

NUMBER 182

SEPTEMBER 21, 2017

Tax Litigation

DISH Network Tax Case Seeking Audience Before Supreme Court

The satellite TV industry is hoping for better reception of its latest claims of discriminatory state tax rates at the U.S. Supreme Court—this time with a case from Florida.

Satellite TV provider DISH Network Corp. has petitioned the high court to consider whether Florida's communication service tax might discriminate against it even if it isn't a purely out-of-state company and the allegedly favored cable industry isn't purely in-state. The company is contesting a Florida Supreme Court ruling from April that found Florida's tax doesn't discriminate, in part because the pure in-state versus out-of-state dichotomy didn't exist (*EchoStar Satellite, LLC v. Fla. Dep't of Revenue*, U.S., No. 17-379, *petition for review* 9/8/17).

The Florida court found cable and satellite companies both to be interstate businesses. But DISH argued in its Sept. 8 petition to the U.S. Supreme Court that such a circumstance doesn't ensure there's no tax discrimination that would violate the dormant commerce clause.

"A purely in-state business is not the only kind of in-state economic interest that may be favored, as other courts properly have recognized," attorneys for DISH wrote to the court.

Josh Rosenkranz of Orrick, Herrington & Sutcliffe LLP in New York, lead attorney for DISH, declined to comment, saying his team is "letting the papers speak for themselves."

Florida's Department of Revenue and the attorney general's office, which is representing the department, didn't immediately respond to requests for comment. The state's response is due to the U.S. Supreme Court by Oct. 12.

Review Denied in Prior Cases The satellite industry has contested state tax schemes in several states, ultimately losing most if not all of those cases. The U.S. Supreme Court declined to review a pair of similar cases out of Massachusetts and Tennessee in November 2015.

The industry typically argues—as it did in Florida—that states charge higher sales or excise tax rates to the satellite industry than they charge the cable industry. The cable industry often counter-argues that it faces the higher total tax burden after adding in other taxes such as local franchise fees.

The Florida case dates back to a 2005 lawsuit. Florida charges communications services sales tax on telecommunication services, currently set at 4.92 percent for

cable providers and 9.07 percent for satellite companies.

A Florida state appellate court ruled in favor of the satellite companies, finding Florida's tax to be discriminatory, before the state's highest court overturned that decision.

'Longest of Long Shots' DISH's chances of getting the Supreme Court to review its case aren't good because there's little or no split among the nation's courts on the case's primary concern, two state and local tax attorneys told Bloomberg BNA.

Courts around the country have consistently ruled in line with the Florida Supreme Court that state tax policies don't have a discriminatory effect against satellite TV companies, Mark E. Holcomb, a tax attorney at Dean Mead in Tallahassee, told Bloomberg BNA Sept. 20.

"It's always a long shot" to get the Supreme Court to review a case, he said. "The way this case has lined up, it's really the longest of long shots."

The Florida Supreme Court did agree with the satellite industry on one important point—that satellite and cable companies are "similarly situated" for purposes of the commerce clause, said Christopher T. Lutz, a Chicago-based multistate tax attorney with Horwood Marcus & Berk Chartered.

"But it goes on to consider whether there was discriminatory purpose, and it says there was no discriminatory purpose here," Lutz told Bloomberg BNA Sept. 19.

The question of how in-state versus out-of-state business interests should be defined is interesting, Lutz and Holcomb both said. But they expressed doubts about whether it would inspire Supreme Court review here.

"I don't know that the court really wants to get engaged in that kind of line drawing—what's in-state, what's out-of-state, what's interstate," Holcomb said.

Question of Acceptable Evidence DISH's petition also urged the court to decide whether Florida courts could have found a discriminatory purpose if they allowed themselves to consider more evidence.

The company and its fellow plaintiffs in the Florida case had offered affidavits from former state lawmakers that indicated cable industry lobbyists were pushing for preferential tax treatment before the state revised its sales tax on cable and satellite companies in 2001. The state favors the cable industry because of the money it invests in local infrastructure to deliver its services, DISH attorneys argued in the petition.

Florida courts deemed that evidence out of bounds, finding they could only consider the text of the statute and the official legislative record.

"Discriminatory purpose is a very high threshold. It's very hard to prove," Lutz said.

Besides that, he said the history of courts finding a lack of discriminatory effect in similar state tax schemes probably makes the argument about discriminatory purpose moot.

BY CHRIS MARR

To contact the reporter on this story: Chris Marr in Atlanta at cMarr@bna.com

To contact the editor responsible for this story: Jennifer McLoughlin at jmcloughlin@bna.com

The U.S. Supreme Court petition is at <http://src.bna.com/sGX>.

The April 2017 decision by the Florida Supreme Court is at <http://src.bna.com/nUL>.

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