Tax Alert

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Four Things You Should Know About the Supreme Court's Decision in *Direct Marketing*

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On March 3, 2015, the United States Supreme Court overturned the Tenth Circuit Court of Appeals' decision in Direct Marketing Association v. Brohl. *The Supreme Court held that the Tax Injunction Act ("TIA"), which bars federal courts from restraining the assessment, levy, or collection of state taxes, did not divest the federal district court of jurisdiction to decide whether Colorado's use tax reporting provisions violate the Commerce Clause of the United States Constitution.*

1. **The Supreme Court's holding does not open up the floodgates to litigate state tax cases in federal court.** The Supreme Court narrowly interpreted the TIA to rule that Colorado's unique use tax reporting requirements are not covered by the TIA because the "TIA is not keyed to all activities that may improve a State's ability to assess and collect taxes." Even where the TIA may not apply, the comity and abstention doctrines may independently bar state tax actions from federal court.

2. **The Supreme Court did not reach the comity issue raised by the Tenth Circuit.** The Supreme Court remanded the case to the Tenth Circuit to determine if Colorado may assert comity as a defense. While the Tenth Circuit opinion stated that the doctrine of comity "also militates in favor of dismissal," Colorado failed to raise it. The Supreme Court stated that the comity doctrine is not jurisdictional, which may mean that by failing to raise it in the lower court, Colorado waived comity as a defense.

3. **Colorado has been enjoined from enforcing the use tax reporting requirements in a separate action filed by the Direct Marketing Association ("DMA") in Colorado state court.** The Supreme Court did not reach the question of whether DMA had a plain, speedy and efficient remedy in state court. Interestingly, the comity doctrine has a similar rubric—plain, complete and adequate remedy. Query whether the federal courts will abstain and allow the state case to proceed. The injunction issued by the Colorado state court suggests an adequate remedy may be available in state court.

4. **Justice Kennedy's concurrence is noteworthy.** He urges the Supreme Court to reconsider the Court's holding in *Quill* that a seller must have an in-state physical presence before the state may

require the seller to collect use tax. While that issue was not before the Supreme Court, Justice Kennedy left little doubt about his view of *Quill's* physical presence standard.

For a discussion of the Tenth Circuit Court of Appeals' decision, please see our client alert dated July 22, 2014, which may be accessed at this link.

The information presented is only of a general nature, intended simply as background material, is current only as of its indicated date, omits many details and special rules, and accordingly cannot be regarded as legal or tax advice.

If you have any questions about the content of this tax alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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