

STATE OF COLORADO

DEPARTMENT OF REVENUE

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John W. Hickenlooper
Governor

GIL-14-013

May 29, 2014

Barbara J. Brohl
Executive Director

XXXXXXXXXXXXXXXXXX
Attn: XXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

Re: Local Sales Tax Collection on Equipment Leases

Dear XXXXXXXXXXX,

You submitted on behalf of ("Company") a request for guidance to determine the proper collection of state administered local sales tax on leases of equipment that are not vehicles.

The Colorado Department of Revenue ("Department") issues general information letters and private letter rulings. A general information letter provides a general overview of the relevant tax issues and is not binding on the Department. A private letter ruling provides a specific determination for a specific set of facts, is binding on the Department but not on the taxpayer, and requires payment of a fee. For more information about general information letters and private letter rulings, please see Department Rule 24-35-103.5 at www.colorado.gov/revenue/tax > Tax Library > Rulings.

The Department initially treats your request as one of a general information letter. If you would like the Department to issue a private letter ruling on the issues you raise, you can resubmit a request and fee in compliance with Department Rule 24-35-103.5. It is important to remember that general information letters, such as this one, are general discussions of tax law and are not a determination of the tax consequence of any particular action or inaction.

Issue

What is the basis for the change in policy on leases of tangible personal property in Department Publication FYI Sales 56?

Background

Company represents equipment leasing and finance companies. Company notes that a prior version Department Publication FYI Sales 56 stated that state administer local sales

tax applies to leases of equipment only if the lessor had a business location or nexus in the same jurisdiction as the lessee. The current version states that lessors who lease tangible personal property to be used or stored in Colorado need to obtain a sales tax license, and that the location of the delivery, use or storage of the tangible personal property determines what local jurisdictional sales taxes will be collected.

Discussion

Colorado levies sales and use tax on the sale, use, storage, or consumption of tangible personal property in Colorado.¹ The obligation to collect sales or use tax requires two elements: nexus with Colorado (sometimes referred to as a “doing business” in Colorado) and a taxable event. The Department has, over the last few years, undertaken the substantial task of examining its FYIs and regulations to ensure that they are correct and up-to-date with current case law. FYI Sales 56 is part of that review. As discussed below, this review was also prompted in part by a recent Colorado Court of Appeals decision and a recent district court decision that examined the time and place of a sale.

At the state level, the Department looks at a number of factors to determine whether a retailer has nexus with the state for sales and use tax collection, including whether the retailer has a “place of business” in Colorado.² “Place of business” is not defined in statute. Moreover, the statutory list of activities that constitute nexus in Colorado is, by the express terms of that statute, not an exhaustive list of the activities that create nexus in Colorado.

The case law addressing nexus is evolving. In *Associated Dry Goods Corporation, d/b/a/ The Denver Dry Goods Company, a Virginia corporation v. City of Arvada, Colorado, a municipal corporation, Don M. Harwell, and S. W. Tanner*, 197 Colo.491 593 P2d 1375, (05/07/1979), the court held that a local tax jurisdiction did not have authority to require a retailer to collect tax from the buyer if the retailer's only contact with the local jurisdiction was to occasionally deliver goods to buyers in that jurisdiction. Some of the case law on which the court relied to reach the conclusion in *Associated Dry Goods Corporation* has been effectively overturned. In *American Furniture Warehouse Co. v Manager of Revenue and City and County of Denver*, Case No. 96CV5349, (December 18, 1998)., the court held that a retailer has nexus with a local jurisdiction if the retailer engages in activities that are more than occasional deliveries, such as installation and repair work. In addition to these, cases, the Department has examined regulations and case law of other states for guidance.

The old and new versions of FYI Sales 56 state that a retailer must have a business presence in the local jurisdiction. However, the old version assumed that owning leased property in a jurisdiction did not create nexus. We believe this advice is inconsistent with Colorado case law, contemporary interpretations of the U.S. Constitutional Commerce Clause, and contrary to the views of many other states. Unlike a sale of goods where the

¹ §§39-26-104(1) and 202, C.R.S.

² §39-26-102(3)(a), C.R.S.

retailer's only activity in the destination jurisdiction is limited to placing the goods with a common carrier or making occasional deliveries in its own vehicles solely for purposes of transferring the property to the buyer, a lessor's activity in the destination jurisdiction is much greater and typically involves a continuing ownership interest in goods that it leases in the local jurisdiction. The continuous presence of business assets in a tax jurisdiction is typically sufficient to create nexus.³

The old FYI Sales 56 assumes that the taxable event takes place other than at the time and place where the leased property is delivered to the buyer. In a recent Colorado Court of Appeals case⁴, the court held that the time and place of a sale occurs when the goods are delivered to the buyer.⁵ Although this case deals with a sale rather than a lease of property, it indicates that the taxable event is when and where the buyer takes possession of goods. This conclusion is particularly appropriate in the case of leases where title never passes to the lessee.

The Department also notes that the Streamlined Sales Tax Project ("SSTP") has, as part of the modernization and simplification of sales tax rules, adopted destination-based sourcing rules.⁶ Revising the FYI in a manner consistent with the SSTP will make tax compliance more efficient and less burdensome for retailers. Finally, scholarly commentary on this issue indicates that the appropriate point of taxation is where and when the goods are consumed.⁷

FYI Sales 56 was revised to correctly identify that the activities of a lessor creates nexus with a local tax jurisdiction. Thus, a lessor, who brings its property into a local jurisdiction for an extended period of time, who retains title and other significant property rights to such property, who typically is responsible for the maintenance and functionality of the

³ See, e.g., Michigan Revenue Administrative Bulletin 1999-1, 05/12/1999; Va. Code Ann. §58.1-612(C)(9); Utah Code Ann. §59-12-107(1)(a)(v). California Sales Tax Counsel Rulings Nos. 220.0163 and 220.0194 (remote retailer that maintains inventory in state has nexus); Kansas Private Letter Ruling No. P-1998-79, 08/17/1998 (rental of TTP in Kansas by remote retailer creates nexus).

⁴ *Leggett & Platt, Inc. v. Ostrom, Interim Finance Director and City Treasurer of the City of Thornton*, Nos. 09CA1322 & 09CA2181 (September 30, 2010).

⁵ See, also, *GE Wind Energy v. Colorado Department of Revenue, et al.*, Denver District Court, Docket No. 11CV 8880, Findings of Fact and Conclusions of Law, dated September 26, 2013, at page 13 (In *Leggett & Platt, Inc. v. Ostrum*, 251 P.3d 1135 (Colo.App. 2010), cert. denied, 2011 WL 2463156 (Colo. 2011), the Colorado Court of Appeals "looked beyond the master vendor agreement to see where goods were actually transferred. The *Leggett* decision repeatedly refers to "physical" possession, and concluded, "transfer of physical possession of goods is a constitutionally permitted taxable event, regardless of technical considerations regarding the time and place of passage of title which might turn on the degree of control short of transfer of physical possession.").

⁶ See, *Hellerstein, State Taxation* (WG&L), 19A.06[1] ("SSUTA identifies the provision of "[u]niform sourcing rules for all taxable transactions" as one of the essential features of the streamlined system designed to "simplify and modernize sales and use tax administration." In implementing this requirement, SSUTA adopts a set of "general" sourcing rules for most transactions. These rules broadly embrace the destination principle.")

⁷ See, *Hellerstein, State Taxation* (WG&L), 18.02[1] ("A good consumption tax should result in taxation in the jurisdiction in which consumption takes place. Taxing the sale or use of goods that cross state lines at their destination implements this principle because goods typically are consumed at their destination.")

equipment while it is being used by the lessee, has sufficient business presence in that jurisdiction to create nexus. Moreover, and consistent with recent case law noted above, the FYI was also corrected to make clear that because the taxable event occurs inside the local tax jurisdiction, when and where the lessee takes possession of and uses the leased property over the term of the lease, the proper tax is a sales tax, not a use tax.

We should also note that the taxation of leases vary depending on the length of the lease. If the leases are short term leases (three years or less), the incidence of taxation falls on the lessor who is treated as the user and consumer of the leased property. A lessor using a short term lease must pay tax when it purchases the property and does not collect sales tax from customers.⁸ If the leases are long term leases (more than three years), the incidence of taxation falls on the lessee because these leases are treated as sales. However, a lessor using a short term lease may move the incidence of taxation to the lessee by agreeing to collect tax on the lease payments.⁹ When the lessor chooses this alternative, the transaction is treated as a sale of property.¹⁰ If a company elects to collect sales tax from customers on short term leases,¹¹ the transactions are treated as sales and sales tax is due on the lease payments.

A taxpayer has an obligation to collect sales tax if it either agrees to collect the tax or it has nexus with the taxing jurisdiction. If a company elects to collect sales tax on lease payments pursuant to 39-26-713(1)(a), C.R.S., it has voluntarily agreed to collect sales tax due on such transactions.¹² The sales taxes of state-administered local jurisdictions are sales taxes due on such lease payments. Therefore, a company has voluntarily assented to collect such taxes and must collect the sales taxes of local jurisdictions in which the equipment is located.

Miscellaneous

This letter represents the good faith opinion of Department personnel who are knowledgeable on state taxes issues. However, the Department does not make a specific determination here on any of the issues raised and the Department is not bound by this general information letter.

⁸ See, 39-26-713(1)(a), C.R.S. Cf, §39-26-102(23), C.R.S. (tax collected on long term lease payments are treated as sales).

⁹ §39-26-713(1)(c), C.R.S.

¹⁰ See footnote 4.

¹¹ Had a company not elected to collect tax on the payments, company would, as the user of such goods, be liable for state use tax on the equipment. Colorado levies use tax on the use, storage, or consumption of tangible personal property in Colorado. Company owns the equipment that is physically present in Colorado. Company uses and consumes the equipment to engage in transactions with Colorado customers. Thus, Company has engaged in a taxable use and consumption of tangible personal property in Colorado. Special districts also levy use tax on the same transactions on which state use tax applies. However, company would not be liable for use tax to statutory cities and counties because they cannot levy use tax (except for uses that are not relevant here).

¹² *Buehner Block Company v. Wyoming Department of Revenue*, 139 P3d 1150, 2006 WY 90, (Wyoming 2006).

The Department administers state and state-administered local sales and use taxes. This letter does not address sales and use taxes administered by home-rule cities and home-rule 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.

Enclosed is a redacted version of this letter. Pursuant to statute and regulation, this redacted letter 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 letter.

Sincerely,

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