December 20, 2011

XXXXXXXXXXXXXXX.
Attn: XXXXXXXXXX
XXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXX

Re: Private letter ruling re: local sales tax

Dear XXXXXXXXXX,

Your firm 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

1. Does the definition of "business location" in FYI Sales 56 constitute a "business presence" as contemplated in FYI Sales 62? If not, what is the state's definition of business presence in FYI Sales 62 for local sales tax?

2. If "business location" is not equivalent to "business presence," what is the difference between business presence and business location in the Colorado local statutes?

3. In the thirteen factual situations outlined in the request, when would the Company be required to collect local taxes?

4. Does the way the product is delivered affect the application of the local taxes?

Conclusion

1. The definition of "business location" in FYI Sales 56 has the same meaning as the term "business presence" used in FYI Sales 62.

2. See response to question 1.

3. The obligation to collect local taxes in the thirteen factual situations outlined in
the request is described in paragraph 3 of the Discussion section of this ruling.

4. The means by which the product is delivered can affect whether local sales and use taxes apply.

Background

Company sells XXXXXXX ("product") and related services. It has twenty-six retail stores located throughout Colorado. Company manufactures its product at plants located outside Colorado and stores the product in warehouses also located outside Colorado. From these facilities, Company distributes the product to various locations within Colorado.

Company sells its product and services to customers at its Colorado retail stores. It also delivers and installs the product at a number of customer locations in Colorado in at least three different ways. In some cases, Company ships the product to the customer's location where it is held until it is needed by the customer. At that time, Company employees will come to the customer's location and install the product on customer's vehicle. In other cases, Company employees visit customers' places of business on a sporadic basis or at the customer's request to install the product on customers' vehicles. Third, Company has employees stationed at some customers' premises due to the customers' high demand for Company's product and services.

The majority of Company's deliveries to customers are made by its retail store vehicles. However, in some cases, Company makes deliveries using either by common carrier, by transportation provided by other unrelated manufacturers of similar products, by affiliated dealers, or by Company owned vehicles from the Company's manufacturing or warehouse facilities.

Finally, Company employs salespersons who travel to Colorado soliciting orders that are filled from locations either within or outside Colorado.

Discussion

1. Does the definition of "business location" in FYI Sales 56 constitute a "business presence" as contemplated in FYI Sales 62? If not, what is the state's definition of business presence in FYI Sales 62 for local sales tax?

State and state-administered cities, towns, counties, and special districts levy sales tax, use tax, or both.¹ There are relatively few statutes that directly address when a retailer is obligated to collect local sales taxes. The most direct reference is found in §29-2-105, C.R.S., which states that when a retailer delivers its goods, either by its own vehicle or by common carrier, to a customer at a destination outside the local tax jurisdiction in which the retailer is located, then the retailer does not collect the local sales tax.

¹ For a list of local jurisdictions levying these taxes, see department publication 1002. The department does not administer the sales and use taxes of home-rule cities and counties and, therefore, this ruling does not apply to those taxes.
sales tax of the taxing jurisdiction in which the retailer is located. Subsection 106 further directs the Department to administer local taxes consistent with statutes governing the administration of state taxes. To flesh out the many issues related to local taxes, the department has issued a variety of informational material.

In FYI Sales 62, ("Guidelines for Determining When to Collect State-Collected Local Sales Tax"), the department sets forth general guidance regarding the application of local sales and use taxes. There are at least two general principals at play in this setting: (1) where does the sale occur (retailer’s or customer’s location) and (2) does the retailer have sufficient connection to the local jurisdiction into which the goods are delivered to allow that destination jurisdiction to require the retailer to collect its local tax.

With respect to the first issue, a sale occurs where title or possession passes to the purchaser. In most cases, title passes with change of possession. Indeed, the fact that a retailer does not collect sales tax on goods delivered outside the local jurisdiction strongly implies, if not compels, the conclusion that the sale occurs at the point of delivery.

As to the second issue, there is no statute that directly addresses to what extent a retailer located in one local jurisdiction within a state must have a business presence in another local jurisdiction of the same state in order for the latter local jurisdiction to impose on the retailer an obligation to collect the latter jurisdiction’s sales tax. 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 if a retailer occasionally delivers its product by common carrier or by its own vehicles into another local jurisdiction and the retailer has no other contact with the destination jurisdiction, then Company does not have sufficient connection with that jurisdiction to collect its local sales or use taxes. FYI Sales 62 states that the retailer must have some significant presence in the destination jurisdiction in order for that jurisdiction to have the authority to require the retailer collect its taxes. In pertinent part, this FYI states,

Sales tax on Tangible Personal Property.
A retailer of tangible personal property with a business presence in a city, county, and/or the Regional Transportation District/Cultural and Scientific Facilities

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2 Leggett & Platt, Inc., The Gap, Inc. v. Maria Ostrom, in her official capacity as Interim Finance Director and City Treasurer of the City of Thornton, 09 Colorado Court of Appeals, 1322; 09CA2181, 09/30/2010
3 Leggett & Pratt, supra.
4 Associated Dry Goods was decided in 1979 and places substantial reliance on Miller Bros for its analysis of Constitutional nexus issues. Constitutional law regarding sales tax nexus has significantly changed since the decision in Associated Dry Goods. It is generally recognized that the Commerce Clause analysis announced in Miller Bros and relied on in Associated Dry Goods has been largely overturned. Nevertheless, the department continues to believe that a retailer must have something more than a de minimis contact with a local jurisdiction before the local jurisdiction can require the retailer to collect that jurisdiction’s tax.
District/Metropolitan Football Stadium District (RTD/CD/FD) must collect all applicable local sales taxes on transactions consummated within the boundaries of that area. This does not include the sale or purchase of motor vehicles. See "Sales Tax on Motor Vehicles" section in this FYI.

**Deliveries of Goods**
Local sales taxes and RTD/CD/FD taxes are not collected when the retailer or his agent delivers tangible personal property, via the retailer's vehicle, to a destination outside the boundaries of the vendor's local taxing jurisdiction(s) or to a common carrier for delivery outside the boundaries of the vendor's local taxing area(s). Delivery of the tangible personal property into another local taxing area does not require the vendor to collect the local sales taxes of the delivery area if the vendor does not have a business presence there. However, sold goods that are turned over to a contractor/subcontractor or other agent who is not primarily a common carrier for delivery outside the local taxing jurisdiction (for example, a carpet store turning over sold carpet to an independent installer who then installs the carpet for the purchaser), does not constitute delivery to another taxing area under this rule. The goods are taxable in the local jurisdiction where the contractor/subcontractor picks up the goods.

This conceptual framework is repeated in FYI Sales 56 ("Sales Tax on Leases of Motor Vehicles and Other Tangible Personal Property"), in which the department sets forth general guidance regarding the application of local sales and use taxes to leases of vehicles and other tangible personal property. In part, this FYI states,

> In the case where city, county and special district taxes are collected by the state, local taxes are applicable only if the lessor has a form of business location in the same jurisdiction as the lessee. Any office, shop, warehouse, salesroom or the temporary but frequent presence of an employee for repair, sales or service purposes is a business location.

Although perhaps lacking some clarity, the use of "business location" and "business presence" are intended to be synonymous because the conceptual issues of where the sale takes place and whether the retailer has sufficient connection with the destination jurisdiction are the same.

2. **If "business location" is not equivalent to "business presence," what is the difference between business presence and business location in the Colorado local statutes?**

These terms are equivalent. See response to Question 1, above.

3. **In the thirteen factual situations outlined in the request, when would the Company be required to collect local taxes?**

Company posits thirteen scenarios in which it sells its product and services to customers and asks whether it has an obligation to collect local taxes. "Store," as
used in the Company's requests and in the department's responses given means a "brick and mortar" store.

a. *Company sells product and services to a customer who is located in the same local tax jurisdiction where the Company's retail store is located.*

Company must collect local sales taxes of local tax jurisdictions in which both the retailer and customer are located. For example, if the retail store is located in the town of Monument and the retailer delivers the product to the customer's place of business which is also in Monument, then the retailer must collect Monument sales tax. Retailer must also collect Monument's sales tax if the buyer takes delivery of the goods at the retailer's store, even though the buyer then takes the goods outside Monument. Because Monument is also within El Paso county and a rural transportation district, retailer must also collect the local sales taxes of those taxing jurisdictions.

b. *Company sells products and services occasionally to customers in a local tax jurisdiction where Company does not have a store physically located.*

We assume for purposes of this question that retailer has no physical presence in the destination jurisdiction, such as property, employees, or contractors. If company occasionally delivers its product by common carrier or by its own vehicles and has no other contact with the destination jurisdiction, then Company does not have sufficient connection with that jurisdiction to collect its local sales or use taxes. See, Associated Dry Goods Corporation, supra.

c. *Company sells products and services along with having employees stationed at Company's customer's business location in a local tax jurisdiction in which Company does not have any other physical presence. In this case, Company employees report daily to a single customer location for as long as the Company has a contract with the customer.*

The sustained presence of Company employees in the destination tax jurisdiction creates a business presence for the Company in that jurisdiction. Therefore, the destination tax jurisdiction can require Company to collect its taxes. Because a sale occurs where the product is delivered to the customer, Company must collect the sales tax of the destination local jurisdiction.

d. *Company sells product and services and has employees report weekly to Company customer's business location in a local tax jurisdiction where Company does not have a retail store.*

Same response as response to Question c.

e. *Company sells products and services and has employees report monthly to Company customer's business location in a local tax jurisdiction where Company does not have a physical store location.*
Same response as response to Question c. See, also, Orvis Company v. Tax Appeals Tribunal, 654 N.E.2d 954, (N.Y.), cert denied, 116 S.Ct. 518 (1995) (systematic visitation to its nineteen wholesale customers on the average of four times a year creates substantial nexus with state); Brown's Furniture, Inc. v. Zehnder, 171 Ill.2d 410 (1996) (vendor's delivery and installation of its product on a repetitive basis will trigger tax collection responsibilities.).

f. **Company sells products and services and has employees report on an irregular basis to Company's customer's business location in a local tax jurisdiction in which Company does not have a physical store location.**

The department does not have sufficient information regarding the frequency or scope of these of these visits to determine whether they create a business presence. See, Orvis Company v. Tax Appeals Tribunal, 654 N.E.2d 954, (N.Y.), cert denied, 116 S. Ct. 518 (1995) (systematic visitation to all of its as many as nineteen wholesale customers on the average of four times a year).

g. **Company leaves equipment at some customers' locations for use by Company employees when they service the customer's vehicles at the customer's business location in a local tax jurisdiction where Company does not have a physical presence.**

We assume that, because the equipment is left at the customer's place of business, the repair work is significant not only in terms of frequency but in the level of service provided. Company's repair services, in and of itself, creates a business presence.

h. **Company consigns product to customers that are in a local tax jurisdiction in which Company does not have a physical store.**

We assume that, by consigning the product with a customer, Company is, in effect, maintaining an inventory of its product at the customer's location. Maintaining inventory at the customer's location creates a business presence for the Company. Company charges state and local sales tax when the customer withdraws product from this inventory.

i. **Company has a salesman who makes regular calls to customers in local tax jurisdictions in which Company does not have a physical store location.**

Same response as response to Question e.

j. **Company has a salesman who makes irregular calls to customers in local tax jurisdictions in which Company does not have a physical store location.**

Same response as response to Question f.
k. **Company only delivers product to a customer’s location in a local tax jurisdiction where Company does not have a physical store location. No service work is performed by the Company employees.**

Same response as response to Question b.

l. **Company delivers product and provides services to a customer who is setting up a new location in a county in which Company does not maintain a physical location. A Company employee is on site during the set-up of the location to provide services as needed. In some cases, this may take up to a year. Once the site is operational, a Company employee may be (1) stationed at the new location, (2) make regular service visits to the location, or (3) make irregular service visits to the location.**

With respect to subpart (1) and (2) of this question, the response is the same as the response to Question c. The response to subpart (3) of this question is the same as the response to Question f.

m. **In some instances, Company delivers product outside of the Company’s local taxing jurisdiction but does not do any service at the time of delivery. Sometime later, Company may be called back to this location to perform some service work.**

A retailer is not required to collect tax for a completed transaction when, at the time the transaction was completed, the retailer does not have a business presence in the local tax jurisdiction, but who later engages in activities that create a business presence.

4. **Does the way the product is delivered affect the application of the local tax?**

We assume that this question is asking whether the Company’s obligation to collect tax depends on whether it delivers its product by common carrier, Company trucks, or by a third party that is not a common carrier (e.g., by vehicles owned and operated by another manufacturer that is unrelated to Company). In Associated Dry Goods, supra, the Colorado appellate court held that a retailer does not create a business presence with the destination local tax jurisdiction if the retailer only occasionally enters into the destination jurisdiction to deliver its goods, regardless of whether the retailer used a common carrier or its own vehicles to make those deliveries.

However, if the retailer has more than merely occasional deliveries into a destination local tax jurisdiction, then it is important to determine whether the retailer used its own vehicles or those of a common carrier. In this latter case, a retailer who uses its own vehicles to make those deliveries will create a business presence in the destination local tax jurisdiction, but not create a business

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5 There are a variety of issues regarding delivery that may affect a retailer's tax obligation. See, e.g., Leggett & Platt, supra, regarding common carriers employed the buyer instead of the seller.
presence when it uses a common carrier. Finally, a company that makes deliveries of Company's product on behalf of the Company is an agent of the Company and the other companies deliveries will be treated as if they were made in the Company's vehicles.

Miscellaneous

This ruling applies only to sales and use taxes administered by the Department. You may wish to consult with home-rule city and county governments, which administer their own sales or use taxes, concerning the applicability of their taxes.

This ruling is premised on the assumption that the Company has 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,

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