

Louisiana Supreme Court Creates Refund Opportunity for Taxes Paid to Other States

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Earlier this month, the Louisiana Supreme Court struck down a Louisiana law limiting tax credits for Louisiana taxpayers who pay taxes in other states; thus these taxpayers may now have refund opportunities. The law at issue is Act 109 of the 2015 Regular Legislative Session. Act 109 amended Louisiana Revised Statute 47:33 to disallow credits for taxes imposed on net income tax paid to other states that do not offer reciprocal tax credits to those states' own residents transacting business in Louisiana. Under Act 109, some Louisiana residents who own business interests in both Louisiana and a state that does not offer reciprocal credits are doubly taxed on the same income. The Supreme Court decision, issued December 5, 2018, is *Smith v. Robinson*, Docket No. 2018-CA-0728. It held Act 109 unconstitutional for impermissibly discriminating against interstate commerce. The Department of Revenue could still ask for a rehearing by the Louisiana Supreme Court or seek further review by the U.S. Supreme Court.

Smith involved Louisiana residents subject to taxes in both Louisiana and Texas. The taxpayers held interests in several flow-through entities (limited liability companies and subchapter S corporations) with operations in Texas, Arkansas, and Louisiana. Although Texas has no state income tax, it does have an entity-level franchise tax (also known as the "Texas margins tax") based on gross receipts and business profits. While the entities were subject to the Texas margins tax based on their Texas-sourced income, the individual taxpayers were also, under Act 109, subject to the Louisiana income tax on all of their income whether derived outside or inside Louisiana. Because Texas does not offer a reciprocal credit for taxes paid to Louisiana, the Louisiana Department of Revenue denied the taxpayers' credit claim for the franchise taxes they paid to Texas. Asserting that the reciprocal credit requirement of Act 109 is unconstitutional, the taxpayers sued the Louisiana Department of Revenue to recover the taxes paid.

[Texas Franchise Tax is Net Income Tax under La. Rev. Stat. 47:33](#)

The Supreme Court first held that the Texas franchise tax is a “net income tax” paid to another state under La. Rev. Stat. 47:33. Relying on an earlier Louisiana appellate court decision, the Court reasoned that the calculation of taxable margin is essentially an income tax.

Act 109 Held Unconstitutional

The Court next agreed with the taxpayers that the amendments made by Act 109 were unconstitutional. Before these amendments, La. Rev. Stat. 47:33 allowed a credit against Louisiana tax for “net income tax” paid to another state and thus prevented Louisiana taxpayers from being subject to income tax more than once on the same income. Act 109 would limit the credit by providing that the credit is available against taxes paid to another state only if the other state offers a reciprocal credit to that state’s own residents transacting business in Louisiana; Act 109 would also cap the credit so that it cannot exceed Louisiana income taxes paid. The Court in *Smith* held that Act 109 violates the dormant Commerce Clause of the U.S. Constitution because it results in a double tax on interstate income but not intrastate income. Applying the four-part test in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) to evaluate whether Act 109 creates a constitutional tax on interstate commerce, the Court held that Act 109 violates the fair apportionment and discrimination prongs of that test. Act 109 violates the external consistency test developed to analyze fair apportionment because, the Court held, Act 109 does not reasonably reflect how and where a taxpayer’s income is generated and fails to fairly apportion the tax according to each state’s relation to the income. In addition, the Court held that Act 109 discriminates against interstate commerce because it exposes one hundred percent of the interstate income of Louisiana residents to double taxation and because, according to the Court, a cap on the credit would cause a portion of the taxpayer’s out-of-state income to be subject to double taxation.

Refund Potential

Louisiana resident individuals who were previously subject to the limitations on the credit for taxes paid to other states should consider filing refund claims with the Louisiana Department of Revenue. Likewise, Louisiana resident individuals doing business in Texas through a limited liability company, S corporation or a partnership who paid Texas margins tax should review their income tax returns and explore whether a claim for refund of income tax overpayment is available.

But beware! Last month’s decision in *Bannister Properties, Inc. v. State of Louisiana*, Dkt. No. 2018-CA-0030 (La. App., 1st Cir., Nov. 2, 2018) suggests a refund claim may fail if a court

concludes that the Department's interpretation that the Texas margins tax is a net income tax constitutes a mistake of law arising from a misinterpretation by the Department. Although the *Bannister Properties* decision is not final as of the date of this post (we anticipate the taxpayer will seek review by the Louisiana Supreme Court) and, to us, seems wrongly decided, it is possible that the ruling in that case could limit a taxpayer's ability to pursue a refund claim should a court determine that the tax overpayments resulted from a mistake of law arising from the misinterpretation of the law by the Department of Revenue.

The Department of Revenue has indicated that it will not issue refund claims to taxpayers whose credits for taxes paid to other states were limited by the provisions of Act 109 if the taxes were not paid under protest, and that such taxpayers would have to file a claim at the Louisiana Board of Tax Appeals. Thus, a taxpayer filing a refund claim for a tax that was not paid under protest should consider filing a protective claim against the State with the Louisiana Board of Tax Appeals in addition to an administrative claim for refund. If successful, such claim against the State may be paid only by legislative appropriation and there are no rights to further appeal if the Board of Tax Appeals denies such a claim.

Please call Caroline Lafourcade or 504-582-1111 or email clafourcade@gamb.com with questions regarding refund opportunities from the Louisiana Supreme Court's decision in *Smith*.