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EXTERNAL ALERT

Illinois Supreme Court Affirms Lower Court Decision Finding Illinois "Click-Through" Nexus Law Unconstitutional

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Overview

The Supreme Court of Illinois recently affirmed the Illinois Circuit Court's 2012 ruling in *Performance Marketing Association Inc. v. Hamer*, holding that the Illinois "click-through" use tax nexus law is unconstitutional.[1] In this Tax Alert we summarize this decision of the Supreme Court of Illinois.

Background

The "Click-through" Nexus Provision

The Illinois "click-through" use tax nexus law, which was enacted in 2011 as part of the Illinois Main Street Fairness Act (the "Illinois Act"),[2] created a new nexus category and thus use tax collection and remittance responsibility for out-of-state retailers that enter into agreements with certain in-state persons for a commission or other consideration. The new law created this use tax responsibility by adding to the statutory definition of the terms "retailer maintaining a place of business in this State" any:

> [R]etailer having a contract with a person located in this State under which the person, for a commission or other consideration based upon the sale of tangible personal property by the retailer, directly or indirectly refers potential customers to the retailer by a link on the person's Internet website. This provision shall apply only if the cumulative gross receipts from sales of tangible personal property by the retailer to customers who are referred to the retailer by all persons in this State under such contracts exceed $10,000 during the preceding 4 quarterly periods ending on the last day of March, June, September, and December.[3]

Out-of-state retailers deemed to have the requisite "contacts" were thus required to collect and remit Illinois use tax with respect to their sales to Illinois residents and businesses.

The Illinois Circuit Court's 2012 Decision

In June 2011, the Performance Marketing Association ("PMA") challenged the click-through nexus law by bringing a legal action before the Illinois Circuit Court. In *Performance Marketing Association Inc. v. Hamer*, the Circuit Court issued an Order granting summary judgment in favor of the PMA. The court found that the Illinois Act, which included the provision adding the click-through nexus law (35 ILCS 105/2 (1.1)), was: (1) in violation of the Commerce Clause of the U.S. Constitution, and (2) preempted by the U.S. Supremacy Clause by virtue of the moratorium against discriminatory state taxes on electronic commerce under the federal Internet Tax Freedom Act ("ITFA").[4] The Illinois Department of Revenue appealed the decision to the Supreme Court of Illinois.

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[1] *Performance Marketing Association Inc. v. Hamer*, 2013 IL 114496 (Oct. 18, 2013), affirming, Ill. Cir. Ct. (Cook County), Dkt. No. 2011-CH-26333 (May 7, 2012). A copy of the decision of the Supreme Court of Illinois is accessible at: **http://www.state.il.us/court/Opinions/SupremeCourt/2013/114496.pdf**.

[2] Public Act 96-1544 (H.B. 3659).

[3] 35 Ill. Comp. Stat. § 105/2 (1.1).

[4] *Performance Marketing Association Inc.*, Ill. Cir. Ct. (Cook County), Dkt. No. 2011-CH-26333 (May 7, 2002), slip op. at 2. Findings set forth in the Illinois Circuit Court's Order concluded that the Illinois Act is unconstitutional. The Illinois Act included both the "click-through" nexus provision (35 ILCS 105/2(1.1)) discussed in this Alert and another provision (35 ILCS 105/2 (1.2)), which created a use tax collection and remittance obligation for a retailer "having a contract with a person located in this State under which … the retailer sells the same or substantially similar line of products as the person located in this State and does so using an identical or substantially similar name, trade name, or trademark as the person located in this State." It is not clear from the Order whether the court intended to find invalid both 35 ILCS 105/2(1.1) and 35 ILCS 105/2 (1.2). Note that the introductory language of the Illinois Circuit Court's Order referenced 35 ILCS 105/2(1.1) only, and did not discuss 35 ILCS 105/2 (1.2).

The 2013 Decision of the Supreme Court of Illinois

The Supreme Court of Illinois affirmed the Circuit Court's summary judgment in favor of the PMA.[5] In rendering its decision, the Supreme Court of Illinois focused on the disparate treatment applied to marketing over the Internet as compared to print or over-the-air marketing in Illinois. The court explained that under the Illinois law:

> performance marketing over the Internet provides the basis for imposing a use tax collection obligation on an out-of-state retailer when a threshold of $10,000 in sales through the clickable link is reached. However, national, or international, performance marketing by an out-of-state retailer which appears in print or on over-the-air broadcasting in Illinois, and which reaches the same dollar threshold, will *not* trigger an Illinois use tax collection obligation.[6]

The court viewed this disparate treatment as imposing a "discriminatory tax on electronic commerce within the meaning of the ITFA . . . [and, on that basis, affirmed] the circuit court's judgment that the definition provisions contained in the Act and codified as 35 ILCS 105/2 (1.1) . . . and 35 ILCS 110/2 (1.1) . . . are expressly preempted by the ITFA and are therefore void and unenforceable."[7] Having found the provisions of the Act void and unenforceable based on preemption, the court did not address whether the "click-through" nexus provisions violated the Commerce Clause.

Considerations

The Illinois Supreme Court affirmed the Circuit Court's ruling that the Illinois "click-through" nexus provisions are void and unenforceable because they are preempted by the U.S. Supremacy Clause by virtue of the moratorium against discriminatory state taxes on electronic commerce under the ITFA. The ITFA is due to expire on November 1, 2014. If the ITFA is not renewed, the Illinois Supreme Court may have to address whether the Illinois "click-through" nexus provisions violate the U.S. Commerce Clause.

The court's decision is not final until expiration of the 21 day period for filing a petition for rehearing.

Contacts

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[5] *Performance Marketing Association Inc. v. Hamer*, 2013 IL 114496 (Oct. 18, 2013), slip op. at 8.
[6] *Id.*
[7] *Id.* Note that the court's holding references both 35 Ill. Comp. Stat. § 105/2 (1.1) and 35 Ill. Comp. Stat. § 110/2 (1.1). The first section, 35 Ill. Comp. Stat. § 105/2 (1.1), is part of the Use Tax Act and the second section, 35 Ill. Comp. Stat. § 110/2 (1.1), is part of the Service Use Tax Act.