

STATE OF COLORADO

DEPARTMENT OF REVENUE
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Bill Ritter, Jr.
Governor

Roxy Huber
Executive Director

XXXXXXXXXXXXX
Attn: XXXXXXXXX
XXXXXXXXXXXXX

February 28, 2008

Re: propane and propane tanks, prepaid phone cards

Dear XXXXXXXXX,

This letter is in response to your letter to the Colorado Department of Revenue, dated December 14, 2007, re: the taxability of prepaid cards, game cards, and other similar prepaid cards. You also ask about the taxability of propane and propane tanks used for home heating and cooking. I apologize for the delay in responding to your inquiries. As noted in our earlier correspondence to you, the department has limited resources and we have not been able to respond to these requests as quickly as we would like.

Issues

You have two groups of questions.

1. Does sales tax apply when a retailer:
 - a. sells a customer a pre-filled new propane tank, or
 - b. fills a tank owned by a customer, or
 - c. exchanges a newly filled tank for an empty tank from the customer?
2. Are sales of various types of prepaid cards for landline and cellular telephone, games, ring tones, music downloads, and Internet access, taxable?

Discussion

1. *Taxability of propane and propane tanks.*

Colorado exempts the sale of gas, including propane, used for residential purposes including home heating and cooking. §39-26-715, C.R.S. and Department regulation (39-)26-715.1. Home heating and cooking includes propane used in an outdoor grill and recreational vehicles.

Question 1(a). Propane tanks are tangible personal property and, as such, their sale or use is taxable. §39-26-104(1)(a), C.R.S. When a retailer sells new prefilled propane tank, sales tax is due and is calculated only on the price of the tank. However, if the prices of the tank and gas are not separately stated on the customer's invoice, sales tax is calculated on the entire purchase price. Although Colorado has an exemption for the sale of containers, it applies only when there is a wholesale sale. See discussion in response to Question 1(c), below.

Question 1(b). No sales or use tax due when a retailer fills a tank supplied by the customer if the propane is used for residential heating or cooking. See discussion below regarding documentation of exempt sales.

Question 1(c). No sales tax is due when a retailer exchanges a filled propane tank for an empty tank if the propane is used for residential heating or cooking. The retailer is considered the consumer of the tank, much like a dairyman is considered the consumer of a returnable milk crate used to deliver milk to customers, or the soft drink distributor is consider the consumer of returnable bottles used to sell its beverage. Typically, when a retailer is the consumer of goods, it must pay sales or use tax when it acquires the property. However, there is an exemption available to retailers who acquire from a distributor containers used by the distributor to ship tangible personal property to the retailer. §39-26-102(20)(a), C.R.S.; *Weed v. Department of Revenue*, 175 Colo. 509 488 P2d 877 (Colo. 1971). For example, if the retailer acquires from Supplier A pre-filled propane tanks which the retailer then exchanges for unfilled tanks from customers, then the retailer is not liable for sales or use tax on its purchase of the tanks (or of the propane) from the distributor. This exemption applies even if the tanks are returnable to the propane distributor for refilling. Any security deposit charged by either the distributor or the retailer for the return of the tank is also not taxable.

However, the retailer is liable for sales or use tax if it acquires unfilled propane tanks from a supplier. For example, if the retailer purchases unfilled tanks from Supplier A and purchases propane from Supplier B and the retailer then fills the tanks from its propane storage facility, the retailer must pay sales or use tax on its acquisition of the tanks from Supplier A. Tax is due because the exemption applies only when the propane distributor uses the tanks as part of its sale of the propane to the retailer.

Finally, I caution that a retailer must maintain appropriate records that establish that the sale of propane is an exempt sale for residential use. As is true of all exemptions, the sale of propane is presumed taxable and the retailer has the burden of establishing with competent, sufficient, and verifiable records that a sale is exempt. A retailer has not overcome the presumption simply on a showing that many of its customers are household consumers. For example, a hardware store retailer has not overcome the presumption simply by establishing that many of its customers are residential consumers. The department will accept written statements retained by the retailer and signed by customers affirming that the propane is for residential heating or cooking, unless the customer's name (e.g., a business name), the volume of propane purchased by the customer, the type of container filled, or other facts raise reasonable doubts about the veracity of the customer's statement.

2. *Taxability of Pre-Paid Cards.*

Although a prepaid card is tangible personal property, the true object of the sale to the consumer is the monetary value of the credit and not the card itself. Compare, *City of Boulder v. Leanin' Tree, Inc.* 72 P3d 361 (Colo. 2003) (transaction is non-taxable sale of a service or intangible even though it involves transfer of incidental tangible personal property). Prepaid cards are equivalent to a paper credit voucher or other similar document which represents an intangible contract right (i.e., credit). Much like a bank which issues a paper bank note or other credit voucher is considered the consumer, not the reseller, of the paper stock on which credit is printed, the retailer of a prepaid card is considered the consumer, not reseller, of the card stock on which the credit is issued. For this reason, the sale by a retailer to a customer of a prepaid card is a non-taxable sale of an intangible property right and the transfer of the credit card is only an incidental and non-taxable aspect of the transaction. See, also, Texas Policy Letter Ruling No. 200605591L, 05/17/2006; Arizona Private Taxpayer Ruling No. LR99-010; Florida Tax Information Publication No. 06(A)01-21.

Please note, however, that the prepaid card maker's purchase of the card stock from the card stock supplier is a taxable retail sale of tangible personal property. The prepaid card maker is the consumer of the card stock and the true object of that sale is the card stock itself. The subsequent sales by the prepaid card maker to retailers (and retailers' sales to consumers) are, as discussed above, not taxable because they are sales of intangible property (i.e., credit).

Finally, the retailer of the underlying product or service which is purchased by a consumer using the credit card (e.g., a telephone company providing telephone service to a consumer who pays for the service using the credit card) is responsible for collecting tax, if any, due from the consumer on the sale or use of such service or product.

Finally, the Department makes a good faith effort to provide accurate and complete answers to questions posed to it by taxpayers. However, the information and answers provided here are not binding on the Colorado Department of Revenue, nor do they replace, alter, or supersede Colorado law and regulations. The Executive Director, who by statute is the only person having authority to bind the Department, has not formally reviewed and/or approved this response.

Respectfully,

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