

# STATE OF COLORADO

## DEPARTMENT OF REVENUE

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PLR-12-002

John W. Hickenlooper  
Governor

May 30, 2012

Barbara J. Brohl  
Executive Director

XXXXXXXXXXXXXXXXXX  
ATTN: XXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXX

Re: Private Letter Ruling

Dear XXXXXXXXXXXX,

You submitted on behalf XXXXXXXX ("Company") a request for a private letter ruling to the Colorado Department of Revenue ("Department") pursuant to Regulation 24-35-103.5. This letter is the Department's private letter ruling.

### Issues

1. Does Company have nexus with Colorado?
2. If Company has nexus with Colorado, what type of filer status would Company have (e.g., sales tax, retailer's use tax, or an alternative filing status)?
  - a. If Company is considered a Retailer's Use Tax filer or an alternative filer, can Company collect the appropriate taxes from end customers?
  - b. If tax is collected from the end customer, is there a flat rate charged for out-of-state shipments into the Colorado or do the local jurisdictions determine the tax rate that should be applied to products shipped into the Colorado?
3. Is Company required to collect all state and local sales and use taxes on all Company's shipments into Colorado, including for local tax jurisdictions that are not administered by the Department?
  - a. If Company is liable to collect all sales and use taxes, is the 'ship to' address of the customer or the Affiliated Company's retail store locations that determines the local tax rates charged to customers?

- b. If the 'ship to' address determines the tax rate, are all sales taxes collected within Colorado remitted on the state sales and use tax return or are there local sales and use tax returns that are filed separately from the state return?
  - i. If there are separate local sales and use tax returns, must Company register for sales and use tax licenses with all these locations? (please provide a list of all jurisdiction that would be liable to collect and remit sales tax)
  - ii. If Affiliated Company's retail location drives the tax rate, which retail location should be used to calculate the correct local rate because there are multiple locations within Colorado?
- 4. In any months that Company does not have sales in Colorado, is Company required to file a zero state and local sales and use tax return for that month?

### **Conclusion**

1. Company has nexus with Colorado.
2. Company must establish a sales tax account and retailer's use tax account. Company collects these taxes from its customers.
3. Company must collect state sales tax on items shipped into Colorado (2.9%) and collect those state-administered local sales and use taxes (whose rates vary by jurisdiction) as more fully set forth below. State and local sales taxes are reported on a single state sales tax return, which is separate from Affiliated Company's sales tax return. Company must open and report sales on a retailer's use tax return, as more fully described below. Local jurisdictions may have registration requirements, but the Department does not administer those requirements. For state and state-administered sales and use tax collection purposes, Company and Affiliated Company are required to register only with the Department. The Department cannot provide guidance on sales and use taxes administered by home-rule local tax jurisdictions.
4. Company is required to file a zero monthly return for any state-administered local tax jurisdiction for which it is registered to collect.

### **Background**

XXXXXXXXXXXXXXXXX ("Parent Company") is an independent wholesaler, distributor, and specialty retailer conducting business through several operating subsidiaries, two of which are relevant to the ruling: Company and XXXXXXXX ("Affiliated Company").

Company is an Internet retailer selling [products] to customers located throughout the United States, including Colorado. Affiliated Company is a retailer selling the same products as Company, but its business operations are conducted in brick-and-mortar retail locations, three of which are located in Colorado. These brick-and-mortar retail stores operate under the same name as Company but without use of “.com.”

Parent Company's corporate headquarter, warehouse, and distribution center are located outside of Colorado. Product is shipped by common carrier from the warehouse either to Company's customers or to Affiliated Company's retail stores.

Company represents that it does not own or lease physical assets in Colorado and it does not have employees in Colorado. However, Company does have certain business arrangements with Affiliated Company that does have employees and physical assets (e.g., stores) in Colorado. Company and Affiliated Company will begin a “loyalty points” program by which customers will receive loyalty points for purchases made from either Company or Affiliated Company. As points accrue, customers will reach a threshold and will receive a redeemable gift certificate to use interchangeably at Affiliated Company and/or Company. In addition, Company and Affiliated Company allow Company customers the option to make returns of any Internet purchases either to Company or at Affiliated Company's retail store locations.

## Discussion

### 1. *Company has nexus in Colorado.*

Colorado imposes sales and use tax on the sale, use, storage, and consumption of tangible personal property (“goods”), including products sold by Company and Affiliated Company.<sup>1</sup> An out-of-state retailer must collect sales or tax for goods sold in Colorado if the retailer is “doing business” in Colorado.<sup>2</sup> “Doing business in this state” is defined to include the following activities:

- (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;

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<sup>1</sup> . §39-26-104 and 202, C.R.S. (sales and use tax apply to the sale, use, storage, or consumption of tangible personal property).

<sup>2</sup> §39-26-102(3), C.R.S.

(b)

- I. 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.
- II. Commencing March 1, 2010, if a retailer that does not collect Colorado sales tax is part of a controlled group of corporations, and that controlled group has a component member that is a retailer with physical presence in this state, the retailer that does not collect Colorado sales tax is presumed to be doing business in this state. For purposes of this subparagraph (II), "controlled group of corporations" has the same meaning as set forth in section 1563(a) of the federal "Internal Revenue Code of 1986", as amended, and "component member" has the same meaning as set forth in section 1563(b) of the federal "Internal Revenue Code of 1986", as amended. This presumption may be rebutted by proof that during the calendar year in question, the component member that is a retailer with physical presence in this state did not engage in any constitutionally sufficient solicitation in this state on behalf of the retailer that does not collect Colorado sales tax.

§39-26-102(3), C.R.S.

Company is "doing business in Colorado" under subsection (3), (3)(a), (3)(b)(i), and (3)(b)(ii). Company is doing business in Colorado as defined in subsection (3) because it is delivering product into Colorado for sale and consumption. Company is doing business in Colorado as defined in subsection (3)(a) because it indirectly maintains a business and sales representatives in Colorado. Specifically, Affiliated Company is an indirect representative of Company because it acts on behalf of Company to solicit and facilitate sales and sales-related activities (e.g., the loyalty program) and because it accepts returns on behalf of Company.

Other states that have considered nexus issues of affiliated companies have reached similar conclusions. For example, in *Borders Online, LLC v. State Board of Equalization*, 129 Cal.App.4th 1179 (2005). Borders Group, Inc. owned two subsidiaries: Borders Online LLC (“Online”), which sold books online and had no stand-alone physical presence in California, and Borders, Inc. (“Borders”), which operated several brick-and-mortar retail bookstores throughout California. Online and Borders were separate business entities but had common management. The court held that Online had nexus with California because Borders carried on a number of activities on behalf of Online to facilitate Online’s Internet sales to California customers. For example, Borders allowed customers to return products purchased from Online. The court concluded that, “by accepting Online’s merchandise for return, Borders acted on behalf of Online as its agent or representative in California” for the purpose of ‘selling’ tangible personal property because ‘selling’ comprised of “all activities that are an integral part of making sales,” which included allowing returns from Online purchases. The “crucial inquiry” is whether the in-state actions taken on behalf of the out-of-state company are “significantly associated with [the out-of-state company’s] ability to establish and maintain a market in the state for the sales.” The court found that the capability of Online customers to return products to local stores “undoubtedly made purchasing merchandise on [Online’s] website more attractive to California customers, as they would know that returning or exchanging any unwanted items would be far simpler than if they purchased items from an e-commerce retailer with no presence in California.”

In the present case, the connection between Company and Affiliated Company are more substantial than those that created nexus in *Borders*. As in *Borders*, Affiliated Company accepts returns of products purchased from Company. In addition, Company and Affiliated Company jointly operate a loyalty points program by which customers accrue and redeem points by shopping at either of the two business entities, as if they were the same company. Additionally, Company lists locations for Affiliated Company on their website to customers. Thus, Company “indirectly” maintains a place of business in Colorado through the Affiliated Company’s brick-and-mortar locations.

For these same reasons, Company is doing business in Colorado pursuant to subsection (3)(b)(i) because Company has indirect representatives (Affiliated Company and its employees) which solicit in Colorado sales from Colorado customers.

Finally, Company and Affiliated Company are doing business in Colorado as part of a controlled group pursuant to §39-26-102(3)(b)(II) C.R.S. Parent Company has a component member (Affiliated Company) that is a retailer with a physical presence in Colorado. 26 U.S.C. (1986) §1563(a) defines a controlled group as:

- (1) Parent-subsidiary controlled group  
One or more chains of corporations connected through stock ownership with a common parent corporation if –

- (A) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of each of the corporations, except the common parent corporation, is owned by one or more of the other corporations; and
  - (B) the common parent corporation owns stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of at least one of the other corporations, excluding, in computing such voting power or value, stock owned directly by such other corporations.
- (2) Brother-sister controlled group  
Power of all classes of stock entitled to vote or more than 50 percent of the total value of shares of all classes of stock of each corporation, taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation.
  - (3) Combined group  
Three or more corporations each of which is a member of a group of corporations described in paragraph (1) or (2), and one of which:
    - (A) is a common parent corporation included in a group of corporations described in paragraph (1), and also
    - (B) is included in a group of corporations described in paragraph (2).

A "component member" is defined in §1563(b) as follows:

*(b) Component member*

(1) General rule. For purposes of this part, a corporation is a component member of a controlled group of corporations on a December 31 of any taxable year (and with respect to the taxable year which includes such December 31) if such corporation—

(A) is a member of such controlled group of corporations on the December 31 included in such year and is not treated as an excluded member under paragraph (2), or

(B) is not a member of such controlled group of corporations on the December 31 included in such year but is treated as an additional member under paragraph (3).

(2) Excluded members. A corporation which is a member of a controlled group of corporations on December 31 of any taxable year shall be treated as an excluded

member of such group for the taxable year including such December 31 if such corporation—

(A) is a member of such group for less than one-half the number of days in such taxable year which precede such December 31,

(B) is exempt from taxation under section 501 (a) (except a corporation which is subject to tax on its unrelated business taxable income under section 511) for such taxable year,

(C) is a foreign corporation subject to tax under section 881 for such taxable year,

(D) is an insurance company subject to taxation under section 801 (other than an insurance company which is a member of a controlled group described in subsection (a)(4)), or

(E) is a franchised corporation, as defined in subsection (f)(4).

(3) Additional members. A corporation which—

(A) was a member of a controlled group of corporations at any time during a calendar year,

(B) is not a member of such group on December 31 of such calendar year, and

(C) is not described, with respect to such group, in subparagraph (B), (C), (D), or (E) of paragraph (2),

shall be treated as an additional member of such group on December 31 for its taxable year including such December 31 if it was a member of such group for one-half (or more) of the number of days in such taxable year which precede such December 31.

(4) Overlapping groups. If a corporation is a component member of more than one controlled group of corporations with respect to any taxable year, such corporation shall be treated as a component member of only one controlled group. The determination as to the group of which such corporation is a component member shall be made under regulations prescribed by the Secretary which are consistent with the purposes of this part.

Parent Company owns Company and Affiliated Company and owns all the voting rights to both companies. Moreover, Company assumes for purposes of this ruling that Affiliated Company will be a component member of the controlled group as of December 31 of each year and is not otherwise excluded as a component member.

Affiliated Company is a retailer with a physical presence in Colorado. Therefore, pursuant to subsection 102(3)(b)(ii), these three companies qualify as a controlled group and Company is a retailer "doing business" in Colorado.

*2. Filer status of Company and determination of which local jurisdictions Company must collect.*

Company must open a sales tax account and retailer's use tax account. These accounts are separate from Affiliated Company's sales tax account. Department's FYI Sales 58 ("Requirements for Sales Tax Remittance for Multiple Location Filers"), quoted below, sets forth Company's filing requirements when it makes sales in multiple tax jurisdictions.

Those companies that have both a location in Colorado and have delivery (mail order/internet) sales from out-of-state will obtain a sales tax account and licenses for the stores in Colorado and will also obtain a retailer's use tax account.

When the company has a delivery sale to a customer in a jurisdiction where they also have a store, the sale shall be reported on the tax return for that site/store. The jurisdiction for the store includes deliveries made anywhere in the city, county, or special district associated with the store. If the customer and the store do not share all the state collected taxes, line 3a of the sales tax return for sales out of the taxing area should be completed for the local taxes that do not apply. (For Example: A store is located in Wellington in Larimer County and an Internet sale is made to an address in Loveland. The Internet sale will be subject to the state and Larimer County sales tax, but not any city tax. The sale will be reported on the DR 0100 for the Wellington location, but the city column will show the sale as out of the taxing area and no city tax will be collected or remitted.).

When the company has sales into jurisdictions where they do NOT have a store, those sales shall be reported on the retailer's use account and include any special district taxes. (For Example: Stores are located in Denver and Colorado Springs and an internet sale is made in Aspen, the state and Roaring Fork RTA taxes will be collected and paid on the retailer use return.)

If a company has more than one store in the same jurisdiction the company should report the sale on the store that has the most taxes in common (state, county, special district) with the customer. If there is no store that has more taxes in common, then the company has the discretion as to which site/store to report the sale.

Those companies that opt to collect all the local sales taxes even when they do not have a store in those jurisdictions are encouraged to do so.

A company based in Colorado should report the delivery sales on the site/store that the item will be shipped from and should exclude any sales out of the taxing area on line 3a of the sales tax return.

Thus, Company will report and collect local sales tax for sales shipped into local jurisdictions in which Affiliated Company stores are located.<sup>3</sup> If Company ships product to local jurisdictions in which Affiliated Company does not have a store, then Company will report the sale on its Retailer's Use Tax Account and collect state use tax and, if the customer is within a special district that levies a use tax.<sup>4</sup>

Affiliated Company operates brick-and-mortar stores in the home-rule cities of Denver, Lakewood and Castle Rock; in the home rule county of Denver and the state administered counties of Douglas and Jefferson; and in the RTD and CD. The Department does not administer the sales or use taxes of home rule cities or home-rule counties and this ruling does not govern the administration of those taxes. We encourage Company to contact home-rule cities and home-rule counties to discuss its tax obligations, if any, in those jurisdictions. The following scenarios regarding state-administered tax jurisdictions apply to Company:

1. *Denver Store* is located in the state-administered RTD/CD special districts and in the home-rule city and county of Denver.
  - a. If Company ships an item to Affiliated Company's Denver store where the customer picks up the item or to a customer located within the city and county of Denver, then Company must collect Colorado state sales tax and RTD/CD sales tax. Company does not report or remit to the Department taxes that may be due to the city and county of Denver.
2. *Lakewood Store* is located in state-administered Jefferson County, RTD/CD and in the home-rule city of Lakewood.
  - a. If Company ships an item to Affiliated Company's Lakewood store where the customer picks up the item, Company must collect: Colorado state sales tax, Jefferson County sales tax, and RTD/CD sales taxes. Company does not report or remit to the Department taxes that may be due to the city of Lakewood.
  - b. If Company ships an item directly to a customer whose address is in Jefferson County, then Company must collect Colorado state sales tax, Jefferson County sales tax and RTD/CD district taxes. The RTD and CD

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<sup>3</sup> Department [publication DRP 1002 lists all local tax jurisdictions in Colorado. This form can be found at [www.colorado.gov/revenue/tax](http://www.colorado.gov/revenue/tax) > Forms > Sales.

<sup>4</sup> State-administered cities and counties do not levy a use tax that applies to Company's product. Special districts do levy a use tax on the same items to which state use tax applies. Special district use taxes are reported to the Department on the Retailer's Use Tax Return. Special districts that currently levy use taxes are the Regional Transportation District (RTD), Cultural District (CD), five rural transportation authorities (RTAs), and Pitkin County Mass Transit Authority (MTA).

districts include all of Jefferson County. See, paragraph 4 below re: RTD/CD taxes.

3. *Castle Rock Store* is located in the state-administered Douglas County and the home-rule city of Castle Rock.
  - a. If Company ships an item to Affiliated Company's Castle Rock store where the customer picks up the item, Company must collect Colorado state sales tax and Douglas County sales tax.
  - b. If Company sells a good and the item is shipped to an address in Douglas County, Company must collect Colorado state sales tax, Douglas County sales tax, and RTD/CD sales taxes if the customer is located within those districts. See, paragraph 4 below re: RTD/CD taxes.
4. *RTD/CD*. If Company ships an item to an address that is within RTD and/or CD districts<sup>5</sup> but the address is not within Douglas or Jefferson counties, then Company must collect the RTD and/or CD district sales taxes because Affiliated Company has a business presence (i.e., the Denver and Lakewood stores are within the RTD/CD districts) in these special districts. For example, if Company ships an item to an address which is located in Arapahoe County and in the RTD/CD districts, then Company collects RTD/CD sales taxes, but does not collect Arapahoe County sales tax because Affiliated Company does not have a store in Arapahoe County.
5. *RTAs and MTAs*. RTAs and MTAs are special districts that levy both a sales and use tax.<sup>6</sup> Company reports and collects these special district use tax on the retailer's use tax return if the item is shipped to an address located within these districts.

Company can create a sales tax account by applying on-line at [www.Colorado.gov/revenue/tax](http://www.Colorado.gov/revenue/tax) > On-line Services > Sales Tax Filing or by paper with a Sales Tax / Withholding Account Application (CR 0100).<sup>7</sup> The fee for a two-year license is \$16, plus a one-time-only \$50 deposit. The deposit is automatically refunded to the business after \$50 in state sales tax has been remitted to the Department. For more information, please see FYI Sales 9, Sales Tax Licenses.

Company must file sales and retailer's use tax returns that lists each state-administered local tax jurisdiction for which Company has an obligation to collect state-administered local sales and/or use tax. Company can file tax returns on-line using Revenue On-line<sup>8</sup> or by paper using Form DR 0100.<sup>9</sup> Company must file a return for each period that the tax account is open and active, even if there is no tax to report. Tax returns must be filed on the monthly or quarterly due date to avoid interest and penalty. The Department offers an on-line sales tax filing system for retailers, which

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<sup>5</sup> The boundaries for the RTD are the same as the CD, except in relatively few instances. See, DRP 1002, which can be found on the Department's web site at [www.taxcolorado.gov/revenue/tax](http://www.taxcolorado.gov/revenue/tax) > Tax Forms > Forms by Number > DR 1002, for a description of these boundaries.

<sup>6</sup> There are three MTAs and five RTAs within Colorado as of the date of this ruling. All RTAs levy a use tax. However, only the Pitkin County MTA levies a use tax.

<sup>7</sup> Form CR 100 can be downloaded from the Department's web site at [www.colorado.gov/revenue/tax](http://www.colorado.gov/revenue/tax) and select Forms.

<sup>8</sup> [www.Colorado.gov/RevenueOnline](http://www.Colorado.gov/RevenueOnline)

<sup>9</sup> See footnote 7.

makes filing efficient and contains a number of edit features that can assist in filing a complete and accurate return. See, [www.colorado.gov/revenue/tax](http://www.colorado.gov/revenue/tax) > "On-line Services" > Sales Tax Filing.

For more information on sales tax licenses, filing frequencies, tax rates, and other sales tax requirements, please view our sales tax FYI publications. FYIs are available on many sales tax topics.

The Department can also provide Company access to resources that identify the state-administered cities and counties and their tax rates. The Department also provides access to third-party resources to help retailers identify whether addresses to which they ship goods are within the local tax jurisdictions for which the Company must collect sales or use taxes. Companies that use these electronic address databases are held harmless if the database incorrectly identifies the tax jurisdictions in which the address is located.

*3. Company is required to file a zero return for a month in which no sales are made.*

If no tax is due, Company must file a "zero" return.

### **Miscellaneous**

This ruling is premised on the assumption that the Company has completely and accurately disclosed all material facts. The Department reserves the right, among others, to independently evaluate Company's representations. This ruling is null and void if any such representation is incorrect and has a material bearing on the conclusions reached in this ruling. This ruling is subject to modification or revocation in accordance to Department Regulation 24-35-103.5.

Enclosed is a redacted version of this ruling. Pursuant to statute and regulation, this redacted version of the ruling will be made public within 60 days of the date of this letter. Please let me know in writing within that 60 day period whether you have any suggestions or concerns about this redacted version of the ruling.

Sincerely,

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Colorado Department of Revenue  
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