Colorado: 10th Circuit upholds out-of-state retailers' notice and reporting obligations

David M. Kall | Friday, March 4, 2016

In *Direct Marketing Association v. Brohl (Brohl III)*, a case that has been working its way up and down the federal court system for several years, the 10th Circuit Court of Appeals **held** that the state of Colorado could require certain sellers to comply with notice and reporting obligations for sales to in-state purchasers that are not subject to sales tax collections.

More specifically, the law in question requires out-of-state online retailers that do not collect Colorado state sales and use taxes to:

1. Notify their customers that they may be subject to Colorado's use tax;
2. To provide an annual purchase summary to customers who bought more than $500.00 that year, and remind them of their obligation to pay taxes on those purchases; and
3. To send the Colorado Department of Revenue an annual customer information report listing their customers' names, addresses, and total amounts spent.

Ultimately, the issue in *Brohl III* was whether the law unconstitutionally discriminates against and unduly burdens interstate commerce.

The **last time we addressed** this case was about a year ago, after a unanimous United States Supreme Court resolved the procedural question of whether the Circuit Court had jurisdiction to hear the merits in the first place. The highest court answered this question in the affirmative, and sent the matter back to the 10th Circuit.

The Court's opinion

At the outset, Judge Matheson, the author of the opinion, presented the dispute as follows:

“When a neighborhood bookstore in Denver sells a book, it must collect sales tax from the buyer and remit that payment to the Colorado Department of Revenue. When Barnes & Noble sells a book over the Internet to a Colorado buyer, it must collect sales tax from the buyer and remit. But when Amazon sells a book over the Internet to a Colorado buyer, it has no obligation to collect sales tax. ”

Justice Matheson placed the blame for the existence of this challenge on the United States Supreme Court’s result in the 1992 case ***Quill Corp. v. North Dakota***. *Quill* determined that a state may not require an out-of-state retailer to collect and remit sales taxes on in-state sales. The *Brohl III* court recognized that many states are thus forced to rely on purchasers themselves to calculate and pay the appropriate taxes, but that few actually do.

As a consequence of this “serious, continuing injustice,” and the explosive growth of the Internet, states are losing significant tax revenue. Additionally, relative to out-of-state sellers, in-state retailers are disadvantaged because they are not only required to calculate, collect and remit sales taxes, they are also liable for sales tax they do not collect, and may be subject to fines or criminal penalties for non-compliance.

The 10th Circuit viewed its inquiry as whether the Colorado law could be fairly viewed as “directed to legitimate local concerns,” with only incidental harm on interstate commerce. If there was merely an incidental burden on interstate commerce, the law would be upheld unless that burden is “clearly excessive in relation to the putative local benefits.”

Unconstitutionally discriminatory?

With respect to this component of the plaintiff’s argument, the 10th Circuit decided that the law did not discriminate against interstate commerce because its plain and unambiguous language does not distinguish between in-state and out-of-state economic interests; it only distinguishes between retailers that do collect the applicable taxes, and those that do not. Similarly, the court did not find significant enough evidence of a discriminatory effect.

Unduly burdensome effect on interstate commerce?

Nor did the court conclude that the law has unduly burdensome effects on interstate commerce. The 10th Circuit reasoned that the law implicates notice and reporting requirements, but not the collection of taxes. As a result, the precedent the plaintiff attempted to analogize from the *Quill* case – that certain tax collections are unlawfully burdensome – could not be applied to the Colorado law.

Implications

In holding that Colorado’s notice and reporting obligations are neither unconstitutionally discriminatory nor unduly burdensome, the 10th Circuit sent the case back to the district court for proceedings consistent with its opinion.

It also invited congress to address this issue, quoting *Quill’s* observation that “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.’”

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