Colorado: Proposal to repeal notice and reporting obligations dead in the House

David M. Kall | Thursday, May 11, 2017

Many spectators have been watching the litigation, and its aftermath, involving the challenge to Colorado's 2010 law imposing notice and reporting requirements on retailers that do not collect the state's 2.9 percent sales and use tax. In the case, Direct Marketing Association v. Brohl, the Direct Marketing Association, now known as the Data & Marketing Association (DMA), claimed that the law discriminated against, and unfairly burdened, interstate commerce in violation of the dormant commerce clause.

In its February 2016 opinion, the Tenth Circuit Court of Appeals determined that the law was constitutional, blessing the following three obligations on those retailers, as long as they had more than $100,000 in total gross sales annually:

- To send a "transactional notice" to purchasers informing them that they may be subject to Colorado's use tax.
- To send Colorado purchasers who buy goods from the retailer totaling more than $500 an "annual purchase summary" with the dates, categories, and amounts of purchases, reminding them of their obligation to pay use taxes on those purchases.
- To send the Colorado Department of Revenue (Department) an annual "customer information report" listing their customers' names, addresses, and total amounts spent.

The DMA had a related case pending in state court, and in a February 23, 2017, press release, it announced that the parties had settled. With the litigation all wrapped up, the law remained firmly in place.

Even those without a financial stake in the notice and reporting requirements were watching closely for its effect on other jurisdictions that may be emboldened to try to recapture some of their own lost tax revenues by way of similar laws. Indeed, it is a relief to Colorado for the revenue that it will now be able to capture.

The effort to repeal

On the other hand, the law is a headache for those subject to it, like out-of-state retailers who sell to in-state buyers via the Internet. Thus, there was a movement afoot

to get lawmakers to repeal it altogether. NetChoice, a trade association "committed to tearing down barriers of e-commerce," was one vocal proponent of the repeal movement. The association is a plaintiff in a different lawsuit, trying to get a similar law in South Dakota overturned.

The result of the effort in Colorado, SB 238, introduced in March, would have relieved retailers of much of their notice and reporting burden. According to the latest fiscal note, the legislation was expected to reduce general fund revenue by up to $4.7 million in fiscal year 2017-18, by up to $5.0 million in fiscal year 2018-19, and similar amounts in future years.

In particular, had it passed, SB 238 would have eliminated the requirement, imposed on "[e]ach retailer that does not collect Colorado sales tax," to file the above mentioned customer information reports showing the total amount of those purchases, among other things. SB238 also would have removed the penalty, $10 per purchaser, for failure to comply.

Additionally, SB 238 would have adjusted the means by which the retailers are required provide the required customer notifications. As it is, the law mandates the use of first class mail, but the repeal legislation called for simple email notification.

Finally, lawmakers' SB 238 contained a new marketing provision "to properly educate Colorado taxpayers of their obligation to pay sales tax on internet purchases…" This would have required the Department to create, and post on its website, the "Know What You Owe" campaign, explaining that items purchased from out of state vendors, "such as those purchased over the internet or by catalogue," may be subject to taxation.

In early April, the measure passed through both the Senate Finance and Senate Appropriations Committees. However, on May 1, 2017, the House Finance Committee passed a motion to postpone the bill indefinitely.

Democratic opposition

A Bloomberg article foreshadowed the bill's fate in the House when it declared that there was sharp opposition in that chamber. The article featured a Netchoice lobbyist who contended that "Democrats, the majority party in the House, believe [Colorado] 'needs the heavy hand of the Department of Revenue' to provoke consumers to pay use taxes that are due." Opposing this tactic, the lobbyist instead opined that "[w]e can get more collections by educating taxpayers than by using the Department of Revenue to squeeze it out of them…And we can do it while protecting people's privacy."

That privacy argument maintains that the notification rules are "a gross violation of the 4th Amendment to the U.S. Constitution" because they require reporting to the government about individual purchases, like amounts spent, and billing and shipping addresses.

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