

Colorado state court grants preliminary injunction against enforcement of use tax notice and reporting law

February 24, 2014

In brief

On February 18, 2014, a Colorado District Judge granted Direct Marketing Association's motion for preliminary injunction against enforcement of Colorado's use tax notice and reporting law enacted in 2010. The judge stated the law's three notification and reporting requirements appear to be facially discriminatory since non-resident retailers are burdened with compliance requirements that would not apply to resident retailers [*Direct Marketing Association v. Dep't of Revenue et al.*; District Court, City and County of Denver, Case No. 13CV34855 (2/18/2014)].

In detail

Direct Marketing Association (DMA) filed a motion for preliminary injunction of Colorado's use tax notice and reporting law in Colorado state district court on November 5, 2013. The law requires non-resident retailers to give notices to their buyers of the use tax that may be due, and to give annual reports to buyers and the state summarizing Colorado purchases. On February 18, 2014, District Court Judge Morris B. Hoffman granted the motion for enforcement of a preliminary injunction.

Facial discrimination

The judge acknowledged that resolution of the preliminary

injunction request depended on whether there is a reasonable probability that DMA will succeed on the merits of its Commerce Clause challenge.

The judge considered whether the law's three requirements are facially discriminatory since they apply only to non-resident retailers selling to Colorado residents. Since the requirements do not apply to resident retailers, the judge stated the burden on non-resident retailers appears to be facially discriminatory.

The Department argued that no discrimination exists because the reporting obligation imposed on out-of-state retailers 'equalizes' the tax

collection burden borne by in-state retailers. The judge disagreed, stating that "to compare the regulatory burdens non-resident retailers face to the burdens they would face were it constitutional to require them to collect use taxes, is not just a case of apples and oranges, it is a case of apples and unconstitutional oranges."

Accordingly, the judge granted DMA's motion to enjoin the Colorado Department of Revenue from enforcing the use tax notice and reporting law.

Previous injunction

The district judge's injunction follows a previous federal

injunction that was formally dissolved on December 10, 2013. Click [here](#) for our summary of the prior federal injunction.

Penalties not assessed

During the time period between the dissolution of the federal injunction and the state injunction, the Department of Revenue stated penalties would not be assessed against retailers failing to comply with the technically operational reporting requirements for years 2010 through 2013. Additionally, the Department expressed that it would not assess penalties for failure to comply with the January 31, 2014, deadline to provide customers with annual purchase summaries, or the March 1, 2014, deadline to provide the Department with an annual report of 2013 purchases [Notice: Non-

Collecting Retailer Reporting Requirements, Colorado Department of Revenue (12/19/2013)].

The takeaway

Judge Hoffman stated that his preliminary conclusions in the case are not 'written in stone,' and that although the material facts are undisputed now, the factual record in the case may very well be different at the time he addresses the merits. The judge acknowledged the Commerce Clause "seems to be a difficult area of the law," and that his preliminary views may be very different after contemplating the merits briefs.

Therefore, at least for the time being, remote sellers continue to be spared from Colorado's burdensome notice and reporting requirements. In the meantime, Colorado continues

introducing nexus expansion legislation targeting online retailers. On February 4, new click-through nexus provisions were introduced in [House Bill 1269](#). If passed, the law would encompass many of the largest remote online sellers already impacted by these use tax reporting requirements.

Since 2010, six other states have enacted, and many other states have proposed, similar notice and reporting requirements. Colorado appears to be the testing ground for the law's constitutionality. As a result, DMA's outcome will likely have a ripple effect on how current and proposed use tax notice and reporting requirements are viewed in other states.

Let's talk

For a deeper discussion of how this issue might affect your business, please contact:

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