

STATE OF COLORADO

DEPARTMENT OF REVENUE
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Governor

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GIL-13-015

May 14, 2013

XXXXXXXXXXXXXXXXXX
ATTN: XXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

Re: Fees and Charges Applied to Utility Bills

Dear XXXXXXXXXX,

You submitted on behalf of XXXXXXXXXXXXX ("Company") a request for guidance to determine the applicability of Colorado sales and use tax on certain fees and charges applied to utility bills.

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 regulation 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 regulation 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 the enumerated fees and charges applied to utility bills subject to Colorado sales tax?

Background

Company is a supplier of tax compliance software for the telecommunication and utility industries and is inquiring about the application of sales tax on specific fees in connection to the sale of gas and electric utility services. The fees in questions are:

1. Connection Fee: A one-time fee assessed when a utility service is connected to a property.
2. Reconnection Fee: A fee assessed to reconnect a utility service after a customer has complied with conditions or obligations, such as payment of delinquent bills.
3. Disconnection Fee: A fee assessed to a customer who requests disconnection of a utility service for any variety of reasons.
4. Late Payment Fee: A fee assessed when a payment isn't received on or before its due date.
5. Returned Check Charge: A separately stated reimbursement fee assessed on customers whose check for payment for a utility service is returned by the bank due to insufficient funds in the customer's account.

Discussion

Colorado levies sales and use tax on gas service for commercial consumption.¹ Colorado exempts from such taxes the sale, use, storage or consumption of natural gas, including propane, used for residential purposes and sold to the occupants.² State-administered local tax jurisdictions have the option to tax such services.³ Tax is calculated on the purchase price paid by the consumer.⁴ Department regulation 39-26-104.1(d.1),⁵ which addresses the taxability of utility services, states:

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.

The Department does not have a regulation or publication that specifically addresses the connection fees and late payment fees outlined above. We note that, in some instances, a retailer provides non-taxable services in connection with the sale of taxable services. Non-taxable services that are "separable" from the sale of the taxable services are not included in the calculation of sales tax.⁶

It is not always easy to determine whether a service is "separable," but the Department will generally look to whether the consumer has a realistic alternative to forgo the service or to obtain the service from another party. For example, the cost to a utility company for reading gas meters as part of its taxable natural gas service is typically recovered in the price charged for natural gas service, and is not separable

¹ §39-26-104(1)(d.1), C.R.S.

² Colorado exempts "all sales and purchase of ...gas but not for resale, to occupants of residences, whether owned, leased, or rented by said occupants, for the purpose of operating residential fixtures and appliances that provide light, heat, and power for such residences...." 39-26-715(1)(a) (II) and (2)(c), C.R.S.

³ §29-2-105(1)(d), C.R.S.

⁴ §39-26-104(1)(a), C.R.S.

⁵ This regulation, as well as the statutes cited in this letter, can be viewed at <http://www.colorado.gov/revenue/tax> > Tax Library.

⁶ *AD Stores v Department of Revenue*, 19 P3d 680 (Colo. 2001)

from the sale of the utility service. The utility generally cannot avoid tax on this cost or other overhead costs by separately charging fees for such costs.

Connection Fee

A connection fee is presumably assessed for the service of physically connecting the utility equipment to the customer's premises and/or the service of administratively activating an account for a customer. In either case, the connection fee should be included in the sales tax calculation if the customer cannot otherwise obtain the taxable utility service but for the connection service (and fee).

Reconnection Fee

A reconnection fee is presumably assessed for the service of physically reconnecting the utility equipment to the customer's premises and/or the service of administratively activating an account after a customer has complied with conditions or obligations, such as payment of delinquent bills. The Department would likely view a reconnection fee in a similar manner as the connection fee.

Disconnection Fee

A disconnection fee is a fee for the service of physically disconnecting the utility service and/or the service of administratively closing an active account. The disconnection fee is presumably agreed upon at the beginning of a contract for the taxable utility service would not be provided but for the customer's agreement to the disconnection fee. As such, the Department would likely view this fee as part of the purchase price and included in the tax base.

Late Payment Fee and Returned Check Charge

Late payment fees and non-sufficient funds fees reflect the vendor's carrying cost of money and/or administrative cost for handling late payment or non-payment. To the extent that these charges reflect the cost of money, then they are not taxable. In Department Regulation 39-26-102.7(a)(4), we state that a finance charge is not part of the purchase price unless the amount is included in the principal amount of a promissory note. The finance charge reflects the financial cost to the retailer of lending credit to the buyer.

Late payment fees and non-sufficient fund fees may also reflect the cost to the retailer for administratively handling a late or non-payment. It is not clear that such fees are part of the provisioning of the taxable service and, therefore, the Department generally views such charges as not taxable if they are separately stated from the unpaid principal balance of the purchase price.⁷

⁷ Many states do not include late payment fees in the tax base. See, e.g., Iowa Admin. Code 701--16.50 (422, 423) ("The amount of any charge, commonly called a "late payment charge," imposed by a public utility on its customers, shall not be subject to tax if the charge is in addition to any charge for the utility's sale of its commodity or service and is imposed solely for the privilege of deferring payment of the purchase price of the commodity or service and furthermore is separately stated and reasonable in amount".); and Okla. Admin. Code 710:65-19-341 Natural or artificial gas and electric utility services, ("Charges which are separately stated and are unrelated to the amount of gas or

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,

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electricity used such as charges for returned checks or for late payment are not subject to sales tax.").