



**COLORADO**  
**Department of Revenue**  
Taxation Division

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PLR 19-003

June 7, 2019

XXXXXXXXXXXX  
Attn: XXXXXXXXX  
XXXXXXXXXXXX  
XXXXXXXXXXXX

Re: Substantial Nexus

Dear XXXXXXXXXXXX,

You submitted a request for a private letter ruling on behalf of XXXXXXXXXXXX (“Company”) to the Colorado Department of Revenue (“Department”) pursuant to 1-C.C.R. 201-1, Reg. 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 1-C.C.R. 201-1, Reg. 24-35-103.5. It cannot be relied upon by any taxpayer other than the taxpayer to whom the ruling is made.

**Issue**

1. Does Company have substantial nexus with Colorado?
2. Is Company required to register with the Department for sales or use tax purposes?
3. Are Company’s products exempt from Colorado sales or use tax?
4. Is Company required to file a return each month even if all of its sales are exempt from state sales taxes?

**Conclusion**

1. Company is doing business in Colorado and has substantial nexus with Colorado for purposes of state and state-administered sales taxes.
2. Company is required to register with the Department to collect and remit state and state-administered sales tax.
3. Company’s products are exempt from Colorado state and special district sales taxes. Company’s products may be subject to local sales tax from state-administered taxing jurisdictions.
4. Company is obligated to file sales tax returns even if all sales are exempt from state and state-administered local sales taxes.

**Background**

Company, which is located outside of Colorado, manufactures and sells prepackaged bakery food products, such as brownies, cookies, and bars. Company’s bakery items are fully cooked, individually wrapped and labeled, and sold for human consumption. Company accepts orders from Colorado residents through Company’s website and over the telephone. Company ships products to customers by common carrier and does not make deliveries utilizing Company’s own vehicles. Company does not have employees, agents, or other representatives working in Colorado, and does not maintain an office, warehouse, or other place of business in Colorado. Company represents that it has not obtained a Colorado sales tax license. Company’s gross revenue from delivery of its products into Colorado during the 2018 calendar year exceeded \$100,000, and Company sold its products in more than 200 separate transactions.

## Discussion

1. Company is doing business in Colorado and has substantial nexus with Colorado for purposes of state and state-administered sales taxes.

A retailer is “doing business in Colorado” if it is selling, leasing, or delivering tangible personal property into Colorado.<sup>1</sup> Colorado requires a retailer that is “doing business in this state” and that has substantial nexus to Colorado to obtain a state sales tax license.<sup>2</sup> A retailer has substantial nexus with Colorado if it has a physical presence in the state or, absent a physical presence, is selling its products into Colorado and has in excess of \$100,000 in retail sales of tangible personal property, commodities, or services in the current or prior calendar year.<sup>3</sup> A retail sale of tangible personal property, for purposes of determining substantial nexus, includes sales of goods that are exempt from sales tax collection.<sup>4</sup>

Company represents that its retail sales in Colorado in the prior calendar year exceeded \$100,000. As a result, Company is doing business in, and has substantial nexus with, Colorado.

2. Company is required to register with the Department to collect and remit state and certain state-administered local sales tax.

Company must obtain a Colorado sales tax license and must collect, report, and remit state sales tax<sup>5</sup> and certain state-administered local sales taxes to the Department. This requirement begins June 1, 2019.<sup>6</sup>

3. Company’s products are exempt from Colorado state and special district sales taxes. Company’s products may be subject to local sales tax from state-administered taxing jurisdictions.

Food sold for domestic home consumption is exempt from Colorado state and special district sales and use tax.<sup>7</sup> Colorado has adopted the U.S. Department of Agriculture’s (“USDA”) definition of “food” as used in the Supplemental Nutrition Assistance Program (“SNAP”).<sup>8</sup> Among food items eligible for the exemption are candy, cakes, and cookies.<sup>9</sup> However, “candy” and “soft drinks” are subject to state and special district sales and use taxes.<sup>10</sup> “Candy” is “a preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruit, nuts, or other ingredients or flavorings of bars, drops, or pieces.”<sup>11</sup> Candy does not include any preparation containing flour.<sup>12</sup> Based on our conversations, Company represents that all of their prepackaged bakery food products include flour. As such, the sale of Company’s baked goods is exempt from state and special district sales and use taxes.

State-administered cities and counties have the option to exempt the sale of food for domestic home consumption.<sup>13</sup> State-administered cities and counties that elect to exempt food for domestic home consumption must use the same definition for food as the Department.<sup>14</sup> It is important to note that the exclusion of candy from the exemption provided in Section 39-26-707(1.5)(a), C.R.S., does not apply to

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<sup>1</sup> Section 39-26-102(3), C.R.S.

<sup>2</sup> Section 39-26-103(1)(a), C.R.S.

<sup>3</sup> Section 39-26-102(3)(c), C.R.S.

<sup>4</sup> Section 39-26-102(9), C.R.S.

<sup>5</sup> Company is obligated to collect sales tax based on the destination of delivery. See Section 39-26-104(3)(a) and (c), C.R.S.

<sup>6</sup> See House Bill 19-1240 at <https://leg.colorado.gov/bills/hb19-1240>.

<sup>7</sup> Section 39-26-707(1)(e), C.R.S. Special Districts levy a sales or use tax on the same transactions as does the state (e.g., the Regional Transportation District in Section 32-9-119(2)(a), C.R.S., and the Scientific and Cultural Facilities District in Section 32-13-107(1)(a), C.R.S.).

<sup>8</sup> 7 U.S.C. Section 2012(k).

<sup>9</sup> 1-C.C.R. 201-4, Reg. 39-26-102.4.5.

<sup>10</sup> Section 39-26-707(1.5)(a), C.R.S.

<sup>11</sup> Section 39-26-707(1.5)(b)(I), C.R.S.

<sup>12</sup> *Id.*

<sup>13</sup> Section 29-2-105(1)(d)(I)(C), C.R.S.

<sup>14</sup> Section 29-2-105(8), C.R.S.

local tax.<sup>15</sup> Therefore, a state-collected city or county that exempts food for domestic home consumption would exempt the sale of Company's products, including candy, as they meet the USDA's definition of food.

The Department publishes the Colorado Sales/Use Tax Rates (DR 1002) twice a year, which lists the exemptions allowed for all such Colorado cities and counties. Company is advised to consult the DR 1002 in order to determine which cities and counties exempt food. Company should separately contact home-rule cities and counties to determine if they exempt food from sales tax.

4. Company is obligated to file sales tax returns reporting all sales to the Department.

Once Company registers with the Department, sales tax returns must be filed on a monthly basis.<sup>16</sup> Colorado retailers are obligated to file sales tax returns reporting all sales, both taxable and exempt.<sup>17</sup> The Department offers taxpayers the ability to file sales tax returns online with Revenue Online or by submitting paper returns. Taxpayers electing to file online are eligible to file returns in various formats (e.g., approved XML files or spreadsheets) depending on their reporting obligations. Company is encouraged to research which method of filing is most advantageous. It is important to note that, as a result of House Bill 19-1240, Colorado's enforcement of taxing obligations for out of state retailers will begin on June 1, 2019.

#### Miscellaneous

This ruling is premised on the assumption that Company has completely and accurately disclosed all material facts and that all representations are true and complete. The Department reserves the right, among others, to independently evaluate Company's representations and assumptions. The ruling is null and void if any such assumption and representation is incorrect and has a material bearing on the conclusions reached in this ruling and is subject to modification or revocation in accordance to 1-C.C.R. 201-1, Reg. 24-35-103.5.

This ruling is binding on the Department to the extent set forth in 1-C.C.R. 201-1, Reg. 24-35-103.5. It cannot be relied upon by any taxpayer other than the taxpayer to whom the ruling is made.

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 notify Ryan Doerflein in writing within that 60 day period if you have any suggestions or concerns about this redacted version of the ruling. If you have any other questions regarding this ruling, please contact XXXXXXXXXXXX at (xxx) xxx-xxxx or xxxxxxxx.xxxxx@state.co.us

Sincerely,

Colorado Department of Revenue  
Tax Policy Division

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

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<sup>15</sup> The exclusion of candy from exemption subjects such sales to "state sales tax." See Section 39-26-707(1.5)(b)(I), C.R.S.

<sup>16</sup> Section 39-26-105(1)(b), C.R.S.

<sup>17</sup> 1-C.C.R. 201-4, Reg. 39-26-105(1)(b).