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*Electronic Commerce*

**High Court May Soon See South Dakota Online Sales Tax Case**

**S**outh Dakota may win the sprint to the U.S. Supreme Court now that a case over its digital sales tax law is returning to state court, according to a tax practitioner.

Randy Ferris, a Sacramento-based executive director with Ernst & Young LLP, said that the U.S. District Court for the District of South Dakota's decision to remand a challenge over the state's economic nexus statute (S.B. 106) may indicate that the litigation will reach the high court before Alabama's litigation over its economic nexus regulation (Administrative Rule 810-6-2-.90.03).

"The South Dakota legislation has specific provisions in it to expedite the appellate review of the statute," Ferris said during a Jan. 18 webcast hosted by Ernst & Young.

On Jan. 17, the district court granted South Dakota's motion to remand a dispute over S.B. 106. The statute, signed into law in March 2016, requires remote retailers with annual in-state sales exceeding \$100,000 or 200 separate transactions to collect and remit sales tax (*South Dakota v. Wayfair, Inc.*, D.S.D., No. 3:16-CV-03019, 1/17/17).

**Moving Forward "Expediently."** The case originated in late April in the South Dakota Sixth Judicial Circuit, with the state seeking a declaratory judgment validating the law. The retailers named as defendants—Wayfair Inc., Overstock.com Inc. and Newegg Inc.—removed the matter to the federal district court, prompting the state's request for remand.

Another state-court case has been on hold pending the federal proceedings—the American Catalog Mailers Association and NetChoice brought suit last April challenging the facial constitutionality of S.B. 106.

S.B. 106 provides that a circuit court shall act on a declaratory judgment suit filed by the state "as expeditiously as possible and this action shall proceed with priority over any other action presenting the same question in any other venue." A subsequent appeal of a decision "may only be made to the state Supreme Court. The appeal shall be heard as expeditiously as possible."

Marvin A. Kirsner, a Boca Raton-based tax shareholder with Greenberg Traurig LLP, told Bloomberg BNA that the statute's directive to put a case "on the front burner" was likely a motivation behind South Dakota's remand request.

"I think the whole point of South Dakota wanting to get it back into state court was to get it to the steps of the U.S. Supreme Court faster," he said.

**Avoiding Delay.** South Dakota may have also sought a return to state court in order to avoid delay as seen in the dispute over Colorado's 2010 notice and reporting regime, Kirsner said.

The Direct Marketing Association—now the Data & Marketing Association—brought the suit in federal district court.

Kirsner explained that the state didn't raise a jurisdictional challenge before the district court. But on appeal, the U.S. Court of Appeals for the Tenth Circuit ruled that the Tax Injunction Act barred federal jurisdiction, which triggered an appeal to the U.S. Supreme Court solely on the jurisdictional issue.

The 2015 decision from the high court, which found in favor of DMA and remanded to the Tenth Circuit, didn't rule on the underlying substantive dispute over the constitutionality of Colorado's law. It wasn't until December 2016 that the high court turned down the substantive appeal over Colorado's law, which the Tenth Circuit upheld in February 2016 (*Direct Mktg. Ass'n v. Brohl*, U.S., No. 16-267, *petition for certiorari denied* 12/12/16; *Brohl v. Direct Mktg. Ass'n*, U.S., No. 16-458, *petition for certiorari denied* 12/12/16).

"It's not just the fact that South Dakota could get it through the state courts quicker, but they may be concerned that it could be delayed by an ultimate reversal or remand in a circuit court of appeals saying that there was no jurisdiction," he said.

**Not Rushing to The High Court.** Kirsner noted that the Supreme Court's 2015 decision in *DMA* indirectly triggered the South Dakota litigation. In a concurring opinion, Justice Anthony Kennedy called for a case that re-evaluates the Supreme Court rule from *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), which prohibits states from imposing sales and use tax collection obligations on sellers without an in-state physical presence.

However, remote retailers may not share states' sense of urgency in reaching the Supreme Court.

"I think it's possible that the e-commerce companies want to delay it, to make sure that *Quill* doesn't get reversed by the Supreme Court before Congress has a chance to deal with it," Kirsner said, adding that a Supreme Court decision just overruling *Quill* would subject e-commerce companies to the separate rules, rates and filing requirements of states and potentially thousands of local jurisdictions. He noted this would particularly hurt the small to medium-sized companies.

“At that point, everything is turned around,” Kirsner added. “Now Congress has to do them the favor of saying, we’ll regulate this so that it’s not the wild west for sales tax collection anymore. Which it will be if *Quill* is overturned without anything else.”

**With a Whimper, Not a Bang.** The South Dakota and Alabama measures challenging *Quill* have encouraged other states to advance similar measures.

However, Ferris noted that *Quill* could end “not with a bang, but with a whimper,” should states start following Colorado’s lead in adopting notice and reporting regimes. Many expect more states will consider enacting a Colorado-style bill in 2017.

“If Colorado’s approach were to spread nationally, it could ultimately negate the need to overrule *Quill*, or it may finally motivate Congress to act,” Ferris said. “Because the demands of Colorado’s notice and reporting scheme are significant enough, and the reputational harm of reporting your purchasers to a department of revenue is serious enough that many unregistered re-

mote sellers would likely decide it’s easier and a better business practice to just collect the tax.”

**Looking Ahead.** During the Jan. 18 webcast, Ernst & Young practitioners noted that, in addition to potential developments over nexus and states’ taxing authority over remote retailers, other key issues will dominate 2017.

Notably, the state-side implications from federal tax reforms will be a key issue. Retroactive tax legislation will also be a prominent issue—several cases out of Michigan and Washington are pending on certiorari petitions before the Supreme Court. And technological advancements may assist tax departments, but may also raise questions over taxation of robotics applications.

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