COAN, PAYTON & PAYNE, LLC
ATTORNEYS AT LAW

New Life For Colorado Tax On Internet Purchases?

By Daniel W. Jones, Esq.

Soon, the United States Supreme Court will announce an opinion in the ongoing battle between the State of Colorado and the Direct Marketing Association over a five-year-old Colorado sales and use tax law. The decision will create implications for many businesses.

In 2010, Governor Ritter signed into law House Bill 10-1193. This bill, codified at section 39-21-112 of the Colorado Revised Statutes, represents the Colorado Legislature's effort to better enable the Colorado Department of Revenue (DOR) to collect sales and use taxes from Colorado residents who purchase products online from remote vendors, rather than collecting sales taxes from the vendors directly.

The 2010 law requires considerable, burdensome cooperation from the affected vendors. Under the law, subject vendors (including Amazon.com, for example) must send an annual notice to each Colorado purchaser, by January 31, showing the total amount paid by each purchaser for Colorado purchases in the previous year, including the dates, amounts and category of the purchase and, if known by the retailer, whether the purchase is tax exempt. The notice must inform each Colorado purchaser that Colorado law requires the filing of a sales or use tax return, and the notice must be sent by first-class mail, separate from product shipments, to each Colorado purchaser.

The law also requires the remote vendors to provide to the DOR an annual statement for each Colorado purchaser, identifying each purchaser and the amount purchased during the prior calendar year, by March 1. For remote vendors with more than $100,000 in applicable sales, the annual statement must be filed "by magnetic media or another machine-readable form for that year." The law establishes a penalty of ten dollars for each purchaser to whom the retailer fails to send the required tax notice and an additional ten dollars for each Colorado purchaser omitted from the annual statement filed with the DOR, "unless the retailer shows reasonable cause for such failure."

Predictably, the law was challenged. The Direct Marketing Association (DMA) sued the executive director of the DOR in June, 2010, alleging unconstitutional discrimination against interstate commerce and imposition of undue burdens on interstate commerce. The U.S. District Court for the District of Colorado granted a preliminary injunction to DMA, prohibiting the enforcement of the notice and reporting provisions of the law. In March, 2012, the District Court granted DMA's motion for summary judgment against the DOR, concluding that the law's notice and reporting requirements discriminate against interstate commerce and place undue burdens that interfere with interstate commerce. The District Court at that time entered a permanent injunction, prohibiting Colorado from enforcing the notice and reporting requirements of the law.

The DOR appealed the District Court's rulings, and the case went to the 10th Circuit Court of Appeals to decide whether the notice and reporting requirements for remote retailers unconstitutionally violate the dormant Commerce Clause. On August 20, 2013, the 10th Circuit

issued its opinion, but did so without reaching the merits about the Commerce Clause violations. Instead, the 10th Circuit focused on a federal law known as the Tax Injunction Act (TIA). The

TIA, section 1341 of Title 28 of the United States Code, provides that "district courts shall not…restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

The 10th Circuit concluded that the District Court did not have jurisdiction, finding that DMA's action sought to restrain the collection of Colorado state taxes and that "Colorado provides avenues for remote retailers to challenge the scheme allegedly forcing them to choose between collecting sales tax or complying with the notice and reporting requirements. Colorado's administrative remedies provide for hearings and appeals to state court, as well as ultimate review in the United States Supreme Court." The case was remanded to the District Court for dismissal of DMA's claims for lack of jurisdiction.

Clearly, the DOR would prefer to litigate this matter in Colorado state courts, rather than in the federal courts, so the 10th Circuit's ruling was a victory for the DOR. However, DMA petitioned the United States Supreme Court for relief. Because the 10th Circuit's decision is contrary to decisions in similar cases from other federal Circuit Courts of Appeals, and differs from the Supreme Court's leading precedent, the Supreme Court agreed on July 1, 2014, to hear DMA's appeal. The Supreme Court will decide "whether the TIA bars federal court jurisdiction over a suit brought by non-taxpayers to enjoin the informational notice and reporting requirements of a state law that neither imposes a tax nor requires the collection of a tax, but serves only as a secondary aspect of state tax administration."

The Supreme Court heard oral arguments in this case, known as Direct Marketing Association v. Brohl, on December 8, 2014. If the DOR prevails at the Supreme Court, it will mean that DMA must fight Colorado's law in Colorado courts, where the DOR may have an advantage. It is certain that businesses around Colorado should be attentive to how this case is resolved. Further, State governments around the nation likely are anxious to see how the Supreme Court rules regarding Colorado's legislation, with an eye toward repeating such legislation in other states if Colorado's scheme is successful.

Stay tuned; businesses around the United States may be affected by the outcome of this case.