COLORADO
Department of Revenue
Taxation Division

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PLR 17-010

December 27, 2017

XXXXXXXXXXXXXXXX
Attn: XXXXXXX
XXXXXXXXXXXXXXXX
XXXXXXXXXXXXX

Re: Tax on Direct Marketing Material

Dear XXXXXXXXXX,

You submitted a request for a private letter ruling on behalf of XXXXXXXXXXXXXXX ("Company") to the Colorado Department of Revenue ("Department") pursuant to Department Rule 1 CCR 201-1, 24-35-103.5. This letter is the Department's private letter ruling. This ruling is binding on the Department to the extent set forth in Department Rule 1 CCR 201-1, 24-35-103.5. It cannot be relied upon by any taxpayer other than the taxpayer to whom the ruling is made.

Issue

Is Company liable for sales or use tax on materials produced and mailed by a third-party cooperative direct marketing advertiser that advertises for multiple parties in the same mailer?

Conclusion

Company is not liable for sales or consumer's use tax on materials produced and mailed by a third-party cooperative direct market advertiser that advertises for multiple parties in the same mailer.

Background

Company is a retailer of tangible personal property. Company hired two cooperative direct mail advertisers[1] ("Advertiser No. 1 and No.2" and

[1] "Cooperative direct mail advertising" is defined as "advertising for one or more businesses which is in the form of discount coupons, advertising leaflets, or other printed advertising which are delivered by mail in a single package or bundle to potential customers of such businesses participating in such advertising." 39-26-102(2.7), C.R.S. "Direct mailing advertising" is defined as "discount coupons, advertising leaflets, and other printed advertising, including, but not limited to, accompanying envelopes and labels. 39-26-102(2.8), C.R.S.

collectively referred to as “Advertisers”) to design, produce, and distribute promotional material (“Materials”). Advertiser No. 1 produces printed Materials, which are mailed directly to Company’s potential customers, as well as digital postcards that are mailed or emailed to potential customers. Customers who receive these email postcards can download and print them and present them to Company to redeem promotions. Advertiser No. 2 produces printed Materials and distributes them primarily by mail.

The contracts between Advertisers and Company are similar in many respects. Company reviews and approves the Materials before Advertisers distribute the Materials. Advertisers either print or engage third-party printers to print the Materials. Company is not a party to the contract, if any, between Advertisers and third-party printers.

Advertisers charge a flat fee, which does not separately state charges for various goods and service components, such as the cost of design, printing, or mailing. Company’s potential customers do not pay to receive the Materials. Advertisers own the copyright for artwork, ad copy, and ad concept developed and produced. Company grants Advertisers a non-exclusive license to use Company’s artwork in the Materials. Advertiser No.2’s contract specifically states that it is the owner of all Materials furnished by, or that represents the creative work of, the Advertiser.

Discussion

The question presented in this request for ruling is whether the Company is liable for sales or use tax for Materials designed, printed, and distributed by Advertisers.[2] More specifically, whether Advertisers are the users and consumers of the Materials (and, therefore, liable for sales or use tax on their purchase of Materials) or has Company purchased Materials from Advertisers and, therefore, Company is liable for sales tax (for the purchase of the Materials) or use tax (for the distribution of the Materials to Company’s potential customers in Colorado). The Department concludes that Advertisers are the consumers of the Materials. We rule so for two reasons.

First, cooperative direct mail advertisers are similar to newspapers that distribute newspaper inserts. In both cases, a company aggregates the advertisements for several clients and distributes them to potential customers. The common understanding of newspaper advertisements, supplements, and inserts printed by a newspaper is that the newspaper publisher is providing advertising services to retailers, and that the newspaper publisher (and not the retailer) is the owner of the paper on which the advertisements are printed.

[2] See, §39-26-102(2.7) and (2.8), C.R.S. defining cooperative direct mail advertising and direct mail advertising material.

Cooperative direct mail advertising is similar in that the marketing company aggregates several clients' promotional material and distributes them to potential customers. The same general perception applicable to newspapers as providers of advertising services for retailers also applies to these cooperative direct mail advertisers.[3]

This characterization of the transaction is also consistent with the terms of the Company's contracts. Advertiser No. 2 states that it is the owner of the materials, which suggests that the Materials are not sold to the Company. Advertiser No.1's contract does not expressly state whether it is the owner of the Material or whether there is a sale of the Materials to Company, but there is no indication either in the contract itself or in the facts that suggests that Company has possession or title to the Materials.

The second reason for concluding that Advertisers are providers of a service is based on legislation addressing cooperative direct mail advertisers and direct mail advertising. Prior to 2010, the Colorado legislature excluded direct mail marketing materials distributed by persons who are engaged solely and exclusively in cooperative direct mail advertising from the definition of "tangible personal property."[4] By excluding these materials from the definition of tangible personal property, the legislation exempted these materials from sales and use tax.[5] The statute defines the exemption in terms of the advertiser's activity (materials distributed by persons solely and exclusively engaged as cooperative direct mail advertisers). One inference that can be drawn from this focus on the advertiser's activity is that the legislature assumed that the advertiser is the user and consumer of the materials.[6] This necessarily means that they are providers of a service (advertising) and, more importantly, are not selling the materials to either their client or to their client's potential customers.

The Department issued guidance in response to this 2010 legislation and stated that the sale of these materials (presumably by printers) to such advertisers is now subject to tax. This guidance treats the cooperative direct mail advertiser as the consumer of the materials.[7] Given the assumption

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[3] We do not address here an advertising company engaged by a single client to distribute advertisements. In *Talbots, Inc. v. City and County of Denver*, 928 P.2d 822 (Colo. C.A. 1996), the court ruled that a retailer who engages a company to design, print, and distribute catalogues of retailer's goods is the owner and purchaser of the catalogue.

[4] §39-26-102(15(a)(I), C.R.S.

[5] Sales and use tax generally only apply to the sale and use of tangible personal property. §39-26-104, C.R.S.

[6] This is not the only inference that is possible. If Advertisers were not considered consumers of these materials, then the incidence of taxation for use tax would fall on Advertiser's client. This statute would also exempt purchases of the Materials by a client from Advertisers and exempt the client's use (distribution) of these materials in Colorado.

[7] It is difficult to interpret this guidance otherwise. If the advertisers are reselling these materials to their clients, then sales to advertisers are not taxable because they would be a

underlying this guidance is that advertisers are providers of a service and given that this interpretation is consistent with the statute's language, the Department, in the absence of convincing argument to the contrary, is not persuaded to overturn its guidance given contemporaneously with the enactment of this legislative change.

Finally, it is important to address Department Special Regulation 1, which governs advertising agencies. This regulation essentially draws a distinction between transactions in which the advertising agencies are providing non-taxable services (advertising) and transactions in which advertising companies are selling tangible personal property. Among the materials that are considered sold to the clients, and, therefore, subject to tax, are direct mail marketing materials. This regulation was adopted in 1977, which is prior to the 1990 legislation that excluded direct mail advertising materials distributed by cooperative direct mail advertisers from the definition of tangible personal property. The statute takes precedence over the regulation.

For these reasons, we conclude that Company does not incur sales or use tax liability pursuant to the contracts with Advertisers No. 1 and 2.

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.

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

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non-taxable purchase for resale and this legislation would have been unnecessary. Indeed, in *Service Merchandise and H.J. Wilson v Service Merchandise and H.J. Wilson v. Colo. Dept. of Revenue, Colo. Dist. Ct., Dkt. No. 94-CV-3143, 5-31-95.. Colo. Dept. of Revenue*, Colo. Dist. Ct., Dkt. No. 94-CV-3143, 5-31-95., the retailer, not the printer / distributor, is the owner of the material and was subject to use tax for those materials distributed in the city. This case addressed a city's ordinance but the discussion is informative. See, also, Colorado Private Letter Ruling No. PLR-11-004, 06/15/2011 (client is owner of advertising materials produced by an advertising agency, who engaged a third-party printer to print and mail the material to recipients located outside Colorado). Clients of cooperative direct mail advertisers are in contrast to a single retailer who is treated as the owner of catalogues printed and distributed by an advertising company and, therefore, is liable for city use tax. *Talbots Inc. v. City and County of Denver, et al*., 928 P.2d 822 (Colo. C.A. 1996)

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

This ruling cannot be relied upon by any other taxpayer other than the taxpayer to whom the ruling is made.