



COLORADO
Department of Revenue
Taxation Division

Physical Address:
1375 Sherman Street
Denver, CO 80203

Mailing Address:
P.O. Box 17087
Denver, CO 80217-0087

GIL-16-001

January 4, 2016

XXXXXXXXXXXXXXXXXX
Attn: XXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

Re: LCC Employee in Colorado

Dear XXXXXXXXXXXXX,

You submitted on behalf of XXXXXXXXXXXXXXXXXXXX ("Company") a request for guidance to determine whether Company is subject to Colorado income tax.

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 but 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 treats this request as one for a general information letter. It is important to remember that general information letters, such as this one, are general discussions of tax law and are not binding on the Department. If Company would like the Department to issue a private letter ruling on the issue raised here, the retailer can submit a request and fee in compliance with Department Regulation 24-35-103.5.

Issue

Is Company subject to Colorado income tax?

Background

Company is a LLC that made the S Corporation tax election. None of Company's shareholders have nexus with Colorado and do not conduct any business in Colorado. Company does not have offices or locations in Colorado.

Company sells technical surveillance products to law enforcement and military governmental customers worldwide. All sales are finalized either by telephone or email at its headquarters located outside of Colorado and all contracts for sales are accepted only at the headquarters. Company has several sales representatives but only one lives in Colorado. Sales representatives do not finalize or close any sales; they only show products

to customers when a customer requests to see the products. Roughly ninety percent of the work of the Colorado representative will be performed out-of-state.

Company is establishing unemployment, withholding and possibly sales tax accounts with Colorado because of the presence of its sales representative in Colorado. However, Company does not believe it is subject to Colorado income tax.

Discussion

Because Company elected to file as an S Corporation, we begin by describing the income tax rules for S Corporations. An S-Corporation is not subject to Colorado income tax. However, members of the S corporation must file a Colorado income tax return if the S Corporation does business in Colorado and 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 business entity organized outside of Colorado has property, payroll or sales that exceed any of the following thresholds in the 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

It is not clear from the relatively few facts provided whether Company exceeds any of the thresholds. If Company does not satisfy any of these criteria, then it has no obligation to file a Colorado income tax return.

Even if Company does meet at least one of these thresholds, Company may still not have any Colorado income tax obligation if it falls within the protection 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).²

We cannot rule in a general information letter, such as this, whether Company exceeds the protection of P.L. 86-272. If the employee is doing more than soliciting sales or activities closely related to solicitations of orders, Company exceeds the protection of P.L. 86-272.

¹ Department Regulation 39-22-301.1

² 15 U.S.C. § 381.

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. 86-272.³

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/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,

Neil L. Tillquist
Colorado Department of Revenue

³ *Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States Under Public Law 86-272.* (Third revision adopted by the Multistate Tax Commission on July 27, 2001). Colorado is a signatory of this Statement and follows the guidance provided therein.