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Multistate Tax
EXTERNAL TAX ALERT

10th Circuit Court of Appeals orders dismissal of District Court's Permanent Injunction precluding Colorado from Enforcing its Remote Seller Sales and Use Tax Notice and Reporting Requirements

August 23, 2013

Overview

On August 20, 2013, the United States Court of Appeals for the Tenth Circuit remanded *Direct Marketing Association v. Barbara Brohl*[1] to the District Court of Colorado and instructed the lower court to dismiss the Commerce Clause claims of the Direct Marketing Association ("DMA") for lack of jurisdiction, dissolve the permanent injunction entered against the Colorado Department of Revenue (the "Department") from enforcing its remote seller sales and use tax notice and reporting requirements, and take further appropriate action consistent with the Tenth Circuit Court's opinion.[2]

The Tenth Circuit Court's ruling reverses the District Court's March 30, 2012, ruling in *Direct Marketing Association v. Roxy Huber* which granted DMA's motion for summary judgment and permanently enjoined the Department from enforcing the provisions of the state's sales and use tax notice and reporting requirements contained in Colo. Rev. Stat. § 39-21-112(3.5) and its accompanying regulations.[3] This Tax Alert summarizes the Tenth Circuit Court of Appeal's order.

Background

Colo. Rev. Stat. § 39-21-112(3.5) established a reporting obligation effective March 1, 2010, on retailers that sell products to customers in Colorado but do not collect and remit Colorado sales or use tax on those transactions. DMA filed suit in the U.S. District Court challenging Colo. Rev. Stat. § 39-21-112(3.5) and its accompanying regulations. On January 26, 2011, the District Court issued a preliminary injunction enjoining the Department from enforcing the sales tax notice and reporting obligations. On March 30, 2012, the District Court granted DMA's motion for summary judgment and issued a permanent injunction. The District Court found that Colorado's reporting requirements for non-collecting retailers discriminated against and placed undue burdens on interstate commerce, in violation of the Commerce Clause of the United States Constitution. Subsequently, the Department appealed the District Court's ruling to the U.S. Court of Appeals for the Tenth Circuit.

Colo. Rev. Stat. § 39-21-112(3.5) and its accompanying regulations require a retailer 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 retailer does not collect Colorado sales tax and, as a result, the customer is required to self-report and pay use tax to the Department;
- Provide to its Colorado customers with over $500 in annual purchases an annual report detailing the purchases for the previous calendar year; and
- Provide to the Department an annual report concerning each of the retailer's Colorado customers, including each customer's name, billing address, shipping address, and total purchases.

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1 *Direct Marketing Association v. Barbara Brohl*, 10th Cir., No. 12-01175, 8/20/13, D.C. No. 1:10-CV-01546-REB-CBS.
2 Direct Marketing Association, slip. op. at 32.
3 See our prior Alert at: **Deloitte Tax LLP| Multistate Tax Alert: Permanent Injunction Issued Precluding Colorado from Enforcing its Remote Seller Sales Tax Notice and Reporting Requirements**.

Summary of the Court of Appeal's Ruling

The issue presented to the Tenth Circuit Court of Appeals was whether Colorado's notice and reporting requirements for non-collecting retailers violate the Commerce Clause. However, instead of reaching the merits on that issue, the Court of Appeals held that the District Court lacked jurisdiction pursuant to the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, to issue a permanent injunction prohibiting Colorado from enforcing its remote seller sales and use tax notice and reporting requirements.

The TIA provides that federal courts do not have jurisdiction to rule upon a plaintiff's action to "enjoin, suspend or strain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state."[4] In determining whether the federal courts have jurisdiction over DMA's claims, the Court of Appeals first considered if DMA's action sought to enjoin, suspend, or restrain the assessment, levy or collection of a state tax.[5] In its analysis, the Court held that Colorado's sales and use tax notice and reporting obligations, while not taxes themselves, were enacted with the sole purpose of increasing sales and use tax collection and that Colorado's imposition of the notice and reporting obligations for non-collecting retailers were a substitute for requiring these same retailers to collect sales and use taxes at the point of sale. Accordingly, the Court held that DMA's challenge to Colorado's sales and use tax notice and reporting requirements sought to restrain the collection of sales and use taxes in Colorado.

The Court then considered whether DMA has a plain, speedy, and efficient remedy in Colorado for its claim. The Court held that Colorado's administrative remedies provide for hearings and appeals to state court, as well as ultimate review in the United States Supreme Court. Accordingly, the Court found that DMA has a plain, speedy, and efficient remedy in Colorado for its action.[6]

In conclusion, the Court held that the District Court did not have jurisdiction to decide DMA's Commerce Clause claims and that the Court likewise did not have jurisdiction to decide upon the merits of the Department's appeal. The Tenth Circuit Court remanded the case to the District Court to dismiss DMA's Commerce Clause claims for lack of jurisdiction, dissolve the permanent injunction entered against the Department, and take further appropriate action consistent with the opinion.

Considerations

While the District Court must dissolve its permanent injunction against the Department from enforcing Colorado's remote seller sales and use tax notice and reporting requirements and dismiss DMA's Commerce Clause claims upon which the District Court ruled, the Court of Appeals did not order the dismissal of DMA's other claims that were stayed pending the resolution of the Commerce Clause claims. It is unclear what effect the Court of Appeal's ruling will have on these other claims. It is anticipated that it will take up to 14 days for the District Court judge to receive the Tenth Circuit's ruling and officially lift the injunction.[7] The DMA is evaluating its various options to appeal the ruling or take the matter to state court.[8]

When the District Court dissolves its permanent injunction against the Department, the Department is expected to issue guidance regarding the timing of it enforcement of the remote seller sales tax notice and reporting requirements. It is unclear what affect recent Colorado legislation[9] enacted in anticipation of the proposed federal Marketplace Fairness Act will have on the Department's enforcement of Colo. Rev. Stat. § 39-21-112.5(3.5) and its associated regulations.

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[4] 28 U.S.C. § 1341.
[5] Direct Marketing Association, slip. op. at 11.
[6] *Id.* at 32.
[7] Per informal discussions with Colorado Department of Revenue. *Also see* Vuong, A. (2013, August 21). Colorado Amazon law opponent to respond "quickly" after appeals loss. *The Denver Post*. Retrieved from http://www.denverpost.com.
[8] Vuong, A. (2013, August 21). Colorado Amazon law opponent to respond "quickly" after appeals loss. *Id.*
[9] H.B. 13-1295, 169th Gen. Assem., Reg. Sess., 314 Colo. Sess. Laws 1645 (2013).

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