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March 21, 2017

Colorado Department of Revenue
Taxation Division
{Sent Via E-Mail}

Re: Comments on Rule 39-26-105(1)(c) & 39-26-102.22

Dear Taxation Workgroup:

On behalf of the Council On State Taxation (COST), we appreciate the opportunity to provide comments on Rule 39-26-105(1)(c) (documenting exempt sales) and Rule 39-26-102.22 (sellers collecting disputed tax). Our suggested revisions to these rules are summarized below.

COST

COST is a nonprofit trade association consisting of approximately 600 multistate corporations engaged in interstate and international business. COST's objective is to preserve and promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. Many of COST's members do a significant amount of business in Colorado.

Documenting Exempt Sales – Rule 39-26-105(1)(c)

Imposing a “good faith” standard, absent fraud, on sellers when accepting exemption requests from purchasers is inequitable, and with more and more sales taking place remotely, is not practical. COST encourages the Colorado Department of Revenue (DOR) to modify this rule to provide procedures that are similar to that used by states that are members of the Streamlined Sales and Use Tax Agreement (SSUTA). Also in accordance with SSUTA, sellers should have a reasonable period of time to obtain documentation from purchasers claiming an exemption from tax upon audit by the DOR.

Sellers Collecting Disputed Tax – Rule 39-26-102.22

COST would appreciate this rule being modified to clarify that the remedy for a purchaser seeking a refund of a disputed tax collected and remitted by the seller is with the DOR, and not with the seller. Sellers are fulfilling a statutory mandate in collecting the tax on behalf of the taxing jurisdiction. Thus, the burdens on sellers should be kept as low as possible and sellers should not be subject to lawsuits for their efforts to comply with their statutory obligations.

Summary

COST respectfully requests the Taxation Division of the DOR take our proposed changes into consideration in its rule review. We look forward to attending the workgroup's meeting tomorrow morning to answer any questions.

Sincerely,

Nikki E. Dobay
Sr. Tax Counsel

Fred Nicely
Sr. Tax Counsel

Attached: Proposed changes to Rules 39-26-105(1)(c) & 39-26-102.22

cc: COST Board of Directors
Douglas L. Lindholm, COST President & Executive Director

Proposed Rewrite of Colorado Regulation 39-26-105.1(c)

1) (a) The seller shall obtain identifying information of the purchaser and the reason the purchaser is claiming a tax exemption. To satisfactorily accomplish that, the seller may require purchasers to fully complete the department's Form DR5002 (hereafter "exemption certificate"), available at: www.colorado.gov/pacific/sites/default/files/DR5002.pdf.

(b) A seller may obtain a blanket exemption certificate from a purchaser with which the seller has a recurring business relationship and may continue to rely on that when there is a recurring business relationship between the buyer and seller. A recurring business relationship exists when a period of no more than twelve months elapses between sales transactions.

2) A seller making a sale to a customer who is located in this state that is claiming resale shall obtain the customer's sales tax account number.

3) The seller shall otherwise obtain the same information for proof of a claimed exemption regardless of the medium in which the transaction occurred; however, a customer is not required to provide a signature to claim an exemption from tax unless a paper exemption certificate is used.

4) The seller shall maintain proper records of exempt transactions and provide them to qualified representative of the department when requested.

5) Absent fraud, a seller that obtains a fully completed exemption certificate or captures the relevant data elements required by the exemption forms covered in subsection (1) above, within 90 days subsequent to the date of sale, shall be relieved of the tax otherwise applicable if it is determined the purchaser improperly claimed an exemption. The purchaser remains liable for any tax, interest and penalty.

6) a) If a seller did not obtain an exemption certificate or all required identifying information within 90 days subsequent to the date of sale, such seller will have 120 days subsequent to a request by the department to either: obtain a fully completed exemption certificate as allowed under subsection (1) above, taken in good faith. For purposes of this rule, "taken in good faith" means the seller obtained a certificate that claims an exemption that (i) was statutorily available on the date of the transaction in the jurisdiction where the transaction is sourced, (ii) could be applicable to the item being purchased, and (iii) is reasonable for the purchaser's type of business. Otherwise, the taxpayer must obtain other information satisfactorily establishing that the transaction was not subject to the tax.

b) If the seller obtains the information described in subsection (6)(a) above, the department will relieve the seller of any liability for the tax on the transaction unless it is discovered through the audit process that the seller had knowledge or had reason to know at the time such information was provided that the information relating to the exemption claimed was materially false or the seller otherwise knowingly participated in activity intended to purposefully evade the tax that is properly due on the transaction. The purchaser remains liable for any tax, interest and penalty.

Colorado Regulation 26-102.22.

It is the duty of the vendor to collect the tax unless he is furnished with satisfactory proof that the sale is exempt by statute.

Whenever there is a disagreement between a vendor and a buyer as to whether a given sale is tax exempt under this article, it shall be the duty of the vendor to collect and the duty of the buyer to pay the tax. The vendor shall thereupon give to the buyer a receipt (a copy of the sales invoice showing the amount of sales tax collected by the vendor will usually be sufficient) and the buyer's only recourse is to ~~may then~~ make application to the department for a refund.