COLORADO
Department of Revenue
Taxation Division

Office of Tax Policy
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PLR-2010-002

March 23, 2010

Attn:XXXXXXXXXXXX
XXXXXXXXXXXXXXXXX

Re: Private Letter Ruling

DearXXXXXXXXXXXXX,

You submitted on behalf of **XXXXXXXXXXXXXXXXXX** ("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.

Issues

1. Is a seller's separately stated charge for transportation included in the calculation of sales or use tax due on the sale, use, storage, or consumption of goods purchased by the Company from the seller.

2. Is the transportation charge described in question 1 included in the tax calculation if the seller separately states the transportation charge on an invoice separate from the invoice for the sale of goods?

Conclusions

1. Transportation charges are not included in the calculation of sales or use tax under the circumstance described in the ruling request, except when the supplier requires Company to purchase supplier's transportation service as part of the sale of taxable goods.

2. Transportation charges set forth on an invoice separate from the invoice reflecting the sale of taxable goods are not included in the calculation of sales or use tax.

Background

Company is a manufacturer of XXXXXXXX or **XXXXXXXXXXX.** Its manufacturing facility is located in Colorado. Company purchases tangible personal property ("goods") from suppliers. Company's agreement with most suppliers provides that the supplier will ship the goods by the most economical manner. Most suppliers use a common carrier to ship the goods and most do not require Company to use the suppliers' transportation services. However, in rare cases, a supplier will require Company to use the supplier's transportation services.

Discussion

Colorado imposes sales and use tax on the sale, use, storage, and consumption of tangible personal property in Colorado. §§39-26-104(1)(a) and 202(1)(a), C.R.S. Tax is calculated on the purchase price paid by the consumer. §39-26-104(1)(a), C.R.S. In cases where the transaction involves the sale of both a taxable good and non-taxable service, a separately stated charge for the service is not included in the tax calculation unless the sale of the service is inseparable from the sale of goods. AD. *Stores v. Department of Revenue,* (Colo. 2001). Examples of "inseparable" transportation services include sales of ready mix concrete or of extreme low temperature liquids, both of which require special transportation equipment which only the supplier can provide. See, Department Special Regulation 37 (Ready Mix Concrete), which states, "[r]eady-mix concrete is taxable on the delivered price, which includes minimum load and transportation charges. Standby charges charged after arrival at the destination are not taxable if segregated on the customer's invoice." See, also, Department PLR-2010-001 (charges for transportation of low temperature liquids taxable when buyer does not have option to acquire goods without the transportation charge).

This bundling of a taxable good and with a non-taxable service often arises in the context of a charge for transportation to move goods from the retailer to the buyer. The department presumes transportation services are separable from the sale of goods, regardless of whether title to the goods has passed from the buyer to seller at the time the transportation service is rendered.[1] Special Regulation 18 (Transportation Services) sets forth the following rules governing transportation charges

> 1) The transportation of tangible personal property between a retailer and purchaser is a service presumed to be not subject to sales or use tax. Transportation charges are not taxable if they are both (1) separable from the sales transaction, and (2) stated separately on a written invoice or contract.

[1] Some states determine the taxability of transportation services by asking whether the service was rendered before or after title to goods was transferred to the buyer. In those states, transportation services rendered after title has moved to the buyer are not taxable. See, e.g., Alabama Department of Revenue, S. 84-172, 05/01/1986. In *AD* Stores, supra, the Colorado supreme court held that passage of title does not determine whether a service is separable from the sale of taxable goods.

a) "*Transportation charges"* include carrying, handling, delivery, mileage, freight, postage, shipping, trip charges, stand-by, and other similar charges or fees.
b) *Separable charges.* Transportation charges are separable from the sales transaction if they are performed after the taxable property or service is offered for sale and the seller allows the purchaser the option either to use the seller's transportation services or use alternative transportation services (including but not limited to the purchaser picking up the property at the seller's location). The fact that transportation charges are stated separately does not, in and of itself, mean the charges are a separable charge.
c) *Stated Separately.* Transportation charges will be regarded as "separately stated" only if they are set forth separately in a written sales contract, retailer's invoice, or other written document issued in connection with the sale.
d) *Intermediate or "Freight in" charges.* Transportation charges incurred in connection with transporting tangible personal property from the place of production or the manufacturer to the eller or to the seller's agent or representative, or to anyone else acting in the seller's behalf, either directly or through a chain of wholesalers or jobbers or other middlemen, are deemed "freight -in" charges and are not a transportation charge exempt from tax.
e) *Overstated Transportation Charges.* The amount of transportation charges excluded from the calculation of tax shall not materially exceed the seller's costs of the transportation.

At the outset, we note that transportation charges are never taxable if the sale, use, storage, or consumption of goods to which the transportation charges apply are not, themselves, subject to sales or use tax. For example, a manufacturer may purchase exempt from sales and use tax machinery and machine tools used in Colorado directly and predominantly in manufacturing and whose price exceeds $500. See, §39-26-709, C.R.S. Charges for transportation of exempt machinery or machine tools are not taxable regardless of whether the transportation service is separable from the sale or use of the exempt goods or whether the charge for the transportation is separately stated on the seller's invoice.

Company's agreement with vendors provides that the Company and seller will use the most economical transportation service. In some cases, this means the vendor uses its own transportation service; but, in most cases, goods are shipped by the vendor on a common carrier hired by the vendor. Company represents that, except in rare cases, vendors do not require Company to use the vendors' own transportation service. The fact that the vendor typically chooses the transportation service to be used does not mean that Company did not have the option to select its own transportation service. Moreover, no vendor charges more for goods if Company uses either its own transportation or a third party transportation service. Based on Company's representations, we conclude that the transportation charges of Company's vendors are separable from the sale of goods purchased by Company.

Company represents that vendors' transportation services are not "freight-in" service charge. Freight-in charges are separately stated charges for shipping goods from the manufacturer or supplier to the seller, vendor, vendor's agent, or to an intermediate wholesale jobber. See, Special Regulation 18, quoted above.

In some instances, Company purchases goods from out-of-state vendors who do not collect Colorado sales tax. For those transactions, Company states that it pays applicable use taxes. In general, use tax is a supplemental tax that places the same tax burden on a transaction that would have applied had the transaction been subject to sales tax. More specifically, rules governing the application of use tax to charges for transportation services are the same as those that apply to sales tax.[2] For example, transportation charges by an out-of-state retailer, who does not collect Colorado sales, are not included in Company's use tax calculation if Company had the option to use a transportation service other than the vendor's (i.e., either using Company's own vehicle or hiring a common carrier), vendor's price for the goods does not vary depending on whether Company uses the vendor's transportation service, and vendor separately states the transportation charge from the purchase price for the taxable goods.

Finally, you ask whether a charge is separately stated within the meaning of the Special Regulation 18 if the charge is separately stated on an invoice ("transportation invoice") that is separate from the invoice for the purchase of the goods ("goods invoice"). We presume in these cases that the price for the goods set forth on the goods invoice do not include the transportation charge. In such cases, transportation charges separately stated on a transportation invoice are not included in the calculation of sales or use tax for the taxable goods.

If the price for goods listed in the goods invoice includes the charge for transportation and the invoice does not separately state those charges, then the separately stated charges for transportation on the transportation invoice is separately stated for purposes of Special Regulation 18 if the invoices are sufficiently detailed to determine which transportation charges on the transportation invoice apply to the bundled price of the goods set forth on the goods invoice.

Miscellaneous

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 the 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. Please note that the Department does not administer the sales or use tax of home-rule cities. We urge

[2] *Howard Electrical and Mechanical, Inc. v. Colorado Department of Revenue,* 771 P2d 475 (Colo. 1989) ("[U]se tax is supplementary to the sales tax rather than separate from it.)

you to consult with your home-rule city regarding the application of its sales and use taxes.

Enclosed is a redacted version of this ruling. Pursuant to statute and regulation, this redacted version of the ruling 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 version of the ruling.

Sincerely,

Office of Tax Policy
Colorado Department of Revenue