

U.S. Supreme Court denies petition for certiorari in *DMA v. Brohl*

Overview

On December 12, 2016, the United States Supreme Court (the Court) denied a petition for writ of certiorari in the case *Direct Marketing Association v. Brohl (DMA)*.¹

The *DMA* litigation has traveled a long road, which includes a prior decision by the U.S. Supreme Court on a jurisdictional question. Please refer to our [prior coverage](#) for an in-depth discussion. This Tax Alert summarizes the latest holding in the case, a February 2016 decision of the U.S. Court of Appeals for the Tenth Circuit (the 10th Circuit), and also provides considerations for taxpayers in the wake of the Court's denial of review.

Background - The 10th Circuit decision

On February 22, 2016, the 10th Circuit issued a decision in *DMA*,² deciding in favor of the Colorado Department of Revenue (DOR) by reversing a U.S. District Court's determination that Colorado's remote seller reporting requirements violated the Commerce Clause of the U.S. Constitution. In reaching its decision, the 10th Circuit determined that the U.S. Supreme Court's holding in *Quill Corp. v. North Dakota*,³ which affirmed the *Bellas Hess* bright-line physical presence standard for substantial nexus under the Commerce Clause,⁴ was limited to sales and use tax collection obligations and therefore not applicable to Colorado's remote seller notice and reporting requirements under Colo. Rev. Stat. § 39-21-112(3.5).⁵ The 10th Circuit further held that Colorado's remote seller notice and reporting requirements neither discriminate against, nor unduly burden interstate commerce.⁶

On August 29, 2016, *DMA* filed a petition for writ of certiorari with the Court requesting that the Court grant review of the 10th Circuit's February 22 decision. In its petition, *DMA* presented three questions: (1) whether a state statute that imposes regulatory obligations that apply, as a matter of law, solely to out-of-state companies, but does not use "language explicitly identifying geographical distinctions" in its text, discriminates against interstate commerce; (2) whether the 10th Circuit erred in adopting a "comparative burdens" test for discrimination; and (3) whether the 10th Circuit erred in concluding that out-of-state retailers that do not collect Colorado sales tax are "not similarly situated" to their direct in-state competitors who collect Colorado sales tax. *DMA*'s petition for review of these questions was rejected by the Court on December 12.

Other States to Follow?

Unless the Court grants a petition for rehearing,⁷ the denial of the petition for review in *DMA* allows the 10th Circuit's limitation of the *Quill/Bellas Hess* standard to sales and use tax collection to stand, and could encourage the widespread adoption by other states of notice and reporting requirements similar to those enacted in Colorado. The adoption of such requirements may also prompt remote sellers to consider whether it would be more efficient to simply collect and remit sales or use taxes rather than to separately develop and maintain the IT systems necessary for compliance with various states' notice and reporting regimes. In 2016 at least eight states have proposed notice

¹ U.S. Supreme Court, 2016 Term Order List for [December 12, 2016](#).

² *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129 (10th Cir. Feb. 22, 2016); Case No. 12-1175 available [here](#).

³ *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

⁴ *Quill*, 504 U.S. at 317.

⁵ *Direct Mktg. Ass'n* at 1136-39.

⁶ *Direct Mktg. Ass'n* at 1143-46.

⁷ See U.S. Supreme Court Rules, Rule 44.2, available [here](#). Generally, a petition for rehearing of the Court's order denying a petition for writ of certiorari must be filed within twenty-five days from the date of the order and the time to file such petition will not be extended. The grounds upon which a petition for rehearing is filed is limited to "intervening circumstances of a substantial or controlling effect" or "other substantial grounds not previously presented."

and reporting bills.⁸ Of those proposals, new statutes have been enacted recently in Louisiana, Oklahoma, and Vermont.⁹ Given that three other states have now joined Colorado in enacting such regimes, it may be an indicator that enacting notice and reporting requirements could become a wide-spread state approach to overcoming the bright-line physical presence standard in *Quill*.

If remote sellers decide to collect and remit sales or use taxes rather than comply with notice and reporting requirements, it could effectively render the practical application of *Quill/Bellas Hess's* bright-line physical presence standard moot, and may end the *Quill* era without the need for a successful state litigation challenge to the standard.¹⁰

Potential Congressional Action?

However, as noted by the 10th Circuit and the U.S. Supreme Court in *Quill*, "Congress holds the 'ultimate power' and is 'better qualified to resolve' the issue of 'whether, when, and to what extent the States may burden interstate [retailers] with a duty to collect [sales and] use taxes.'"¹¹ Several bills and discussion drafts that seek to require out-of-state retailers to collect sales and use tax have recently been contemplated in Congress.¹² While the likelihood of Congressional action is unknown, taxpayers should continue to monitor any federal legislative developments as a federal bill could be enacted that may definitively resolve the *Quill* and *Bellas Hess* debate.

Additional Colorado Considerations

Now that the U.S. Supreme Court has denied DMA's petition for review, the case will be remanded to the U.S. District Court for further proceedings consistent with the 10th Circuit's opinion. DMA originally raised fourteen claims, including violations of due process and privacy, but the 10th Circuit decision considered only two of them. It is unclear whether the U.S. District Court will now consider the remaining twelve claims.

It is also important to note that, after the 10th Circuit's 2013 decision on jurisdictional issues instructed the U.S. District Court to dissolve the permanent injunction enjoining the DOR from enforcing the remote seller reporting law,¹³ DMA filed suit in Colorado District Court in the City and County of Denver.¹⁴ On February 18, 2014, the Colorado District Court issued a preliminary injunction enjoining the DOR from enforcing the remote seller reporting law.¹⁵ On July 10, 2014, the Colorado District Court stayed all further proceedings of the DMA case pending resolution of the DMA's initial appeal to the U.S. Supreme Court.¹⁶ It is unclear how the Colorado District Court case will proceed following the U.S. Supreme Court's denial of DMA's petition for review.

Taxpayers are encouraged to seek advice regarding their particular situation in complying with the requirements of Colorado's remote seller reporting law. Once the Colorado District Court issues a decision or lifts its injunction, it is expected that the Colorado DOR will issue guidance regarding the timing of its enforcement of the remote seller notice and reporting requirements. Retailers that may be subject to the requirements should continue to consider whether they are prepared to comply with the standards should the injunction be lifted. Due to the potential burden on retailers of complying with the reporting obligations, which may require adding complex augmentations to sales and use tax systems, retailers may need to consider whether voluntary sales tax collection and remittance is a more compelling alternative than compliance with the reporting obligations.

⁸ Iowa, Kansas, Louisiana, Minnesota, Oklahoma, Rhode Island, Utah, and Vermont.

⁹ HB 1121 (Act 569), 2016 Leg., Reg. Sess. (La. 2016); HB 2531, 55th Leg., 2nd Reg. Sess., (Okla. 2016); H 873 (Act 134), 2015-16 Leg. Sess. (Vt. 2016).

¹⁰ See *South Dakota v. Wayfair Inc.*, No. 16-CV-03019-RAL (D. S.D. May 25, 2016); see also *South Dakota v. Wayfair Inc.*, No. 32CIV16-000092 (S.D. 6th Cir. Ct. 2016).

¹¹ *Direct Mktg. Ass'n v. Brohl*, at 1147, quoting *Quill*, 504 U.S. at 318.

¹² See, Marketplace Fairness Act of 2015 (S. 698); Online Simplification Act of 2015; Remote Transaction Parity Act (H.R. 2775).

¹³ *Direct Mktg. Ass'n v. Brohl*, 735 F.3d 904, 921 (2013)

¹⁴ *Direct Mktg. Ass'n v. Colo. Dep't of Revenue*, Case No. 2013CV34855, District Court, City and County of Denver, State of Colorado.

¹⁵ *Direct Mktg. Ass'n v. Colo. Dep't of Revenue*, Case No. 2013CV34855 (Colo. Dist. Ct. Feb. 18, 2014).

¹⁶ *Direct Mktg. Ass'n v. Colo. Dep't of Revenue*, Case No. 2013CV34855 (Colo. Dist. Ct. Jul. 10, 2014).

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