

STATE OF COLORADO

DEPARTMENT OF REVENUE
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John W. Hickenlooper
Governor

Barbara J. Brohl
Executive Director

GIL-2008-31 (amended)

August 8, 2013

XXXXXXXXXXXXXXXXXX
Attn: XXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

Re: taxability of medical records

Dear XXXXXXXXXXXX,

The Department previously provided you a general information letter (GIL-08-031) dated August 15, 2008 on behalf of XXXXXXXXXXXX. The Department has had an opportunity to revisit this issue and has come to a different conclusion in the context of the sale of computer software and the electronic transmission of data over the Internet. In our previous ruling, we stated that electronic transmission of data over the Internet is not tangible personal property. However, the Department has come to a different conclusion in which the electronic delivery of music, movies and other goods are the sale of tangible personal property. You may also be interested in PLR-13-002. This general information letter supersedes our August 15, 2008 general information letter.

Issue

1. Does Company have nexus with Colorado?
2. Is a fee for copies of records, which are owned by a company located in Colorado, and delivered to the purchaser, who is also located in Colorado, subject to Colorado sales tax?
3. Is a fee for copies of records, which are owned by a company located outside Colorado, and delivered to the purchaser, who is located in Colorado, subject to Colorado sales tax?
4. Is a fee for copies of records, which are owned by a company located in Colorado, and delivered to the purchaser, who is located outside Colorado, subject to Colorado sales tax?

Background

Company is based in XXXXXXXXXXXX [another State] and contracts with medical facilities throughout the United States to provide a service related to the release of medical records information to third parties, such as law firms or insurance companies

(the Record Recipient). Company utilizes an online Internet-based system. The process for providing medical records is as follows:

1. The medical facility logs a medical record request into Company's on-line system.
2. The medical facility staff makes an electronic image of the medical record information by either scanning paper documents onto the system or by importing electronic information into the on-line system. All medical information is stored in image format (TIF). Company does not own or have any legal right to the medical records.
3. Company provides the medical records information to the Requesting Recipient using either paper, CD or transmits the record electronically. If the information is provided on paper or CD, Company mails the requested record from Company's print and distribution facilities located in XXXXXXXXX [another State].
4. Company, acting as agent for the medical facility, invoices the Requesting Recipient.
5. In some instances, Company remits a percentage of the fee to the medical facility and Company charges each medical facility a flat monthly service fee.
6. In other instances, Company retains all of the fees collected and Company does not charge the medical facility a monthly service fee.

Company provides the internet-based system to the medical facilities, but the medical facilities provide their own scanners and computers.

Discussion

1. Doing business in Colorado.

Your request raises two important issues. The first is whether Company has sufficient nexus with Colorado to impose on Company an obligation to collect, remit and report sales taxes. The second issue is whether these transactions result in a taxable sale.

A retailer must collect and remit sales or use tax if it is doing business in Colorado and the sale or use occurs in Colorado. "Doing business in this state" is defined (§39-26-102(3), C.R.S.) 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;
 - (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.

A number of federal court cases have limited the right of a state to impose on a retailer the obligation to collect state 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 a state. 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."

Your request raises a number of fact-specific issues regarding the relationships between Company and the medical facilities. It is beyond the scope of a general information letter to determine whether the relationship you described is a principal / agency relationship or whether Company and/or out-of-state medical facilities have nexus with Colorado. Nevertheless, certain general observations can be made. If the seller and buyer are in Colorado, then sales tax is due from the purchaser and must be collected by the seller. If the seller is located in Colorado and the property is delivered by common carrier to a buyer located outside Colorado, then neither sales nor use tax is due from the seller. If the seller is located outside Colorado and it delivers the property to a buyer located inside Colorado, then the seller may have to collect Retailer's use tax if the seller is "doing business in Colorado." See, Department FYI Sales 5 for additional information concerning retailers located outside Colorado.

2. Sale of property v. sale of services.

The second issue raised in your request is whether, in any of the scenarios outlined above, there is a sale of taxable tangible personal property. Colorado imposes sales tax on the sale of most tangible personal property sold at retail, but generally does not impose sales tax on services. §39-26-104, C.R.S. "Tangible personal property" is defined as corporeal personal property. §39-26-102(15), C.R.S. Corporeal is typically defined as that which is physical, tangible, or material in nature.¹ In contrast, intangible personal property does not have a physical existence and is conceptual in nature, such as a contract, stock, and goodwill.

Clearly, the sales of magazines, as well as books, music and movies either in form of paper, CD, DVD, or celluloid are subject to tax. Moreover, the electronic delivery of

¹ Merriam-Webster Desk Dictionary (1995); American Heritage College Dictionary, 3rd Ed. 1993.

music or movies is not the sale of an intangible concept, but, rather, the sale of something that is part of the real world and, therefore, tangible.² However, the taxability of electronically transmitted goods is a complex and controversial area of taxation. Among other things, we note that beginning July 1, 2012, electronically transmitted computer software is not subject to sales or use tax. See, §39-26-102(), C.R.S.

On the other hand, some transactions will be characterized as non-taxable services even though some incidental tangible personal property is exchanged. The sale by an author of a manuscript to a publisher is a non-taxable sale of a service and the medium in which it is sold (written manuscript) is treated as incidental to the sale. Department Publication FYI Sales 52 "Service Enterprises."

The distinction between sale of taxable tangible personal property and non-taxable services is sometimes stated in terms of whether the "true object" of the transaction is the acquisition of a service or tangible personal property. That is, the transaction is taxable if the true object is the sale of tangible personal property, and not taxable if the true object is the service. Although the true object test is easy to state in the abstract, it is not always easy to apply in practice. See, *City of Boulder v. Leanin' Tree*, 72 P3d 361 (Colo. 2003). In general, the Department will consider whether the transactions at issue are commonly and reasonably understood to be the sale of a service or a sale of goods.

The issue of whether the copying of records constitutes a sale of taxable goods or the provisioning of a non-taxable service arises in many circumstances. A common example is a store that either copies documents for customers or allows customers to use the store's copiers to make copies. Although there is a service component to such an operation (formatting, copying, etc.), the Department generally views the sale of copies in such cases as the sale of tangible personal property.

You state that Company invoices the Requesting Recipient the "statutory fee" or "fee mandated by that state." You do not disclose what is meant by statutory fee. Some states do not tax fees required by law to sales tax on the basis that sales tax only applies to contractual sales, not transfers of property required by law. We are not inclined to offer a view on this issue in the absence of more information about the "statutory fee" referenced in your request.

Please note that the Department of Revenue 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. Visit our web site at www.colorado.gov/revenue/tax for more information about state and local sales taxes.

Pursuant to state law, the Department will make public a redacted version of this letter.

² *Public Service Company v. Department of Revenue*, 10CA1026, Colorado Court of Appeals Div. III) (Colo. Ct. Appls 2011) (property that is not intangible is, a fortiori, tangible).

Your letter requesting this informational letter is not made public. For more information about general information letters and private letter rulings, please see Department regulation 24-35-103.5 at www.colorado.gov/revenue/tax > Tax Library > Rulings. . I enclosed a proposed redacted version of this letter. Please contact me within 60 days from the date of this letter if you have any questions, comments or concerns about the redacted letter.

I hope this is helpful. Please feel free to contact me if you have any questions.

Sincerely,

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

STATE OF COLORADO

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Bill Ritter, Jr.
Governor

Roxanne Huber
Executive Director

GIL-2008-31

December 16, 2008

XXXXXXXXXXXXXXXXXX
Attn: XXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX.
XXXXXXXXXXXXXXXXXX

Re: taxability of medical records

Dear XXXXXXXXXXX,

This letter is in response to your request for a general information letter concerning the applicability of sales or use tax to services and goods provided by XXXXXXXXXXXXXXX ("Company"). This letter is issued pursuant to Department Regulation 24-35-103.5. The guidance provided in this letter is not binding on the department.

Issue

1. Does the Company have nexus with Colorado?
2. Is a fee for copies of records, which are owned by a company located in Colorado, and delivered to the purchaser, who is also located in Colorado, subject to Colorado sales tax?
3. Is a fee for copies of records, which are owned by a company located outside Colorado, and delivered to the purchaser, who is located in Colorado, subject to Colorado sales tax?
4. Is a fee for copies of records, which are owned by a company located in Colorado, and delivered to the purchaser, who is located outside Colorado, subject to Colorado sales tax?

Background

The Company is based in XXXXXXXXXXXXXXX [another State] and contracts with medical facilities throughout the United States to provide a service related to the release of medical records information to third parties, such as law firms or insurance companies (the Record Recipient). The Company utilizes an online Internet-based system. The process for providing medical records is as follows:

1. The medical facility logs a medical record request into the Company's on-line system.

2. The medical facility staff makes an electronic image of the medical record information by either scanning paper documents onto the system or by importing electronic information into the on-line system. All medical information is stored in image format (TIF). The Company does not own or have any legal right to the medical records.
3. The Company provides the medical records information to the Requesting Recipient using either paper or a CD, or transmits the record electronically. If the information is provided on paper or a CD, the Company mails the requested record from the Company's print and distribution facilities located in XXXXXXXXX [another State].
4. The Company, acting as agent for the medical facility, invoices the Requesting Recipient.
5. In some instances, the Company remits a percentage of the fee to the medical facility and the Company charges each medical facility a flat monthly service fee.
6. In other instances, the Company retains all of the fees collected and the Company does not charge the medical facility a monthly service fee.

The company provides the internet-based system to the medical facilities, but the medical facilities provide their own scanners and computers.

Discussion

1. Doing business in Colorado.

Your request raises two important issues. The first is whether the Company has sufficient nexus with Colorado to impose on the Company an obligation to collect, remit and report sales taxes. The second issue is whether these transactions result in a taxable sale.

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(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.

A number of federal court cases have limited the right of a state to impose on a retailer the obligation to collect state 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).

Your request raises a number of fact-specific issues regarding the relationships between the Company and the medical facilities. It is beyond the scope of a general information letter to determine whether the relationship you described is a principal / agency relationship or whether the company and/or out-of-state medical facilities have nexus with Colorado. Nevertheless, certain general observations can be made. If the seller and buyer are in Colorado, then sales tax is due from the purchaser and must be collected by the seller. If the seller is located in Colorado and the property is delivered by common carrier to a buyer located outside Colorado, then neither sales nor use tax is due from the seller. If the seller is located outside Colorado and it delivers the property to a buyer located inside Colorado, then the seller may have to collect Retailer's use tax if the seller is "doing business in Colorado." See, Department FYI Sales 5 for additional information concerning retailers located outside Colorado.

2. *Sale of property v. sale of services.*

The second issue raised in your request is whether, in any of the scenarios outlined above, there is a sale of taxable tangible personal property. Colorado imposes sales tax on the sale of most tangible personal property sold at retail, but generally does not impose sales tax on services. §39-26-104, C.R.S. "Tangible personal property" is defined as corporeal personal property. §39-26-102(15), C.R.S. Books, videos, magazines, trade publications are clearly taxable tangible personal property, even though they are the culmination of the personal services of writers, researchers, and analysts and contain intangible intellectual property, research, and data. Similarly, licensed "canned" software, which is typically protected intellectual property, is taxable when sold on CD or on other tangible mediums. Special Regulation 52 (Service Enterprises).

On the other hand, some transactions will be characterized as non-taxable services even though some incidental tangible personal property is exchanged. The sale by an author of a manuscript to a publisher is a non-taxable sale of a service and the medium in which it is sold (written manuscript) is treated as incidental to the sale. Special Regulation 52.

The distinction between sale of taxable tangible personal property and non-taxable services is sometimes stated in terms of whether the "true object" of the transaction is

the acquisition of a service or tangible personal property. That is, the transaction is taxable if the true object is the sale of tangible personal property, and not taxable if the true object is the service. Although the true object test is easy to state in the abstract, it is not always easy to apply in practice. See, *City of Boulder v. Leanin' Tree*, 72 P3d 361 (Colo. 2003). In general, the department will consider whether the transactions at issue are commonly and reasonably understood to be the sale of a service or a sale of goods.

The issue of whether the copying of records constitutes a sale of taxable goods or the provisioning of a non-taxable service arises in many circumstances. A common example is a store that either copies documents for customers or allows customers to use the store's copiers to make copies. Although there is a service component to such an operation (formatting, copying, etc.), the department generally views the sale of copies in such cases as the sale of tangible personal property. The Company's services and the paper and CD produced by the Company are substantially similar to these taxable transactions. Compare, California Sales Tax Counsel Ruling No. 515.0235 (company providing copying service for hospitals to whom a request for records is submitted is selling taxable goods and not a non-taxable service).

There is one important qualification to the taxability of copying charges. The department has previously determined that, in the context of the sale of computer software, the electronic transmission of data over the Internet is not tangible personal property. See, Department Special Regulation Sales 7. Therefore, the electronic transmission of medical records is not a sale of tangible personal property.

You state that the Company invoices the Requesting Recipient the "statutory fee" of "fee mandated by that state." You do not disclose what is meant by statutory fee. Some states do not tax fees required by law to sales tax on the basis that sales tax only applies to contractual sales, not transfers of property required by law. We are not inclined to offer a view on this issue in the absence of more information about the "statutory fee" referenced in your request.

Please note that the Department of Revenue 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. Visit our web site at www.revenue.state.co.us for more information about state and local sales taxes.

Pursuant to state law, the Department will make public a redacted version of this letter. Your letter requesting this informational letter is not made public. See, §24-35-103.5(13), C.R.S. The regulation governing private letter rulings and informational letters is available on our web site at: <http://www.revenue.state.co.us/taxstatutesregs/3921reg24-35-103.5.html>. I enclose a proposed redacted version of this letter. Please contact me within 60 days from the date of this letter if you have any questions, comments or concerns about the redacted letter.

I hope this is helpful. Please feel free to contact me if you have any questions.

Sincerely,

Neil L. Tillquist
Colorado Department of Revenue
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Email: ntillquist@spike.dor.state.co.us