

# STATE OF COLORADO



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GIL-11-004

June 15, 2011

XXXXXXXXXXXXXXXXXXXX  
Attn: XXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXXXX

Re: Private letter ruling re: direct mail advertising

Dear XXXXXXXXX,

Your firm submitted on behalf of XXXXXXXXXXXXXXXXXXXXXXX ("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.

## Issue

1. Is an advertising agency's separately stated charge for "direct mail advertising materials" that the advertising agency instructed a printer to print and mail to potential customers located outside Colorado subject to Colorado sales and use tax?
2. Is an advertising agency's separately stated charge for mailing fulfillment services subject to Colorado sales or use tax?

## Conclusion

1. An advertising agency's separately stated charge for the sale of direct mail advertising materials to the agency's client who directs the advertising agency to instruct the printer to print and mail the material to potential customers located outside Colorado is not subject to Colorado sales and use tax.
2. An advertising agency's separately stated charge to its client for mailing fulfillment services is not subject to Colorado sales or use tax.

## Background

Company asks us to consider four related transactions regarding the sale of direct mail advertising materials (“materials”) and services (“services”).

Retailer, a multistate company with offices in Colorado as well as in other states, enters into a contract<sup>1</sup> for the purchase and sale of advertising materials and services with Advertising Agency, which is located in Colorado. Agency then enters into a contract with Printer, which is also located in Colorado, to print and mail the materials from its Colorado facilities to Retailer’s potential customers who are located outside Colorado. Printer’s invoice to Agency separately states a charge for printing and a charge for fulfillment services. Fulfillment services are described as the services of sorting and bundling the direct mail advertising materials for mailing purposes. Charges for fulfillment services include the charge by the United States Postal Service to mail the materials. Charges for mailing the advertising materials using the USPS are separately stated from the charges for the fulfillment services. Agency presents its Colorado sales tax license to the Printer for purposes of claiming a sale for resale exemption from sales and use taxes. Finally, Agency submits an invoice to Retailer in which the price of the materials is separately stated from the charge for fulfillment services. Retailer describes the charges Retailer pays for the fulfillment services as a “resale” (by the Agency) of the fulfillment services performed by the Printer.

### **Discussion**

Colorado levies sales and use tax on the sale, use, storage, or consumption of tangible personal property.<sup>2</sup> Prior to March 1, 2010, Colorado law expressly excluded direct mail advertising materials distributed in Colorado by a person engaged solely and exclusively in cooperative direct mail advertising from the definition of tangible personal property and, therefore, exempted those materials from sales and use tax.<sup>3</sup> We conclude that the materials<sup>4</sup> at issue here do not fall within the definition of direct mail advertising material because there is no basis presented in the ruling request to conclude that these materials are distributed by a person engaged solely and exclusively in cooperative direct mail advertising or that the materials are distributed in Colorado. Effective March 1, 2011, the definition of tangible personal property was amended to include direct mail advertising material.<sup>5</sup> Therefore, the materials at issue in this ruling request are categorized as tangible personal property both before and after March 1, 2011.

Colorado tax exemptions for certain transactions. As the Company correctly noted in its ruling request, there are at least two exemptions that apply here.

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<sup>1</sup> This ruling assumes without determining that the contracts between Printer and Agency and between Agency and Retailer contain agreements to buy and sell the materials.

<sup>2</sup> §39-26-104(1), C.R.S.

<sup>3</sup> §39-26-102(15)(a)(I), C.R.S.

<sup>4</sup> Company characterizes the advertising material at issue as “direct mail advertising material.” Direct mail advertising material is specifically defined in Colorado as discount coupons, advertising leaflets, or other printed advertising. We assume without deciding that Company’s characterization of the material is correct.

<sup>5</sup> §39-26-102(15)(a)(I), C.R.S.

First, wholesale sales are exempt from Colorado sales and use taxes.<sup>6</sup> The department specifically addressed this wholesale exemption in the context of advertising agencies. Department's Special Regulation ("SR")1(2) provides, in pertinent part,

- (2) If an [advertising] agency acquires articles for resale to its clients, the agency must have a sales tax license to purchase such property tax free for resale....

The assumption underlying this regulation is that an advertising agency is entitled to a wholesale sales tax exemption when it purchases materials from a third party and resells the materials to its client. Therefore, the sale of materials from Printer to Agency is exempt as a wholesale sale because Agency<sup>7</sup> resells the materials to Retailer.

The subsequent resale of materials by Agency to Retailer is also exempt from sales and use tax.<sup>8</sup> Specifically, department regulation 39-26-704.2(4) states, in pertinent part, that,

- (4) Sales of tangible personal property located within this state at the time of sale and delivered to the purchaser by the vendor or by common carrier to a destination outside this state for use outside this state are not taxable....

The sale of materials from Agency to Retailer falls squarely within this exemption. Printer mails Retailer's materials from the Printer's premises in Colorado to Retailer's potential customers who are located outside Colorado. Therefore, the resale of material by Agency to Retailer is exempt from sales and tax.

Finally, we conclude that the Printer's and Agency's charges for fulfillment services are not subject to sales or use tax. With some exceptions and under some circumstances not applicable here, Colorado does not levy tax on services. When as here a transaction involves both the provision of services and tangible personal property, we are typically required then to determine whether charges for services are inseparable<sup>9</sup> from the sale of goods and whether the true object of such a bundled<sup>10</sup> transaction is

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<sup>6</sup> Colorado sales tax applies only when there is a "retail" sale, which are all sales except a wholesale sale. §39-26-104(1) and 102(9) and (19), C.R.S.

<sup>7</sup> We accept without ruling that Agency holds a retail sales tax license issued by the Department.

<sup>8</sup> Special Regulation 1(2) states that the resale from the agency to the client is taxable ("The sales tax charged by the agency [to its clients] would apply to the total amount of the retail sale of property prepared by its employees or acquired from outside sources..."), but, as we discuss above, this resale is exempt under another exemption.

<sup>9</sup> *A.D. Stores v. Department of Revenue*, 19 P.3<sup>rd</sup> 680 (Colo. 2001) (charges for dress alteration services are separable from the sale of the dress and, therefore, separately stated charges for alteration services are not subject to sales tax).

<sup>10</sup> Company presents the transaction between Agency and Retailer (as well as the transaction between Printer and Agency) as two distinct transactions: one for the sale of goods and one for the sale of

one primarily for the sale of goods or services. We do not reach those issues here because we previously concluded that the sale of materials is non-taxable. Therefore, charges by Printer to Agency and charges by Agency to Retailer for fulfillment services are not taxable.

### **Miscellaneous**

This ruling is premised on the assumption that the Company has completely and accurately disclosed all material facts. The department reserves the right, among others, to independently evaluate the 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  
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fulfillment services. Although we do not necessarily agree that these are two distinct transactions, we need not resolve that issue here because we conclude that the sale of the materials is not taxable.