after 1986 — also to avoid a double deduction. Oregon in 2018 enacted legislation (S.B. 1529) that required such an addback, but staff said the bill specifically applied to corporate taxpayers and not individuals, which they said was an oversight.

The provision was opposed by Sen. Herman Baertschiger Jr. (R), who noted that S.B. 851 would apply the state addback for the federal deemed repatriation tax deduction retroactively to tax year 2017. "To go back that far, make things retroactive back that far, I'm uncomfortable with that," he said.

A legislative analysis of S.B. 851 said the DOR's current position is that individuals must add back the federal deduction for the one-time deemed repatriation tax, and thus the provision is not anticipated to collect additional revenue but might result in a small number of filers needing to adjust their taxes. However, the bill wouldn't apply penalties or interest on additional taxes due because of adjustments related to the issue. ■

WEST VIRGINIA

U.S. Supreme Court Rejects Challenge to Cigarette Penalty

by Andrea Muse

The U.S. Supreme Court will not hear a cigarette wholesaler's appeal arguing that a West Virginia civil penalty for violating cigarette distribution laws violates the Eighth Amendment of the federal constitution.

The Court on June 17 denied the February 6 certiorari petition in *Ashland Specialty Co. Inc. v. Steager*, letting stand a penalty against the company of almost $160,000 for selling cigarette brands that had been removed from the state's directory of authorized cigarettes.

Ashland Specialty Co. Inc. argued in its petition that the penalty — 500 percent of the retail value of the unauthorized cigarettes that were sold — violated the Eighth Amendment's excessive fines clause because the state automatically applied the maximum percentage rate and the penalty was grossly disproportionate to the offense.

The West Virginia Supreme Court of Appeals held in May 2018 that the penalty did not violate the federal Constitution or the excessive fines clause of the state constitution. The state high court ruled that the commissioner's consistent application of the 500 percent penalty was not an abuse of discretion by the tax commissioner, noting that the commissioner could have imposed a much higher penalty under the law.

West Virginia law allows the tax commissioner to impose a penalty not to exceed the greater of 500 percent of the retail value of the cigarettes or $5,000 per violation. The commissioner may also suspend or revoke a company's registration certificate for violating the law.

Ashland claimed that its conduct — inadvertently selling unauthorized cigarettes in 2009 that it self-reported to the state — should not have resulted in an automatic 500 percent penalty, noting that the penalty was 64 times the profit the company made on the sales.

Stating that the Court held in a 1998 case, *United States v. Bajakajian*, that a fine is excessive if it is "grossly disproportionate" to the underlying

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offense, Ashland contended that *Bajakajian* did not set out the factors courts should consider when determining if a fine is "grossly disproportionate."

Adding that the factors used to evaluate the excessiveness of fines vary between lower federal courts and state courts, Ashland urged the Court to hear its appeal and articulate which factors should be considered and "clear up the confusion below."

In a March 13 amicus brief in support of Ashland, the Bluegrass Institute argued that the Court had recently held in *Timbs v. Indiana* that the protection against excessive fines applies to states, but "the ruling will provide limited actual benefit to businesses and taxpayers if the standard courts must apply is not also addressed."

> ***Ashland asserted that the factors used to evaluate the excessiveness of fines vary between lower federal courts and state courts, and urged the Court to hear its appeal and articulate which factors should be considered and 'clear up the confusion below.'***

"Without clarifying the standard of review courts are to apply, there remains little real protection for small businesses or individual taxpayers against arbitrary excessive fines imposed by state governments or their regulatory agencies," the institute contended.

But the state argued in a May 15 brief in opposition that the 500 percent penalty was directly proportional to the severity of the violation and that turning a blind eye to the conduct could have resulted in the state losing millions of dollars in Tobacco Master Settlement Agreement funds. The state said its 500 percent penalty is substantially similar to the penalties in over 40 states and that the penalty amount could have been more than $61 million if it had imposed the $5,000-per-cigarette-pack penalty.

The state claimed that lower courts consistently look to the "grossly disproportionate" language of *Bajakajian* to determine whether a penalty or forfeiture constitutes an excessive fine and that it was unnecessary for the Court to revisit the issue.

Mark Loyd of Bingham Greenebaum Doll LLP, who represented Ashland, told *Tax Notes* June 17 he's disappointed that the Court declined to review the case, but that he expects the Court will see this issue again.

While *Timbs* "makes it clear that excessive fines clause protections apply to all states," Loyd said, "unfortunately, without clear direction, I think that it can be anticipated that state taxing agencies and other federal and state agencies may assess increasingly oppressive fines and penalties, without regard for Eighth Amendment protections."

Loyd said that oppressive fines and penalties by government agencies are a pervasive problem that can have a devastating effect on an individual or small business. Because the cost to fight the excessive penalties can be more than the penalty itself, "such unconstitutionally excessive fines and penalties often evade judicial review," he added. ■

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