American College of Tax Counsel Files Brief Urging Supreme Court to Affirm State Court Ruling on a State's Jurisdiction and Taxing Power over a Nonresident Trustee

Nationwide non-profit association of tax lawyers filed a "friend of the court" brief in the United States Supreme Court case of North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust (No. 18-457), asking the court to affirm the holding of the North Carolina Supreme Court rejecting the state's assertion of taxing power.

The American College of Tax Counsel announces the filing on March 25, 2019, of an amicus brief with the United States Supreme Court in the case of *North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust* (No. 18-457). The issue on which certiorari was granted by the Supreme Court in *Kaestner* was whether a state may assert jurisdiction over a nonresident trustee based solely on the fact that a contingent beneficiary resides in that state.

Background of the Case

The *Kaestner* case involves the attempt by the North Carolina Department of Revenue to exercise jurisdiction over a nonresident trustee who did not engage in any conduct purposefully availing himself of North Carolina. The state sought to tax the income of the trust based solely on the fact that a contingent trust beneficiary happened to reside in North Carolina.

Relying on that fact alone, the state taxed the nonresident trustee on the worldwide income of the trust property. The state imposed that tax even though the record reflected that the trustee had no contacts in North Carolina, the beneficiary was unaware of the trust for most of its existence, and the beneficiary neither received nor was entitled to any trust income during the tax years involved. The trustee of the *Kaestner* trust paid the tax for the tax year involved and filed a claim for refund.

The North Carolina lower courts and the North Carolina Supreme Court rejected the state's assertion of taxing power over the trust as a violation of fundamental principles of due process and upheld the trust's refund claim.

American College of Tax Counsel Urges the Supreme Court to Affirm the Decision of the North Carolina Supreme Court

The College maintains in its brief that "trustees, settlors, and trust beneficiaries are each distinct entities, while trusts are treated as separate taxable entities for federal and state tax purposes. Exercise of State power over a trust and its trustee based solely on the in-state presence of a contingent trust beneficiary could meet due process requirements only if those important distinctions were disregarded. Such disregard would be contrary to decades of modern jurisdictional precedent." The College expressed its concern that the position espoused by North Carolina would create tax jurisdiction chaos between states and non-resident sources of potential tax revenue and would have far-reaching and unpredictable consequences for trust administration and advice provided by tax practitioners, including Fellows of the College.

The College contends that the Supreme Court's jurisprudence and North Carolina law recognize that Due Process Clause personal jurisdiction over nonresident trustees and the assets they manage should be exercised by the state in which the trust is managed and administered, not the States in which beneficiaries may reside. The relationship between trustee and beneficiary, standing alone, does not permit the exercise of jurisdiction over the nonresident trustee by the State of domicile of a trust beneficiary. According to Wells Hall, President of the College and counsel of record on the brief, "A state should no more be allowed to reach outside its borders under the Due Process Clause and tax the income of a nonresident trustee on the trust's out of state income than it should be allowed to subject a nonresident trustee to the jurisdiction of its courts, which the Supreme Court has made clear that it may not."

The College further points out in its brief that nothing in the recent Supreme Court decision in *South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018), changed this fundamental Due Process principle. *Wayfair* brought the application of the Commerce Clause for sales taxes in line with other forms of State taxation by recognizing that there was no longer any basis for a physical-presence nexus requirement as a condition for a state to impose a sales tax on shipments to residents of the state. The essential Due Process mandate set forth in *Quill Corp. v. N.D.*, 504 U.S. 298 (1992), growing from *Int'l Shoe Co. v. Wash.*, 326 U.S. 310 (1945), that the "person, property, or transaction" sought to be taxed must have "purposefully availed" itself of the forum state, stands unchanged by *Wayfair*. The College asserts that the North Carolina Supreme Court's decision in *Kaestner* properly applied that long-standing Due Process requirement to determine that the nonresident trustee lacked a definite connection to North Carolina. "Rather than "modernizing" trust taxation, North Carolina's position invents a new nexus rule specific to trusts that exists nowhere else in the Court's tax nexus jurisprudence."

The College contends in its brief that multiple precedents of the Supreme Court would need to be re-evaluated and likely overruled in order to reach the result sought by North Carolina, including the seminal decision of *Hanson v. Denckla*, 357 U.S. 235 (1958). "Since the Supreme Court's jurisdiction-to-tax case law grows from the same roots that form the *in personam* and *in rem* jurisdictional framework described in *Hanson*, it would be unwise to create a variant jurisdictional test allowing North Carolina to exercise tax jurisdiction over a nonresident trustee over whom it does not have adjudicative jurisdiction." In conclusion, the College respectfully submits that the decision of the North Carolina Supreme Court in *Kaestner* should be affirmed.

About Amicus Briefs

An Amicus Curiae ("friend of the court") or Amicus brief allows a person or organization with a strong interest in or important views on the subject matter of a case to file a brief explaining those views and urging the court to rule in a manner consistent with those views. Friend of the court briefs are often filed in cases of broad public interest and are filed with the permission of the court and usually, as in this instance, with the written consent of all the parties in the case.

About the American College of Tax Counsel

The American College of Tax Counsel is a nonprofit association of tax lawyers in private practice, in law school teaching positions, and in government, who are recognized for their excellence in tax practice and for their substantial contributions and commitment to the profession. One of the chief purposes of the College is to provide a mechanism for input by tax attorneys into the development of U.S. tax laws and policy. The College's brief was submitted by its governing Board of Regents, represented by attorneys C. Wells Hall III, Charles H. Mercer, Jr., and Reed J. Hollander of Nelson Mullins Riley & Scarborough, LLP of Charlotte and Raleigh, North Carolina.