States and online retailers continue to battle over sales tax laws

David M. Kall | Thursday, March 16, 2017

South Dakota

Less than a year ago, we wrote about a taxing provision that South Dakota lawmakers passed in an effort to quell revenue losses attributable to out-of-state internet sellers who do not have enough of a connection, or nexus, with the state to be subject to sales tax collection and remittance obligations. That law, SB 106, effective May 1, 2016, set a threshold of $100,000 of in-state sales, or 200 separate transactions, above which an out-of-state retailer would be required to collect and remit sales taxes.

In April 2016, just before the law took effect, the state sued several internet retailers, Newegg Inc., Overstock.com Inc., and Wayfair LLC, requesting a trial court declaration that the retailers are subject to the terms of SB 106. In a subsequent motion for summary judgment, the retailers sought dismissal of the case arguing the opposite. They reasoned that the 1992 U.S. Supreme Court case *Quill Corp. v. North Dakota*, which bans states from imposing a use tax collection duty on out-of-state retailers for products shipped into the state unless they have an in-state physical presence, applies to preclude SB 106 from applying to them.

In a March 6, 2017, Order that Bloomberg posted online, the court agreed with the retailers and granted their motion. In the briefs, the parties agreed that they both desired a speedy resolution such that no hearing was necessary, and that under *Quill*, South Dakota may not impose sales tax collection and remittance obligations on the Defendants. The court recognized, and the state admitted, that it "is required to grant summary judgment in Defendants' favor, because of the *Quill* ruling."

Indeed, the court observed that "by requiring remittance of sales tax by sellers who 'do[] not have a physical presence in the state, [SB 106] fails as a matter of law to satisfy the physical presence requirement that remains applicable to state sales and use taxes under *Quill* and its application of the Commerce Clause."

The court declared this to be "true even when changing times and events clearly suggest a different outcome," acknowledging that it cannot simply disregard a ruling from the United States Supreme Court.

At the very outset of the case, in its Complaint, the state disclosed that it was hoping to cause a reversal of *Quill*, because that ruling "effectively immunize[s] out-of-state retailers lacking a physical presence within a state from having to remit any state sales or use taxes…the effects of that immunity on the State treasury and its general retail markets have vastly multiplied because of the meteoric rise of Internet commerce."

Now, the South Dakota Department of Revenue is preparing to take its appeal to the state Supreme Court due to a special provision in S.B. 106 that directs the appeal there. Even so, because the state has conceded that *Quill* applies in favor of out-of-state retailers to prevent sales tax collection obligations, one retail stakeholder,

Steve DelBianco, the executive director of NetChoice in Washington, D.C., cheered that the same outcome will likely occur in the high court. Assuming further appeal to the U.S. Supreme Court, he noted, “if [it] declines to hear the case, then *Quill* stays in place.” NetChoice, along with another concerned retailer, the American Catalog Mailers Association, also sued South Dakota last April, asking the court to declare that S.B. 106 is facially unconstitutional.

Colorado

Another case that has been up and down the court system is *Direct Marketing Association v. Brohl*. In *Brohl*, the Ninth Circuit Court of Appeals ultimately held that the law at issue, which requires out-of-state internet retailers that are not subject to sales tax and remittance obligations to nevertheless comply with notification and reporting requirements, is constitutional. When we last addressed the litigation earlier this month, the parties had reached a settlement in a separate but similarly-reasoned case that they filed in state court. This effectively left the challenged law in place.

Steve DelBianco, the above-mentioned NetChoice executive, does not like the “tattle-tale provision” of Colorado’s law and is helping lawmakers there draft a bill that would kill it, according to a different Bloomberg piece. The proposal is expected shortly.

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