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Small Business Notes

Minnesota Department of Employment and

Will There Be A Reconsideration of State Sales Tax Collection by Out-Of-State Vendors?

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In 1992 the U.S. Supreme Court gave its decision in *Quill Corp. v. North Dakota* [504 U.S. 298] where it stated that states can only require sales tax collection by vendors with a tangible physical presence in the state. In the intervening years the growth of online sales over the Internet has prompted many states to seek to collect sales taxes from remote sellers. Some states, led by New York State, have enacted so called "affiliate nexus laws" which consider an in-state affiliate or agent of a remote seller that drives business to the seller's website or provides some servicing of orders to be an adequate nexus to meet the tangible physical presence burden. These laws are often referred to as "Amazon laws" since their initial application has been to sales by Amazon.com. (Note that Amazon, in the wake of such laws, has begun voluntarily collecting sales tax in some states. It began such a voluntary collection in Minnesota in 2014.)

In light of *Quill*, most states rely on purchasers to calculate, self-report, and pay a "use tax" on purchases from out-of-state vendors that do not collect the sales tax. While sales tax collection compliance is estimated to be high, use tax compliance is estimated to be very low (somewhere between 0 and 5 percent). In 2010 Colorado –to assist the state in collecting this use tax from its residents who purchased goods from out-of-state-vendors– passed a law imposing three obligations on "non-collecting retailers": (1) to send a "transactional notice" to purchasers informing them that their purchase is, or may be, subject to Colorado use tax; (2) to send Colorado purchasers with total purchases of more than $500 an "annual purchase summary" listing the dates, categories, and amounts of purchases and reminding the purchasers to pay the use tax; and (3) to provide the Colorado Department of revenue with an annual "customer information report" giving the names, addresses, and amounts spent by customers of non-collecting vendors.

In 2010 the Direct Marketing Association –composed of businesses selling products via catalogs, broadcast media, and the Internet– sued in federal court claiming that the Colorado law discriminated against and unduly burdened interstate commerce. Between 2010 and 2014 the case bounced back and forth

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between federal and state courts on both jurisdictional and substantive claims issues finally coming to rest at the Court of Appeals for the Tenth Circuit which delivered its opinion on February 22, 2016.

In that decision the court concluded that *Quill* applied narrowly to sales and use tax collection and not to the sales reporting scheme of the Colorado law. It also concluded that the law was not facially discriminatory because "…it does not distinguish between in-state and out-of-state economic interests. It instead imposes differential treatment based on whether the retailer collects Colorado sales or use taxes. Some out-of-state retailers are collecting retailers, some are not." Likewise, the court held that the law was not unduly burdensome. One of the judges in his concurring opinion noted, "The plaintiffs haven't come close to showing that the notice and reporting burdens Colorado places on out-of-state…retailers compare unfavorably to the administrative burdens the state imposes on in-state brick and mortar retailers who must collect sales and use taxes."

Most of the decision was based on the precedential value of the *Quill* case. In the past the U.S. Supreme Court has been unwilling to hear cases challenging that decision. That same concurring opinion notes that it can be expected that more and more states will follow the lead of Colorado with sales and use tax reporting laws .

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