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U.S. Supreme Court Holds DMA's Action Is Not Barred By Tax Injunction Act

The U.S. Supreme Court unanimously held that the Tax Injunction Act does not bar Direct Marketing Association's federal court challenge to Colorado's sales and use tax notice and reporting requirements.

In 2010, Colorado enacted a sales and use tax notice and reporting statute, and promulgated regulations that apply the law, to require noncollecting retailers to notify any Colorado customer about the state's use tax requirement and to report tax-related information to those customers and the Colorado Department of Revenue (the Department).[1] Noncollecting retailers include out-of-state sellers without Colorado sales and use tax nexus that do not collect and remit Colorado use tax on sales to Colorado customers. Specifically, the sales and use tax notice and reporting law generally requires noncollecting retailers with Colorado gross sales that exceed $100,000 to 1) notify Colorado purchasers about the Colorado sales and use tax requirement on nonexempt purchases, 2) provide an annual notice to certain Colorado purchasers that summarizes their purchases for the preceding calendar year, and 3) file an annual report with the Department that provides sellers' Colorado purchasers and the amount of their purchases for the prior calendar year.[2]

Direct Marketing Association (DMA) is a trade association of direct marketing retailers, many of which sell to Colorado customers but are not required to collect and remit Colorado use tax because they do not have nexus with Colorado. DMA filed an action against the Department in the U.S. District Court for the District of Colorado (District Court) asserting that Colorado's notice and reporting law is unconstitutional under the negative Commerce Clause. On March 30, 2012, the District Court granted partial summary judgment in favor of DMA and issued a permanent injunction against enforcement of the notice and reporting law.

The Department appealed to the U.S. Court of Appeals for the Tenth Circuit (Tenth Circuit), which determined that the federal courts lacked jurisdiction to adjudicate the action based on the Tax Injunction Act (TIA).[3] DMA petitioned the Tenth Circuit's decision to the U.S. Supreme Court (Court), which granted certiorari.

U.S. Supreme Court Holding

The Court unanimously held that the TIA does not bar DMA's action in federal court and reversed the Tenth Circuit's decision.[4] The Court reviewed the application of the TIA, which provides that the federal district courts "shall not enjoin, suspend or 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."[5] The Court interpreted the phrase "assess, levy or collection," as referring to specific phases of the taxation process and as not including information notices or private reports of information relevant to tax liability. As such, the Court determined that the TIA applies "to the

1. Colo. Rev. Stat. §39-21-112(3.5)(c), (d).
2. *Id.;* 1 Colo. Code Regs. §201-1:39-21-112.3.5.
3. 28 U.S.C. §1341.
4. *Direct Marketing Ass'n. v. Colo. Dep't Rev.*, 575 U.S. ___ (2015). Justice Kennedy and Justice Ginsberg each filed a concurring opinion.
5. 28 U.S.C. §1341.

acts of assessment, levy and collection themselves, and enforcement of the notice and reporting provisions is none of these."[6]

The Court declined to address whether the comity doctrine, which is a nonjurisdictional doctrine that counsels lower federal courts to refrain from interfering with the fiscal operations of state governments, bars DMA's action in federal court. Accordingly, the Court held that DMA's action is not barred by the TIA, reversed the Tenth Circuit's decision, and remanded the case to the Tenth Circuit to determine whether comity prevents DMA's federal court action.

Notably, Justice Anthony Kennedy's concurring opinion indicated a willingness, at least on his part, to revisit the physical presence requirement for nexus established under *Quill*.[7] Although Justice Kennedy stated that this case is not appropriate for reviewing the requirement, his concurrence may encourage states to become more aggressive in asserting nexus against out-of-state retailers.

Conclusion

The next step is for the Tenth Circuit to address whether the comity doctrine bars DMA's federal court action and to review the District Court's decision on the merits. Retailers should continue to monitor this case and other developments regarding sales and use tax requirements to ensure compliance and prevent unexpected exposures in Colorado and other states.

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6. *Direct Marketing*, 575 U.S. ___ at 9.
7. *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

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