

STATE OF COLORADO

DEPARTMENT OF REVENUE
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GIL-2007-31

Bill Ritter, Jr.
Governor

Roxy Huber
Executive Director

XXXXXXXXXXXXX.
Attn: XXXXXXXXX
XXXXXXXXXXXXX.
XXXXXXXXXXXXX

December 10, 2007

Re: Taxability of drop shipments

Dear XXXXXXXX,

This letter is in response to your letters to the Colorado Department of Revenue, dated June 21, 2007, re: taxability of [name] products and services. We apologize for the time it has taken to respond to your inquiry.

Issue

Does [Company] have an obligation to collect and remit Colorado sales or use tax for drop shipments?

Background

[Company] has only one location, which is in [State]. Your company manufactures and distributes restaurant equipment. You ship all of your products by common carrier. In at least one case, [Company] has a customer (Customer A) who is not physically located in Colorado and does not hold a Colorado sales tax license. Customer A has a customer (Customer B), who is located in Colorado. [Company] will, at the direction of Customer A, drop ship its product to Customer B. [Company] sends an invoice to Customer A.

Discussion

[Company] has an obligation to collect Colorado sales and use taxes if it is "doing business in this state." "Doing business" in Colorado 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 a retailer the obligation to collect state sales and use taxes. *Quill Corp. v North Dakota*, 504 US 298 , 112 S Ct 1904 , 119 L Ed 2d 91 (1992); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). In general, these cases require that the retailer have substantial nexus with Colorado. In other words, a retailer must have some presence in the state, either directly, such as in the form of a store, or indirectly, such as through independent sales agents, and engage in regular, purposeful in-state sales activities specifically directed at in-state customers. *Tyler Pipe Industries, Inc. v. Wash. State Dept. of Revenue*, 483 U.S. 232, 250 (1987). For more information about this issue, see department publication FYI Sales 5 (sales tax information for out-of-state businesses).

You state that you do not have a store in Colorado. You also state that your only contact with Colorado is to send your goods by common carrier to Customer B. Based on these limited facts, it does not appear that you are doing business in Colorado.

I note, however, that you have a Colorado retailer's sales tax license. A retailer who requests and obtains a Colorado retailer's sales tax license has voluntarily submitted to the jurisdiction of this State and must collect sales and use tax on taxable transactions. Compare, *Buehner Block Company v. Wyoming Department of Revenue*, 139 P3d 1150, 2006 WY 90 (Wyoming 2006). You can request to have your license cancelled and you will be relieved of the obligation to collect Colorado taxes, assuming, as appears to be the case, you are not doing business in Colorado.

I note two additional items, although neither creates an obligation on your part to collect Colorado tax. First, your sale to Customer A appears to be a wholesale sale. Colorado tax applies only to retail sales. §39-26-104(1)(a), C.R.S. A wholesale sale is not a retail sale and, therefore, is not subject to sales or use tax. §39-26-102(9), C.R.S. Second, if Customer A is not "doing business in Colorado" (as it is assumed in this case), then Customer B must file a consumer's use tax return and remit use tax on the purchase. In any event, [Company] does not have, under the scenario you have represented, an obligation to collect or remit sales or use tax to Colorado.

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,

Steve Asbell
Taxpayer Service Division
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