

STATE OF COLORADO

DEPARTMENT OF REVENUE
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John W. Hickenlooper
Governor

Barbara J. Brohl
Executive Director

GIL-12-019

December 31, 2012

XXXXXXXXXXXXXXXXXXXX
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Re: Nexus

Dear XXXXXXXXXXXXXXX,

You submitted on behalf of your client ("Company") a request for guidance to determine whether Company has established nexus in Colorado and is required to collect and remit sales and use taxes on its Colorado sales.

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 regulation 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 regulation 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

Has Company established nexus in Colorado, and is Company therefore required to collect and remit sales and use tax on its Colorado sales?

Background

Company is a corporation located outside of Colorado, and has an employee whose job is to process and complete Company's internet sale orders through web sites such as eBay

and PayPal. This employee is moving to Colorado and will continue to be employed by Company doing the same job he is currently doing, but working out of his own home and using his own computer. Employee will not be actively soliciting sales, only contacting customers should there be processing type questions on Internet sales. Company will continue to pay the employee's wages, which will be reported on Form W-2, but will not pay the employee for any rent for use of an office in employee's home. The question at issue is whether these circumstances are sufficient to create nexus in Colorado, and, therefore, require Company to collect and remit sales and use tax on Company's Colorado sales?

Discussion

An out-of-state retailer may have an obligation to collect sales or use tax for goods sold, used, stored, or consumed in Colorado if the retailer is "doing business" in Colorado. "Doing business in this state" is defined in § 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 [sales tax], 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 the retailer the obligation to collect state sales and use taxes. *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 general, nexus can be created when a retailer has a physical presence in the state, either directly in the form of employees or property or indirectly through agents. *Complete Auto Transit, Inc., supra*. Moreover, a taxpayer will have nexus with a state even if the taxpayer's activity in the state is not directly related to the transaction to which sales tax applies. See, *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 97 S. Ct. 1386, 51 L.Ed.2d 631 (1977). For more information about this issue, see Department publication FYI Sales 5 "Sales Tax Information For Out-of-State Businesses."

Whether a company has nexus is generally a fact-intensive determination. The Department does not provide in a general information letter a determination with respect to a specific set of facts, particularly on issues of nexus. You may request a private letter ruling for a determination of nexus. If you wish to request a private letter ruling, feel free to give me a call and we can assist you in submitting such a request.

Miscellaneous

This letter represents the good faith opinion of Department staff who are knowledgeable of 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 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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