

Colorado Update – Federal Court Dissolves Injunction that had Precluded Enforcement of Remote Seller Rules; DOR Issues Guidance; Taxpayer Pursues Injunction in State Court

January 28, 2014

Overview

On January 24, 2014, the 2nd Judicial District Court of Colorado (Denver) (a state-level trial court referred to herein as the “State District Court”) heard a Motion for Preliminary Injunction brought by the Direct Marketing Association (“DMA”). In its motion, DMA seeks to temporarily prevent the Colorado Department of Revenue (“DOR”) from enforcing the state’s remote seller use tax notice and reporting requirements while the court addresses DMA’s constitutional challenge of those requirements. Although the State District Court has not yet issued its ruling on DMA’s motion, the hearing is yet another part of the ongoing litigation involving Colorado’s notice and reporting requirements that have recently been addressed by the U.S. District Court for the District of Colorado (the “Federal District Court”) as well as the U.S. Court of Appeals (10th Circuit). In this Tax Alert we summarize:

- the Colorado use tax notice and reporting requirements;
- the recent Federal District Court and U.S. Court of Appeals rulings that resulted in the December 10, 2013 dissolution of the Federal District Court’s permanent injunction against the enforcement of such requirements and the dismissal of the U.S. Commerce Clause claims made by DMA;¹
- the U.S. Supreme Court’s December 19, 2013 issuance to DMA of an extension of time to file a petition for a writ of certiorari;² and
- the DOR’s December 19, 2013 issuance of its **Notice: Regarding Non-collecting Retailer Reporting Requirements** (the “Notice”) wherein the DOR stated that it will not assess penalties for failure to comply with the law for calendar years 2010 through 2013. The Notice also provides that the DOR will not assess penalties for a remote seller’s failure to comply with: (1) the January 31, 2014 deadline to provide annual purchase summaries to customers, and (2) the March 1, 2014 deadline to provide an annual report to the DOR regarding customers’ 2013 purchases.

Colorado’s Remote Seller Use Tax Notice and Reporting Requirements

Effective March 1, 2010, Colo. Rev. Stat. § 39-21-112(3.5) and its accompanying regulations require a remote seller with \$100,000 or more of sales to customers in Colorado that does not collect and remit Colorado sales or use tax on those transactions to perform the following tasks:

- Notify its Colorado customers that the remote seller does not collect Colorado sales tax and, as a result, the customer is required to self-report and pay use tax to the DOR;
- Provide by January 31 to its Colorado customers with over \$500 in annual purchases an annual report detailing the purchases for the previous calendar year; and
- Provide by March 1 to the DOR an annual report concerning each of the remote seller’s Colorado customers, including each customer’s name, billing address, shipping address, and total purchases.

Failure to meet these notice and reporting requirements can result in a number of penalties for a remote seller, including:

- A penalty of \$10 for each failure to provide by January 31 to its Colorado customers with over \$500 in annual purchases an annual report detailing the purchases for the previous calendar year; and
- A penalty of \$10 for each customer that the remote seller failed to include in the annual statement provided to the DOR by March 1.

¹ Order Dismissing Commerce Clause Claims and Dissolving Injunction, *Direct MKTG. Ass’n v. Brohl*, No. 1:10-CV-01546-REB-CBS (D. Colo. issued Dec. 10, 2013). *Direct MKTG. Ass’n v. Brohl*, 735 F.3d 904, 920-921 (Aug. 20, 2013) (the U.S. Court of Appeals had ruled that the federal courts lacked jurisdiction to decide the matter and had remanded the case to the Federal District Court for appropriate action).

² The Direct Marketing Association sought and was granted by the U.S. Supreme Court (on Dec. 19, 2013) an extension of time to file a petition for a writ of certiorari. See, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/13a633.htm>.

Court Litigation

DMA filed suit in the U.S. District Court challenging the remote seller use tax notice and reporting statute and its accompanying regulations. On January 26, 2011, the District Court issued a preliminary injunction enjoining the DOR from enforcing the notice and reporting requirements. On March 30, 2012, the Federal District Court granted DMA's motion for summary judgment and issued a permanent injunction enjoining the DOR from enforcing the notice and reporting requirements.³ The court found that the requirements discriminated against and placed undue burdens on interstate commerce in violation of the U.S. Commerce Clause.⁴

Subsequently, the DOR appealed the Federal District Court's ruling to the U.S. Court of Appeals for the Tenth Circuit. The Court of Appeals found that, based on the Tax Injunction Act, 28 U.S.C. § 1341, the District Court lacked jurisdiction to decide the matter and remanded the case to the District Court with instructions to dissolve the permanent injunction.⁵ On December 10, 2013, the District Court dissolved the permanent injunction,⁶ leaving the DOR free to enforce Colorado's notice and reporting obligations under Colo. Rev. Stat. § 39-21-112(3.5) and its accompanying regulations.

However, this case is not yet final. Subsequent to the U.S. Court of Appeals' ruling in August 2013, DMA sought relief in the State District Court by filing a motion for an injunction preventing the DOR from enforcing the notice and reporting requirements. On January 24, 2014, State District Court heard DMA's motion but has not yet issued a decision.

Also, on December 19, 2013, the U.S. Supreme Court granted DMA's application to extend DMA's deadline to file a writ of certiorari regarding the U.S. Court of Appeals decision until February 28, 2014.⁷

The DOR's Notice

On December 19, 2013, the DOR posted the Notice on its website, stating that the DOR: (1) will not enforce any penalties for failure to comply with the reporting requirements during the period the injunction was in place (calendar years 2010 through 2013); (2) will not assess penalties for a retailer's failure to comply with the January 31, 2014 deadline to provide annual purchase summaries to customers; and (3) will not assess penalties for a retailer's failure to comply with the March 1, 2014 deadline to provide the annual report to the DOR regarding customers' 2013 purchases.⁸ In the Notice, the DOR acknowledges the ongoing litigation and states that: "Should the law become subject to an injunction, the DOR will review the scope of the injunction and, if necessary, provide further guidance regarding enforcement."⁹

Considerations

In light of the Notice, remote sellers may refrain from providing 2013 annual purchase summaries to their customers and 2013 annual reports to the DOR since it will not penalize non-collecting remote sellers for failing to do so. Any additional clarity in this matter will depend on further related developments at the Colorado and federal court level.

It is unclear whether the State District Court will grant DMA's motion for an injunction enjoining the DOR from enforcing the notice and reporting requirements. It also remains unclear what affect recent Colorado legislation,¹⁰ enacted in anticipation of the proposed federal Marketplace Fairness Act, will have on the DOR's enforcement of the notice and reporting statute and its associated regulations.

³ *Direct MKTG. Ass'n v. Huber*, No. 10-CV-01546-REB-CBS, 2012 U.S. Dist. LEXIS 44468, 2012 WL 1079175, at *30-33 (D. Colo. Mar. 30, 2012).

⁴ *Id.*

⁵ *Direct MKTG. Ass'n v. Brohl*, 735 F.3d 904, 920-921 (Aug. 20, 2013).

⁶ Order Dismissing Commerce Clause Claims and Dissolving Injunction, *Direct MKTG. Ass'n v. Brohl*, No. 1:10-CV-01546-REB-CBS (D. Colo. issued Dec. 10, 2013).

⁷ See, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/13a633.htm>.

⁸ Colo. Dept. Rev., Notice: Non-Collecting Retailer Reporting Requirements (Dec. 19, 2013), available at: <http://www.colorado.gov/cs/Satellite/Revenue/RE VX/1251649097022>.

⁹ *Id.*

¹⁰ H.B. 13-1295, 169th Gen. Assem., Reg. Sess., 314 Colo. Sess. Laws 1645 (2013).

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