the Oklahoma Supreme Court's opinion is an outlier regarding the preemptive reach of the IGRA and that certiorari review is appropriate.” These cases, per the brief, have “held that the IGRA and *Bracker* do not preempt taxes imposed on contractors related to the construction or expansion of gaming casinos,” *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184 (9th Cir. 2008); *Flandreau Santee Sioux Tribe v. Haeder*, 938 F.3d 941 (8th Cir. 2019); “do not preempt a business and occupational tax imposed on a corporation who provides cash access services *inside* casinos,” *Everi Payments, Inc. v. Washington*, 432 P.3d 411 (Wis. Ct. App. 2018); and “do not preempt a claim related to termination of a management contract for casino operations,” *Casino Res. Corp. v. Harrah's Entertainment*, 243 F.3d 435 439 (8th Cir. 2001).

Petitioners also argue that a de minimis tax could defeat preemption and asserts that the argument was properly raised and is an “important issue” for the courts' review. In primary support, Petitioners reference the court in *Mashanucket*, which “held that the extent of tax liability that might be passed onto a tribe is relevant to the Tribe's interest under *Bracker*, but that any effect on the Tribe is minimal compared to the other relevant interests.” Drawing contrast to the case presented, Petitioners note that there was “no evidence that the *ad valorem* tax burdened 'gaming' or any sovereignty interest of the Cherokee Nation.”

Petitioners also address *Bay Mills*, distinguishing the case “as it dealt with tribal sovereign immunity,” whereas in the present case, a tribe is not a party and noting that the case “focused on the action rather than the equipment.” Indeed, according to Petitioners, “[t]he *ad valorem* tax at issue here, just like the one in *Mashantucket*, is not targeted at the 'action.’”

Like Respondents, Petitioners spend the remainder of their reply brief addressing various aspects of the *Bracker* analysis, highlighting issues which Respondent ignored. In this effort, Petitioners points out that the IGRA “does not preclude all state regulation” and that its purpose was to rectify “Cabazon's ouster of state authority,” which related to regulation of gaming on Indian lands. *Citing Bay Mills*, 572 U.S. at 794-795 . Petitioners also maintain that the tribal interests are preserved and in balance with State interests as the “passed on cost” which serve a legitimate state interest will not threaten “the purpose of Nation being the primary beneficiary of the gaming operation.”

Pending Petitions

Taxpayer's challenge to Ohio's and Ohio's tax commissioner's immunity to suit: We continue to track *Great Lakes Minerals, LLC v. Ohio*, Docket 20-24, petition for cert. filed July 10, 2020, ruling below at 597 S.W.3d 169 (Ky. 2019) where the Kentucky Supreme Court held that principles of sovereign immunity protected the State of Ohio and its Tax Commissioner, in his official capacity, from Great Lakes Minerals, LLC's (“Great Lakes”) claim for declaratory and injunctive relief in

Kentucky court. The Kentucky Supreme Court also held that principles of immunity, together with the doctrine of comity, protect the Tax Commissioner, in his personal capacity, from a claim for monetary relief for the alleged forced collection of taxes not owed. The Court has been asked by Great Lakes to review these immunity and comity rulings.

Questions presented:

(I.) Whether the Court's decision in *Franchise Tax Board of California v. Hyatt*, 139 S.Ct. 1485 (2019) [*Hyatt III*] extends a state's sovereign immunity to declaratory or injunctive relief and to individuals sued in their individual capacity.

(II.) Whether an individual or business that does not have sufficient minimum contacts to be subject to the jurisdiction of a foreign state may seek declaratory or injunctive relief within their home state.

(III.) Whether a state court can employ principles of comity to dismiss an action properly brought pursuant to 42 U.S.C.A. 1983 against a state official in his individual capacity.

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