

STATE OF COLORADO

DEPARTMENT OF REVENUE

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GIL-2007-15

Bill Ritter, Jr.
Governor

Roxy Huber
Executive Director

XXXXXXXXXXXXX
Attn: XXXXXXXXXXX
XXXXXXXXXXXXX
XXXXXXXXXXXXX

December 4, 2007

Re: wheelchairs, scooters

Dear XXXXXXXXXXX,

This letter is in response to your undated letter to the Colorado Department of Revenue, we received on May 30, 2007, re: taxability of [Company] products. We apologize for the time it has taken to respond to your inquiry.

Issue

- 1) Does sales tax apply to the following products?
 - a) Electric wheelchairs
 - b) Manual wheelchairs
 - c) Wheelchair repair parts
 - d) Electric scooters
 - e) Wheelchair lifts (attached to motor vehicles)
 - f) Ramps
 - g) Wheelchair rentals
- 2) If taxable, does the tax rate at the point of delivery to customer apply or the tax rate at the company's warehouse?
- 3) Is there an exemption that applies if the purchase of the product is covered in whole or in part by Medicare or Medicaid?
- 4) Does tax apply to wheelchair rentals?

Background

You provide the following background for your request. All [Company] products are sold directly to consumers and usually, although not always, they are sold under a doctor's prescription or pursuant to a certificate of medical necessity. Most sales are covered under Medicare or Medicaid. [Company] maintains a warehouse or administrative offices in Colorado. These facilities are not open to the public. Product is delivered to the warehouse and then delivered to direct to the consumer on company vehicles. Title transfers at the point of delivery to the consumer. All sale leads are generated in [State].

Discussion

- 1) *Wheelchairs prescribed by a legally qualified member of the healing arts are exempt, but scooters, lifts, ramps, and repair parts are not exempt.*

a. Wheelchairs

Colorado imposes a sales and use tax on the sale, use, storage or consumption of tangible personal property (§39-26-104(1)(a), C.R.S.), but exempts wheelchairs if they are prescribed by a practitioner of the healing arts. §39-26-717(1)(a), C.R.S. However, the prescription must specifically state that an electric wheelchair is being prescribed. [Company]’s [Product A], [Product B], [Product C], product series appear to be wheelchairs within the meaning of the exemption statute.

I am not familiar with a certificate of medical necessity to which you refer in your letter and, therefore, cannot comment on whether such a certificate qualifies as a prescription.

b. Scooters

You refer to “electric scooters” in your letter. I reviewed the literature attached to your letter but could not find any reference to “electric scooters.” I note, however, that you included literature concerning a “transporter” and “forerunner,” and I assume these are the electric scooters. They are three and four wheel vehicles, appear to have an extended wheelbase, are steered by handle-bars rather than a wheelchair’s joystick, and most models have a front headlight package. They appear to be functionally designed for use outdoors and long distances. It is significant that [Company] does not characterize these vehicles as wheelchairs, but as scooters. Although they have characteristics of a wheelchair, they do not appear to be what are commonly understood to be a wheelchair.

Exemptions from taxation are narrowly construed and will not be granted unless the transaction clearly falls within the exemption. *Security Life & Accident Co. v. Heckers*, 177 Colo. 455, 495 P.2d 225, 226 (1972). Scooters do not clearly fall within what is commonly understood to be a wheelchair. Therefore, scooters are not exempt.

c. Repair parts

The statutory language for the wheelchair exemption does not also refer to repair parts for wheelchairs. When the legislature intends to include repair parts, it has expressly stated the exemption in statute. Compare, §39-26-709(1)(a)(II), C.R.S. (manufacturing machinery exemption extended to tools and parts) and §39-26-716(1)(d) (farm equipment exemption extended to repair parts). Therefore, repair parts for wheelchairs are not exempt.

d. Lifts and ramps

[Company] also sells lifts which are describe as electrically powered platforms that attach to the rear of motor vehicles and are used to lift [Company] wheelchairs or scooter off the ground for transportation. Ramps are light weight aluminum ramps used to facilitate access of the wheelchair and scooter over stairs and thresholds of a home or into a motor vehicle. The statute setting forth the wheelchair exemption does not also include lifts or ramps. Therefore, neither the lift nor ramp is exempt under subsection 717(1)(a). See, also, Department FYI Sales 68 (wheelchair lifts listed as taxable under “Patient Supplies”).

I have also considered whether lifts and ramps qualify as exempt prosthetics devices or accessories related to therapeutic devices that are sold to correct or treat a human physical disability or surgically created abnormality. §39-26-717(1)(b) and (c), C.R.S. A “prosthetic device” is defined in regulation as an artificial part which aids or replaces a bodily function and which is designed, manufactured or adjusted to fit a particular individual. Colorado Regulation (39-)26-717.1.

The lifts and ramps do not qualify as prosthetics. They are not prosthetic devices because they are not an artificial part of the body which aids or replaces a bodily function. Although, in a broad sense, they assist a person use and transport a wheelchair, prosthetics are commonly understood to be devices that are attached to a person. See, e.g., Department FYI Sales 68 (prosthetic devices include artificial breasts, limbs, eyes, teeth and prescription glasses) and FYI Sales 23 (dental prosthetics include crowns, dentures). In addition, lifts and ramps are not designed, manufactured or adjusted to fit a particular person.

Similarly, lifts and ramps are not “related accessories” to therapeutic devices. Therapeutic devices are equipment that corrects or treats a physical human disability. Therapeutic implies healing. See, e.g., Minn. R. 8130.4800 (therapeutic devices are those that cure or heal.) Wheelchairs neither correct nor treat a disabled part of the body. Rather, wheelchairs act in lieu of a disabled part of the body. It is also of some significance that the legislature separately listed wheelchairs from therapeutic devices.

2) *The tax rate is determined by the location of the delivery.*

a. *Doing business in Colorado*

As an initial matter, it is clear that [Company] has nexus to Colorado for purposes of collection of sales and use Colorado taxes. A retailer is responsible for collection of sales and use tax if it is “doing business in this state.” “Doing business in this state” means

(3) “Doing business in this state” means the selling, leasing, or delivering in this state, or any activity in this state in connection with the selling, leasing, or delivering in this state, of tangible personal property by a retail sale as defined in this section, for use, storage, distribution, or consumption within this state. This term includes, but shall not be limited to, the following acts or methods of transacting business:

(a) The maintaining within this state, directly or indirectly or by a subsidiary, of an office, distributing house, salesroom or house, warehouse, or other place of business;

(b) The soliciting, either by direct representatives, indirect representatives, manufacturers' agents, or by distribution of catalogues or other advertising, or by use of any communication media, or by use of the newspaper, radio, or television advertising media, or by any other means whatsoever, of business from persons residing in this state and by reason thereof receiving orders from, or selling or leasing tangible personal property to, such persons residing in this state for use, consumption, distribution, and storage for use or consumption in this state.

§39-26-102(3), C.R.S.

A number of federal court cases have limited the right of a state to impose on the retailer the obligation to collect state sales and use taxes. *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed2d 91 (1992). In general, these cases require that the retailer have substantial nexus with Colorado. In order to have nexus in Colorado, a retailer must engage in regular, purposeful in-state sales activities specifically directed at in-state customers. *Complete Auto Transit, Inc.*, *supra*. See, also, DOR publication FYI Sales 5, for more information about out-of-state retailers doing business in Colorado, and which you can view and download from our web site at: www.revenue.state.co.us (go to Taxation > FYIs > Sales Tax).

[Company] maintains in Colorado a warehouse and/or administrative office. I presume that this also means [Company] has employees who work at these facilities in Colorado, including drivers for [Company]’s delivery trucks. Sales representatives, however, are located out-of-state. Although delivery of its goods by [Company] into this state, in and of itself, does not necessarily create nexus (*Quill*, *supra*), [Company]’s warehouse and/or administrative office, and its employees, function as significant links in [Company]’s purposeful efforts to exploit the marketplace in Colorado. See, e.g., Colorado Revenue Determination No. 120 Reference: DD-556 (out-of-state retailer, which had warehouse and administrative offices in Colorado, and sales employees located in Colorado, had nexus with Colorado). [Company]’s facilities and employees receive the governmental services accorded other businesses in Colorado and, therefore, it is important then that [Company] also bear the tax burden of these services. Therefore, [Company] is doing business in Colorado and is responsible for collecting and remitting sales and use taxes administered by the Department.

b. *Local taxes determined by consumer location when goods delivered by retailer.*

Colorado sales tax is a “destination” tax. When goods are delivered by the retailer or common carrier, the tax rate is determined by the location where the goods are delivered, not by the retailer’s location. See, e.g., Department Regulation (39-)26-704.2(4) (sales tax does not apply to goods sold in Colorado and shipped by common carrier to purchaser located outside Colorado for use outside Colorado); §29-2-105(1)(b), C.R.S. (city sales tax that is otherwise applicable to retailer’s location does not apply if property delivered outside city in which retailer is located.); Colorado Revenue Determination No. 120 Reference: DD-556 (out-of-state retailer liable for county sales tax). I understand you to suggest that neither [Company]’s warehouse nor administrative office is a retail store because neither is open to the public. Because all products are delivered to the customer by [Company] and because Colorado sales tax is a destination tax, it is not necessary to determine whether these facilities are retail stores.

In addition to the state’s sales and use tax, the department administers a number of city, county sales and taxes, and the sales and use taxes of special districts. For a list of state administered cities, counties, and special districts and their tax rates, see department publication DRP 1002. You can view and download this

publication from our website at: www.revenue.state.co.us (go to Taxation > Forms > Businesses > Sales and Use). In addition, Colorado has a number of home-rule cities and counties that administer their own sales and use taxes. These jurisdictions are also listed in DRP 1002. We encourage you to contact these home-rule cities and counties to learn about their requirements if you do business within their jurisdictions.

Finally, the department offers a number of electronic services to out-of-state retailers to assist them in their tax responsibilities. In particular, the department offers:

Local tax rates by address. The department links to private vendors who provide, either at no cost or at a minimal charge, the applicable tax rates for any given address you enter.

Local tax rates – this system, which is available on-line or by telephone allows you to enter a name of a city or county and the department will list the applicable sales tax rates.

These services can be found on our web site, listed above, under “Online Services > Sales Tax Information.”

3) *There is not an exemption for products covered by Medicare or Medicaid.*

Supplies reimbursed by Medicare or Colorado Compensation Insurance: Purchases of medical supply items reimbursed by Medicare or Colorado Compensation Insurance (i.e., Worker's Compensation) are subject to sales tax, unless otherwise exempt. If vendors accept Medicare assignment, Medicare payments to the vendors includes sales tax. This tax must be remitted to the Department. If the assignment is not accepted, vendors should remit that portion of the Medicare payment that represents sales tax, together with the sales tax computed on that portion of the total charge not covered by Medicare. Purchases of medical supply items reimbursed by Medicaid are not subject to Colorado sales tax. See, Department FYI Sales 68.

4) *Rental of wheelchairs is not taxable.*

Rental of tangible personal property is taxable to the same extent that the sale of such property is taxable. See, §39-26-102(23), C.R.S. Because the sale of a wheelchair is not taxable, the rental of a wheelchair is not taxable.

Finally, the Department makes a good faith effort to provide accurate and complete answers to questions posed to it by taxpayers. However, the information and answers provided here are not binding on the Colorado Department of Revenue, nor do they replace, alter, or supersede Colorado law and regulations. The Executive Director, who by statute is the only person having authority to bind the Department, has not formally reviewed and/or approved this response.

Respectfully,

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