Colorado: US Supreme Court leaves notice and reporting requirement intact

David M. Kall | Thursday, December 22, 2016

In February of this year, the Tenth Circuit Court of Appeals decided the case *Direct Marketing Association v. Brohl*. As we explained when the opinion came out, the court held that the state of Colorado could require certain sellers to comply with notice and reporting obligations related to those retailers' sales to in-state purchasers that are not subject to sales tax collections.

The Direct Marketing Association (DMA) viewed the law as unconstitutionally discriminatory, and having an unconstitutionally burdensome effect on interstate commerce, in part because it distinguished between in-state and out-of-state economic interests. It took its loss to the United States Supreme Court, where it lost again when the court denied the DMA's petition for review, on December 12, 2016.

Bloomberg described response to the "eagerly anticipat[ed]" decision. A displeased DMA bristled that the result "will only encourage other states to adopt similar laws and regulations that are designed to put arbitrary burdens on out-of-state sellers…This is an issue Congress should address, as the Constitution explicitly gives the legislative branch the authority to regulate interstate commerce."

Indeed, that is precisely what the author of the Tenth Circuit's opinion suggested, quoting the 1992 case *Quill Corp. v. North Dakota*: "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.'"

Another stakeholder, the president of the American Catalog Mailers Association, contended that the *Brohl* decision would undermine the trust between consumers and business "by requiring remote sellers to report to state tax collectors on the buying habits of their customers, including health care products, apparel or other sensitive items."

Similarly, Bloomberg pointed to a statement by the executive director of NetChoice, in which he expressed concern that because the Supreme Court did not choose to take on the DMA case, "states will now be unrestrained in passing new 'tattletale reporting' laws that force online and catalog retailers to report personal information and purchase data to state tax collectors."

With a different perspective, the general counsel of the Multistate Tax Commission opined that the Tenth Circuit "got it right…[t]hat said, information reporting will not level the playing field for bricks-and-mortar entities…"

Finally, the National Conference of State Legislatures (NCSL) told Bloomberg that it has "long advocated for a solution to the remote sales tax collection problem…

Many states, especially those that do not levy personal or corporate income taxes, are particularly reliant on this revenue stream to fund important programs and services provided by the states."

Even so, the NCSL took the position that *Brohl* was not the best case to challenge the long-standing precedent, set forth in *Quill*, that a state may not require an out-of-state retailer to collect and remit sales taxes on in-state sales. Though the NCSL did not elaborate, this could be because the Colorado law that *Brohl* challenged was technically one requiring only the notification and reporting of tax obligations, and not the actual collection of the owed taxes.

David M. Kall

Team member bio