North Carolina Department of Revenue

Beverly Eaves Perdue
Governor

David W. Hoyle
Secretary

August 17, 2012

Account ID: [redacted]
Federal ID: [redacted]

[redacted]

Attention: [redacted]

Re: [redacted]

Dear Mr. [redacted]

We have your July 31, 2012 letter regarding your original August 22, 2011 request for a private letter ruling on behalf of your above-referenced client concerning whether the firm is considered to be "engaged in business" and/or "doing business" for sales and use tax purposes and for corporate income and franchise tax purposes. In letters to you dated January 10, 2012 and June 6, 2012, we made specific requests for additional information, for which we have not received complete answers.

In our January 10, 2012 letter, we requested additional information concerning the activities of your client's North Carolina employees, copies of Form W-2 issued to the employees, and additional information concerning your client's various delivery services. In your January 19, 2012 written response you state that both of your client's North Carolina employees' jobs were the same, as one person replaced the other, and both employees' job descriptions are: "[c]oordinate online paid search campaigns." In your response, the employees' activities are described as: "[w]orking through [redacted] search marketing, each would coordinate payment for paid online placements on each Search marketing Sponsored listings on their search engines." Also, you stated that '[redacted] did not engage others to perform installation, set-up, delivery, or any other services in North Carolina, other than online paid search placements. . . ."

In our June 6, 2012 letter, we requested additional explanations of your client's employees' job descriptions, copies of Form W-2 issued to the employees for 2011, and additional information concerning your client's various delivery services ([redacted]) offered to customers on its website. [redacted]. The company would have to dig far more deeply to find orders shipping by 'white glove' by one of the following carriers ([redacted]) then determine which of those if any involved 'set up'." Also, in your July 5, 2012 response to our request for the number of delivery trips each delivery company made into North Carolina during the preceding three calendar years, you stated: "Again, the company would need to dig more deeply to provide the number of orders shipped on the above list of carriers over the last three years grouped by year. And again, the company believes this will be a nominal number."

On July 13, 2012, we wrote you extending additional time to your client to obtain the additional information requested. In your July 31, 2012 response, you stated ". . .the company has [redacted]."

G.S. 105-164.3(9) defines "[e]ngaged in business" to include "[a]ny of the following:

a. Maintaining, occupying, or using permanently or temporarily, directly or indirectly, or through a subsidiary or agent, by whatever name called, any office, place of distribution, sales or sample room, warehouse or storage place, or other place of business for selling or delivering tangible personal property, digital property, or a service for storage, use, or consumption in this State, or permanently or temporarily, directly or through a subsidiary, having any representative, agent, sales representative, or solicitor operating in this State in the selling or delivering. The fact that any corporate retailer, agent, or subsidiary engaged in business in this State may not be legally domesticated or qualified to do business in this State is immaterial.
b. Maintaining in this State, either permanently or temporarily, directly or through a subsidiary, tangible personal property or digital property for the purpose of lease or rental.
c. Making a remote sale, if one of the conditions listed in G.S. 105-164.8(b) is met.
d. Shipping wine directly to a purchaser in this State as authorized by G.S. 18B-1001.1.

G.S. 105-164.8(b) provides, in pertinent part, that "[a] retailer who makes a remote sale is engaged in business in this State and is subject to the tax levied under this Article if at least one of the following conditions is met: . . .

(2) The retailer maintains retail establishments or offices in this State, whether the remote sales thus subject to taxation by this State result from or are related in any other way to the activities of the establishments or offices.
(3) The retailer solicits or transacts business in this State by employees, independent contractors, agents, or other representatives, whether the remote sales thus subject to taxation by this State result from or are related in any other way to the solicitation or transaction of business. . . ."

On the basis of the information provided your client is "engaged in business" in North Carolina and required to collect and remit the applicable State and local sales or use taxes on all of its taxable retail sales delivered or sourced to North Carolina. Therefore, your client should promptly register and begin collecting and remitting sales or use taxes.

Additionally, after reviewing your client's activities with the Income Tax Division, it has been determined that your client's activities exceed mere solicitation and activities protected by 15 USC § 381, more commonly known as P.L. 86-272. Your client is considered "doing business" in this State pursuant to North Carolina's Doing Business Rule, 17 NCAC 5C .0102(a)(4), copy enclosed. The above federal statute protects companies operating in interstate commerce from state income taxation when the only activity within a state is the solicitation of orders of tangible property, the order is sent out of the state for approval and the goods are shipped from a point outside the state. However, the federal law does not protect the provider of a service, nor does it protect activities conducted within a state that exceed the "mere solicitation" of orders of tangible personal property. The installation and/or set-up of a product in this State by company employees or an independent contractor acting on your client's behalf would exceed the "mere solicitation" provisions of P. L. 86-272 and would destroy the company's immunity from taxation in North Carolina.

[redacted]. Your client is liable for sales or use tax, corporate income, and franchise tax the earlier of the date it began its delivery activities in this State using independent delivery companies who provide delivery services above and beyond small parcel or standard curbside delivery or the date employees established home offices in this State.

[redacted].

This letter ruling is based solely on the facts submitted to the Department of Revenue for consideration of the transactions described. If the facts and circumstances given are not accurate, or if they change, then the taxpayer requesting this ruling may not rely on it. If a taxpayer relies on this letter ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material aspect from the facts and circumstances given in this letter ruling, the letter ruling will not afford the taxpayer any protection. It should be noted that this letter ruling is not to be cited as precedent and that a change in statute, a regulation, or case law could void this ruling.

If you have any questions, you may reach me at the number listed below.

Very truly yours,

[redacted]
Administration Officer
Sales and Use Tax Division

[redacted]

cc: [redacted], Director – Sales and Use Tax Division
[redacted], Assistant Director – Sales and Use Tax Division
[redacted] – Income Tax Division
[redacted], Administration Officer – Income Tax Division, Corporate Section