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External Multistate Tax Alert
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Direct Marketing Association Reaches Settlement with Colorado

Overview

On February 22, 2017, the Data & Marketing Association ("DMA", formerly Direct Marketing Association) and the Colorado Department of Revenue (the "Department") agreed to settle DMA's state court claims challenging the legality of the 2010 Colorado statute that requires retailers that do not collect Colorado sales and use tax to issue transactional notices and annual summaries to Colorado customers informing them of their Colorado use tax responsibilities, and provide to the Department annual customer information reports.[1]

In this Tax Alert, we summarize the terms of the Settlement Agreement and offer some taxpayer considerations.

Background

Colo. Rev. Stat. § 39-21-112(3.5) established a reporting obligation, effective March 1, 2010, on remote sellers that sell products to customers in Colorado but do not collect and remit Colorado sales or use tax on those transactions. DMA challenged the statute and its accompanying regulation in federal and Colorado courts based upon multiple constitutional claims, including that the statute violated the Commerce Clause of the United States Constitution. Both the federal and Colorado courts issued preliminary injunctions enjoining the Department from enforcing the notice and reporting requirements until the claims were decided. On July 10, 2014, the Colorado District Court stayed all further proceedings of DMA's state court claims pending resolution of the federal court claims.[2]

On February 22, 2016, the 10th Circuit issued a decision deciding in favor of the Department.[3] In reaching its decision, the 10th Circuit determined that the U.S. Supreme Court's holding in *Quill Corp. v. North Dakota*,[4] which affirmed the *Bellas Hess* bright-line physical presence standard for substantial nexus under the Commerce Clause,[5] was limited to sales and use tax collection obligations and was therefore not applicable to Colorado's remote seller notice and reporting requirements provided by Colo. Rev. Stat. § 39-21-112(3.5).[6] The 10th Circuit further held that Colorado's remote seller notice and reporting requirements neither discriminate against, nor unduly burden interstate commerce.[7]

On August 29, 2016, DMA filed a petition for writ of certiorari with the U.S. Supreme Court requesting that the Court grant review of the 10th Circuit's decision. On December 12, 2016, the Court rejected DMA's petition for review, effectively ending DMA's federal court claims leaving only the state court claims and injunction in place.[8]

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[1] *Settlement Agreement*, executed by Data & Marketing Association and Colorado Department of Revenue on Feb. 15 and 22, 2017, available here.

[2] *Direct Mktg. Ass'n v. Colo. Dep't of Revenue,* Case No. 2013CV34855 (Colo. Dist. Ct. Jul. 10, 2014).

[3] *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129 (10th Cir. Feb. 22, 2016).

[4] *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

[5] *Quill*, 504 U.S. at 317.

[6] *Direct Mktg. Ass'n* at 1136-39.

[7] *Direct Mktg. Ass'n* at 1143-46.

[8] U.S. Supreme Court, 2016 Term Order List for December 12, 2016; While the Court's rejection of the petition for review

Settlement

Pursuant to the terms of DMA's settlement with the Department, dated February 22, 2017, DMA filed a joint motion with the Department to dismiss its state court claims and the preliminary injunction enjoining the Department from enforcing the sales and use tax notice and reporting law.[9] In response to DMA's motion, the Colorado District Court subsequently dissolved its preliminary injunction.

According to the Settlement Agreement, the Department found the uncertainty caused by federal and state challenges to the law to be "reasonable cause for non-compliance with the Act and Regulations."[10] The Settlement Agreement provides that the Department will not require compliance with the sales and use tax notice and reporting requirements until July 1, 2017, and will waive any and all penalties for non-collecting retailers who fail to comply with these rules prior to July 1, 2017.[11]

In accordance with Colo. Rev. Stat. § 39-21-112(3.5), non-collecting retailers must presumably begin providing transactional notices to Colorado customers on July 1, 2017, issue 2017 annual purchase summary forms to Colorado customers by January 31, 2018, and provide 2017 customer information reports to the Department by March 1, 2018.

Considerations

Out-of-state retailers that do not collect Colorado sales and use tax and are making sales into Colorado may wish to consider whether the imposed notice and reporting requirements might be more burdensome than agreeing to register and collect sales tax.

On April 25, 2017 the Department will facilitate a stakeholder work group to discuss possible revisions to Regulation 39-21-112.3.5, which the Department promulgated in response to Colo. Rev. Stat. § 39-21-112(3.5) and became effective on July 30, 2010. In particular, the Department will examine whether the rule should address marketplace sellers,[12] and if so, how these sellers should be treated under the reporting statute and rule. Written comments can be sent to the Department via email to dor_rulereview@state.co.us by April 24, 2017.[13]

Contacts:

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ended DMA's Commerce Clause claims in federal court, DMA still had the option of refiling its other constitutional claims in federal court.

[9] *Settlement Agreement*, para. 1.

[10] *Settlement Agreement*, para. 2.

[11] *Id.*

[12] The term "marketplace seller" generally refers to vendors who sell their products using a third party website / platform.

[13] For additional information on how to participate in the workshop, visit the Department website here.

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