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

Barbara J. Brohl
Executive Director

PLR-13-007

October 2, 2013

XXXXXXXXXXXXXXX
ATTN: XXXXXXXXXX
XXXXXXXXXXXXXXX
XXXXXXXXXXXXXXX

Re: Private Letter Ruling

Dear XXXXXXXXXXX,

You submitted on behalf of XXXXXXXXXXXXXXX ("Company") a request for a private letter ruling to the Colorado Department of Revenue ("Department") pursuant to Regulation 24-35-103.5. This letter is the Department's private letter ruling.

Issues

Is Company's method of collecting and remitting sales tax on the marked-up price Company charges to insurance companies correct?

Conclusion

Company's method of collecting and remitting sales tax on the marked-up price Company charges to insurance companies is correct.

Background

Company operates as a Third Party Administrator of auto glass claims for U.S. insurance companies. Company does not own glass installation locations, but operates two call centers outside of Colorado where appointments for policyholders are arranged with independent retail auto glass repair facilities in the state where the policyholder is located. Company makes referrals to these independent vendors which then source the glass and labor to repair the policyholders' vehicles.

Company operates on a "Sale for Resale' basis in Colorado because most invoices and its components include a 'mark-up' from the original auto glass vendor's invoice when invoiced to the insurance client. Thus, Company remits sales tax on the full amount charged to the insurance client rather than the amount the glass vendor initially charged. Accordingly, Company provides auto glass vendors performing work on

behalf of Company's clients with a certificate of exemption with their Colorado sales tax account number.

The following example was provided by Company. A retailer in Colorado charges Company $300 for a windshield part and the related tax amount based on that $300. Company invoices the insurance company for that same part marked up to $310. Company then calculates the sales tax obligation on the total $310 bill to the final payer, the insurance company. The question at issue is whether this method of collecting and remitting sales tax on the marked-up price is correct.

Discussion

The principal issue raised in this request for ruling is whether Company is selling goods or simply acting as a broker between the sellers (suppliers) and buyers (insurance companies) of such goods. The distinction is suggested because Company describes itself as a Third Party Administrator of insurance claim obligations of the insurance companies. That is, a Third Party Administrator simply may be providing the service of a broker who facilitates a sale between the supplier and insurance company and does not, itself, purchase the goods. The distinction is important because if Company does purchase the goods, then it purchases the goods exempt[1] from tax from suppliers and collects sales tax from insurance companies when it resells the goods to them. On the other hand, if Company is merely the disclosed agent or broker for the insurance companies, then Company is neither the buyer nor seller and, therefore, does not have the obligation to pay or collect sales tax.[2]

In most cases, a buyer is both the person who pays for the goods and the consumer of the goods. However, the buyer need not be the consumer. For example, a buyer of a gift for another is liable for sales tax even though the gift is consumed by the recipient of the gift. In the case before us, the insurance company and the car owner are the consumers of the goods, not Company. Thus, we generally look to see who has the contractual obligation to the seller to pay the purchase price.

We have examined standard contracts between Company and suppliers and Company and insurance companies. Although there are contract provisions that suggest to the contrary, we believe that these contracts indicate that Company is not merely a broker of services, but is contractually the reseller of the goods. A number of provisions lead us to that conclusion. First, the contracts indicate that Company is the party who contracts with suppliers and who is contractually responsible for payment to them. Company's contract with its network of suppliers states in relevant part,

> 7. Independent Subcontractor. It is understood and agreed that Affiliate shall not, under any circumstances, be deemed to be an agent, employee or partner

---

[1] Sales tax applies only to retail sales, which are all sales except wholesale sales. §39-26-102(9), C.R.S. A purchase for resale is an exempt wholesale purchase.

[2] Sales tax is imposed on the purchaser and collected by the seller. Department Regulation 39-26-104.1(a) and *J.A. Tobin Construction Co. v. Hugh H.C. Weed, Jr., 158 Colo.430, 407 P.2d 350 (1965)*

of, in joint venture with, HSG. *HSG shall be responsible for the payment of taxes on retail sales reported by affiliates who are understood to be operating as subcontractor to HSG. HSG is deemed to be operating on a "sale for resale" basis in most states and will calculate, collect and remit all applicable sales tax to the proper authorities.* [emphasis added] In such states where HSG is deemed to operate on a "sale for resale" basis, Affiliate shall not be liable for payment of sales and use taxes. Should Affiliate pay sales and use tax HSG reserves the right to reduce reimbursement to Affiliate for the amount of sales and, or use tax due to the proper authorities. HSG shall not be responsible for reimbursing Affiliate in such cases where Affiliate improperly collected sales taxes.

Company's contracts with the insurance companies is less clear. In some provisions, it appears that Company is simply forwarding the supplier's invoice for payment by the insurance company and Company is, for a fee, passing the payment on to the suppliers.

10. EDI/Electronic Billing. HSG will provide EDI invoicing (or other methods of electronic invoicing) for all Auto Glass Claims utilizing established ANSI standards. HSG will require all glass shops (network shops and non-network shops) to bill them electronically. Any paper invoices will be converted to electronic format by HSG for the benefit of the Company. HSG will provide technical assistance as it relates to electronic invoicing and payment of Auto Glass Claims. HSG agrees to maintain, at its expense, all Company invoice and claim details within its system for a period not less than five (5) years from the date of payment. The data stored shall be available to the Company on 72-hour notice and shall be provided electronically or as otherwise reasonably requested at no cost to the Company.

...

For all Auto Glass Claims, if a policyholder does not express a preference for a specific glass shop, HSG will arrange for an network or nonnetwork glass shop to provide the necessary services; ... and HSG will audit the glass invoices for accuracy and electronically submit the invoices and loss reports to the Company for all fulfilled Auto Glass Claims. The Company will remit payment to HSG and within an average of five (5) business days from receipt of the invoice, but in any event invoices shall be paid within 30 days. ... HSG will be responsible for submitting payment to the glass shop for services as well as managing all 1099 reporting requirements with respect to all Auto Glass 2 Claims managed by HSG for the Company. Additionally, HSG will provide a limited warranty on all glass repairs and replacements that are fulfilled by one of its network shops.

Other provisions also suggest Company is providing a service rather than that of a sale for resale relationship.

The Company appoints HSG and HSG accepts the appointment as the Company's exclusive contractor to manage and process Auto Glass Claims through HSG network shops and non-network shops on behalf of the Company

> during the term of this Agreement (the "Term"). HSG network shops shall meet the Company's service, warranty, and pricing criteria in order to be qualified to receive orders for job placement
>
> ...
>
> HSG will provide the following management and processing services with respect to FNOL Calls and Auto Glass Claims for the Company:

However, the specific contractual provision relating to billing indicates that Company is not simply passing the supplier's invoice on to the insurance companies for payment, but rather Company is setting the price for the goods. In the case of network suppliers, the price for the goods will be those set forth in its price schedule. For non-network suppliers, Company's price will be reasonable and customary for the local marketplace.

> Billing/Pricing. For work that is performed by a member of the HSG network, HSG will bill the Company for glass repair and replacement services based on discounts from the National Auto Glass Specifications (NAGS) standard price list. These prices are specified in Exhibit A. For work that is performed by a party that is not a member of the HSG network, HSG will bill the Company at pricing that is reasonable and customary for the local marketplace in which the work is performed.
>
> ...

There is no contractual provision that states Company is purchasing the goods merely as an agent for the insurance companies. Indeed, there appears to be no direct contractual relationship between the insurance company and suppliers. We note in this regard that the insurance company, not the insured, is the ultimate consumer of the goods. When a company undertakes the obligation to warrant and repair defective or damaged goods owned by a third party, the company is the consumer of the replacement part and it is not reselling the same to the consumer.[3] Therefore, we conclude that Company is reselling the goods to the insurance companies.[4]

Tax is collected on the consideration paid by the purchaser to the seller.[5] Company typically purchases goods from suppliers and marks up the goods for resale to the insurance companies. Company's purchases from suppliers are exempt wholesale purchases. Company must collect the applicable sales tax from insurance companies.

Colorado has a number of local tax jurisdictions whose taxes are administered by the Department. There are generally two important issues that must be resolved to determine what, if any, local taxes are due. First, was there a sale or consumption in the local tax jurisdiction? Whether a sale occurs in the local tax jurisdiction is important because state-administered city and county tax jurisdictions impose only sales tax and

---

[3] Department Regulation 39-26-105.2. You can view this regulation on the Department's web site at www.colorado.gov/revenue/tax > Tax Library > Regulations > Final Regulations > Sales Regulations.

[4] See, e.g., *H.L.E. Meyer v. State Board of Equalization*, 267 P.2d 257 (CA 1959); *Graybar Electric v. Curry*, 189 So.186 (Al. 1939);

[5] §§39-26-102(7) and 104(1)(a), C.R.S.

do not impose use taxes.[6] Thus, if there is no sale in that jurisdiction, there is no local sales tax liability. However, state-administered special districts, such as the Regional Transportation District, levy both a sales and use tax. Therefore, there is a local tax liability for these local tax jurisdictions if there was either a sale or use in these jurisdictions.

The second important question is whether the seller (or reseller) has nexus with the local tax jurisdiction? That is, even if a local sales tax or use tax is due, does the seller have sufficient connection (nexus) with the local tax jurisdiction to be compelled to collect such taxes?

With respect to the first question, a sale is deemed to occur in Colorado if and where either title or possession passes to the buyer or consumer. In the case before us, title to the goods passes from Company to the insurance company and, ultimately, to the vehicle owner when the goods are delivered to the buyer or consumer.[7] Thus, the title will typically pass where and when the goods are installed into the vehicle. Similarly, possession also passes from seller to buyer or consumer when and where the goods are installed into the vehicle.

Company does not own any property in Colorado and does not have employees in Colorado. The insurance companies presumably have nexus with Colorado because they are required to be licensed and are regulated by Colorado.[8] As purchasers of the goods, the insurance companies are liable for sales tax for goods installed in vehicles located in Colorado.

Company has contractually agreed with insurance company to collect and remit any applicable taxes. Company has also registered and obtained a Colorado sales tax license from the Department. Therefore, Company is responsible for collecting state and state-collected local sales taxes. The applicable local sales taxes are determined by the location of the vehicle when the goods are installed.

Miscellaneous

This ruling applies only to sales and use taxes administered by the Department. Please note that the Department administers state and state-collected city and county sales taxes and special district sales and use taxes, but does not administer sales and use taxes for self-collected home rule cities and 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.

---

[6] State-administered cities and counties can impose use tax on vehicles and building materials and supplies, none of which are relevant here.

[7] Pursuant to UCC 4-2-401(2)(b), and in the absence of contractual terms to the contrary, title passes from the seller to buyer when goods are delivered.

[8] See generally, title 10, article 2, C.R.S.

This ruling is premised on the assumption that Company has completely and accurately disclosed all material facts. The Department reserves the right, among others, to independently evaluate Company's representations. This ruling is null and void if any such representation is incorrect and has a material bearing on the conclusions reached in this ruling. This ruling is subject to modification or revocation in accordance to Department Regulation 24-35-103.5.

Enclosed is a redacted version of this ruling. Pursuant to statute and regulation, this redacted version of the ruling 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 version of the ruling.

Sincerely,

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