COLORADO
Department of Revenue
Taxation Division

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PLR-09-004

October 14, 2009

XXXXXXXXXXXXXXXXXXX
ATTN: XXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXX

Re: Private Letter Ruling

Dear XXXXXXXXX,

Your firm submitted on behalf of XXXXXXXXXXXXXXXXXXXXX ("Company") a request for a private letter ruling to the Colorado Department of Revenue ("Department") pursuant to Regulation 24-35-103.5. This letter is the Department's private letter ruling.

Issue

Are optional and separately stated charges for a prepaid toll program, roadside assistance program, and carbon offset program subject to sales or use tax when offered in connection with a taxable charge for rental of a motor vehicle?

Conclusion

Optional and separately stated charges for prepaid toll program, roadside assistance program, and carbon offset program are not subject to sales or use tax when offered in connection with a taxable charge for rental of a motor vehicle.

Background

The Company is in the business of renting motor vehicles. It offers customers three supplemental services. The first is a prepaid toll program in which, for a predetermined daily rate, a customer may incur unlimited highway toll fees. The second is a roadside assistance program whereby, for a predetermined charge, the Company will provide a customer roadside assistance such as replacement of lost keys and unlocking when keys locked in the car. The third is carbon offset program whereby a customer makes a contribution in the amount determined to equal the

carbon emissions associated with the average fleet vehicle's operations. The Company holds the contributed funds in escrow, matches the customer's contribution, and donates the combined amount to a certified offset project administrator. The Company does not retain any portion of the contributed funds.

Discussion

Colorado levies sales and use tax on the rental of motor vehicles. §§39-26-102(23) and 713(1)(a), C.R.S. Tax is calculated on the purchase price. §39-26-104(1)(a), C.R.S. The purchase price means the price paid by the consumer and includes the total amount received in money. §39-26-102(7)(a) and 102(5), C.R.S. See, also, Department regulation 39-26-102.7(a). However, in some instances, charges paid by a purchaser are not included in the calculation of sales tax.

Charges for non-taxable services that are both "separable" and separately stated[1] on the invoice from charges for taxable goods are not included in the calculation of sales tax. For example, a separately stated charge for alteration service that a retailer offers in connection with the sale of a garment is not included in the sales tax calculation because the alteration service is "separable" from the sale of the garment. *A.D. Stores v. Department of Revenue*, 19 P.3d 680 (Colo. 2001). However, a charge for labor incurred in manufacturing custom made goods is not separable from the sale of custom made goods and cannot be excluded from the calculation of tax, even if the labor charge is separately stated. See, §39-26-102(12) and department regulation 39-26-102.12; General Information Letter 08-30 (purchaser cannot avoid sales tax on charges for fabrication service on custom made goods even if separately stated).

In determining whether a service is "separable," the department examines, among other things, whether the purchaser has the option of acquiring the taxable property without also purchasing the service, whether the performance of the service is essential to the lease of taxable goods,[2] and, more generally, whether there is a common understanding that the trade, business, or occupation involves selling products or rendering services. *A. D. Stores*, supra; Hellerstein, State Taxation ¶ 12.08. For example, a delivery charge is generally considered separable from the sale of goods if the consumer has the option not to purchase the delivery service.[3] The retailer must separately state the charge for separable services in order to exclude the charge from the calculation of sales or use tax. See, e.g., department regulation 39-26-102.7(a).

In the present case, the toll, roadside assistance, and carbon setoff programs are separable from the rental of the motor vehicle. First, the Company represents that

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[1] See, Hellerstein, State Taxation (WG&L), ¶17.12 (The Separate Statement Rule).
[2] Ibid, ¶19A.04. Tax Base Simplification (citing Streamlined Sales Uniform Tax Agreement re: bundling); and, by analogy, Department Special Regulation 7 re: allocation and apportionment of corporate income, ¶1.C.(v) ("bundled transactions").
[3] See, Department sales tax special regulation 18 (Transportation Charges) and regulation 39-26-102.7(a) (delivery and installation charges not included in tax base if separately stated).

the consumer has the option of renting the motor vehicle without purchasing any of these programs and separately states on the invoice the charge for each service.[4]

Second, these programs are not essential to the rental of the vehicle. Aconsumer can enjoy the full use the vehicle without employing any of these services. Tollfees are not imposed by the Company but rather by a third-party and, importantly, are imposed for the use of the toll road, not for the use or rental of a motor vehicle itself. The toll fee program offered by the Company is simply a mechanism to shift the collection of the toll fee (and the risk of additional toll fees) from the lessee to lessor.

The carbon offset charge is clearly not essential to the rental. Indeed, it does not even appear to be the purchase of a service or tangible personal property but, rather, a purchase of an intangible right or, perhaps, a donation or contribution of money by the lessee and lessor. In any event, the program is not essential to the use of the vehicle.

Finally, roadside assistance is not essential to the rental of the vehicle, although it is more related to the rental than the other two services. Roadside assistance is typically the service of a locksmith, tow truck driver, or some other person who comes to the roadside to assist a stranded motorist. Services of a locksmith and tow truck driver are not the rental of a motor vehicle. We would not levy sales tax on such services had the consumer purchased them from a third-party rather than from the Company. Moreover, roadside assistance programs are commonly offered in transactions unrelated to car rental, such as when a buyer purchases a buyer club membership, tires, or as a stand alone product (e.g., from AAA).[5] Roadside assistance services bundled in those transactions are not subject to sales or use tax if separately stated.[6] We also note that the roadside assistance program is, in a general sense, similar to an optional maintenance agreement for rented property, in

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[4] The Department will likely conclude that a consumer does not have an option if the option is not obvious to the consumer. For example, “opt-out” contractual terms, if not clearly stated, may be indicia that the option is not obvious.

[5] See, also, Texas Policy Letter Ruling No. 9308044L.2, 07/13/1993 (roadside assistance program offered in connection with buyer’s club membership not taxable) and Missouri Private Letter Ruling No. LR 5619, 04/30/2009 (roadside assistance offered as part of buyer’s club membership is not subject to sales tax).

[6] In Revenue Bulletin No. 92-14, 07/01/1992, the Department concluded that charges for collision insurance are taxable, but charges for personal accident coverage, extended insurance protection, personal effects coverage, and personal accident and effects coverage are exempt if written under a separate contract or insurance policy. Collision insurance is closely related to the rental of the tangible personal property (i.e., motor vehicle). For example, a retailer’s property insurance costs (e.g., property insurance for goods held in inventory) are part of the retailer’s cost of doing business and the retailer cannot exclude this cost from the sales tax calculation by separately stating the cost on a customer’s invoice. On the other hand, personal insurance coverage is directed more to the reimbursement for loss or damage for things other than the motor vehicle. We view the personal service provided under the roadside assistance program to be more akin to the exempt personal insurance and personal effects coverage than collision insurance coverage for the repair of a damaged rented motor vehicle. Roadside assistance protects the user’s ability to use the rented property rather than protecting property itself. And it is sufficient that this roadside assistance charge is separately stated rather than provided for in a separate contract.

that both provide some form of risk coverage related to the use of a taxable good.[7] Charges for maintenance and service agreements are not subject to sales tax if they are set forth in a separate contract.[8] Finally, we note that, in an analogous context, the department determined that a charge by a rental car company to refuel a rented vehicle when returned by the lessee is not subject to tax. See, Colorado Revenue Bulletin No. 85-1, 07/01/1985 (refueling service is not included in sales tax calculation if the charge is not included in the charge for the motor vehicle rental). This refueling service has obvious parallels to refueling as part of a roadside assistance program.
Whether the refueling occurs at the lessor's facility or out on the road would seem immaterial for purposes of determining the separability of this service. For these reasons, we conclude that roadside assistance is not essential to the rental of the motor vehicle. See, also, Massachusetts DOR Directive No. 02-9, 08/26/2002 (roadside assistance fee is not included in sales tax calculation for rental of amotor vehicle); Texas Policy Letter Ruling No. 9907553L, 07/14/1999 (roadside assistance program not subject to sales tax when offered at time of sale of a motor vehicle).

Therefore, charges for the toll fee, carbon offset, and roadside assistance programs are not included in the calculation of sales or use tax levied on the rental of motor vehicles.

Miscellaneous

This ruling applies only to sales and use taxes administered by the Department. You may wish to consult with local governments which administer their own sales or use taxes about the applicability of those taxes.

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

Enclosed is a redacted version of this ruling which you have approved for publication on the Department's web site.

Sincerely,

Office of Tax Policy
Colorado Department of Revenue

[7] Massachusetts DOR Directive No. 04-3, 05/03/2004 (roadside assistance treated similar to insurance coverage). The two services are somewhat different in that maintenance and service agreements generally cover some defect in, or maintenance of, the rented property; roadside assistance ismore directed to the risks created by the lessee (e.g., lost keys, locked car, fueloutages).

[8] Department Regulation 39-26-105.2 (charges for maintenance and service sold in connection with taxable property are not subject to tax if they are set forth in separate contract).