Practitioners:

Dirk Giseburt

by Eric Yauch

For the second time in as many years, Dirk Giseburt has asked the U.S. Supreme Court to rule on the constitutionality of retroactive state tax laws, an issue on many taxpayers' minds.

Giseburt, a partner at Davis Wright Tremaine LLP, Seattle, said retroactive state tax legislation is frustrating not only for taxpayers but also for states forced to take dishonest legal positions:

> One of the most distressing aspects of retroactive tax legislation is that it pushes government actors into dishonest positions in order to defend the rationality of the act — dishonest pretense in statements of legislative intent, fiscal notes that are unreliable on their face, judicial opinions that mischaracterize or just omit entirely the taxpayer's arguments. If the Supreme Court would take one of these cases and clarify how the rational basis test works outside the *United States v. Carlton* "mistake" context, I would hope the whole system would settle into a more transparent and honest process.

A Seattle native, Giseburt graduated magna cum laude from Princeton University, then served as a *Harvard Law Review* editor at Harvard Law School. After Harvard Law, he briefly worked in Tokyo for Japanese law firms before returning to Seattle to work for his current firm.

When the Internal Revenue Code was overhauled in 1986, Giseburt volunteered to help with Davis Wright Tremaine's considerable workload — leading to a friendship with state tax attorney Jim Judson and, ultimately, Giseburt's 30-year run in state and local tax.

At one point in the early 1990s, Giseburt seriously considered leaving law practice altogether to become a plant biologist. With the arrival of his child, however, he concluded that it would make more sense to remain a lawyer, although he works with local botanical gardens in his free time.

Given his passion for working with other areas of law and curbing government overreach, Giseburt said he doesn't regret staying in tax law.

"I would say the two most satisfying aspects of working in state and local tax are, first, the opportunity to work on teams with my colleagues from so many practice groups within the firm — like healthcare, telecommunications, real estate, and employment, as well as business transactions generally; and, second, the role of the tax lawyer in keeping the government honest," Giseburt said.

Keeping the government honest has been Giseburt's primary objective in his fight against retroactive tax legislation. In 2015 he was the counsel of record in *Hambleton v. Department of Revenue*, a case challenging the retroactive application of an amendment to Washington's Estate and Transfer Tax Act in response to a state supreme court decision that said the Department of Revenue overstepped its authority in taxing certain assets of a decedent.

Giseburt filed a cert petition with the U.S. Supreme Court, arguing that the eight-year retroactive amendment violated due process and that the Court's case on the topic, *Carlton*, involved a one-year retroactivity period. In *Carlton*, Justice Sandra Day O'Connor said that any period longer than one year could raise serious constitutional concerns, he noted.

The Court denied cert in *Hambleton*, but Giseburt was back at it in 2016 with a cert petition in *Dot Foods Inc. v. Department of Revenue*, this time challenging the retroactive application of the state's business and occupation tax. According to the cert petition Giseburt filed September 9, *Dot Foods* is an ideal vehicle to finally resolve court splits over the constitutionality of retroactive tax laws.

Former Missouri Revenue Commissioner Janette Lohman, now a partner with Thompson Coburn LLP, described Giseburt as "viciously intelligent."

"He's an excellent friend and colleague, and he's remarkably witty and funny, but very serious when he's working on client projects," said Lohman, who met Giseburt through the American Bar Association Section of Taxation. Lohman said *Hambleton* and *Dot Foods* are exactly the type of unfairness that Giseburt would set out to challenge: taxing the deceased in *Hambleton* and out-of-state companies in *Dot Foods*. ■

Gregory Nowak

by Amy Hamilton

State Tax Notes recognizes Gregory Nowak of Miller, Canfield, Paddock and Stone PLC for his outstanding work litigating Multistate Tax Compact issues in Michigan.

Nowak is one of the few tax lawyers to convince state courts that his clients had the right to apply the compact's elective apportionment formula in tax years at issue. As a result of his work, Michigan courts have found that the compact election was harmonious with both the Michigan business tax (MBT) and the state's earlier single business tax (SBT).

Nowak has represented some 40 companies in about 80 separate cases either asserting the ability of taxpayers to use the compact's elective apportionment formula or challenging the state's retroactive repeal of the compact to 2008.

"Greg Nowak is a creative and sophisticated lawyer who has intrepidly developed innovative and thoughtful approaches to the issues surrounding tax retroactivity and the Multistate Tax Compact from a Michigan perspective," said former Michigan Supreme Court Chief Justice Clifford Taylor, who this year joined Nowak in representing IBM Corp. in the company's ongoing original compact case involving tax year 2008. "Even at this late date in my career, I find I learn from him constantly. Not only that, he also is a gentleman and square shooter. Indeed, just the kind of guy you would want to practice with."

International Business Machines Corp. v. Department of Treasury became the lead case in Michigan after Nowak was engaged to appeal Treasury's denial of IBM's compact election made in 2008, the first year of the MBT. "However I can't claim to be the first to realize the election was available," Nowak said.

Though he had been involved in a work group that advised the Legislature on technical matters during the 2007 drafting of the MBT, Nowak said there were so many complex issues to tackle in designing a new tax from scratch that the potential application of the compact election wasn't on the radar. "It was only after the MBT took effect in 2008 and all of us in Michigan began digging into the issues that the applicability of the compact came to light," Nowak said. "At that point many advisers brought it to the attention of their clients, and many cases were pending by the time the compact was amended in 2011 to eliminate the election."

Nowak was referring to the corporate income tax adopted during Republican Gov. Rick Snyder's first year in office and accompanying statutory changes specifying that the apportionment formulas contained in both the MBT and the replacement corporate income tax would take precedence over the compact election. (Prior coverage: *State Tax Notes*, May 2, 2011, p. 303.) "That legislation did not bring attention to the election so much as it was a reaction to the growing volume of claims," he said.

The Michigan Supreme Court in 2014 held that IBM could use the compact formula for tax year 2008, holding that the compact election was not repealed by implication by the state's enactment of the MBT. The court also found that both the net income base and the modified gross receipts base of the MBT met the compact's definition of an income tax, and thus the compact election was applicable to both bases.

Asked whether there are any underreported angles to the Michigan compact election litigation, Nowak replied: "Perhaps the most fascinating angle is one that is unfortunately foreclosed by the statute of limitations." After the state retroactively repealed the compact to 2008 to avoid paying an estimated $1.1 billion in refunds following *IBM*, a consolidated group of taxpayers argued that the retroactive repeal did not extend to tax years under the earlier SBT — Michigan's famous 30-year experiment with a value added tax, in effect from 1976 to 2007.

"For that entire time Treasury's position was that because it was a VAT and not an income tax, the election didn't apply," Nowak said, adding that he had raised the issue years earlier in a case that had been settled.

In the consolidated case *AK Steel Holding Corp. v. Department of Treasury*, the Michigan Court of Appeals — largely

following the state supreme court's reasoning in *IBM* regarding the MBT — held in February 2016 that the SBT also meets the compact's definition of an income tax and that the election was available to taxpayers. The appellate court also held that the state's retroactive repeal of the compact to 2008 did not extend to the earlier years the SBT was in effect. Miller Canfield represented 21 of the 23 businesses in *AK Steel Holding*.

The Treasury Department let stand the February ruling in favor of SBT payers, and a trial court shortly after entered judgment in the only known cases in which taxpayers have benefited from the compact election provision.

"It was gratifying to win this case and validate a position that nobody else had thought of in the 30 years that the tax was in effect," Nowak said. "It was just unfortunate that the tax was repealed before we proved Treasury wrong."

Then there were the continuing proceedings in the original compact case IBM won at the Michigan Supreme Court. At the start of 2016, Nowak called the ongoing original *IBM* case "the poster child for the evils of retroactive legislation." By late November, it appeared that the Michigan Supreme Court might have finally brought the saga to an end.

Nowak continued to represent IBM as the company fought a trial court's holding that the state's retroactive repeal of the compact applied to IBM itself for tax year 2008, effectively denying the company $6 million in refunds in the case it had won at the state supreme court. In July it seemed that IBM and Miller Canfield were making headway in the proceedings when all three judges on a Michigan Court of Appeals panel expressed skepticism that the trial court had authority to ignore the Michigan Supreme Court's 2014 order to enter summary judgment in favor of IBM. The appeals court quickly reversed the trial court, and remanded the case for entry of judgment in favor of IBM consistent with the supreme court's direction in *IBM*.

The Michigan Treasury accepted that decision. Yet the case still wasn't over. Michigan Attorney General Bill Schuette (R) independently sought leave to appeal that decision to the Michigan Supreme Court to seek a reversal.

"To my knowledge this has never happened before in Michigan's history," Nowak said. And then, in late November, the Michigan Supreme Court appeared to bring the proceedings to a conclusion when it granted IBM's motion to strike Schuette's attempted intervention.

In the meantime, IBM has separate cases for 2009 and 2010 that were part the Michigan Supreme Court's June 24 orders denying leave to appeal in *Gillette Commercial Operations North America v. Department of Treasury* — the leading group of cases challenging the constitutionality of the state's retroactive repeal of the compact as a fix to the 2014 *IBM* decision. Some of Nowak's clients, with the assistance of Mayer Brown LLP, are joined in a December petition for a writ of certiorari with Gillette; Miller Canfield filed a separate cert petition on behalf of IBM as one of the parties presenting the due process question to the U.S. Supreme Court.

While the focus of the Michigan compact litigation now is primarily on the tax retroactivity issue, "we aren't giving up on the compact issues by any means," Nowak said.

"This case doesn't merely present the question of whether a state can retroactively impose a tax, but whether it can do so by retroactively withdrawing from an interstate compact," Nowak said. "Hopefully Gillette's California application whetted their appetite on that issue and this smorgasbord of issues will be too appetizing to pass up." ■