

SALT: The Life of the Party?

by Kay Miller Hobart



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In this article, Hobart interviews herself, as she relates highlights and observations from her two decades of state tax controversy experience, illustrating the lighter side of state taxation.

KMH: So, why don't you like to tell people that you are a state and local tax attorney?

Me: When I'm at a cocktail party and tell people I practice in the area of state and local taxation, the responses range from "I'm sorry" to a skeptical "Do you find that interesting?" Let's just say not everyone finds state taxation as fascinating as we do.

KMH: That's hard to believe.

Me: I know. I mean, who would not want to trade *bons mots* over whether the dormant commerce clause really exists or debate the tax policy considerations of the "sharing economy"?

KMH: Hmmm. Maybe you could tell them some interesting stories.

Me: Hey, that's a great idea.

KMH: For example, you could tell a story that proves tax litigation isn't all dry and boring.

Me: Well, there was this one corporate tax hearing back in the "first generation" Delaware holding company days. One of the underlying questions was whether a corporate subsidiary had economic substance. An officer of the company was testifying about his position with the subsidiary and the fact that all the corporate formalities had been observed. He was asked on direct examination whether he had a business card. He pulled out his business card and pointed out that it contained the address and phone number of the subsidiary, which, he reminded everyone, was separate and distinct from the parent company. After a recess and during cross examination, opposing counsel asked the hearing officer if he would mind calling the phone number on the business card. The hearing officer obliged. The phone

rang a few times and an answering machine picked up to reveal what was obviously a child's voice explaining that no one could come to the phone right now.

KMH: Oops.

Me: Yeah. And that's just one example of when a lack of attention to detail in the planning stage can have significant consequences in the "trying-to-justify-what-you-did" stage. Remember, too, this was back in the early days of state tax planning.

KMH: Speaking of the early days, how has the practice changed since you started?

Me: When I began practicing, there was no such thing as "SALT." There were very few state tax attorneys, and we all knew each other. When the opposing counsel in one of my cases filed a petition for certiorari with the U.S. Supreme Court, he called me and offered to sponsor my admission to the Supreme Court bar. He jokingly warned me that if I accepted his offer, his name would appear on my certificate and haunt me for the rest of my career. I laughed and accepted his offer. I get a smile every time I look at the certificate hanging in my office.

KMH: Anything else different back then?

Me: Sure, the lack of Internet, cellphones, and instantaneous access to information. Before widespread use of the Internet, on "opinion days," you went down to the court of appeals or the supreme court and thumbed through the baskets looking for your opinion. If it came down that day, it would be in a large manila envelope with your name on it. Of course, if you were not in town on opinion days, you might hear about your case by other means.

KMH: Like what?

Me: Well, a number of years ago I was at a tax conference in another state. Opposing counsel in one of my cases was giving a presentation on significant pending cases. At one point, he looked out in the audience, saw me, and congratulated me on my victory that day in the North Carolina Supreme Court. I nearly fell out of my chair. Somehow I managed to sit through the remaining presentation before running to my hotel room, calling my office, and asking them to fax (yes, fax) the opinion to me.

KMH: Just how old are you?

Me: Next question.

KMH: Can you describe some pivotal moments that influenced the way a case turned out?

Me: Yes, the same case I just mentioned had attracted a number of amici. Buried in the court's opinion was a

reference to a statement in one of the amici briefs that I immediately knew was going to cause me problems in another one of my cases.

KMH: And did it?

Me: Yes, unfortunately.

KMH: What did you learn from that?

Me: Even if an amicus generally supports your position, if the interest of the amicus is not wholly aligned with yours, or if it is pursuing its own agenda, it has the potential to complicate litigation.

KMH: A number of people have commented on the proliferation of amicus briefs in general.

Me: Right. It's not like "she who has the most amici wins." The problem with many amicus briefs is that they just parrot the contentions of the party they are supporting. That is not a helpful amicus brief. A helpful amicus brief adds something to the equation, brings a different perspective.

KMH: Wait a minute. Didn't you just say that an amicus who was not in lock step with you was a potential problem? Aren't you contradicting yourself?

Me: Wow. I'm really giving myself the third degree here. I recognize that a good amicus brief from a court's perspective may be different from a good amicus brief from a party's perspective. For example, an amicus brief might take a more aggressive position, a more conservative position, or offer a policy rationale that you may not agree with.

KMH: How important a role do you think amici briefs play?

Me: With the one exception previously mentioned, they have not played a significant role in my cases.

KMH: Any other pivotal moments?

Me: Yes, there was another case in which the taxpayer and the revenue department were discussing the legitimacy of a transaction that gave rise to a deduction. The taxpayer was explaining the purpose for the transaction in great detail and, much to his attorney's chagrin, summarized the whole situation by saying, "We needed to create a deduction." I don't know that the case necessarily turned on that statement, but it certainly colored the department's perspective on the matter.

KMH: Ouch. That must have been awkward. So, tell me, what is your favorite state tax opinion?

Me: I always laugh when I read the dissent in *Master Hatcheries v. Coble*,¹ a 1975 case from the North Carolina Supreme Court. The case was about whether a taxpayer qualified for the preferential 1 percent rate of sales tax imposed on manufacturers. The taxpayer, a hatchery, used "sophisticated automated equipment" to incubate eggs and hatch chicks. The department had argued that "since only God can make a tree, only God can make a baby chick." In a 4-3 decision, the court held that the hatchery was a manufacturer. In one of two dissents in the case, Justice J. Frank Huskins wrote: "Every layman of normal intelligence knows that a hatchery does not 'manufacture' baby chicks, and the law does not require judges to be more ignorant than other people."

KMH: Speaking of dissents . . .

Me: Yes, there have certainly been some interesting and — some would say — humorous dissents recently from the Supreme Court. Imaginary commerce clause, anyone?

KMH: On a more serious note, what troubles you about the SALT practice?

Me: States that use the litigation process to conduct an audit function.

KMH: Can you explain what you mean?

Me: Sure. I'm referring to states that don't challenge a particular position during the audit, but then later, in litigation over a completely different item, argue for the first time that the position they had accepted before is improper.

KMH: That certainly seems unfair.

Me: Not only unfair, but very burdensome to the taxpayer.

KMH: Well, I certainly have enjoyed our little talk today.

Me: Me, too. You have asked some very insightful questions.

KMH: Thank you. Do you think our discussion has given you some ideas for how to strike up a conversation about state taxes at a cocktail party without making everyone's eyes glaze over?

Me: Why yes, it has. At my next party, I plan to take an informal survey and ask guests whether they think the internal consistency test is the new *sine qua non* of a state's power to tax under the commerce clause.

KMH: Sigh. Remind me to send my regrets. ☆

¹*Master Hatcheries Inc. v. J. Howard Coble*, 212 S.E.2d 150 (N.C. 1975).