

US Supreme Court grants certiorari in two sales and use tax cases

July 9, 2014

In brief

On July 1, 2014, the US Supreme Court [granted petitions for writ of certiorari](#) in two sales and use tax cases, [Direct Marketing Ass'n v. Brohl](#), 10th Cir. Ct. of App., No 12-1175 (8/20/13), and [CSX Transportation, Inc. v. Alabama Department of Revenue](#), No. 2:08-cv-00655-AKK, 11th Cir. (7/1/13).

In detail

Direct Marketing

The *Direct Marketing* litigation has followed a winding procedural path through both state and federal courts. The Direct Marketing Association (DMA) originally filed suit against Colorado in US District Court, claiming notice and reporting requirements for out-of-state sellers were unconstitutional (*Direct Marketing Assoc. v. Huber*, U.S. Dist. Ct., Dist. Co., No. 10-cv-01546-REB-CBS (1/26/11)). The US District Court Judge issued a permanent injunction, barring Colorado from enforcing its use tax reporting law. On appeal, however, the US Court of Appeals for the 10th Circuit remanded the matter back to the district court to lift the permanent injunction and dismiss DMA's Commerce Clause claims for lack of jurisdiction under the Federal Tax Injunction Act (TIA). DMA

subsequently filed a writ of certiorari with the US Supreme Court on February 25, 2014 contesting the grounds for dismissal.

Although DMA's petition for writ of certiorari was granted, it is important to note the legal question at issue is not related to whether Colorado's use tax reporting requirement is constitutional. Rather, the US Supreme Court is likely only to address the procedural question of whether third-party, non-taxpayer plaintiffs have the right to challenge a state reporting requirement law in federal court. If the US Supreme Court decides the suit is not barred under the TIA then the US District Court of Appeals may eventually review the constitutionality of Colorado's use tax reporting requirement.

In the meantime, DMA also filed suit in Colorado District Court. On February 18, 2014, a Colorado District Court Judge

granted the 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 notification and reporting requirements appear to be facially discriminatory since non-resident retailers are burdened with compliance while resident retailers are not required to comply. However, the judge expressly stated that the injunction was only preliminary and that his views may be very different after contemplating the merits of the case (*Direct Marketing Association v. Dep't of Revenue et al.*; District Court, City and County of Denver, Case No. 13CV34855 (2/18/2014)). Most recently, on June 2, 2014, DMA filed a motion for summary judgment urging the Colorado district court to grant a permanent injunction.

The Colorado Department of Revenue has not enforced its use tax reporting law throughout the course of the lawsuits and it is unlikely (or unable) to do so pending the outcome of both the federal and state litigation. Please see here for prior summaries of *Direct Marketing*: [Colorado – Use tax notice and reporting requirement injunction dissolved](#) and [Colorado state court grants preliminary injunction against enforcement of use tax notice and reporting law](#)

CSX Transportation

In *CSX Transportation*, the US Supreme Court will review whether

Alabama's sales tax violated the federal Railroad Revitalization and Regulatory Reform Act of 1976 precluding tax discrimination against rail carriers. The rail carriers' purchases of diesel fuel were subject to sales tax while similar purchases by competitors such as motor and water carriers were exempt. While the case is specific to rail carriers, the case will be instructive for challenges of current or potential future federal laws that prohibit discriminatory state taxation. Please see here for a prior summary of *CSX Transportation* [Alabama –Sales tax on rail carrier's diesel fuel](#)

[purchases discriminatory in violation of federal act.](#)

The takeaway

Although the US Supreme Court granted DMA's petition for writ of certiorari, it is important to note the Court is unlikely to consider at this time whether Colorado's use tax reporting requirements are constitutional. Rather, the Court is likely only to consider the issue of whether DMA is barred by the TIA from filing suit in federal court.

Let's talk

For questions regarding the *Direct Marketing Association* petition, please contact:

State and Local Tax Services

Todd Roberts
Partner , *Denver*
+1 (720) 938-9191
todd.roberts@us.pwc.com

For questions regarding the *CSX Transportation* petition, please contact:

Bryan Mayster
Managing Director, *Chicago*
+1 (312) 298-4499
bryan.mayster@us.pwc.com