



## **CRITERIA USED TO DETERMINE WHETHER COST WILL GRANT AN *AMICUS* BRIEF REQUEST**

- **General Comments:** When the Lawyers' Coordinating Subcommittee of the COST Board of Directors reviews a taxpayer's request that COST file an amicus brief on its behalf in state tax litigation, it utilizes multiple criteria in its analysis of the request/case. By referring to these criteria when analyzing every request for a brief that is submitted to the Board, the Subcommittee ensures that the decision-making process is viewed both by COST members (many of whom submit requests for briefs in their own litigation) and by non-members as being fair and principled. Moreover, the selective exercise of its judicial advocacy assures COST that the Subcommittee's credibility and the import of its voice on matters of state and local tax policy is preserved. [An additional benefit to this approach is that the schedule of the primary drafters of briefs (i.e., COST staff members) is taken into account.]
- **Is the requesting party a member of COST?** Given the limited resources of COST, priority is given to amicus requests submitted by COST members. While COST membership has a positive bearing on COST's decision to participate, it is weighed with the other factors below.
- **Does the issue offer an opportunity for COST to further its mission among its members and to the public at large regardless of the weight the court may place on the case?** COST seeks to promote its mission through several different channels. Sometimes, filing a brief in a case affects the public debate on the issue regardless of whether a court ultimate reviews that particular case.
- **Will the party agree to cover the expenses associated with preparing and filing the brief?** Consideration shall be given to whether the requesting party is willing to pay the expenses associated with filing a brief such as printing, local counsel, etc. Where such reimbursement is not allowed by rule of court or otherwise this factor will not apply.
- **Does the case address income, franchise, sales, use, gross receipts, or property taxes?** These are the tax matters on which COST focuses.
- **Is the case postured to be appealed to the supreme court of a state, or to the U.S. Supreme Court?** If not, then almost without conceivable exception, the matter is not ripe enough to warrant COST's intervention. This conclusion has some basis in the limited resources of COST, and in the need to preserve COST's credibility with the courts through its selectivity.
- **Can a consensus be reached among the COST membership on the issue being addressed in the case?** This is a critical consideration, as there are many issues where COST members fall out on both sides of the line being drawn. For example, COST cannot advocate the use of a single sales factor apportionment formula in any given state, because the in-state members generally benefit from such a formula whereas the out-of-state members are generally disadvantaged. Likewise, the issues of combination, incentives, business/nonbusiness income tests, etc. On the other hand, discrimination issues and fairness issues (due process, equal treatment, etc.) usually generate consensus amongst the COST membership.

- **Is the matter of broad interest/import to the COST membership?** Even if the oil and gas companies care strongly about the states' adaptation of a federal fuel excise tax provision, the issue will not warrant COST's intervention if no other members are affected, either directly or indirectly (e.g., the principles in the fuel excise tax case have applicability to all excise taxes affecting all industries).
- **Can COST contribute meaningfully to the matter, through presentation of an original/unique perspective?** COST will not file a "me, too" brief with any court, even the U.S. Supreme Court. The justices and clerks who review applications and appeals also have limited time, and COST will not tax their patience or diminish its welcome by failing to take its role as amicus curiae ("friend of the court") literally. This is also an important question from the standpoint that COST often has a different view of the strengths/weaknesses/ramifications of a case than the parties who are litigating it. Is there room for COST to articulate its views while ostensibly supporting the party on whose behalf it files a brief?
- **Does the requesting party truly need the assistance of COST?** It often happens that a party attempting to secure review of its case by the U.S. Supreme Court will request a brief from every tax organization that considers state tax matters; this may include Tax Executives Institute, the Institute for Professionals in Taxation, and others. If this is the case and one or more of those groups agrees to file a brief, then the case must be of particular interest to the COST membership to warrant the filing of a brief.

If you have any questions about these criteria, or wish to suggest additional criteria for consideration, please contact [Karl Frieden, Greg Turner and Fred Nicely](#).