

STATE OF COLORADO

DEPARTMENT OF REVENUE

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GIL-13-009

April 18, 2013

XXXXXXXXXXXXXXXXXXXXX
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Re: C Corporation Income Tax Return

Dear XXXXXXXXXXXX,

You submitted on behalf of your client ("Company") a request for guidance to determine whether Company will be subject to filing a C Corporation Income Tax Return to the State of Colorado.

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

Is Company subject to filing a C Corporation Income Tax Return to the State of Colorado?

Background

Company provides representative services to a number of manufacturers. Company, which is a C Corporation, solicits orders in many states for various manufacturers. The orders are sent back to Company's corporate office, which is located outside of Colorado, for approval

and passed along to the respective manufacturer(s). A manufacturer(s) can accept or reject any order requests. Orders that are accepted are sold by the manufacturer(s) who ships the tangible personal property to customers located throughout the country. The Manufacturer(s) pay commissions to Company for soliciting their sales, which, in turn, pays the wages for Company's employees. Company represents that it does not sell any tangible or intangible property, but merely solicits orders for the manufacturers it represents.

Company has hired a Colorado resident to assist with solicitation of order in various western states. Company has registered as a withholding agent for the new employee, and is withholding and submitting Colorado Income Tax to the State. The question at issue is whether Company is subject to filing a C Corporation Income Tax Return to the State of Colorado.

Discussion

A C Corporation must file a Colorado corporate income tax return if it does business in Colorado or derives income from Colorado sources. A corporation is considered to be doing business in Colorado if it has substantial nexus with Colorado. Substantial nexus is established when a business entity organized outside of Colorado has property, payroll or sales that exceed any 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

If Company does not exceed any of these thresholds, then it does not have substantial nexus with Colorado and is not be required to file a C Corporation Income Tax Return. If, however, Company does exceed any of these thresholds, we then look to whether Company is protected under Public Law ("P.L.") 86-272 (15 U.S.C. 381), which states,

- (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

¹ Department Regulation 39-22-301.1

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, if a corporation located outside of Colorado is only soliciting sales of tangible personal property, and the sales orders are sent out of Colorado for acceptance and fulfillment, the corporation does not have a filing obligation with Colorado.

However, the protection of P.L. 86-272 applies only to those businesses engaged in the interstate commerce of selling tangible personal property, and does not apply to the sale of services.³ Company appears to be selling the service of soliciting sales for manufacturers rather than selling tangible personal property. Therefore, P.L. 86-272 would not immunize Company from the liability of reporting and remitting Colorado corporate income tax if they exceed any of the thresholds to establish substantial nexus.

If a corporation has taxable income derived from sources in Colorado and outside Colorado, then the corporation must apportion its business income and allocate its non-business income. For tax periods commencing on or after January 1, 2009, income is generally apportioned based on the single factor apportionment method.⁴ All business income is apportioned to Colorado by multiplying such business income by a fraction, the numerator of which is the total sales of the taxpayer in Colorado during the tax period and the denominator of which is the total sales of the taxpayer everywhere during the tax period. For more information about apportionment and allocation, see Department regulation 39-22-303.5.4 and 303.5.4, which you can view at www.Colorado.gov/revenue/tax > Tax Library > Rules and Regulations > Final Regulations > Income.

² 15 U.S.C. § 381.

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 §39-22-303.5(4)(a), C.R.S.

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,

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