

STATE OF COLORADO

DEPARTMENT OF REVENUE
State Capitol Annex
1375 Sherman Street, Room 409
Denver, Colorado 80261
Phone (303) 866-3091
FAX (303) 866-2400



Bill Ritter, Jr.
Governor

Roxanne Huber
Executive Director

PLR-11-001

February 17, 2011

XXXXXXXXXXXXXXXXXX
Attn: XXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

Re: Private Letter Ruling

Dear XXXXXXXXX,

XXXXXXXXXXXXXXXXXX ("Company") submitted 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

Is Company liable for Colorado use tax when it prints and mails from out-of-state facilities advertisements to Colorado residents?

Conclusion

Company is liable for consumer's use tax for advertising material it mails to Colorado residents.

Background

Company provides the following recitation of facts. It is a corporation located out-of-state and is engaged in the business of providing advertising services, including consumer analytics, ad placement in publications distributed by unrelated businesses, and graphic design. Although most of its services are provided to unrelated businesses seeking advertising services, it also provides services to other unrelated advertising businesses.

Company publishes a multi-advertiser advertising publication distributed through the mail in Colorado and other states. The mail recipients of the publication do not pay a charge for the publication. Company's publication is branded, is published on a regular basis using a publication schedule established in advance, contains no editorial content, and contains advertisements for goods and services offered by

multiple, unrelated advertisers.

The publication includes advertising inserts for multiple, unrelated advertisers, which may be supplied by the Company or the advertiser. On occasion, the Company mails inserts for a specific advertiser separately from the publication when the circulation area or publication date does not coincide with the needs of the advertiser. Company retains ownership of the publication, and all inserts supplied by Company, until possession is transferred at the ultimate destination to the consumer's household mailbox.

Taxpayer designs each advertisement and the layout of the advertising publication, contracts for printing of the publication and its inserts by multiple printers which it selects (none of which are located in Colorado), procures a mailing list based on circulation territories which it defines, assembles the publication and arranges for its distribution as mail.

The United States Postal Service certifies that the publication meets Postal standards and accepts postage for the mailing out-of-state. The publication is sealed after inspection by the Postal Service and is shipped, using a common or contract carrier, from the Company's out-of-state location to a Post Office in Colorado where it is distributed as mail by the Postal Service in Colorado to individual residences at no cost to the recipient.

Company does not maintain an office, salesroom, or any place of business in the state and does not have a Colorado telephone listing. Company has one employee in the state whose sole function is to solicit orders for placement of advertisements in the publication. Company asserts that no advertising services are provided in Colorado.

Discussion

Colorado levies a "consumer's" use tax on a person's use, storage, or consumption of tangible personal property in Colorado.

(1)(b) ... there is imposed and shall be collected from every person in this state a tax or excise ... [on] the storage or acquisition charges or costs for the privilege of storing, using, or consuming in this state any articles of tangible personal property purchased at retail.¹

This use tax is reported and paid by the user of the property.

(5) Every person subject to the provisions of this [use tax] who uses, stores, or consumes tangible personal property in the conduct of a business in this state, which property is purchased either inside or outside this state, and who has not paid the sales or use tax imposed by this

¹ §39-26-202(1)(a)(b), C.R.S.

article to a retailer shall make a return and remit the tax [to the Department].

For example, a business that purchases tangible personal property outside Colorado and brings the property into Colorado for use, storage or consumption must report and remit use tax to the Department.

Consumer's use tax applies only to tangible personal property. Prior to March 1, 2010, Colorado law defined tangible personal property to exclude direct mail advertising material. However, Colorado recently amended this definition to include direct mail marketing material for sales and uses occurring on or after March 1, 2010.²

"Tangible personal property" means corporeal personal property. The term shall not be construed to include newspapers, as legally defined by section 24-70-102, C.R.S., preprinted newspaper supplements which that become attached to or inserted in and distributed with such newspapers, or direct mail advertising materials that are distributed in Colorado by any person engaged solely and exclusively in the business of providing cooperative direct mail advertising; except that, commencing March 1, 2010, for purposes of the state sales or use tax, *"tangible personal property" shall include direct mail advertising materials that are distributed in Colorado by any person engaged solely and exclusively in the business of providing cooperative direct mail advertising. (emphasis added)*

"Cooperative direct mail advertising" means,³

Advertising for one or more businesses which is in the form of discount coupons, advertising leaflets, or other printed advertising which are delivered by mail in a single package or bundle to potential customers of such businesses participating in such advertising.

"Direct mail advertising materials" means,⁴

Discounts coupons, advertising leaflets, and other printed advertising, including, but not limited to, accompanying envelopes and labels.

Company states that it is not liable for use tax on advertising materials mailed to residents in Colorado for three separate reasons. First, Company believes that it is not "doing business in" Colorado because its headquarters and employees (except for a sales employee) are located outside Colorado and the work it performs to provide marketing services are performed outside Colorado. In addition, Company asserts that Colorado's use tax applies only when goods are sold to consumers and Company's advertising materials are not sold to Colorado residents. Finally,

² House Bill 2010-1189 amending §39-26-102(15), C.R.S.

³ §39-26-102(2.7), C.R.S.

⁴ §39-26-102(2.8), C.R.S.

Company states that it is providing a non-taxable service (marketing) and it is the consumer of the advertising materials to provide this service.

Company assertions are correct insofar as they address retailer's use tax.⁵ Retailer's use tax is imposed on out-of-state retailers "doing business" in Colorado who sell or deliver taxable goods to Colorado consumers as part of a retail transaction. Company does not sell its advertisements to Colorado consumers and, therefore, there is no retail transaction. Instead, the Company itself is using the advertising material to conduct its marketing business.

Although retailer's use tax is not applicable, Company is liable for consumer's use tax. Company asserts, and we agree, that it is the owner of the advertising material until the material is received by the mail recipient. Company uses and stores this material in Colorado to promote the interests of its clients / advertisers. Direct mail marketing material, like any other business property used to perform marketing services, is generally considered consumed by the marketing company and not by the recipients of the marketing material. Thus, in all respects, Company's use and storage of these advertisements in Colorado satisfies the statutory elements for Colorado consumer use tax.

Out-of-state direct marketing companies have argued that they are not "using" or "storing" advertising material in Colorado because they do not have possession or control over the material once it is placed in the hands of the Postal Service or a common carrier outside Colorado. This argument has been addressed and rejected by Colorado courts. In *Service Merchandise Company, Inc. v City and County of Denver and Colorado Department of Revenue*, 971 P2d 654 (Colo. App. 1997), an out-of-state advertising company challenged a local use tax assessment for advertising materials mailed by the company to Colorado residents. The marketing company argued that it did not have dominion or control over the advertising material after it delivered the material to the Postal Service and, therefore, it did not use or store the advertisements in Colorado. The court held that the company used the

⁵ Retailer's use tax is identical to consumer's use tax in that it is a tax on a consumer's (not retailer's) use, storage, or consumption of tangible personal property. However, unlike consumer's use tax which is reported and remitted to the department by the consumer, retailer's use tax imposes on the out-of-state retailer an obligation to collect use tax from the consumer when the sale occurs outside Colorado.. An out-of-state retailer who fails to collect and remit this tax is liable for the use tax.

(2) Every retailer doing business in this state and making sales of tangible personal property for storage, use, or consumption in the state, ..., shall collect the tax imposed by 39-26-202, from the purchaser ...

...

(5)(a) If a person neglects or refuses to make a return in payment of the tax or to pay any tax as required by this article, ..., [shall be liable for such tax].

Colorado sets forth in statute a non-exhaustive list of activities that constitute "doing business in" Colorado.⁵ However, and as explained below, it is not necessary that we determine whether Company is "doing business in" Colorado in order to rule on the question posed by this ruling request.

material in the local jurisdiction when it purposefully directed its material into the tax jurisdiction for the purpose of promoting its advertisers' businesses.⁶

This marketing material is analogous to an out-of-state company storing equipment, inventory, or other tangible personal assets in Colorado. Although a company has its headquarters, employees, and all other assets located outside Colorado, Colorado can still levy use tax on the company for its assets located in Colorado. The marketing material at issue in this ruling is the Company's tangible personal property, it is located in Colorado, and it is used by the Company to perform a specific task (marketing to Colorado residents). As such, Company is subject to Colorado's consumer's use tax for this material.

To be clear, this conclusion is based on sales or uses occurring on or after March 1, 2010. As noted earlier, Colorado exempted direct mail advertising material from tax for sales and uses occurring prior to March 1, 2010 by excluding such material from the definition of tangible personal property.

Finally, there are a number of special tax districts that assess consumer's use tax on the same uses, storage, and consumption taxed by the state. These include the Regional Transportation District, Scientific and Cultural Facilities District, Metropolitan Football Stadium District, and rural transportation authorities. See, Department Publication DRP 1002 for a list of these jurisdictions. The Department administers the use tax for these special tax districts. The Department also provides taxpayers access to on-line systems that can determine whether addresses are within state and local tax jurisdictions, as well as a variety of other resources, to assist in determining a taxpayer's use tax obligation. These are available at www.taxColorado.org.

Colorado also has "home-rule" cities and counties that levy consumer's use tax. These home-rule taxes are not administered by the Department. Company is encouraged to contact these home-rule cities and counties to discuss the applicability of their use taxes. See, DRP 1002 for a list of these home-rule cities and counties.

⁶ Citing, *Talbots, Inc. v. Schwartzberg*, 928 P.2d 822 (Colo. App. 1996) (rejecting out-of-state retailer's argument that Denver's use tax on its catalogues, which the company printed and mailed from facilities outside Colorado, violated the Constitution's Commerce Clause); and *Walgreen Co. v. Charnes*, 859 P.2d 235 (Colo. App. 1992) (retailer liable for advertisements printed and mailed from facilities outside Colorado). See also, *Sharper Image Corp. v. Miller*, 692 A.2d 774 (Conn. 1997) ; *Service Merchandise Co. v. Arizona Department of Revenue*, 937 P.2d 336, 339 (Ariz. App. 1996) ("By directing the catalogs and fliers to be mailed to customers from the post office, Service Merchandise 'used' the catalogs in Arizona.").

Miscellaneous

This ruling is premised on the assumption that the Company completely and accurately disclosed all material facts. The Department reserves the right, among others, to independently evaluate the 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,

Neil L. Tillquist
Colorado Department of Revenue
Tele: (303)866-5627
Email: ntillquist@spike.dor.state.co.us