

# STATE OF COLORADO



DEPARTMENT OF REVENUE  
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John W. Hickenlooper  
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GIL-14-010

April 28, 2014

XXXXXXXXXXXXXXXXXX  
Attn: XXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXX

Re: Doing Business in Colorado

Dear XXXXXXXXXXXX,

You submitted on behalf of XXXXXXXXXXXXXXXX ("Company") a request for guidance on whether Company should be collecting sales or use tax on the sale of its metal building packages to customers in Colorado.

The 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](http://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

Is Company required to collect sales or use tax on the sale of its metal building packages to customers in Colorado?

## Background

Company is located outside of Colorado and sells metal building packages to customers in Colorado. The packages are delivered by a contract carrier. Company does not have a

physical presence in Colorado, and will only be advertising in magazines and taking orders over the phone.

### Discussion

Colorado levies sales and use tax on the sale, use, storage, or consumption of tangible personal property in Colorado.<sup>1</sup> An out-of-state retailer must collect sales tax for goods sold in Colorado if the retailer is “doing business” in Colorado.<sup>2</sup> “Doing business in this state” is defined 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)
    - I. 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.

If the only activity in which a company engages, directly or indirectly, is advertising in magazines or catalogues distributed in Colorado and using a common carrier to occasionally deliver goods to customers in Colorado, then Company is likely not doing business in Colorado. The United States Supreme Court has held<sup>3</sup> that states cannot require an out-of-state seller to collect sales tax if its only contact with the state is to advertise in catalogues distributed in the state and delivers goods into the state by common carrier. 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 Colorado Supreme Court

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<sup>1</sup> §§39-26-104(1) and 202, C.R.S.

<sup>2</sup> §39-26-102(3), C.R.S.

<sup>3</sup> *Quill Corp. v. North Dakota*, 504 US 298, 112 S Ct 1904,,19 L Ed 2d 91 (1992).

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 the company does not have sufficient connection with that jurisdiction to collect its local sales or use taxes. But see *American Furniture Warehouse Co. v Manager of Revenue and City and County of Denver*, Case No. 96CV5349, (December 18, 1998).<sup>4</sup>

Company represents that it uses a contract carrier rather than a common carrier to deliver its goods to buyers. A common carrier is one who holds itself out to serve all who request its service. In contrast, a contract carrier has no such obligation.<sup>5</sup> The distinction is important because, unlike a common carrier, a contract carrier is the agent of the shipper.<sup>6</sup> Thus, a contract carrier, unlike a common carrier, can create substantial nexus with Colorado (and the local jurisdictions into which it delivers goods) if Company regularly ships goods via a contract carrier into Colorado. In addition, if Company meets any other of the qualifications in §39-26-102(3), C.R.S. above, then Company is doing business in Colorado and in the local jurisdictions in which they fulfill those activities. For example, installation and warranty work on these structures will likely be sufficient to establish nexus.

### 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.

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](http://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

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<sup>4</sup> *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. See, also, *In re Laptops Etc. Corp.*, 164 B.R. 506 (Bankr. D. Md. 1993). (presence in state of retailer's agent who accompanied common carrier on occasional sales into state were insufficient nexus for Commerce Clause).

<sup>5</sup> *AT&T Communications of Maryland v. Comptroller of the Treasury*, 950 A2d 86, 405 Md 83 (2008).

<sup>6</sup> See, e.g., Kansas Information Guide, No. KS-1510, 12/01/2011 (For nexus [purposes, retailer's use of contract carrier is same as retailer's use of retailer's own vehicle); Wisconsin Dept. Rev. Tax Bulletin, No. 65, 01/01/1990 (contract carrier is agent of the person who hires it); *AT&T of Maryland v. Comptroller of the Treasury*, 950 A2d 86, 405 Md 83 (2008) (Common carrier is not agent of shipper for purposes of nexus).

know in writing within that 60 day period whether you have any suggestions or concerns about this redacted letter.

Sincerely,

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Email: [neil.tillquist@state.co.us](mailto:neil.tillquist@state.co.us)