Maine Case Underscores Importance Of Coordinating Tax and Legal Advice

by Michael J. Semes

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Michael J. Semes is a professor of practice in the graduate tax program at the Charles Widger School of Law at Villanova University and of counsel at BakerHostetler.

In this article, Semes examines the Maine Supreme Judicial Court's decision in *Express Scripts* and its significance.

In *Express Scripts*,[1] the Maine Supreme Judicial Court held that Express Scripts (ES) was required to source its receipts to the location of its client's customer — not to the location of its client. At first blush, this may seem like an incongruous result, but facts in the record, including unambiguous contract terms and Form 10-K statements, made this conclusion unavoidable. Hence, the case drives home that it is essential for in-house tax, legal, and accounting personnel to communicate among themselves and with their outside advisers.

For the three years at issue in the case, ES sold its services to its clients, which included health insurers, HMOs, employers, governmental health programs, and union-sponsored benefits plans. In turn, the primary recipients of ES's services were its clients' members. For instance, the members of a health insurer client would be the insured individuals; if a client was an employer, the members were the employees covered by the employer's health plan.

ES generated approximately 99 percent of its annual revenues from the delivery of prescription drugs to its members through its contracted network of retail pharmacies.[2] Therefore, even though ES contracted with its clients to provide services, it delivered 99 percent of its prescription drugs to its members. Stated differently, ES generated almost the entirety of its revenues from the delivery of prescription drugs to its "customers' customers."

ES raised the following statutory arguments before the court:

1. The applicable statute required that its receipts from the performance of its pharmacy benefit management (PBM) services should be sourced to the location of its clients "because the services were received at its clients' commercial and administrative headquarters, not at the location of the retail pharmacies where members filled prescriptions."[3]
2. Alternatively, "if the location where its services were received is not readily determinable, those receipts should be attributed to its clients' commercial and administrative headquarters because those were the locations from which its clients ordered the services."[4]

The applicable statute regarding the required sourcing of ES's receipts stated that:

[1] *Express Scripts Inc. v. State Tax Assessor*, 2023 ME 68 (Me. Nov. 7, 2023).

[2] *Id.*, slip op. at 3.

[3] *Id.* at 7-8.

[4] *Id.* at 8.

> Except as otherwise provided by this subsection, *receipts from the performance of services must be attributed to the state where the services are received*. If the state where the services are received is not readily determinable, the services are deemed to be received at the home of the customer or, in the case of a business, the office of the customer from which the services were ordered in the regular course of the customer's trade or business. If the ordering location cannot be determined, the services are deemed to be received at the home or office of the customer to which the services are billed.[5]

The court found that the statute's "mandate is clear — income must be apportioned to the location where the service is *received*."[6]

The court next turned to ES's argument that the parties disputed where its services were received. ES argued that "because it contracts with only its clients, not individual members, the ultimate recipient of its services is the client, even if it is the member who initiates the claim at the retail pharmacy."[7]

The court summarily rejected ES's argument because:

> (1) the summary judgment record repeatedly controverts Express Scripts' contention that clients are the recipients of its PBM services and (2) Express Scripts has failed to point to specific facts that affirmatively show the existence of an authentic factual dispute to support their contention that the receipts at issue include charges for PBM services other than processing member claims at retail pharmacies.[8]

The court found that the record contained statements by ES that controverted the company's first argument. For example, in its Form 10-K, ES said, "Express Scripts provides [PBM] services *to members* of the affiliated health plans of its clients"[9] and "although we contract with health plans and employers, the *ultimate recipients of many of our services are the members* and employees of these health plans and employers."[10] And a contract between ES and a client stated that ES processed claims for "millions of members' prescription drug claims at retail pharmacies in Maine."[11]

ES submitted affidavits to support its arguments, but the supreme court, agreeing with the trial court, found that the contracts in the record were to be "interpreted according to their plain meaning" and that the affidavits were "not admissible to explain or alter an unambiguous contract."[12]

The trial court found — and the supreme court agreed — that the contracts and Form 10-K statements in the record controverted the affidavits ES submitted. The contracts and statements made clear that ES members were the beneficiaries of the services the company provided. Therefore, the court held that the plain language of the statute required ES to source its receipts to the location of its customers' customers.

Putting the statutory interpretation result to the side, this case raises the question of whether the public communications and contractual terms could have been tailored to achieve the desired public and legal results without spoiling the tax result. But even if that's possible, query whether that could have been done over a decade before the ultimate decision in the tax case. Nonetheless, this case demonstrates the importance for all stakeholders in an organization — for example, tax, legal, accounting, investor relations, and operations — of communicating frequently and openly. It also underscores the need for all stakeholders to have a broad view and thorough understanding of their organization. ■

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[5] 36 Me. Rev. Stat. section 5211(16-A)(A) (emphasis added by the court). *Express Scripts*, slip op. at 16.

[6] *Express Scripts*, slip op. at 16.

[7] *Id.* at 20.

[8] *Id.* at 19.

[9] *Id.* (emphasis added by the court).

[10] *Id.* (emphasis added).

[11] *Id.*

[12] *Id.* at n.2.