



State and Local Tax Alert

Tennessee Edition



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Multistate Tax Commission Seeks Backdoor Intervention in Tennessee Tax Dispute

By Brett R. Carter and Patricia Head Moskal

In Tennessee tax disputes, the Commissioner of Revenue traditionally is represented solely by the State Attorney General's Office – that is, until recently when the Multistate Tax Commission (MTC), the national organization for state tax administrators, sought to participate in two related tax cases as counsel of record for the Commissioner. *Pfizer, Inc. v. Farr, Commissioner of Revenue* and *Pharmacia, Inc. v. Farr, Commissioner of Revenue*, Davidson County Chancery Court Nos. 09-1945-II and 09-1946-II. Although the State of Tennessee is not a full member of the MTC's Multistate Tax Compact, it is an associate member, which means that Tennessee participates in and cooperates with the MTC and its member states. The State's recent effort to bring the MTC on-board as co-counsel for the Commissioner in the *Pfizer* lawsuits, signals a significant departure from long-standing practice in Tennessee that the only proper parties in Tennessee tax disputes are the Commissioner, represented by the Attorney General's Office, and the taxpayer, represented by its counsel. In the past, interested third parties have attempted to intervene in pending tax lawsuits, but such efforts routinely have been rejected by the courts, largely – and ironically – based on the objections of the Commissioner and the Attorney General's Office.

In the authors' view, it appears that the MTC is attempting, as a practical matter, to intervene in the *Pfizer* lawsuit under the guise of a motion for MTC's attorney to be allowed to appear *pro hac vice*. A motion to appear on behalf of a party as *pro hac vice* counsel is the method by which out-of-state counsel requests a court's permission to represent a litigant in a Tennessee lawsuit. In *Pfizer*, counsel for the Commissioner of Revenue filed the *pro hac vice* motion on behalf of MTC's attorney. *Pfizer* objected, and the trial court denied the motion. The Commissioner filed an interlocutory appeal of that ruling to the Tennessee Court of Appeals, and the appeal currently is pending (Tennessee Court of Appeals No. M2011-01359-COA-R10-CV).

The Department of Revenue's effort to involve the MTC in these two taxpayers' cases is significant to other Tennessee taxpayers because of the potential dangerous precedent that may be set. If MTC attorneys ultimately are allowed to appear, the MTC will assume an active role as co-counsel for the Commissioner and will be allowed to fully participate in all aspects of the case, including written discovery and depositions, procedural and substantive motions, legal strategy, and, ultimately, at trial and on appeals. Taxpayers confidentiality also becomes a concern if the MTC is admitted as co-counsel in these cases.

These cases are unusual because the participation of national organizations, such as the MTC, in tax lawsuits across the country historically are limited to filing briefs as *amici curiae*, or "friends of the court." The concept behind allowing interested organizations or parties to participate as friends of the court is to allow them to share their broader perspectives and provide insight into important policy issues that will assist the court in its adjudication of the issues presented. When organizations or other interested parties seek to participate in a pending case as an *amici curiae*, they must first request permission from the court and, if granted, their participation traditionally is limited to filing written briefs addressing legal issues. A party appearing as *amicus curiae* and its counsel do not participate in fact

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discovery, motion practice, or present oral argument at hearings unless specifically allowed by the court.

Interestingly in the *Pfizer* cases, the Council On State Taxation (COST) requested permission from the trial court and was allowed to file a brief as *amicus curiae* on the limited issue of MTC's participation as counsel for the Commissioner. The brief filed by COST highlighted the important legal distinction between participation as counsel for a party and the more limited role of participation as *amicus curiae*. If allowed permission to participate as counsel in the *Pfizer* cases, MTC's role would not be limited to assisting the court, but would instead be expanded to an active role in litigation activities and strategic decisions in the prosecution of the case. Tennessee taxpayers should be aware of these novel efforts by the Commissioner and the MTC in the *Pfizer* cases and closely monitor future developments because they may directly impact the future of state tax litigation in Tennessee.

Please contact Brett Carter or Patricia Head Moskal in our Nashville office if you would like to discuss these issues. Brett's email address is bcarter@babbc.com, and his direct line is (615) 252-2383. Patricia's email address is pmoskal@babbc.com, and her direct line is (615) 252-2369.

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