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EXTERNAL ALERT

U.S. Supreme Court Hears Oral Arguments in CO Remote Seller Notice Case

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Overview

The U.S. Supreme Court recently heard oral arguments in *Direct Marketing Association v. Brohl*.[1] The original issue in this case, litigated in Federal District Court, involved whether notice and reporting requirements under Colo. Rev. Stat. § 39-21-112(3.5) (applicable to retailers that do not collect Colorado sales tax) violated the Commerce Clause of the U.S. Constitution. The District Court had previously granted a motion for summary judgment brought by the Direct Marketing Association ("DMA") and issued a permanent injunction enjoining the Colorado Department of Revenue ("DOR") from enforcing the remote seller notice and reporting law, holding that the law violated the Commerce Clause of the U.S. Constitution.[2] The District Court's decision was subsequently reversed by the U.S. Court of Appeals for the 10th Circuit, holding that under the Tax Injunction Act ("TIA") (28 U.S.C. § 1341) the District Court lacked jurisdiction to issue a permanent injunction prohibiting enforcement of the law.[3] The issue before the U.S. Supreme Court is whether the TIA bars federal court jurisdiction over the suit to enjoin the DOR from enforcing the remote seller notice and reporting law. It is important to note that DMA has also brought a separate action in Colorado state court. That court has granted DMA's motion for a preliminary injunction, preventing Colorado from enforcing its remote seller use tax notice law.

In this Tax Alert we summarize the parties' arguments before the U.S. Supreme Court and provide some taxpayer considerations.

DMA's Arguments before the U.S. Supreme Court

In its brief filed with the Supreme Court, DMA contends that the language of the TIA, specifying that "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law . . . [,]"[4] does not apply to the law at issue in this case. According to DMA, Colorado's notice and reporting requirements do not require remote sellers to collect, report, or pay any state tax, nor do the requirements constitute the assessment, levy, or collection of tax by the DOR. The Tenth Circuit determined that the TIA applied to any "procedure required by a state's taxing statutes that aim to enforce and increase tax collection."[5] DMA argued that the Tenth Circuit's characterization of the notice and reporting requirements as "collection methods" is misplaced and that this interpretation would shield from federal court review any state law purporting to have some bearing on tax payment. In his oral argument, counsel for DMA asserted that "the fact that there may be information which is of use, of relevance that may precede the collection activity of the government doesn't convert those preliminary activities into collection itself."[6]

Additionally, counsel for DMA pressed the issue that the DOR did not seek dismissal in the District Court based on the TIA, and the DOR previously acknowledged in its brief to the Tenth Circuit that the TIA did not bar the court from hearing the case.[7] Counsel asserted further that because the DOR affirmatively moved for summary judgment on the merits of the case at the District Court level, it consented to proceeding in federal court.[8]

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[1] *Direct Mktg. Ass'n v. Brohl*, 134 S. Ct. 2901 (U.S. 2014), *cert. granted*; argued Dec. 8, 2014.
[2] *Direct Mktg. Ass'n v. Huber*, 2012 U.S. Dist. LEXIS 44468 (D. Colo. Mar. 30, 2012).
[3] *Direct Mktg. Ass'n v. Brohl*, 735 F.3d 904 (10th Cir. Colo. 2013).
[4] 28 U.S.C. § 1341.
[5] Brief for the Petitioner at 42, *Direct Mktg. Ass'n v. Brohl*, U.S. (No. 13-1032).
[6] Transcript of Oral Argument at 17, *Direct Marketing Association v. Brohl*, U.S. (No. 13-1032).
[7] Transcript of Oral Argument at 4-5.
[8] *Id.* at 6-7.

DOR Executive Director's Arguments before the U.S. Supreme Court

The DOR's main argument in its brief is that the remote seller notice and reporting requirements are a central part of Colorado's tax system and are the only method to ensure the payment of sales and use taxes on remote seller transactions.[9] The injunction against the law makes it impossible for the DOR to obtain the necessary information regarding these transactions and, as a result, restrains the assessment and collection of Colorado tax. Thus, the DOR contends in its brief that the TIA applies because the District Court "enjoined" Colorado's law and the law's purpose is to assess and collect a state tax. The reporting requirements lead to compliant self-assessing and payment of tax, which are part of the tax "collection" process. The purpose of the TIA is to prevent federal law suits that will enjoin or restrain states from collecting taxes. Congress designed the TIA to apply broadly by disallowing federal court interference with state tax administrations. The plain meaning of the TIA states that federal suits prohibiting a state's program to assess and collect tax are jurisdictionally barred.

During oral argument the justices challenged DOR counsel that the injunction against the law does not prohibit Colorado from collecting the tax or receiving the necessary information to collect the tax, but instead prohibits using this particular law as a tool to get the information. The justices appeared to disagree with counsel when he argued that there are no other means to effectively acquire this information.[10]

Considerations

While we await the U.S. Supreme Court's decision in this case, remote sellers to which the Colorado notice and reporting requirements are directed should consider the following:

- As noted previously, prior to the U.S. 10th Circuit Court's holding that under the TIA the District Court lacked jurisdiction in case, the District Court had held that the notice and reporting requirements violated the U.S. Commerce Clause.
- DMA has also filed suit in Colorado state court. There is currently a temporary injunction in place at the state court level and the case is subject to a stay of proceedings pending a U.S. Supreme Court decision.
- It is unclear what effect recent Colorado legislation enacted in anticipation of the proposed federal Marketplace Fairness Act ("MFA")[11] will have on the DOR's enforcement of the notice and reporting requirements should the DOR prevail in the U.S. Supreme Court or the Colorado state court.

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[9] Brief for the Respondent at 10, *Direct Mktg. Ass'n v. Brohl*, U.S. (No. 13-1032).
[10] Transcript of Oral Argument at 46-47, *Direct Mktg. Ass'n v. Brohl*, U.S. (No. 13-1032).
[11] The MFA had been pending before the 113th U.S. Congress that expired on January 3, 2015, without having passed the MFA. Had it been adopted into law, the MFA would have generally allowed Streamlined Sales and Use Tax Agreement members states as well as states adopting certain "minimum simplification requirements" to impose law that would require remote sellers to collect and remit sales/use taxes on sales to in-state residents.