

STATE OF COLORADO

DEPARTMENT OF REVENUE

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John W. Hickenlooper
Governor

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Executive Director

PLR-13-009

November 13, 2013

XXXXXXXXXXXXXXXXXX
ATTN: XXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

Re: Private Letter Ruling

Dear XXXXXXXXXXXX,

You submitted on behalf of XXXXXXXXXXXXXXXXXXXX ("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.

Issue

Does Company need to collect use tax on the consigned merchandise procured for auction in states outside of Colorado?

Conclusion

Company must collect Colorado sales tax on property sold at its auctions, which are conducted outside Colorado, if the taxable tangible personal property is delivered to a buyer who is located in Colorado or to a person who is designated by buyer to receive the goods and who is located in Colorado. Company also has an obligation to collect Colorado use tax if the sale is deemed to occur outside Colorado but is delivered into Colorado to the buyer for use, storage, or consumption in Colorado. Company does not have an obligation to collect sales or use tax if the property is sold at auction conducted outside Colorado and the property is delivered to the buyer or consumer who is located outside Colorado.

Background

Company is an auction house that has a representative in the City of Denver that solicits merchandise for sale at auctions it conducts in California and New York. Company does not have an office, distributing house, or retail operation in Colorado. The representative does not procure merchandise in Colorado for the specific purpose of selling, leasing, or distributing the auctioned property to persons in Colorado, but a successful bidder may

reside in Colorado. The representative's sole purpose is to procure consignments in Colorado to be sold in auctions conducted outside of Colorado.

A resident of the State of Colorado is disputing whether Company's business operations in the state require Company to collect sales and/or use tax from its clients and remit the tax to the state. Company began collecting use tax in the month of March per instructions from a Department's call center representative based on that person's interpretation of Regulation 39-26-102.3 and FYI Sales 5, "Sales Tax Information for Out of State Business," but wishes to know if this advice is correct.

Discussion

As a general rule, Colorado requires a retailer who is doing business in Colorado and selling tangible personal property in Colorado to collect, report, and remit Colorado sales or use taxes.¹ A retailer includes an auctioneer, unless the owner of the auctioned property is a retailer licensed by the Department.² This general rule requires a retailer to consider at least two questions: (1) is there a taxable event in Colorado and (2) is retailer "doing business" in Colorado – that is, does the retailer have sufficient nexus with Colorado?

With respect to whether there is a taxable sale in Colorado, sales tax is incurred when taxable tangible personal property is sold in Colorado.³ A sale occurs in Colorado when ownership or possession⁴ passes to the buyer in Colorado.⁵ Ownership is presumed to pass when the goods are delivered to the buyer.⁶ For example, a sale by a retailer located in Colorado to a buyer located outside Colorado who takes possession outside Colorado is not subject to sales tax because the sale occurs outside Colorado when the goods are delivered to the buyer.⁷ Conversely, when a company conducts an auction sale in another state and ships the goods to a buyer in Colorado, a sale occurs in Colorado because title and possession pass to buyer in Colorado.

Even if the sale occurs outside of Colorado, Colorado levies a use tax on such property if the buyer uses, stores, or consumes the property in Colorado.⁸ A retailer who is "doing business" in Colorado has an obligation to collect use tax from such buyers.⁹

¹ §39-26-105(1)(a), C.R.S.

² §39-26-102(1.3), C.R.S. (Auction sales)

³ §39-26-104(1)(a), C.R.S.

⁴ A sale includes any transfer of an interest in taxable property or taxable services for consideration. §39-26-102(23), C.R.S. Thus, a lease or license is a sale even though seller does not transfer title to the buyer.

⁵ Department Regulation 39-26-102.10 ("... Whether the transaction is absolute or conditional, it shall be considered a sale if it transfers from a seller to a buyer the ownership or possession of tangible personal property or specified services.")

⁶ Department Regulation 39-26-102.10 states that a sale occurs where either ownership or possession passes to buyer.

⁷ Department Regulation 39-26-704.2(4), C.R.S. ("Sales of tangible personal property located within this state at the time of sale and delivered to the purchaser by the vendor or by common carrier to a destination outside this state for use outside this state are not taxable...")

⁸ §39-2-202(1)(a), C.R.S.

⁹ §39-26-204(2), C.R.S.

Once it is determined that a sale or taxable use occurs in Colorado, the second question becomes relevant: does the seller have sufficient nexus with Colorado to permit Colorado to impose the tax collection, reporting, and remitting requirements on that seller? A retailer is “doing business” in Colorado and, thus, has nexus with Colorado if it engages in any number of activities in Colorado.¹⁰ For example, a seller has nexus in Colorado if it maintains employees in this state, even if the activities of the employee are completely unrelated to the sales transaction at issue.¹¹

Thus, Company has sufficient nexus in Colorado because it has an independent contractor in Colorado, even though the person is soliciting for auction sales that occur outside Colorado and does not solicit the sale for which Colorado tax is due. *Tyler Pipe Industries v. Washington Department of Revenue*, 483 U.S. 232 (1987) (independent contractors employed by seller create nexus). Therefore, Company must collect sales tax on property sold at its auctions, which are conducted outside Colorado, if the taxable tangible personal property is delivered to a buyer who is located in Colorado or to a person who is designated by buyer to receive the goods and who is located in Colorado. Company also has an obligation to collect Colorado use tax if the sale occurs outside Colorado but is delivered into Colorado to the buyer for use, storage, or consumption in Colorado.

We also note that when the owner of the consigned goods holds a retail sales tax license issued by the Department, Company, as an auctioneer, does not have an obligation to collect Colorado sales or use tax. In such cases, Colorado law states that the auctioneer is not a retailer for sales and use tax purposes and the owner has the obligation to collect, report, and remit sales or use tax to the Department if the sale occurs in Colorado or the buyer has a taxable use of such property in Colorado.

Finally, the Department administers sales tax for a number of local tax jurisdictions, including statutory cities, counties, and special districts. See, Department publication DRP 1002¹² for a list of state-administered local jurisdictions. Company must collect, report, and remit all state-administered local sales and use taxes that apply to the point of delivery to buyer.

Miscellaneous

This ruling applies only to sales and use taxes administered by the Department. Please note that the Department administers state and state-collected city and county sales taxes and special district sales and use taxes, but does not administer sales and use taxes for self-collected home rule cities and counties. You may wish to consult with local governments which administer their own sales or use taxes about the applicability of those taxes. Visit our web site at www.colorado.gov/revenue/tax for more information about state and local sales taxes.

¹⁰ §39-26-102(3), C.R.S. (Defines “doing business” in Colorado).

¹¹ *National Geographic Society v. California Board of Equalization*, 430 US 551 (1977).

¹² You can find this publication and others at www.colorado.gov/revenue/tax > Forms > Forms by Number > DR 1002.

This ruling is premised on the assumption that 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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