COLORADO
Department of Revenue
Taxation Division

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PLR 24-003

August 21, 2024

XXXXXXXXXX
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Via Electronic Mail: XXXXXXXXXX

Re: Sourcing of sales to the U.S. Government of property stored by the seller in Colorado

Dear XXXXXXXXXX:

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

Issue

Whether Company's receipts from sales of XXXXXXXXXX to the U.S. Government, as described in this ruling and made under the contract in effect for XXXXXXXXXX and later, are in Colorado under section 39-22-303.6(5), C.R.S.

Conclusion

Company's receipts from sales of XXXXXXXXXX to the U.S. Government, as described in this ruling and made under the contract in effect for XXXXXXXXXX and later, are not in Colorado under section 39-22-303.6(5), C.R.S.

Background[1]

Company is a Delaware corporation headquartered in Colorado. Company is organized as a C corporation for federal income tax purposes. Company manufactures and sells XXXXXXXXXX. One of Company's principal customers is the United States Government and its departments and subdivisions. Although Company sold XXXXXXXXXX to the U.S. Government prior to XXXXXXXXXX, the following facts pertain to Company's contract in effect for XXXXXXXXXX and later.

The XXXXXXXXXX are principally manufactured in Colorado. The U.S. Government purchases the XXXXXXXXXX for delivery to the U.S. Government locations outside of Colorado. However, because the U.S. Government facilities are often not ready to receive the XXXXXXXXXX, the U.S. Government

[1] Paragraph (4)(b)(ii) of 1 CCR 201-1, Rule 24-35-103.5 requires the request for a private letter ruling to include a statement of facts. This section generally recites the statement of facts provided in the initial request or in any supplement or amendment thereto, which is not an indication that the Department found such facts relevant to its analysis. Some relevant facts may be redacted or omitted to ensure confidentiality as required by section 24-35-103.5(5), C.R.S. The terms used in this section to describe the factual background are generally those of the requester.

contract also requires Company to store the XXXXXXXXXX in Colorado until the U.S. Government is ready to receive the XXXXXXXXXX. The U.S. Government pays the Company for the XXXXXXXXXX and pays Company to store and service the XXXXXXXXXX in Colorado until the XXXXXXXXXX are delivered by Company to the U.S. Government location designated by the U.S. Government.

Upon manufacturing completion, the Company performs XXXXXXXXXX in Colorado XXXXXXXXXX on every XXXXXXXXXX. Upon successful completion of the XXXXXXXXXX for the XXXXXXXXXX, the U.S. Government performs a production "Final Inspection." "Unconditional Acceptance" of the XXXXXXXXXX occurs upon successful completion of the "Final Inspection." The XXXXXXXXXX is then immediately moved to the Company's storage.

The Company maintains control and possession of the XXXXXXXXXX (in Colorado) until final delivery is completed at a location outside of Colorado. Company is obligated to store the XXXXXXXXXX for a period of 30 days as part of the purchase price of the XXXXXXXXXX. The storage and maintenance services, for which the U.S. Government must pay an additional charge, commence 30 days after the customer's "Unconditional Acceptance."

Once the Government elects to ship the accepted XXXXXXXXXX, Company transports the XXXXXXXXXX to the U.S. Government designated and operated destination outside of Colorado.

For the purposes of section 39-22-303.6(3)(c), C.R.S., Company is taxable in every state in which it delivers XXXXXXXXXX to the U.S. Government.

Discussion

For income tax years commencing on or after January 1, 2019, a C corporation must apportion and allocate its net income pursuant to section 39-22-303.6, C.R.S., if it has income from business activity that is taxable both within and without Colorado.[2] Income is apportioned with a fraction, the numerator of which is the total receipts of the taxpayer in Colorado during the tax period and the denominator of which is the total receipts of the taxpayer everywhere during the tax period.[3] State statute and rules prescribing apportionment are based on models developed by the Multistate Tax Commission ("MTC")[4] but deviate from the models with regard to sales to the U.S. government, as discussed later in this ruling.

In general, receipts from the sales of tangible personal property are in Colorado if "[t]he property is delivered or shipped to a purchaser in Colorado regardless of the f.o.b. point or other conditions of the sale."[5] Receipts are also sourced to Colorado if the property is shipped from an office, store, warehouse, factory, or other place of storage in Colorado and the taxpayer is not taxable in the state to which the property is shipped (the "throwback rule").[6] Although the MTC model also includes a throwback provision specifically for sales to the U.S. government, this provision is not included in the Colorado statute or rules applicable to tax years commencing on or after January 1, 2019.[7]

The plain language of the statute attributes sales to Colorado if they are "delivered or shipped to a purchaser in Colorado" and explicitly disregards in making this determination "the f.o.b. point or other

[2] Section 39-22-303.6(3)(b), C.R.S.
[3] Section 39-22-303.6(4)(a), C.R.S.
[4] See 2018 Colo. Sess. Laws, ch. 369, § 1(2) and the Statement of Basis and Purpose at the beginning of 1 CCR 201-2, Rules 39-22-303.6–1 through 39-22-303.6–18.
[5] Section 39-22-303.6(5)(a), C.R.S., and 1 CCR 201-2, Rule 39-22-303.6–6.
[6] Section 39-22-303.6(5)(b), C.R.S.
[7] Compare Multistate Tax Commission Model Compact Art. IV, §16 (as revised July 29, 2015) (prescribing specific sourcing for sales to the U.S. government) with section 39-22-303.6(5), C.R.S. (omitting these provisions regarding U.S. government sales). The MTC sourcing provisions for sales to the U.S. government were adopted by the State of Colorado in section 24-60-1301, art. IV, §16, C.R.S., and the regulations promulgated thereunder in 1 CCR 201-3. However, that statute and accompanying regulations do not apply to tax years commencing on or after January 1, 2009. See section 24-60-1308, C.R.S.

conditions of the sale."[8] As the Hellerstein treatise observes, the "purpose of the sales factor [is] to reflect the contribution of the market state to the taxpayer's income."[9] Several MTC model rules adopted by the state reflect this purpose,[10] as does the decision of the Colorado Supreme Court in *Lone Star Steel Co. v. Dolan*.[11] Nothing in the applicable statute or rules bases the sourcing of a sale on the location of property at the time title transfers or the storage of the property by the seller for any period of time thereafter.[12]

Company has income from business activity that is taxable both within and without Colorado and it therefore must apportion and allocate its net income pursuant to section 39-22-303.6, C.R.S., for tax years commencing on or after January 1, 2019.[13] Company is taxable in every state into which it delivers sales of tangible personal property to the U.S. Government. Therefore, the throwback rule does not apply in sourcing these sales.

Under section 39-22-303.6(5)(a), C.R.S., receipts from the sales at issue in this ruling are not in Colorado because the XXXXXXXXXX are not delivered or shipped to the U.S. Government in Colorado. Company represents that the U.S. Government does not take possession of the XXXXXXXXXX at any time prior to the delivery of the XXXXXXXXXX to locations outside of Colorado.

The physical location of the XXXXXXXXXX at the time of "Final Inspection" and "Unconditional Acceptance" does not determine the state to which the sales are sourced. Under section 39-22-303.6(5)(a), C.R.S., the location of the sale is determined without regard to "the f.o.b. point or other conditions of the sale." Although the federal regulations[14] prescribe various rules relating to the conditions of sales to the U.S. Government, such as final inspection,[15] acceptance,[16] and delivery,[17] sales to the U.S. Government are nevertheless sourced under section 39-22-303.6(5)(a), C.R.S., like sales to any other purchaser, to the location where "[t]he property is delivered or shipped to [the] purchaser … regardless of the f.o.b. point or other conditions of the sale."

Company's storage of the XXXXXXXXXX for the U.S. Government after "Final Inspection" and "Unconditional Acceptance" does not determine the state to which the sales are sourced. The Colorado Supreme Court considered a case in which an intermediary service was performed by an unaffiliated company prior to delivery of the purchased property to the customer. In that case, a steel company (Lone Star) manufactured pipe in Colorado and sold it to customers outside of Colorado but transferred the pipe to an unaffiliated company (Gaido-Lingle) to wrap the pipe in tar and paper prior to delivery to Lone Star's customers outside of Colorado. In determining where to source Lone Star's sales, the court reasoned:

> "The pipe is delivered to Gaido-Lingle, which is not a purchaser, but is instead merely an intermediary, much as a common carrier is. The difference is that Gaido-Lingle transforms the pipe physically, while a carrier transports it spatially. There seems little reason in policy to treat

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[8] Section 39-22-303.6(5)(a), C.R.S., and 1 CCR 201-2, Rule 39-22-303.6–6.
[9] Hellerstein & Hellerstein. *State Taxation*, ¶ 9.18[3][a].
[10] See, for example, paragraphs (2), (3), and (4) of 1 CCR 201-2, Rule 39-22-303.6–6.
[11] *Lone Star Steel Co. v. Dolan*, 668 P.2d 916 (Colo. 1983). The court concluded that the intervening transfer of pipe purchased from a steel company to a third-party service provider in Colorado prior to delivery by common carrier to an out-of-state purchaser did not result in the sourcing of the sale to Colorado for income tax purposes.
[12] By contrast, see Mich. Comp. Laws Ann. § 206.665(1)(a), which sources to the state sales of property that is "stored in transit" within the state for a period of 60 days or more.
[13] Section 39-22-303.6(3)(b), C.R.S.
[14] Federal Acquisition Regulation in Chapter 1 of Title 48 of the Code of Federal Regulations.
[15] See, for example, 48 CFR §§ 46.402 and 46.403, prescribing rules for determining whether inspection is performed at the source or at the destination, respectively.
[16] See, for example, 48 CFR § 46.101 ("Acceptance means the act of an authorized representative of the Government by which the Government, for itself or as agent of another, assumes ownership of existing identified supplies tendered or approves specific services rendered as partial or complete performance of the contract.") and 48 CFR § 46.501 ("Acceptance may take place before delivery, at the time of delivery, or after delivery, depending on the provisions of the terms and conditions of the contract.").
[17] See, for example, 48 CFR § 47.302(c)(1): "The place of performance of Government acquisition quality assurance actions and the place of acceptance shall not control the delivery term, except that if acceptance is at destination, transportation shall be f.o.b. destination (see 47.304–1(f))."

> the two kinds of transactions differently. In neither case has the purchaser actually taken delivery of the pipe."[18]

Similarly, the U.S. Government does not take delivery of the XXXXXXXXXX in Colorado, notwithstanding Company's storage of the XXXXXXXXXX in Colorado after "Final Inspection" and "Unconditional Acceptance."

Miscellaneous

This ruling is premised on the assumption that Company has completely and accurately disclosed all material facts, that all representations are true and complete, and that Company has otherwise complied with the requirements of section 24-35-103.5, C.R.S., and the rules promulgated pursuant thereto. The Department reserves the right, among others, to independently evaluate Company's facts, representations, and assumptions. The ruling is null and void if any such fact, representation, or assumption is incorrect and has a material bearing on the conclusions reached in this ruling. This ruling is binding on the Department, and is subject to modification or revocation, in accordance with 1 CCR 201-1, Rule 24-35-103.5.

Thank you for your request.

Sincerely,

Office of Tax Policy
Colorado Department of Revenue

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

[18] *Lone Star Steel Co. v. Dolan*, 668 P.2d 920 (Colo. 1983).