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John Hickenlooper
Governor

Barbara J. Brohl
Executive Director

GIL-16-020

October 4, 2016

XXXXXXXXXXXXXXXXXXXX
Attn: XXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

Re: Third-Party Liability

Dear XXXXXXXXXXXXXXX,

You submitted on behalf of XXXXXXXXXXXXXXX (“Company”) a request for guidance regarding Company’s sales tax obligation for purchases from Company’s Internet Marketplace.

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 Rule 1 CCR 201-1, 24-35-103.5 at www.colorado.gov/pacific/tax/letter-rulings

The Department treats this request as 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, Company can submit a request and pay the fee in compliance with Department Rule 1 CCR 201-1, 24-35-103.5.

Issues

1. If Company collects and remits sales tax on third-party sales, will the third-party retailer be relieved of the liability to collect tax?
2. Will Company and third-parties be relieved from collecting sales tax if the buyer presents to Company an exemption certificate that lists Company as the seller?

Background

Company develops and markets a wide range of software, services, and digital products. In connection with these products, Company operates a marketplace for third-party software,

games, apps, movies, books, and other digitized products available for customers to purchase and download electronically using their personal computers, tablets, game consoles, phones, and other devices. Although the marketplaces are separately branded (i.e., XXXXXXXXXXXXXXXXXXXX, etc.) Company refers to them collectively as the “Marketplace.”

Customers gain access to the Marketplace using their computing devices. Customers may search a catalog that identifies the title and the Independent Software Vendor (ISV) of the digitized content available for purchase (e.g., XXXXXXXXXXXXXXXXXXXX). To initiate a purchase, the customer selects a title to add to the shopping basket. The customer checks out, using a credit card or other form of payment. Company processes the payment using its own payment infrastructure, and provisions the product from one of its data centers. The sale may include titles from more than one ISV. Company is not required to obtain approval from the ISV prior to the sale.

ISVs enter into service agreements with Company whereby Company agrees to host and electronically deliver digitized products to customers on each ISV’s behalf, process the customer’s payment, and remit the proceeds to each ISV less Company’s service fee. Company is entitled to withhold the service fee, equal to a percentage of the product’s sale price, from the sales proceeds. Company also calculates the appropriate amount of sales tax due on the transaction and remits the sales tax directly to the Department.

Company does not sublicense the digitized content to the customer. The license agreement is directly between the ISV and customer. The ISV, as the licensor, determines the price at which the software or other products are sold to the end customers.

Discussion

A. Discharge of co-retailer’s liability

Retailers must collect, report, and remit sales tax on taxable sales to buyers. A “retailer” is “a person doing business in Colorado, including a remote seller, if the retailer is known in the trade and public as such, and is selling to the user or consumer...”¹ In some cases, the Department can require an agent of the retailer to collect, report, and remit the applicable sales tax. Specifically, § 39-26-103(9)(e), C.R.S. states,

In addition, when in the opinion of the executive director it is necessary for the efficient administration of this section to treat any salesman, representative, peddler, or canvasser as the agent of the vendor, distributor, supervisor, or employer under whom he operates or from whom he obtains tangible personal property sold by him or for whom he solicits business, the director may, in his discretion, treat such agent as the vendor jointly responsible with his principal, distributor, supervisor, or employer for the collection and payment over of the tax.

Company represents that it is an agent of ISVs for the purpose of selling ISVs’ goods. Company further represents that, if it collects and remits sales tax on sales subject to tax in Colorado, it agrees to do so as a “jointly responsible” retailer. Company asks the Department to confirm that, if such collection and payment is made by Company, the Department will not seek to collect tax from the ISVs.

¹ § 39-26-102(8), C.R.S.

“Jointly responsible” is not statutorily defined. In the absence of a statutory definition, the Department applies the common and ordinary meaning to such terms. Company correctly asserts that, under the law of contracts and Colorado’s uniform commercial code, payment of a debt in full by one joint-obligor discharges the other joint-obligor from liability for such debt.² In the context of § 103(9)(e), C.R.S., payment in full of the correct amount and type of tax debt by one jointly responsible retailer discharges the payment obligation of the other jointly responsible retailer.

However, the discharge of the monetary liability does not discharge or otherwise limit the Department’s statutory authority to administer and collect taxes from either jointly responsible retailer if a deficiency occurs in the future.

B. Exemption certificates and sales tax licenses for exempt sales

A retailer should not collect sales tax or retailer’s use tax from a buyer who presents a valid sales tax license or exemption certificate issued by the Department. The retailer must exercise due diligence when accepting a sales tax license or exemption certificate, and must collect sales tax if there is reasonable doubt whether the exemption applies.³ Company, as a jointly responsible retailer, may accept exemption certificates and sales tax licenses for purpose of exempting a sale from sales or retailer’s use tax to the same extent and in the same manner as an ISV may do so. If Company exercises reasonable diligence when accepting the exemption certificate or sales tax license, then both the Company and ISV are relieved of liability for collecting tax if the Department later determines that the exemption did not apply.

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 Tillquist
Colorado Department of Revenue
Office of Tax Policy & Analysis

² See, e.g., Restatement (Second) of Contracts, §§289, 294; §§4-3-116 and 4-3-605, C.R.S. (Colorado UCC).

³ See, FYI Sales 1 “How to document sales to retailers and tax-exempt organizations.”