

STATE OF COLORADO

DEPARTMENT OF REVENUE

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GIL-2007-30

Bill Ritter, Jr.
Governor

Roxy Huber
Executive Director

XXXXXXXXXXXXXXXXXX
Attn: XXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

December 4, 2007

Re: Taxability of license agreement and maintenance for [Product]

Dear Mr. XXXXXXXXX,

This letter is in response to your letters to the Colorado Department of Revenue, dated April 19, 2007, re: taxability of agreement and maintenance for [Product]. We apologize for the time it has taken to respond to your inquiry.

Issue

Does this ASP provider have nexus in Colorado?

Discussion

In order for your company to be subject to Colorado tax, you must be "doing business in Colorado." "Doing business in this state" is defined (§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, 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 a retailer the obligation to collect state sales and use taxes. *Quill Corp. v North Dakota*, 504 US 298 , 112 S Ct 1904 , 119 L Ed 2d 91 (1992); *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 other words, a retailer must have some presence in the state, either

directly, such as in the form of a store, or indirectly, such as through independent sales agents, and engage in regular, purposeful in-state sales activities specifically directed at in-state customers. *Tyler Pipe Industries, Inc. v. Wash. State Dept. of Revenue*, 483 U.S. 232, 250 (1987). For more information about this issue, see department publication FYI Sales 5 (sales tax information for out-of-state businesses).

Your letter does not provide enough detail about the product and how it is made available for us to make an informed opinion about the application of Colorado tax. For example, are the servers for your ASP product located in Colorado? Do you own or lease property in Colorado or have any physical presence in Colorado? Do you have sales representatives or other agents in Colorado? If so, how often? What is the nature of their contact in Colorado? Is any tangible personal property exchanged with the purchaser? If you have additional information that you wish to provide, I will be happy to review it.

Finally, the Department makes a good faith effort to provide accurate and complete answers to questions posed to it by taxpayers. However, the information and answers provided here are not binding on the Colorado Department of Revenue, nor do they replace, alter, or supersede Colorado law and regulations. The Executive Director, who by statute is the only person having authority to bind the Department, has not formally reviewed and/or approved this response.

Respectfully,

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