Craig A. Griffith, West Virginia State Tax Commissioner v. ConAgra Brands, Inc., No. 11-0252

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Benjamin, J., concurring:

I concur with the majority opinion which affirms the circuit court's ruling that ConAgra Brands' licensing transactions do not constitute doing business in West Virginia and that the tax assessments fail to meet the requirements of the Due Process and Commerce Clauses of the Constitution of the United States.

I write separately to reiterate my objections to *Tax Comm'r v. MBNA Am. Bank*, 220 W. Va. 163, 640 S.E.2d 226 (2006), which the Court discusses in the majority opinion in the instant case. In *MBNA*, the majority of this Court found tax liability for an out-of-state corporation with no tangible or intangible presence in this State on income realized out-of-state from accounts kept out of state. The Court based its finding of tax liability on what it termed "a significant economic presence test," *MBNA*, 220 W. Va. at 171, 640 S.E.2d at 234, to determine whether a substantial nexus existed for Commerce Clause purposes. In the instant opinion, the Court distinguishes *MBNA* by finding that ConAgra Brands did not engage in solicitation of the type conducted by the taxpayer in *MBNA*. While I certainly agree with this distinction, I would take the opportunity presented in this case to overrule *MBNA*. Otherwise, *MBNA* will continue to linger like a dormant virus in our body of law,

threatening to erupt into a full-blown infection every time this Court is presented with a tax case like the instant one.[1]

I am fully aware that *MBNA* is only six years old, and the doctrine of *stare decisis* usually prohibits overruling such recent precedent. This Court has explained the importance of *stare decisis* as follows:

> The doctrine of *stare decisis* rests upon the principle that law by which men are governed should be fixed, definite, and known, and that, when the law is declared by court of competent jurisdiction authorized to construe it, such declaration, in absence of palpable mistake or error, is itself evidence of the law until changed by competent authority.

In re Proposal to Incorporate Town of Chesapeake, 130 W. Va. 527, 536, 45 S.E.2d 113, 118 (1947) (quotation marks and citation omitted). However, the doctrine of *stare decisis* is not sacrosanct, and in rare instances there are valid reasons to depart from it. For example, in the recent case of *State ex rel. W.Va. Dep't of Transp. v. Reed*, No. 11-1358, slip op. (W. Va. Feb. 10, 2012), this Court overruled a 2006 opinion of the Court after finding that the earlier opinion was legally incorrect. In doing so, the Court opined that while "this Court is loathe to overturn a decision so recently rendered, it is preferable to do so where a prior decision

[1]In *AccuZip, Inc. v. Dir., Div. of Taxation*, 25 N.J.Tax 158 (2009), the Tax Court of New Jersey declined to follow this Court's opinion in *MBNA*. In doing so, the Tax Court quoted the assertion in my *MBNA* dissent that the U.S. Supreme Court has never held in any state tax case that the nexus requirements of the Commerce Clause can be satisfied in the absence of a taxpayer's physical presence in the taxing state.

was not a correct statement of law." *Reed*, slip op. at 5-6 (quoting *Murphy v. Eastern Am. Energy Corp.*, 224 W. Va. 95, 101, 680 S.E.2d 110, 116 (2009)). This Court expounded in *Reed* that "a precedent-creating opinion that contains no extensive analysis of an important issue is more vulnerable to being overruled than an opinion which demonstrates that the court was aware of conflicting decisions and gave at least some persuasive discussion as to why the old law must be changed." *Reed*, slip op. at 6 (quoting *State v. Guthrie*, 194 W. Va. 657, 679 n. 28, 461 S.E.2d 163, 185 n. 28 (1995)). Similarly, the U.S. Supreme Court has articulated several crucial functions served by *stare decisis*.

> Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors.

Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970). The Supreme Court noted that "[t]he first factor[] [is] often considered the mainstay of *stare decisis*." *Id.*

A proper analysis of the precedential value of *MBNA* using the factors set forth above compels the conclusion that *MBNA* should be overturned. First, *MBNA* is an incorrect statement of the law. As I commented in my dissent in *MBNA*,

> by endorsing a nexus standard which permits West Virginia to assess a tax on an out-of-state corporation with no property, tangible or intangible, in this state on income realized from credit accounts maintained and serviced in another state, the majority merges the nexus requirements of the Due Process Clause and the Commerce Clause and effectively returns to the merged nexus jurisprudence of 1967, in [*National*] *Bellas Hess*[, *Inc.*] [*v. Department of Revenue*, 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967), *overruled, in part, by Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992)], albeit with the minimal due process requirements now carrying the day for nexus determination rather than the physical presence requirement of *Bellas Hess*.

MBNA, 220 W. Va. at 175, 640 S.E.2d at 238 (Benjamin, J., dissenting). Second, *MBNA* contains no extensive analysis. The majority in *MBNA* completely failed to consider that the Supreme Court "has never held in any state tax case that the nexus requirements of the Commerce Clause can be satisfied in the absence of a taxpayer's physical presence in the taxing state." *MBNA*, 220 W. Va. at 176, 640 S.E.2d at 239 (Benjamin, J., dissenting). Moreover, there is no precedential support whatsoever for the majority's holding in *MBNA*. In my dissent in that case, I explained that

> the majority . . . boldly goes where no court has gone before. In doing so, the majority relies not on bedrock constitutional principles or on established legal precedent, but rather on legal commentaries with thinly veiled state-favoring taxing agendas, a strained and inaccurate reading of the United States Supreme Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992), and a unilateral restatement of the important policy considerations which led to the inclusion of the Commerce Clause within the United States Constitution because, according to the majority opinion, the framers could not possibly have foreseen the future.

MBNA, 220 W. Va. at 173-74, 640 S.E.2d at 236-37 (Benjamin, J., dissenting).

Finally, the first consideration of *stare decisis* which is the desirability that the law furnish a clear guide for the conduct of individuals, is wholly absent in *MBNA*. While the majority in *MBNA* announced a significant economic presence test, it failed to define such a test with any specificity. Notably, despite the fact that the decision in *MBNA* hinges on the significant economic presence test, the majority only briefly attempts to define such a test and does so simply by alluding to general factors such as purposeful direction, the degree to which a company has exploited a local market, both the quality and quantity of a company's economic presence, and the frequency, quantity, and systematic nature of a taxpayer's economic contacts with the State. I submit that such an amorphous test is practically useless in aiding an out-of-state entity in planning for its tax liability arising from its economic contact with this State.

In sum, I believe this Court should have taken the opportunity in the instant case to overrule *MBNA* because it is not a correct statement of the law, it does not contain an extensive analysis of the relevant law, and it provides no clear guidance for individuals or entities to enable them to plan their affairs with assurance against untoward surprise. Otherwise, I concur with the majority opinion.