



SALT To Taste

State and Local Tax Items of Interest

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U.S. Supreme Court Denies Certiorari in *Blue Bell Creameries*

On Monday, June 27, 2011, the U.S. Supreme Court denied certiorari in *Blue Bell Creameries*.^[1] The Tennessee Supreme Court (“Tennessee”) decided in *Blue Bell Creameries* that capital gains recognized as part of a reorganization were apportionable as business earnings pursuant to the state's functional test, and therefore subject to the state's excise tax. The resulting tax was also determined to be constitutional pursuant to (1) Tennessee's finding that the capital gains and underlying stock served an operational function to Blue Bell Creameries, LP (“Tennessee”); and (2) Tennessee's finding that Taxpayer was unitary with its parent, a pure holding company.

[See our previous SALT To Taste newsletters discussing Tennessee's analysis of its statutory functional test ([click here](#)) and its application of the operational function analysis as a part of the unitary business principle ([click here](#)).]

Taxpayer, in its petition for writ of certiorari, asked the U.S. Supreme Court to determine whether Tennessee was proper in declaring Taxpayer and its parent unitary without having applied any of the tests^[2] developed by the U.S. Supreme Court during the evolution of the judicially created unitary business principle.^[3] Taxpayer claimed that the decision handed down by Tennessee, if left unchanged, would result in a per se rule establishing all pure holding companies unitary with their operating subsidiaries without the need for performing a factual unitary business analysis pursuant to tests already established by the U.S. Supreme Court.

Tennessee, in its opposition brief, claimed to have performed the analysis required under each of the unitary business tests – that is, determining the scope of the business being conducted. Tennessee stated that because of the unique situation at issue (the lack of business operations in the parent company) the use of its “single underlying activity analysis” was used to implement the U.S. Supreme Court's established unitary business principle, not as a replacement for it.

Conclusion

Unfortunately, given the U.S. Supreme Court's decision not to review *Blue Bell Creameries*, Tennessee's Supreme Court ruling will stand. This case serves as a reminder of how states are broadening their reach to maximize apportionable income subject to taxation. As a result, taxpayers must not ignore the potentially bad precedent and dangerous trend set by the Tennessee decision.

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¹ *Blue Bell Creameries, LP v. Commissioner*, Dep't of Rev., Tenn. Supreme Court, No. M2009-00255-SC-R11-CV (January 24, 2011).

² These tests include the "hallmarks" of a unitary business (i.e., functional integration, centralized management, and economies of scale); the three unities (i.e., unity of ownership, unity of use, and unity of operation); or the dependency and contribution test.

³ Tennessee also found that the capital gains represented business earnings under that state's definition of "business income." However, this issue was not included as a part of the petition for writ of certiorari since it would be rendered moot by the resolution of the federal constitutional issues presented.

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