STATE OF COLORADO

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GIL-11-004

April 13, 2011

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Attention: XXXXXXXXXXXXXXX

Re: Sales tax collection by auctioneers

Dear XXXXXXXXXXX,

This letter is in response to your undated letter submitted on behalf of the xxxxxxxxxxxxxxxxxxxxxxxxx ("Association") to the Colorado Department of Revenue regarding sales tax obligations of auctioneers who auction motor vehicles. By way of background, the department issues private letter rulings and general information letters. See, §24-35-103.5, C.R.S. and Department regulation 24-35-103.5. Private letter rulings are issued in response to tax questions relating to the taxpayers' specific factual circumstances and are binding on the department. General information letters provide general tax advice that is not a determination with respect to a taxpayer's specific factual circumstances, and they are not binding on the department. For more information about rulings and letters, you can view this regulation on-line at: www.taxcolorado.org > FYI/Publications > Rulings and click on "24-35-103.5."

The department does not issue private letter rulings to associations. However, individual members of the Association may submit a request for a private letter ruling. Therefore, I am initially treating the Association's request as a request for a general information letter. Individual members can submit requests for private letter rulings regarding their specific circumstances. Again, 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 auction sale of motor vehicles.

Issue

Are auctioneers who sell taxable tangible personal property, including motor vehicles, required to collect sales tax?

Discussion

You provided the following description of the auction process for motor vehicles. Auctioneers conduct "estate" sales, which are auctions conducted at a farm or ranch and at which the owner's motor vehicle is sold. The auctioneer does not hold title to the motor vehicle at any point. Rather, the auctioneer's obligation is to solicit and accept offers to purchase from bidders. Once the auction is complete, the buyer tenders payment to the auctioneer. The auctioneer deducts its fee from the proceeds and remits the balance to the owner. The owner or the owner's executor/agent then assigns title to the motor vehicle to the buyer. Bidders are generally aware prior to the sale that the owner of the farm or ranch where the auction is conducted is the owner of the motor vehicle.

In some cases, the auctioneer will sell motor vehicles from the auctioneer's permanent place of business. The process for the auction is much the same as described above, although the owner of the motor vehicle is generally not disclosed to the bidder prior to the sale.

a. Sales tax collection responsibilities of auctioneers.

Colorado law requires that a retailer of tangible personal property[1] collect sales tax from the buyer. In the typical retail transaction, the retailer is also the owner of the property. An auction is somewhat unusual in that the auctioneer is often not the owner of the property that he or she is selling. The question, then, is whether an auctioneer must collect sales tax from the buyer.

The general rule adopted by many states is that when an owner's agent discloses to the buyer that the agent is selling the goods on behalf of an owner, the agent is not responsible for collecting sales tax from the buyer (the owner is liable for collection and reporting the tax). When an agent does not disclose to the buyer that the agent is acting on behalf of an owner, then the agent is responsible for collecting sales tax from the buyer. An auctioneer is generally considered the agent of the owner and, therefore, is governed by these general principles of agency.

Consistent with other states, the department promulgated regulation (39)26-102.1, which addresses when an auctioneer is required to collect sales tax on auction sales.

> Every auctioneer acting for an unknown or undisclosed principal, and who is entrusted with possession of any bill of lading, customhouse permit, or warehouseman's receipt for delivery of any tangible personal property, or who is entrusted with possession of any such personal property for the purpose of sale, shall be deemed to be the owner thereof and, upon the sale of such property, shall be required to collect the tax, file a return, and remit the tax thereon. (See C.R.S. 1973, 39-26-105(1)(a).)

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[1] Tangible personal property is defined as corporeal personal property. §39-26-102(15), C.R.S. Motor vehicles are tangible personal property and, therefore, subject to sales and use tax.

> A sale by an auctioneer when acting for a known or disclosed and properly licensed principal shall be deemed to be a sale by the principal; the principal shall be responsible for collecting and remitting the tax and filing the return.
>
> This regulation applies to lienholders, including storagemen, pawnbrokers, mechanics and artisans who sell at auctions.
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> Gross receipts from retail sales by an auctioneer at his established auction house, sales yard or other place of business are taxable, regardless of how the property may have been acquired or by whom it may be owned and the auctioneer is required to obtain a sales tax license.

The sale tax collection obligations of an auctioneer are also addressed in statute. See, §39-26-102(1.3), C.R.S. This statute classifies auctioneers as retailers and requires auctioneers to collect sales tax on auction sales unless the owner holds a sales tax license issued by the department or the sale is exempt. Section 39-26-102(1.3), C.R.S. states,

> "Auction sale" means the sale conducted or transacted at a permanent place of business operated by an auctioneer or a sale conducted and transacted at any location where tangible personal property is sold by an auctioneer when such auctioneer is acting either as agent for the owner of such personal property or is in fact the owner thereof. The auctioneer at any sales defined in subsection (11)[2] of this section, except when acting as an agent for a duly licensed retailer or vendor or when selling only tangible personal property that is exempt [...] is a retailer or vendor [...] and the business conducted by said auctioneer in accomplishing such sale is the transaction of a business as defined by this section.

Although this statute does not explicitly make the distinction between a disclosed and undisclosed owner, the distinction is an implicit and necessary part of the exception involving a duly licensed owner. A buyer can discharge its sales tax obligation only by paying a licensed retailer.[3] If the licensed owner is not disclosed, a buyer cannot determine whether he or she has discharged that tax obligation.

Taking the regulation and statute together, the following general statements can be made. An auctioneer who sells a motor vehicle on behalf of an owner is, unless an exception applies, a retailer and must collect and remit sales taxes administered by the department. There are only two exceptions to this general rule. The first exception has three conditions:

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[2] This statutory reference to subsection (11) is incorrect. Subsection (11) addresses the taxability of short term living accommodations, such as hotels. Living accommodations are rarely, if ever, sold at auction. The correct reference should be to subsection (10), which contains the definition of "sale" or "sale and purchase."

[3] *J. A. Tobin Construction Co. v. Weed, Jr., Colorado Department of Revenue*, 158 Colo. 430 407 P2d 350 (Colo. 1965)("Payment to an unlicensed seller is not payment to the state and provides no protection against a demand by the state upon the purchaser for payment of the tax.").

the owner must have a sales tax license issued by the department, the owner's identity must be disclosed to the buyer when the auctioneer collects the buyer's payment (which includes the sales tax), and the auctioneer must turn over to the licensed owner the full amount of the purchase,[4] including the sales tax.[5] If all three conditions are not met, the auctioneer must collect and remit the sales tax and is liable for uncollected or unremitted sales tax.

For example, an auctioneer has a duty to collect and remit sales tax if the owner is not disclosed to the buyer at the time the buyer makes payment to the auctioneer, even though the owner is duly licensed by the department and the auctioneer has transferred the buyer's sales tax payment to the owner (but the owner failed to remit the tax to the department). This is so because the auctioneer is deemed the owner/retailer when the identity of the owner is not disclosed.

In the case where both the auctioneer and owner are licensed, the auctioneer is, for these same reasons, responsible for collecting and remitting sales tax if the licensed owner is not disclosed, but the licensed auctioneer is relieved of those duties if the licensed owner is disclosed.

Finally, auctioneers must collect sales tax if the owner is not a duly licensed retailer, even though the auctioneer discloses the owner's identity.

The second exception to the auctioneer's duty to collect is when the sale is exempt from tax, either because the item itself is not taxable (e.g., certain farm equipment and agricultural products are exempt) or the buyer or seller are exempt from tax (e.g., the buyer is a charitable entity or buys for resale). Although there are many exemptions from sales tax, there are at least two of which auctioneers should be particularly mindful. One such exemption that auctioneers may frequently encounter is the sale of tangible personal property that qualifies as a "farm close-out sale." §39-26-716(4)(a), C.R.S.[6] A "farm close-out sale" is,

> [...] a sale by auction or private treaty of all tangible personal property of a farmer or rancher previously used by him in carrying on his farming or ranching operations. Unless said farmer or rancher is making or attempting to make full and final disposition of all property used in his farming or ranching operations and is abandoning the said operations on the premises whereon they were previously conducted, such sale shall not be deemed a "farm close-out sale" within the meaning of this article.

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[4] The commission is an inseparable part of the purchase price and therefore must be included when calculating the sales tax.

[5] The auctioneer may retain its commission, but the full amount of the sales tax must be remitted to the owner.

[6] "(4) The following shall be exempt from taxation under the provisions of parts 1 and 2 of this article:

> (a) All sales and purchases of livestock, all sales and purchases of live fish for stocking purposes, and all farm close-out sales and the storage, use, or consumption of such property;"

§39-26-102(4), C.R.S.

Another exemption that auctioneers of motor vehicles may see is the exemption for non-resident purchasers who will use and register the vehicle out-of-state. For example, an auction of a motor vehicle to a purchaser who resides in Wyoming and who will use and register the vehicle in Wyoming is exempt from state and all local sales and use taxes.[7]

If an auctioneer conducts a sale of a motor vehicle for which the auctioneer must collect sales tax (that is, the owner is not a duly licensed retailer and the sale is not exempt), then the question arises as to what sales taxes must the auctioneer collect. When the sale is conducted in Colorado and the purchaser is a resident of Colorado, then the auctioneer must collect state sales tax. In addition, the auctioneer must collect local sales taxes (e.g., city and county sales tax) if the place of sale and the purchaser's residence are both in the same local tax jurisdiction. For example, if the auction takes place at the auctioneer's place of business in the city of Boulder and the purchaser resides in Boulder county but not the city of Boulder, then the auctioneer must collect Boulder county tax because the place of sale and purchaser's residence are both in Boulder county; but not collect city of Boulder sales tax because only the place of auction is in the city of Boulder. The auctioneer will also collect the Regional Transportation District (RTD), Scientific and Cultural Facilities District (SC), and Metropolitan Football Stadium District (FD) sales taxes because both the place of sale and the purchaser's residence are in these special districts. For more information about the local taxes that must be collected by the seller of motor vehicles, see Department FYI Sales 62, Guidelines For When To Collect State-Collected Local Sales Taxes (enclosed).

b. Auctioneers must maintain records establishing that sales tax collection was not required.

An auctioneer must exercise due diligence in determining whether a sale is exempt and must maintain appropriate documentation of transactions for which the auctioneer was not required to collect sales tax. The department will presume that an auctioneer has exercised due diligence in establishing the farm close-out exemption if the auctioneer obtains a written statement, signed by the farm or ranch owner or owner's agent, that includes the following declarations: (1) the vehicle was used in the owner's farming or ranching operation; the owner/owner's agent is (2) making or attempting to make full and final disposition of all property used in his farming or ranching operations, and (3) is abandoning the said operations on the premises whereon they were previously conducted; and, if the statement is signed by the owner's agent, (4) a declaration that the agent has personal knowledge of the facts supporting the statements or has confirmed with a person who has such personal knowledge, that the forgoing statements are true. A copy of the written statement must be given to the purchaser of the motor vehicle who will present it to the county clerk when the vehicle is registered. The auctioneer must retain a copy of the original statement for audit purposes for a period of three years.

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[7] 39-26-113(5)(a), C.R.S. ("The sale of a new or used automobile to a purchaser who is a nonresident of Colorado and who purchases such automobile for use outside this state is exempt from all sales taxes, the collection of which is provided for by this section.")

The department is considering proposing a regulation concerning the farm close-out sale exemption. If the Colorado Auctioneer Association or any of its members are interested in submitting comments, please send your request to be placed on the list of parties receiving notices of rulemaking to Colorado Department of Revenue, Attn: Rick Miller, 1375 Sherman Street, Denver, Colorado 80302 (rmiller@spike.dor.state.co.us). Include your name, mailing address, and email address with your request.

Miscellaneous

Pursuant to state law and department regulation 24-35-103.5, noted above, the Department will make public a redacted version of this letter. Your letter requesting this general information letter is not made public. I enclose a proposed redacted version of this letter. Please contact me within 60 days from the date of this letter if you have any questions, comments, or objection concerning the redacted letter.

I hope this is helpful. Please feel free to contact me if you have any questions.

Sincerely,

Neil L. Tillquist
Colorado Department of Revenue