



COLORADO

Department of Revenue

Taxation Division

Office of Tax Policy
P.O. Box 17087
Denver, CO 80217-0087

DOR_TaxPolicy@state.co.us

GIL-13-021

August 20, 2013

XXXXXXXXXXXXXXXXXX
ATTN: XXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

Re: Public Law 86-272

Dear XXXXXXXXXXXX,

You submitted on behalf of your client (“Company”) a request for guidance to determine whether Company exceeds the minimum standards of Public Law 86-272.

The Colorado Department of Revenue (“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 regulation 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 regulation 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.

Issue

Does Company exceed the minimum standards of Public Law 86-272?

Background

Company is a wholesaler based outside of Colorado. Company ships products via common carrier to third-parties who have distribution centers in Colorado. The third-parties accept delivery at their distribution centers and then ship the product to locations outside Colorado. Company has one full-time employee who works in Colorado and is responsible for soliciting sales in order to meet and exceed Company’s sales and financial goals. This employee does not solicit sales from customers located in Colorado. Employee supervises the solicitation activities of a sales team, including reviewing the sales teams’ travel schedules and sales proposals, overseeing contracts for major

accounts, and developing and implementing strategies to increase solicitation revenue. Although Company ships products to Colorado, this is done as a convenience to out-of-state customers who have distribution centers in Colorado but who are based in other states.

Discussion

A corporation must file a Colorado corporate income tax return if it does business in Colorado or derives income from Colorado sources. A corporation is doing business in Colorado if it has substantial nexus with Colorado. Substantial nexus is established when a company has property, payroll, or sales that exceed any one 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.¹

For purposes of this ruling, we assume Company exceeds the payroll threshold. Although Company has substantial nexus, Company will not have any income tax obligation in Colorado if it falls within the ambit of P.L. 86-272, which states, in pertinent part,

(a) No state, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, the following:

- (1) The solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
- (2) The solicitation of orders of such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

...

(c) For purposes of subsection (a) of this section, a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, of tangible personal property.²

More specifically, a corporation will not have a Colorado income tax filing obligation if its only activity in Colorado is soliciting sales of tangible personal property and the sales orders are sent out of Colorado for acceptance and fulfillment. P.L. 86-272 applies only to those

¹ Department Regulation 39-22-301.1

² 15 U.S.C. § 381.

businesses engaged in the interstate commerce of selling tangible personal property and does not apply to the sale of services.³

The issue raised in your request is directed at employee activities that are not, in the strictest sense, solicitation activities but, rather, are activities related to solicitation activities. You correctly noted that the protection of P.L. 86-272 is not lost if the employee engages in activities that are closely related to solicitation activities.⁴ However, if the employee is doing more than activities closely related to solicitations, then Company exceeds the protections of P.L. 86-272. For example, a company whose employee regularly accepts returns on behalf of a company or regularly handles warranty claims will likely be viewed as having engaged in activities that exceed those protected by P.L. 86-272 and, therefore, subject the company to a Colorado income tax filing obligation. We cannot rule in a general information letter, such as this, whether the activities you outline, particularly the “overseeing contracts of major accounts” and “developing strategies for sales,” are activities so closely related to the solicitation as to fall within the protection of P.L. 86-272.

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,

Office of Tax Policy
Colorado Department of Revenue

³ Other states have reached the same conclusion. See, Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States Under Public Law 86-272; Arizona Corporate Tax Ruling No. 99-5; Connecticut Informational Publication No. 2010(29.1), 12/28/2010; Florida Technical Assistance Advisement 99(C)1-002, 06/03/1999; Ill. Admin. Code 100.9720, Nexus.

⁴ *Wisconsin Department of Revenue v. William Wrigley, Jr., Co.*, 505 US 214 (1992). *Coors Porcelain Co. v. State of Colorado*, 183 Colo. 325, 517 P.2d 838 (1973).