

STATE OF COLORADO

DEPARTMENT OF REVENUE
State Capitol Annex
1375 Sherman Street, Room 409
Denver, Colorado 80261
Phone (303) 866-3091
FAX (303) 866-2400



John W. Hickenlooper
Governor

GIL-14-015

May 29, 2014

Barbara J. Brohl
Executive Director

XXXXXXXXXXXXXXXXXX
Attn: XXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

Re: Online and Mail Orders

Dear XXXXXXXXXXX,

You submitted on behalf of your client ("Company") a request for guidance on whether Company has any sales, use, income, withholding or other Colorado tax liability responsibility on its sales to Colorado customers or its compensation of its employees while 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 > 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.

Issues

1. Is Company required to collect sales tax or use tax on its sales to Customers in Colorado?
2. Is Company required to remit income tax to Colorado or withhold tax from employees while in Colorado?

Background

Company is an online and mail order retailer selling tangible personal property. Company advertises in magazines, television, and radio. All of its deliveries are by common or contract carriers.

Company sends employees to Colorado to meet with suppliers and potential suppliers. Some of these visits to Colorado will be to trade shows as attendees. Company does not have customer contact while in Colorado. Company engages in the procurement activity while in Colorado. Some of Company's customers in Colorado may receive shipments directly from Colorado suppliers to Company's customers (i.e., a drop shipment).

Company wishes to know whether it has any sales, use, income or withholding responsibilities on its sales (or receipts or income attributable to such sales) to Colorado customers or on its compensation to employees while in Colorado. Company's intent is to have its employees visit Colorado vendors as much as possible without incurring tax liability or responsibility.

Discussion

Sales and Use Tax

Colorado levies sales and use tax on the sale, use, storage, or consumption of tangible personal property in Colorado.¹ A retailer has an obligation to collect sales and use taxes if the retailer is doing business (i.e., has nexus) in Colorado. We cannot determine in the context of a general information letter whether your company has nexus in Colorado. However, the following information provides some general guidance.

The U.S. Supreme Court has held that whether a company has nexus with a state is measured by "whether the activities performed [in the taxing jurisdiction] on behalf of the taxpayer [were] significantly associated with the taxpayer's ability to establish and maintain a market ... for the sales."² In general, a seller has nexus in Colorado if it has employees or independent contractors in this state.³ Moreover, the presence of these employees is sufficient even if their activities are completely unrelated to the sales transactions at issue.⁴ Notwithstanding *National Geographic Society v. California Board of Equalization*, it does not initially appear that Company has nexus with Colorado. In general, visiting suppliers and trade shows as attendees is not enough to create nexus.

In addition, Company represents that it uses both a contract carrier and common carrier to deliver its goods to buyers. A common carrier is one who holds itself out to serve all who

¹ §§39-26-104(1) and 202, C.R.S. You can view this statute, as well as other department publications, by visiting the department's web site at www.Colorado.org>Taxes>Tax Library>Statutes.

² *Tyler Pipe Industries v. Washington Department of Revenue*, 483 U.S. 232 (1987).

³ *Tyler Pipe Industries v. Washington Department of Revenue*, supra, (Independent contractors employed by seller create nexus).

⁴ *National Geographic Society v. California Board of Equalization*, 430 US 551 (1977) (Company has nexus with state even if the activities of it employees in state are unrelated to the sales).

request its service. In contrast, a contract carrier has no such obligation.⁵ The distinction is important because, unlike a common carrier, a contract carrier is an agent of the shipper.⁶ 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.

Colorado is relatively unique in that cities, counties, and special districts (e.g., the regional transportation district ("RTD")) can and do levy their own sales and, in some cases, use taxes.

Assuming that Company has nexus with Colorado, it is important to determine whether there is a taxable event in Colorado (i.e., was there a taxable sale or use in Colorado). In the case you describe, it appears that the sales take place in Colorado. A sale generally takes place when and where the retailer delivers goods to the buyer. In this case, delivery takes place when the contract or common carrier delivers the goods to the buyer in Colorado.

Income Tax

A corporation must file a Colorado income tax return if the corporation does business in Colorado or derives income from sources in Colorado. A corporation is considered to be doing business in Colorado if it has substantial nexus with Colorado. The Department will presume that a company has substantial nexus if it has property, payroll, or sales in Colorado that exceed any of the following thresholds in any tax period:

- (i) a dollar amount of \$50,000 of property; or
- (ii) a dollar amount of \$50,000 of payroll; or
- (iii) a dollar amount of \$500,000 of sales; or
- (iv) twenty-five percent of total property, total payroll or total sales.⁷

If Company does not exceed any of these thresholds, then it does not have substantial nexus with Colorado and is not be required to file a Colorado income tax return.

If, however, Company does exceed any of these thresholds, we would then look to whether federal law prohibits Colorado from requiring Company to pay income tax. However, Company has not provided sufficient information to determine whether Public Law ("P.L.") 86-272 (15 U.S.C. 381) applies.

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

⁶ 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).

⁷ Department Regulation 39-22-301.1

Wage Withholding

Employers who have employees working in Colorado must open a wage withholding account and withhold income tax from wages earned in Colorado. See, Department FYI Withholding 5, which states in pertinent part,

Employers are required to have a Colorado withholding account and remit Colorado withholding taxes if:

1. The compensation is subject to federal withholding for income tax purposes; and
2. Employees are Colorado residents (working inside or outside Colorado), or employees are nonresidents of Colorado performing services in Colorado.⁸

For purposes of wage withholding, Colorado does not consider attendance at a trade show as solely an attendee as the performance of services in Colorado. Moreover, employees coming in to Colorado for less than a day do not give rise to a wage withholding obligation. However, if the employee performs services for more than a single day in Colorado, they are required to file and pay Colorado income tax, and the employer is required to withhold and remit Colorado income tax.

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 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,

Neil L. Tillquist
Colorado Department of Revenue
Tele: (303)866-5627
Email: neil.tilquist@state.co.us

⁸ §39-22-604, C.R.S.