



COLORADO
Department of Revenue

Taxation Division

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PLR-16-001

January 13, 2016

XXXXXXXXXXXXXXXXXX
Attn: XXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

Re: Electric Use

Dear XXXXXXXXXXXX,

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

Issue

1. Is the electric service used at Company's facilities subject to Colorado sales or use tax?
2. If Company's use of electric service is taxable, upon what basis should the tax be computed, given that none of the tangible personal property purchased by Company to produce the electric service is incorporated into the electric service as consumed?

Conclusion

The electric service used by Company at its facilities is not subject to Colorado sales or use tax because Company does not sell the electricity.

Background

Company is XXXXXXXXXXXXXXXXXXXX and consumes electricity XXXXXXXXXX for corporate support, general lighting, powering equipment, and computing at its facilities. Company uses an electric meter at each of its locations to measure the electric service consumed. Company pays tax on this consumption XXXXXXXXXXXXXXXXXXXXXXXXXXXX. Company's affiliates also consume electricity when employees of those companies are located in one of Company's facilities. In such situations, the affiliates do not make any payment for this use and Company does not sell electricity to the affiliates. Company has historically treated the electrical service consumed for its own business use as a taxable use of tangible personal property. In *Department of Revenue v Public Service Co.*, 330 P.3d 385 (Colo. 2014), the Colorado Supreme Court ruled that the sale of electricity is taxable as a service rather than taxable as tangible personal property.

Discussion

Colorado levies sales and use tax on the sale, use, storage, or consumption of tangible personal property.¹ Colorado generally does not impose sales tax on services, with the notable exceptions of gas and electric and steam services.² Specifically, Colorado levies a tax on "gas or electric service, whether furnished by municipal, public, or private corporations or enterprises, for gas and electricity furnished and sold for commercial consumption and not for resale."³ Department Regulation 1 CCR 201-4, 39-26-104(1)(d.1) further explains that,

Gas or electric service furnished within the state of Colorado is subject to the tax imposed by §39-26-106, C.R.S. whether furnished by public, private, mutual, cooperative, or governmental corporations or enterprises for commercial use. The tax attaches to all amounts paid by the user or consumer for gas or electric service, whether or not there is actual consumption, and regardless of the manner in which the payment is made.

As noted above, electric service is an enumerated service subject to sales tax.⁴ The requirements of the service are that 1) it be furnished and sold 2) for commercial consumption. There is no question that Company engages in some commercial activity and, thus, some consumption is commercial in nature.

The question at issue is whether XX. In order to incur a sales tax liability, there must be a "sale".⁵ Specifically, §39-26-102(10), C.R.S., states that "a 'sale' includes the sale or furnishing, of electrical energy, gas, steam, telephone, or telegraph services."

Department Regulation 1 CCR 201-4 39-26-102.10 defines a "sale" as:

...any transaction, except as provided in 26-102.7(b), whereby a person, in exchange for any consideration, such as money or its equivalent, property, the rendering of a service, or the promise of any of... perform[ing] or furnish[ing], or agrees to perform or furnish, or contracts to have another perform or furnish, any service taxable under this Act for *any other person*. Whether the transaction is absolute or conditional, it shall be considered a sale if it *transfers from a seller to a buyer* the ownership or possession of tangible personal property or specified services... (*emphasis added*)

A "sale," for sales and use tax purposes, requires a transaction between two separate legal entities. XXXXXXXXXXXXXXXXXXXXXXXXXXXX. Therefore, there is no sale XXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXX. In addition, Company XXXXXXXXXXXXXXXXXXXX. Furnish is generally understood to mean supplying or giving (something) to someone.⁶ Again, because XXXXXX XX, XXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXX. Therefore, there is no tax liability because there is no sale.

¹ See, generally, §§39-26-104(1) and 202, C.R.S.

² §§39-26-104(1)(c) and (d.1), C.R.S.

³ §39-26-104(1)(d.1), C.R.S.

⁴ *Ibid.*

⁵ §39-26-104, C.R.S.

⁶ "Furnish", *Merriam-Webster.com*. Retrieved January 29, 2015 from <http://www.merriam-webster.com/dictionary/furnish>.

A "sale" also requires that there be some form of consideration. Company represents that it does not to charge its affiliates for their consumption of electrical service by employees located in one of Company's facilities. Because there is no consideration paid, there is no sale and, thus, no tax liability.⁷

In addition to the energy consumed by affiliates, XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXX. Use tax is levied on the acquisition, use, storage or consumption of tangible personal property.⁸ Electricity is treated as the sale of a service and not the sale of tangible personal property.⁹ Therefore, Company is not liable for use tax on the electricity it consumes. More generally, use tax applies when the consumer acquires the taxable good at a retail sale. XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX. Therefore, use tax would not apply because there is no retail purchase of the electricity.

Our analysis is different with respect to electricity XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX. In this case, there is a sale between two separate entities and consideration is paid by Company to the third party XXXXXXXXXXXXXXXXXXXXXXXX. XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XX. Most of this electricity XXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXX and, therefore, Company XX XXXXXXXXXXXXXXXXXXXXXXXX. A XXXXXXXXXXXXXXXX portion of the XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX and Company must pay sales tax XX.¹⁰

Finally, Company's purchase and use of XX XXXXXXXX is an industrial use XXXXXXXXXXXXXXXXXXXXXXXX and is exempt from sales tax.¹¹

Miscellaneous

This ruling is premised on the assumption that 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.

This ruling is binding on the Department to the extent set forth in Department Regulation 24-35-103.5. It cannot be relied upon by any taxpayer other than the taxpayer to whom the ruling is made.

This ruling applies only to sales and use taxes administered by the Department. Please note that the Department administers state and state-collected city and county sales taxes and special district sales and use taxes, but does not administer sales and use taxes for self-collected home rule cities and counties. You may wish to consult with local

⁷ Department Regulation 1 CCR 201-4 39-26-102.10.
⁸ § 39-26-202(1)(b), C.R.S.
⁹ *Department of Revenue v. Public Service Company of Colorado*, 330 P.3d 385 (Colo. 2014). (Electric utility not entitled to manufacturing machinery exemption because the exemption applies only to machinery that manufactures tangible personal property and electricity is a service).
¹⁰ Company has offices and other assets XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX that consume electricity. Many of these may be relatively small consumers. The Department will accept any reasonable allocation that allocates at least some consumption to each of these various locations. Company will report the tax on line 10 of the Colorado sales tax return once a year.
¹¹ § 39-26-102(21), C.R.S.

governments which administer their own sales or use taxes about the applicability of those taxes. Visit our web site at www.colorado.gov/tax for more information about state and local sales 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,

Neil L. Tillquist
Colorado Department of Revenue
Office of Tax Policy Analysis

This ruling cannot be relied upon by any other taxpayer other than the taxpayer to whom the ruling is made.