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DMA and DOR Move for Summary Judgment as Modifying Legislation Dies in Colorado General Assembly

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On January 26, 2011, Judge Robert Blackburn of the United States District Court for the District of Colorado sided with the Direct Marketing Association ("DMA") and enjoined the Colorado Department of Revenue (the "Department") from enforcing the novel use tax notice and reporting requirements enacted in 2010. The Department appealed Judge Blackburn's grant of the preliminary injunction to the Tenth Circuit Court of Appeals but voluntarily dismissed the appeal after the district court judge entered a stipulated order under which the parties agreed to submit cross-motions for summary judgment on the Commerce Clause issues without further discovery. The DMA and the Department filed their respective summary judgment motions on May 6, 2011. Meanwhile, the Colorado General Assembly considered legislation that would partially repeal the law at issue in the DMA's challenge and, if passed, render the litigation moot.

A Disagreement of Sorts

The DMA and the Department disagree about the constitutionality of a new Colorado law, Colo. Rev. Stat. § 39-21-112(3.5) (2010), and the implementing regulations, 1 Colo. Code Regs. § 201-1:39-21-112.3.5 (2010), which require retailers that do not collect sales tax on sales to Colorado customers to report certain information regarding the purchases to their customers as well as the Department. Pursuant to Judge Blackburn's January 26 order, the Department is temporarily enjoined from enforcing the law and regulations; however, the preliminary injunction is not dispositive. Both parties have now moved for summary judgment with respect to Counts I and II, which allege that the statute and regulations facially violate the Commerce Clause of the United States Constitution.

The DMA argues in its motion for summary judgment that the notice and reporting requirements impermissibly discriminate against interstate commerce by placing different burdens on out-of-state retailers versus in-state retailers.[1] According to the DMA, the Department cannot meet its burden of proving that the statute and regulations serve a legitimate local purpose for which there is no reasonable nondiscriminatory alternative.[2] The DMA cites the majority practice of placing a line for the self-reporting of use taxes on state income tax

[1] Plaintiff's Motion for Summary Judgment as to Counts I and II Alleging Violations of the Commerce Clause, *Direct Mktg. Ass'n v. Huber*, No. 10-CV-01546-REB-CBS, 17–19 (D. Colo. filed May 6, 2011).

[2] *Id.* at 19–21.

returns as one example of a nondiscriminatory alternative.[3] The DMA also contends that, pursuant to the principles established in *Quill Corp. v. North Dakota*,[4] Colorado is prohibited from placing an undue burden on interstate commerce by imposing cumbersome notice and reporting requirements on retailers with no physical presence in Colorado.[5]

The Department moved for partial summary judgment as well, claiming that the new requirements actually further rather than offend the objectives of the Commerce Clause by encouraging "open competition and tax neutral decisions by consumers."[6] The Department maintains that the new law does not discriminate against remote retailers because it affords such retailers a choice to subject themselves to the same burdens imposed upon their in-state counterparts, does not benefit in-state retailers at the expense of out-of-state retailers, and serves the strong state interest in collecting sales and use taxes.[7] Furthermore, the Department argues that *Quill*'s physical presence requirement is limited to the actual collection and remittance of sales and use taxes and does not prohibit states from imposing notice and reporting obligations on remote retailers.[8]

The Colorado General Assembly's Failed Intervention

Amid the current litigation, the Colorado General Assembly mulled over a bill intended to substantially negate the new law. Colorado House Bill 11-1318 would have repealed the most offensive portions of the notice and reporting requirements and effectively mooted the DMA's challenge. The Republican-controlled House passed HB 11-1318 on May 5, 2011. In the hectic final days leading up to the May 11 adjournment of the General Assembly's regular session, however, the bill died in the Senate Committee on State, Veterans, and Military Affairs.

Next Steps

The Colorado General Assembly failed to fashion a legislative remedy for the notice and reporting dilemma, so the current litigation will move forward. Each party filed a motion opposing the other's motion for summary judgment on May 27, 2011, but the court has yet to schedule a hearing. Unless Judge Blackburn departs from his thorough analysis laid out in the preliminary injunction, it appears likely that he will grant the DMA's motion for summary judgment. The Department would then almost certainly appeal an adverse decision to the Tenth

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[3] *Id.* at 20.

[4] 504 U.S. 298 (1992).

[5] Plaintiff's Motion for Summary Judgment, *supra* note 1, at 21–25.

[6] Defendant's Motion for Partial Summary Judgment – Counts I and II (Commerce Clause), *Direct Mktg. Ass'n v. Huber*, No. 10-CV-01546-REB-CBS, 11 (D. Colo. filed May 6, 2011).

[7] *Id.* at 12–23.

[8] *Id.* at 24–30.

Circuit Court of Appeals. Stay tuned for updates on the case in the next edition of the *State Tax Return*.

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