

STATE OF COLORADO

DEPARTMENT OF REVENUE
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Bill Ritter, Jr.
Governor

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Executive Director

GIL-2009-012

July 7, 2009

XXXXXXXXXXXXXXXXXX
Attn: XXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

Re: income nexus

Dear XXXXXXXXXXXX,

You request guidance regarding whether XXXXXXXXXXXXXXXXXXXX ("Company") has nexus with Colorado for state income tax purposes. I apologize for the delay in responding to your inquiry.

The Department issues general information letters and private letter rulings. A general information letter provides a general overview of the applicable tax law, does not provide a specific determination, and is not binding on the department. A private letter ruling is a determination of the applicability of tax to a specific set of circumstances and is binding in the department. A party requesting a private letter ruling must provide certain information and remit a fee. For more information about general information letters and private letter rulings, please refer to the Department's regulation 24-35-103.5, C.R.S., which is available on our web site at: www.colorado.gov/revenue/tax.

Although you request a "determination," I will initially treat your request as one for a general information letter because the request does not contain the information necessary for a private letter ruling. You may resubmit this request as a request for a private letter ruling.

Issue

Does the Company have nexus for state income tax purposes?

Background

The Company manufactures glassware and its commercial domicile is in XXXXXX

[another state]. The Company ships by common its products to Colorado based on orders from customers who are located the northwest. Approximately .35% of the Company's 2007 sales were shipped to Colorado destinations. In order to provide better service to these customers, the Company uses a common warehouse for storage of its inventory. We assume from the nature of your question that this warehouse is located in Colorado. The Company further asserts that the warehouse serves no independent business function other than to facilitate deliveries to its customers. The Company asserts that PL 86-272 prohibits Colorado from asserting income liability under the circumstances it has described.

The department does not make specific determinations regarding nexus in general information letters, which are limited to a general discussion of the law.

Discussion

Colorado levies income tax on foreign corporations that derive income from sources within Colorado. §39-22-303, C.R.S. For tax years beginning on or after January 1, 2009, corporations that have sources of income within and outside Colorado must apportion the income based on a single factor (sales) apportionment methodology. For tax years that began prior to January 1, 2009, corporations had an election to apportion income using either a two or three factor apportionment methodologies. Under any of these apportionment methodologies, income derived from sales of tangible personal property includes sales where the "recipient" of the property is located in Colorado. For example, a company, located in State A, must apportion income to Colorado if it sells goods to a purchaser, located in State B, and delivers the goods to a recipient (ultimate consumer) located in Colorado (i.e., a drop shipment).¹ Similarly, a company must apportion income to Colorado if it maintains a warehouse in Colorado and ships its goods to a recipient located in another state if the company is not subject to income tax in the other state.

In general, Colorado imposes income tax on foreign corporations that engage in activities that exceed the minimum thresholds set forth in PL 86-272 and have nexus with Colorado.² PL 86-272 prohibits a state from imposing income tax liability if the company's only connection with the state is soliciting order for sales, approval of such

¹ Department Regulation (39)22-305.5(4)(B)(1), states, in part: "(1) Gross receipts from sales of tangible personal property are in this state:

- (a) if the property is delivered or shipped to a purchaser within this state regardless of the f.o.b. point or other condition of sale; or
- (b) if the property is shipped from an office, store, warehouse, factory, or other place of storage in this state and the taxpayer is not taxable in the state to which the property is shipped."

² *Coors Porcelain Company v. State of Colorado and John H. Heckers*, 183 Colo 325 517 P2d 838 (Colo. 1973) ("We mention initially that we are inclined to agree with the statement of the Attorney General that our General Assembly has sought to tax all the income that Colorado can constitutionally tax."). See, also, Colo. Code Regs. 39-22-301.1 Doing business in Colorado ("A corporation will be considered to be doing business in Colorado whenever the minimum standards of Public Law 86-272 are exceeded.")

orders is made outside the state, and the property is shipped from a point outside the state.³ As is the case of any exemption from taxation, this law is generally construed against the exemption.

A company that maintains a warehouse in a state exceeds the minimum threshold established in PL 86-272. See, e.g., Colorado Revenue Determination No. 70, 01/01/1993 ("In the case of the parent, taxable nexus is demonstrated, in part, by the storage, warehousing, and shipping of food products within Colorado under the management, direction and control of the parent, and, in part, by their market research, advertising, and credit activities."); Hellerstein, *State Taxation*, ¶6.17, General Analysis of Public Law 86-272 ("Local warehousing and delivery of goods out of a local warehouse are clearly beyond the pale of the minimum standards established for immunity. Instead, shipment must be made from a point outside the state."); compare, *CalRoof Wholesale v. Tax Com.*, 242 Or 435, 447 (1966), aff'g 2 OTR 91 (1965), and *Herff Jones Co. v. Tax Com.*, 247 Or 404, 411 (1967), aff'g 2 OTR 207 (1965) ("The provisions of subsection (a) of section 1 of the bill [PL 86-272] will not be available to grant immunity to a person where the orders are filled by a shipment or delivery from a stock of goods, warehouse, plant, or factory maintained by the person within the State."); *In the Matter of NL Industries, Inc. 1230 Avenue of the Americas New York, NY 10020*, Iowa Department of Revenue and Finance Declaratory Order 84-116-2A-A, 09/18/1987; but, see, *American Brands, Inc. v. Wisconsin Department of Revenue*, I-7376, 07/03/1986.

Moreover, a company that maintains an inventory of its products within Colorado has nexus with Colorado for income tax purposes. Colorado Revenue Determination No. 70, 01/01/1993. Other states have come to a similar conclusion. Compare, Florida Technical Assistance Advisement 01(C)1-004, 03/07/2001; Illinois Dept. of Rev. General Information Letter IT 98-0085-GIL, 11/04/1998 (maintaining inventories in state exceeds activities protected by PL 86-272 and likely creates nexus for state income tax purposes).

Miscellaneous

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

³ 15 USCA §381, states, in part: "(a) Minimum standards: No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

- (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
- (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1)."

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
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