THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AMAZON.COM, LLC,

Plaintiff,

v.

KENNETH R. LAY,

Defendant.

JANE DOE 1, JANE DOE 2, JANE DOE 3, JANE DOE 4, JANE DOE 5, JANE DOE 6, AND CECIL BOTHWELL,

Plaintiffs-Intervenors,

v.

KENNETH R. LAY, and AMAZON.COM, LLC,

Defendants in Intervention.

No. 10-cv-00664-MJP

NORTH CAROLINA'S REPLY TO INTERVENORS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COMPLAINT IN INTERVENTION (Fed. R. Civ. P. 12)

NOTE ON MOTION CALENDAR: September 24, 2010

OVERVIEW

This is a state tax dispute. Either Amazon or its customers owe North Carolina $50 million in sales and use taxes on internet purchases. The struggle to collect taxes from on-line

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purchases is a scene that is playing out not only in North Carolina, but across the country. The question of how to enforce the sales and use tax due from on-line purchases has long occupied those in the state tax field. With state budgets in shambles, this issue has recently gained center stage as states have stepped up their enforcement efforts. Some states have focused on the sales tax, others on the use tax and still others have adopted a dual approach.

On the sales tax side, a bill has been introduced in Congress that would authorize states which are part of the Streamlined Sales Tax Agreement to require remote retailers to collect and remit sales taxes on purchases in their states. H.R. 5660. States are not waiting for Congress to act. A number of states have adopted what have been termed "Amazon" laws requiring on-line retailers to collect sales tax. Woodard Decl. V, ¶ 3.

On the use tax side, Colorado has enacted a law that requires on-line retailers to inform their customers of the amount of use tax that the customer owes the state. Oklahoma recently adopted a similar law. The Colorado legislation also requires the retailer to file reports with the state that contain each customer's name, purchase amounts and category of purchase.[1] Alabama recently sent letters to a random sample of taxpayers informing them of their obligation to pay use taxes on their on-line purchases. Nebraska is currently pursuing use taxes against charities, including the March of Dimes. South Carolina has reported that it is aggressively collecting the use tax. The Multistate Tax Commission, of which North Carolina is a member, is drafting a uniform regulation modeled after the Colorado and Oklahoma laws that would impose reporting requirements on retailers to enable states to more easily enforce existing use tax laws. North Carolina recently completed the Internet Transaction Resolution Program and informed non-participating on-line retailers that it would be seeking use tax collection information from them. *Id*. at ¶¶ 4, 5.

Despite their protestations to the contrary, intervenors (and Amazon's other North Carolina customers) are critical players in the tax dispute over internet purchases. The fight is not only between Amazon and North Carolina, as intervenors mistakenly assert. Rather, like the

[1] Amazon states on its website that this law was enacted "over our strong objections." *Id*. at ¶ 5.

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controversy in so many other states, the use tax liability of Amazon's customers looms front and center in this tax dispute. Tax is due from either Amazon or its North Carolina customers. Amazon has challenged its liability and refused to collect tax on sales to North Carolina residents. Because they purchased non-taxed products, the use tax liability of Amazon's North Carolina customers is beyond question as a matter of law. Use tax cannot be assessed or collected, however, absent identification of those customers. In the context of the current tax dispute, intervenors improperly seek to limit North Carolina's discretion over its fiscal operations and tie the Secretary's hands in weighing whether to proceed against Amazon or its customers. Perhaps even more troubling, intervenors also ask for expansive and undefined injunctive relief which would impermissibly impede NC Revenue's future investigative efforts and the assessment and collection of taxes against countless and unnamed taxpayers.

ARGUMENT

I. THE TAX INJUNCTION ACT BARS INTERVENORS' EFFORTS TO PREVENT THE ASSESSMENT OF USE TAX AGAINST THEM

No one likes to pay taxes, especially on on-line purchases. Amazon has steadfastly refused, litigating or severing business relationships in those states which have enacted "Amazon" laws. Amazon's North Carolina customers, including intervenors, therefore owe use tax on their internet purchases. Intervenors do not contest this fundamental point of state tax law. They have all but admitted they have not paid use taxes on their purchases from Amazon, and their failure to provide evidence of payment creates a presumption of non-payment. "[T]axes are the life-blood of government, and their prompt and certain availability an imperious need." *Bull v. United States*, 295 U.S. 247, 259 (1935). Intervenors have asked this court to permanently enjoin NC Revenue from obtaining customer names and general product descriptions, information necessary to assess and collect use taxes against Amazon's North Carolina customers, taxes which are legally due under North Carolina's statutory scheme. Not content to stymie collection efforts against themselves, intervenors also ask this court for a vague and sweeping injunction sharply curtailing NC Revenue's broad investigatory powers into the

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tax liability of other taxpayers, including other on-line retailers and their customers. Inexplicably, intervenors assert that the use tax liability of Amazon's customers to North Carolina is irrelevant to the question of whether the Tax Injunction Act bars this federal court action to restrain the assessment and collection of the very taxes that they have admitted are due and that are presumed unpaid. Response at 9 n.4. This action is plainly and unmistakably barred by the TIA.

As explained, intervenors bear the burden to overcome the broad jurisdictional bar of the TIA and affirmatively prove federal court jurisdiction exists. Their entire argument on this point rests on the faulty premise that preventing NC Revenue from obtaining customer names and product information will not reduce the flow of state tax revenues. Response at 1. This factual foundation is demonstrably false. Failure to provide customer names (with or without accompanying product information) will severely hinder, if not prevent, North Carolina's ability to assess and collect the use tax that is due on internet purchases by North Carolina residents. The revenue loss from this case alone is estimated to be approximately $50 million, not including interest and penalties.

In advancing their proposition, intervenors maintain that NC Revenue has stated that expressive content such as book and movie titles are irrelevant to sales or use tax liability and therefore the failure to provide this information could not decrease tax revenues.[2] Response at 8. This statement is highly disingenuous and a grave misrepresentation of NC Revenue's position. It is true that NC Revenue does not need – and did not request – expressive content such as book or movie titles for the reasons intervenors state. Intervenors glaringly omit a critical piece of the puzzle: customer names. This information is not only relevant but indispensable in assessing and collecting use tax. The failure to provide customer names will have a significant deleterious

[2] Even more remarkably, intervenors proclaim that preventing NC Revenue from obtaining customer names would "if anything increase, rather than decrease, tax revenue" based on their suggestion that NC Revenue should issue less than accurate sales tax assessments against Amazon which are certain to be contested. Response at 10. This futile effort to escape the bar of the Tax Injunction Act deliberately ignores North Carolina's use tax law, which clearly imposes tax liability on Amazon's customers.

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impact on NC Revenue's ability to collect the use tax revenue due to the State.[3] Intervenors, as well as Amazon, persist in conveniently ignoring the use tax aspect of NC Revenue's investigation and the absolutely critical role customer names play in that investigation.[4]

Intervenors also assert that because NC Revenue could alternatively propose an assessment of sales tax against Amazon, the Tax Injunction Act does not divest the court of jurisdiction. Response at 8. Throughout this litigation, intervenors have sought to portray themselves as innocent pawns in a tax dispute that does not concern them. This is an egregious mischaracterization. Each of Amazon's North Carolina customers has a legal obligation to remit use taxes to the State on his or her on-line purchases. The dispute over taxes due North Carolina on internet purchases most definitely involves Amazon's customers, including intervenors.

In fact, because the tax liability of Amazon customers is unmistakable and certain, the liability of Amazon's customers is in many respects more fundamental to this dispute than the liability of Amazon itself. Amazon is challenging its liability for the sales tax and any sales tax assessment by NC Revenue will almost certainly be the subject of protracted litigation, as is occurring in New York. Although administratively more difficult, use tax assessments against Amazon's customers are far less complex legally because their tax liability to the State is certain.

North Carolina, like many other states, is struggling to meet the needs of its citizens during this economic crisis which has generated a budget shortfall of $3.5 billion. Constitutionally, North Carolina is required to have a balanced budget and may not incur a deficit. N.C. CONST. art. III, § 5. In order to avoid a deficit and continue to provide vital services, it must consider all options regarding the enforcement of its tax laws and the collection of state tax revenue. It is not for intervenors or Amazon or even this court to dictate to NC

[3] Contrary to intervenors' characterization, NC Revenue's position on the use tax liability of Amazon's customers is not "an unfounded assertion that this lawsuit will prevent it from assessing and collecting" the use tax due the State. Response at 9.

[4] The real battleground in this litigation is not expressive content but customer names. Amazon has provided replacement disks without the ASIN numbers. It continues to refuse to provide customer names, however, despite the absence of expressive content. This refusal demonstrates that its true complaint is providing customer names, a point further evidenced by its actions in other states such as Colorado (where it opposed legislation requiring the reporting of customer names without expressive content). Amazon's motive, of course, is to maintain its commercial advantage over its competitors who collect tax from their customers.

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Revenue which path it should take in performing this critical sovereign function. *See National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 590 (1995) (TIA may be best understood as but a partial codification of the federal reluctance to interfere with state taxation); *Rosewell v. La Salle National Bank*, 450 U.S. 503, 522 (1981) (TIA recognizes imperative need of state to administer its own fiscal operations). Yet, that is exactly what both intervenors and Amazon seek to do – mandate that North Carolina must embark on a prolonged and uncertain route in an effort to collect sales tax from Amazon while turning a blind eye to the "low hanging fruit" of the use tax liability of Amazon's customers. *See* Woodard Decl. V, ¶ 5.

Comity also prohibits this sort of interference in North Carolina's fiscal affairs. *See Levin v. Commerce Energy, Inc*., 130 S. Ct. 2323, 2328 (2010) (comity doctrine "restrains federal courts from entertaining claims for relief that risk disrupting state tax administration"). The fact that NC Revenue could assess (with absolutely no assurance of ultimate collection) sales tax against Amazon obviously does not preclude it from assessing Amazon's customers for use tax. Comity dictates that the decision whether to assess sales tax, use tax, both or neither is exclusively the province of North Carolina. In this economic climate, there is a heightened interest on the part of many states in enforcing use tax laws on internet sales. The interference intervenors seek from this court to prevent not only NC Revenue's ability to assess use tax, but, even more fundamentally, to obtain the basic information necessary to make that sovereign decision, is barred by the TIA and principles of comity.

Intervenors ineffectually seek to distinguish *Commerce Energy*. They contend that, unlike here, the plaintiffs in that case were seeking to improve their financial position within the state tax scheme. Response at 10. This distinction is hollow. Here, Amazon is trying to improve its financial position by maintaining its tax-advantaged status over its brick and mortar competitors and on-line retailers who collect sales taxes. Not only has Amazon refused to collect sales tax, but it has refused to provide customer names even in the absence of ASIN numbers. Woodard Decl. V, ¶ 6. The reason for this is simple – if Amazon provides customer names it will allow North Carolina to assess use tax against its customers, effectively eliminating its

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competitive advantage no differently than if it collected sales taxes from its customers itself. This motivation is confirmed by its opposition to Colorado's law, which requires retailers like Amazon to provide customer names and purchase amounts (without expressive content), and by its own SEC filings. *See id*. at ¶ 4; Amazon.com, Inc. 2008 SEC Form 10-K at 14.

Intervenors also seek to improve their financial position and avoid use tax liability by this litigation which seeks to prevent NC Revenue from learning their identities so it can assess the use tax due on their purchases. Not one of the intervenors has alleged that they paid use tax and the presumption is therefore to the contrary. Intervenors essentially concede this point, attempting to dismiss their non-payment of use tax as irrelevant under the TIA.

Intervenors further assert that no one is seeking to avoid taxes in this dispute. Again, this is simply untrue. It is self-evident that both Amazon and intervenors are attempting to avoid paying taxes to North Carolina. This is a state tax case, plain and simple. As such, this court lacks jurisdiction under the TIA and principles of comity and it must be dismissed.[5]

II. THE PRE-ENFORCEMENT STATUS OF THIS TAX INVESTIGATION DEPRIVES THE COURT OF JURISDICTION AS THE CLAIM IS NOT RIPE

Contrary to intervenors' claims, pre-enforcement actions are not "routinely permitted" in tax cases. Intervenors ignore the wall of authority holding that even constitutional claims in a tax case are not ripe until a summons enforcement proceeding has commenced and that a First Amendment challenge does not overcome the bar of the TIA. Intervenors have little if any response to NC Revenue's arguments on these points. They repeatedly rely on inapposite cases that do not involve the enforcement of a summons by a taxing authority and fail to successfully distinguish *Reisman v. Caplin*, 375 U.S. 440 (1964), and its progeny.

Intervenors accuse NC Revenue of ignoring "clear caselaw" but it is intervenors who have relied on the wrong body of law relating to the issuance of subpoenas to third parties by

[5] Contrary to intervenors' assertion, this court is not better situated to rule on Amazon's claim under the Washington State Constitution. Response at 11 n.7. With no viable federal claim, this court's pendant jurisdiction over Amazon's state constitutional claim does not exist. In addition, the 11th Amendment bars this court from asserting jurisdiction over that claim. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984).

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investigatory agencies. In *SEC v. Jerry T. O'Brien, Inc*., 467 U.S. 735 (1984), the United States Supreme Court reversed a decision of the Ninth Circuit Court of Appeals that required notice to targets of a third party subpoena in a case involving the conduct of a nonpublic investigation into possible violations of securities laws. The Court applied its rationale from tax summons cases to find that neither the Constitution nor the standards for IRS administrative subpoenas established in *United States v. Powell*, 379 U.S. 48 (1964), required the SEC to notify the targets of its investigations when issuing a subpoena to a third party. The Court refused to curb or impede the SEC's exercise of its broad investigatory powers by notifying targets of their investigations. *O'Brien*, 467 U.S. at 751 (citing *United States v. Arthur Young & Co*., 465 U.S. 805, 816 (1984) (absent unambiguous direction from Congress, the summons power conferred on the Internal Revenue Service by statute should not be restricted by the courts).[6] SEC summonses, like IRS or NC Revenue summons, are not self-enforcing and require judicial enforcement. *Id*. at 741.[7]

Reiterating *dicta* in *Reisman*, the Court stated that "those affected by a disclosure [pursuant to a summons] may appear or intervene before the District Court and challenge the summons by asserting their constitutional or other claims." *Id*. at 749 n.19 (quoting *Reisman*, 375 U.S. at 445). The Court emphasized, however, that "[o]ur decision in *Donaldson* made clear that the right of a third party to intervene in an enforcement action 'is permissive only and is not mandatory,' and that determination whether intervention should be granted in a particular case requires '[the] usual process of balancing opposing equities.'" *Id*. (quoting *Donaldson v. United States*, 400 U.S. 517, 529, 530 (1971)).[8] Consistent with these Supreme Court decisions, the North Carolina Supreme Court has held that the superior court has the inherent authority to

[6] The Ninth Circuit held the United States District Court for the Eastern District of Washington correctly denied injunctive relief with respect to subpoenas directed at the third party, agreeing that there was an adequate remedy for challenging the subpoenas. The district court's ruling denying the request requiring notice to the targets of third party subpoenas, although erroneously reversed by the Ninth Circuit, was also correct. *Id*. at 740.

[7] The language of the expansive investigatory and summons authority of the SEC is almost identical to North Carolina's summons statute for revenue investigations. *Compare id*. at 744 *with* N.C. Gen Stat. § 105-258.

[8] Although Congress elected to amend the IRS statutory authority to require notice to the target of a third-party request, such notice is not constitutionally required.

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permit notice to and intervention by third parties in a summons enforcement action. *In re Summons Issued to Ernst & Young*, 363 N.C. 612, 617, 684 S.E.2d 151, 154 (2009).

Ironically, intervenors allege a parade of difficulties that could arise in giving notice to targets in third party subpoena situations. Response at 16-18. They argue that these difficulties demonstrate that the state remedy is inadequate, thereby seeking to avoid the bar of the TIA. By contrast, the United States Supreme Court viewed the complexity of providing notice as unnecessary and highly burdensome impediments to investigations by the SEC, which, like those of NC Revenue, are nonpublic. *O'Brien*, 467 U.S. at 749-50. The Court found that such a requirement would "'unwarrantedly cast doubt upon and stultify the [Commission's] every investigatory move.'" *Id*. at 751 (quoting *Donaldson*, 400 U.S. at 531). Congress' enactment of the TIA mandates that similar attempts by parties seeking to curb the exercise of the investigatory powers of state taxing authorities are not within the purview of the federal courts.

Because intervenors have a "plain, speedy and efficient" remedy in the North Carolina courts to challenge a summons issued by NC Revenue, the very narrow exception to the TIA cannot confer federal court jurisdiction. *See* NC MTD Intervenors at 12-14. The North Carolina courts have sufficient discretion and leeway in determining any appropriate notice that might be required and the form of the notice to be given. This inherent authority of the North Carolina courts fully comports with applicable United States Supreme Court precedent in *Powell*, *Reisman*, *Donaldson* and *O'Brien* and provides an adequate remedy under the TIA.

Intervenors attempt to distinguish *Reisman* by asserting that, there, the remedy was adequate because no harm could occur until the records were obtained by the IRS pursuant to the summons enforcement proceeding. Intervenors contend that, here, by contrast, the harm has already occurred. Response at 13. This assertion is at odds with the facts. The only cognizable First Amendment "harm" that possibly could occur as the result of an enforcement proceeding against Amazon is that NC Revenue could obtain customer names, an event that has not yet occurred. Without customer names, even the highly improbable potential for linking individual customers to particular expressive content based on ASIN numbers does not exist.

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Unquestionably, before requiring the production of customer names, the North Carolina courts offer a forum for intervenors to assert their constitutional objections by intervening in any summons enforcement proceeding that may occur.[9]

Intervenors' reliance on First Amendment cases involving chilling effects and special protection provided in such cases is misplaced and ignores the consistent interpretation of *Reisman* to foreclose constitutional claims. *See* NC MTD Intervenors at 16-17. The United States Supreme Court specifically has declined to carve out a special exception in tax cases for First Amendment claims under the TIA. *See California v. Grace Brethren Church*, 457 U.S. 393, 416-17 (1982). The First Amendment issues in the cases relied on by intervenors are not germane to this tax dispute: a statute banning display of sexually-explicit materials to minors (*Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988)); a statute regulating political advocacy expenditures (*Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003)); regulations prohibiting ABC licensees from displaying erotic art (*LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1156 (9th Cir. 2000)); and a claim of targeting aliens for deportation based on association with disfavored organizations (*American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1062 (9th Cir. 1995)).

The harms of self-censorship in those cases that the courts determined required a judicial forum in which to be heard simply cannot be analogized to intervenors' speculative claims that they might be disinclined to shop over the internet if they knew they would be identified as individuals owing use tax to North Carolina. *See* Jane Doe Declarations. Just as all records from sellers of books are not protected by the First Amendment, so too, information regarding the purchase of music, videos or other materials containing expressive content is not all protected by the First Amendment, especially when it is sought for a compelling interest such as the enforcement of state tax laws. *See Tattered Cover, Inc. v. Thornton*, 44 P.3d 1044, 1053 n.17 (Colo. 2002) (bills and other bookstore records that do not list titles of books purchased are not

[9] To the extent that the original disks with ASIN numbers are still in Secretary Lay's possession at the time of an enforcement proceeding, the presiding judge has the discretion to fashion an appropriate remedy to assure that the disks are destroyed, returned or turned over to the court itself.

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protected by the First Amendment). To the extent intervenors sincerely believe that NC Revenue is a rogue tax agency seeking to gather unnecessary expressive content information, those fears can be presented in any summons enforcement proceeding that ensues to obtain customer names from Amazon. Intervenors have failed to point to any tax case that carves out an exception that would provide this court with jurisdiction to hear their pre-enforcement tax summons claim.

Intervenors incorrectly argue that targets of third-party record requests like themselves are "routinely permitted" to bring pre-enforcement challenges because they may never have the opportunity to raise their objections. *See* Response at 14-17. Again, intervenors ignore the relevant caselaw prohibiting pre-enforcement constitutional challenges to tax summonses, instead relying on inapposite cases. For example, *In re Grand Jury Subpoena for N.Y. State Income Tax Records*, 607 F.2d 566 (2d Cir. 1979), dealt with the ability to appeal an order of the district court denying a motion to quash a tax summons.[10] Similarly, *Perlman v. United States*, 247 U.S. 7 (1918), involved the appeal of a disclosure order issued by the district court.[11] *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491 (1975), is equally *in apropos*. There, although the Supreme Court reversed the Court of Appeals because the issuance of the congressional subpoena was found to be within the sphere of legitimate legislative activity, it found that the appellate court "properly entertained the action" that involved a subpoena to a third party bank seeking an organizations' records. *Id*. at 501 n.14. The Court of Appeals found judicial review available in that case, however, because with a congressional subpoena, unlike a tax summons, "no alternative avenue of relief is available other than through the equitable powers of the court." *Id*. at 497 (internal citation omitted).

[10] It is interesting that in the one case involving a taxing authority, the New York Department of Taxation was the party opposing a federal grand jury subpoena because state law made the tax information sought confidential and prohibited disclosure. *N.Y. State Income Tax Records*, 607 F.2d at 568. Similarly, North Carolina has stringent confidentiality laws protecting taxpayer information and records obtained by NC Revenue. N.C. Gen. Stat. § 105-259.

[11] As discussed in *N.Y State Income Tax Records*, the *Perlman* doctrine created an exception to the general rule that such disclosure orders were not appealable when a subpoena is addressed to a person who has custody of the materials to which another person has a privilege of non-disclosure; in such circumstances the person with the privilege may appeal a disclosure order immediately. *Id*. at 570.

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Intervenors simplistically assert that this matter is ripe because they have alleged that NC Revenue's request for information is not permissible under the First Amendment and the issues presented are purely legal and require no further factual development. Response at 12. As explained, the fact that intervenors have raised a First Amendment claim does not trump the TIA or create jurisdiction in this pre-enforcement tax summons action. Under *Reisman*, the relevant question is whether an actual enforcement proceeding has been commenced; whether or not there are facts which need further development is simply beside the point. Here, both the party to be summoned (Amazon) and parties affected by disclosure (intervenors) may appear or intervene in any summons enforcement action commenced in the North Carolina courts. Established law allows a party that may be affected by enforcement of an investigatory tax summons to intervene and challenge it by asserting any constitutional claims or privileges. A pre-enforcement challenge to a tax summons such as the one asserted by intervenors is not ripe for judicial review. *Id*. at 449; *see* NC MTD Intervenors at 15-17. This court therefore lacks subject matter jurisdiction over intervenors' complaint and it must be dismissed.

CONCLUSION

For the reasons stated herein, defendant's motion to dismiss should be granted and the complaint in intervention should be dismissed in its entirety.

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DATED this the 24th day of September, 2010.

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