

STATE OF COLORADO



DEPARTMENT OF REVENUE
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John W. Hickenlooper
Governor

Barbara J. Brohl
Executive Director

GIL-14-009

April 28, 2014

XXXXXXXXXXXXXXXXXX
Attn: XXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

Re: Demand Charge

Dear XXXXXXXXXXXX,

You submitted on behalf of XXXXXXXXXXXXXXXXXXXX ("Company") a request for guidance to determine whether demand charges are subject to Colorado sales or use tax.

The Colorado Department of Revenue ("Department") issues general information letters and private letter rulings. A general information letter provides a general overview of the relevant tax issues and is not binding on the Department. A private letter ruling provides a specific determination for a specific set of facts, is binding on the Department but not on the taxpayer, and requires payment of a fee. For more information about general information letters and private letter rulings, please see Department Rule 24-35-103.5 at www.colorado.gov/revenue/tax > Tax Library > Rulings.

The Department initially treats your request as one of a general information letter. If you would like the Department to issue a private letter ruling on the issues you raise, you can resubmit a request and fee in compliance with Department Rule 24-35-103.5. It is important to remember that general information letters, such as this one, are general discussions of tax law and are not a determination of the tax consequence of any particular action or inaction.

Issue

Are demand charges for the use of electricity subject to Colorado sales or use tax?

Background

Company was charged a demand charge for the ability to pull about 74,600 watts¹ of electricity at one time. Company was charged sales tax on the demand charge and believes sales tax should not apply.

Discussion

Colorado levies sales tax on the sale or use of tangible personal property, but not generally on the sale of services.² Although Colorado does not generally impose sales and use tax on services, electricity is a service that is subject to Colorado sales tax.³ A demand charge is a charge for using electricity in certain circumstances. For example, a utility may offer consumers a lower base rate for energy consumption but a higher rate if the consumer's energy consumption exceeds certain levels during specified periods (typically periods of peak demand). This is similar to a retailer who offers its goods or services at a lower price when demand for the goods or services is low and a higher price when there is higher demand for the goods and services. In either case, sales tax is imposed on the purchase price paid by the consumer.⁴ The same result applies to the demand charge. Regardless of the energy price structure, sales tax is imposed on the purchase price paid by the consumer.

There are two exemptions for electricity. There is an exemption for electricity used for residential purposes⁵ and an exemption for electricity used for "processing, manufacturing...construction...and industrial purposes".⁶ State administered local tax jurisdictions do not levy sales tax on sales of electricity for industrial use.⁷

However, non-industrial commercial uses are not exempt. For example, electricity used for indoor and outdoor lighting of office buildings, heating and cooling of commercial buildings, and other commercial uses that are not directly related to industrial use are subject to sales tax.⁸

¹ Company states that it operates a 100 horsepower electric motor. Department understands that one horsepower equals 746 watts.

² §§39-26-104(1)(a), and 202 C.R.S. You can view statutes on the Department's website at www.colorado.gov/revenue/tax >Tax Library > Statutes.

³ §39-26-104(1)(d.1), C.R.S.

⁴ Sales tax is calculated on the purchase price. 39-26-104(1)(a), C.R.S. The purchase price is the price paid by the consumer. 39-26-102(7)(a), C.R.S.

⁵ §39-26-715(1)(a)(II), C.R.S.

⁶ §39-26-102(21)(a), C.R.S. (Sales of electricity used for industrial purposes is deemed a wholesale sale, even when sold to the ultimate consumer.)

⁷ §29-2-105, C.R.S.

⁸ Department Special Rule SR 19 Gas and Electric Services.

Miscellaneous

This letter represents the good faith opinion of Department personnel who are knowledgeable on state taxes issues. However, the Department does not make a specific determination here on any of the issues raised and the Department is not bound by this general information letter.

The Department administers state and state-administered local sales and use taxes. This letter does not address sales and use taxes administered by home-rule cities and home-rule counties. You may wish to consult with local governments which administer their own sales or use taxes about the applicability of those taxes. Visit our web site at www.colorado.gov/revenue/tax for more information about state and local sales taxes.

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

Sincerely,

Neil L. Tillquist
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