

TAX NEWS MAKERS: AN INTERVIEW WITH CURTIS W. SCHWARTZ, ESQ.



Curtis Schwartz is the Chair of Modrall Sperlberg's state and local tax practice group. He represents clients in state and federal contested tax matters including audits, administrative protests, administrative hearings, refund claims, refund litigation and appellate tax litigation. He has worked extensively with industry specific taxes such as severance, gasoline, motor fuel and motor transportation taxes and with taxes of general application such as the corporate income, gross receipts and property taxes. Among his major cases have been: *Kmart Properties, Inc. v. Taxation and Revenue Dept.*; *Teco Investments Inc. v. Taxation and Revenue Dept.*; *Conoco Inc. and Intel Corp. v. Taxation and Revenue Dept.* He has served as Chairman of the Taxation Section of State Bar of New Mexico; Chairman of the New Mexico Supreme Court Board of Legal Specialization; Public Member of the legislative committee studying New Mexico taxation; Member of the American Bar Association, Tax Section, State and Local Tax Committee; New Mexico Correspondent for STATE TAX NOTES and as a Member of the Board of Directors of the New Mexico Tax Research Institute. His honors include being a Fellow of the American College of Tax Counsel and he was named in The Best Lawyers in America in categories of Tax Law and Trusts and Estates. He received his education at the University of Illinois, B.A., 1967; University of Iowa, Juris Doctor, 1970 and New York University, LL.M. in Taxation, 1973. He is admitted to practice in New Mexico, Iowa, U.S. Supreme Court, 10th Circuit U.S. Court of Appeals and the U.S. Tax Court. NMTRI spoke with Mr. Schwartz in late August, 2006.

NMTRI: How long have you been practicing state tax law in New Mexico?

Mr. Schwartz: Thirty-six years. In 1970 after I graduated from law school I was hired by Franklin Jones as one of the lawyers for the Bureau of Revenue, now the Taxation & Revenue Department.

NMTRI: When you started practicing state tax law in New Mexico, how many other state tax law practitioners were there?

Mr. Schwartz: There were only two or three attorneys in private practice who worked in the tax area in New Mexico in 1970 and no one really practiced in the state and local tax area except for the attorneys for the Bureau of Revenue.

NMTRI: How many state tax cases have you presented to the NMTRD?

Mr. Schwartz: I have represented hundreds of taxpayers in disputes with the Taxation & Revenue Department.

NMTRI: How many state tax cases have you tried in the courts?

Mr. Schwartz: The vast majority of cases settle. I have tried perhaps 20 to 25 cases over the years. The cases tried for the most part have been important cases where the Department did not want to settle because they wanted to obtain a court decision on a point of law or we felt the Department was just wrong as to the law and the monies at issue were significant enough to warrant litigation.

NMTRI: What is the most important state tax case that you have tried?

Mr. Schwartz: Actually, there were two cases that I tried which were of national importance – the Conoco/Intel case decided about 10 years ago and the recent Kmart case. The Conoco and Intel cases were companion cases which were consolidated on appeal. All of these cases were decided by the New Mexico Supreme Court. The Department asked the U.S. Supreme Court to hear the Conoco/Intel case but the U.S. Supreme Court declined. The Conoco/Intel case involved corporate income tax and Kmart involved the gross receipts tax. Conoco/Intel resulted from the Department's attempt to tax foreign dividends which we correctly asserted was unconstitutional because the New Mexico corporate income tax statute unconstitutionally discriminated against foreign commerce and in favor of domestic commerce. Moreover, we asserted that the Department's proposal to remedy the unconstitutional discrimination lessened, but did not eliminate, the discrimination. The Court agreed. Kmart involved the state's attempt to tax a transaction which did not occur in New Mexico. Both cases were similar because the Department was pushing the envelope to determine the bounds of its taxing authority.

NMTRI: What is the most important state tax case that has been decided in New Mexico during your career?

Mr. Schwartz: Without a doubt the 1982 U.S. Supreme Court decision in *F.W. Woolworth Co. v. Taxation & Revenue Dep't* has been the most important tax case to arise in New Mexico. The Woolworth decision by the U.S. Supreme Court was a seminal case involving the reach of a state's taxing authority.

NMTRI: What issues exist for taxpayers today that did not exist when you started?

Mr. Schwartz: Jurisdictional issues have always been there but they seem more prevalent now. By jurisdictional issues I mean those issues relating to the limitations on a state's ability to tax imposed by the U.S. Constitution and federal law. In the 1970s and early 1980s the development of state tax law was in its infancy, not only in New Mexico, but nationally. In New Mexico, taxpayers and the Department were principally dealing with fundamental issues such as what constituted gross receipts and the extent of the statutory exemptions and deductions.

NMTRI: What is the biggest challenge facing a taxpayer's lawyer in New Mexico today?

Mr. Schwartz: I am not certain there is any unusual challenge today. One must be facile with state tax law, federal tax law and constitutional law and be able to marshal and

utilize the facts and the law in a manner which presents your client's case both fairly and in a persuasive manner.

NMTRI: You have seen the practice of state tax law change in New Mexico and across the country. What has been the most significant change during your career? What was the best change? What was the worst?

Mr. Schwartz: The most significant and the best change is something that is not limited to the state tax area but is rather something that has affected all of our daily lives. That is the availability of information. The availability of information relating to what is transpiring at the federal level and at the state level in the area of taxation is important because one always tries to paint a cohesive picture of the basic principles of state taxation and the availability of information has made that much easier. The worst change has been the change from taxation based on sound tax policy principles to taxation based primarily on revenue demands.

NMTRI: You were counsel for the Taxation & Revenue Department at one time. Would you comment on the different perspectives of a lawyer who has seen both sides?

Mr. Schwartz: Actually, I did not experience a difference because my goal has always been to arrive at the correct answer, i.e., the tax that is properly owed. That is the principle that I have always followed. If the client, whether the Department or a taxpayer is wrong, they need to be advised of such and act accordingly. If the client is correct, they need that information as well so the client can take the appropriate action.

NMTRI: If you could waive a wand and change some aspect of the practice of state tax law in New Mexico, either a legislative change or an administrative change, what would it be?

Mr. Schwartz: I cannot emphasize enough how much the adoption of legislation as well as the administration of taxation by the Department has changed for the worst over the last 35 years. Today, every action seems to be based on the generation or loss of revenue – how much new revenue will be generated by enacting a particular bill, how much revenue will be lost by enacting a particular bill or how much revenue a particular tax case will generate or cost the state. That view permeates every aspect to handling a matter for a client. Unfortunately, Department attorneys are quick to explain that they believe that their job is to get as much money as possible for the state, as opposed to doing the right thing – collecting the appropriate amount of tax due.

NMTRI: Is there a tax collected by New Mexico that just should not be there?

Mr. Schwartz: Nothing comes to mind.

NMTRI: Regulations play an important role in tax administration, and they must faithfully implement law as enacted by the Legislature and as interpreted by the Courts. Should there be a system of legislative oversight of the regulation promulgation process?

Mr. Schwartz: I do not think that legislative oversight is necessary. There is plenty of opportunity for taxpayer input into the regulatory process and Jan Goodwin has opened that process even more. I would like to think that the Department gives serious consideration to the information gathered. Often, quite understandably, Department personnel do not have enough information relating to the workings of a particular industry to adopt meaning regulations. They want input and, my experience has been, they listen to and value that input.

NMTRI: Secretary Goodwin suggested in her interview with Tax Matters that she did not need additional settlement authority. Do you agree?

Mr. Schwartz: It depends on the context of the settlement. The settlement authority for determining the correct amount of taxes due is appropriate. The standard is whether there is a good faith doubt as to legal liability. However, the Department, unlike the IRS, has no settlement authority based on inability to pay. That results in hardships to taxpayers who for one reason or another owe back taxes. The lack of such settlement authority can be a real impediment to someone trying to right the ship and become a productive, taxpaying member of society when the federal government will compromise but the state can not.

NMTRI: Taxes do play a role in the economic development of a state. Do you think New Mexico has a tax system that welcomes business development?

Mr. Schwartz: The problem, if there is one, with New Mexico's tax system is that it is often misunderstood. I believe that is so because New Mexico's tax system is somewhat different from that of most other states. We have a gross receipts tax, as opposed to the more common sales tax, and it is imposed on a broad array of services which is not the case in other states. Additionally, our income tax rates have traditionally been higher than those in surrounding states. Conversely, no one notices how low our property tax rates are. Nevertheless, painting with an extremely broad brush, the overall tax burden imposed by New Mexico on business is fairly competitive. There are, of course, certain industries such as the extractive industries where the overall burdens are high in comparison to other states.

NMTRI: Congress can make changes that impact state tax administration and policy. Is there anything Congress should do?

Mr. Schwartz: I think the time has come for Congress to exercise its Commerce Clause powers and create modest uniformity in the area of state taxation because although states and business have made attempts at uniformity, state tax laws are far less uniform today than in the past. That lack of uniformity, of course, means that compliance is becoming unduly complex.

There are four areas where Congress should consider legislation to create more uniformity among state tax regimes. The first is nexus, that is, the minimum contacts

necessary to subject a taxpayer to a state's taxing jurisdiction. Second, I believe Congress should mandate a uniform apportionment formula which all states must use if they impose a corporate income tax. Third, and perhaps this overlaps with the nexus point, is that Congress needs to address when an out of state company that exploits a state's economic market by just selling into that market has an obligation to collect from the buyer and pay over that state's transaction taxes. Finally, Congress needs to deal with the proliferation of tax incentives, some of which may be unconstitutional under the Commerce Clause, and approve or disapprove of those schemes.

NMTRI: Is there anything you have not said that needs to be said to tax policy makers in New Mexico?

Mr. Schwartz: Revenue demands are always there. However, in meeting those demands tax policy makers should try diligently to avoid enactment of specific tax provisions that violate basic principles of tax policy. This applies to tax policy makers at the state and local level whether legislative or regulatory. Legislation, ordinances and administrative rules based on perceived political benefit or pure revenue enhancement should be avoided.

NMTRI: Thank you, Curtis, for sharing some time with us and our readers.