COLORADO
Department of Revenue
Taxation Division

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GIL-08-020

August 26, 2008

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Re: taxability of certain goods and services

Dear XXXXXXXXXXXXX,

This letter is in response to your letter, dated February 1, 2008 regarding the taxability of a variety of goods and services. I apologize that it has taken so long to reply to your request.

The Colorado Department of Revenue provides informational letters as a service to taxpayers. These letters represent the opinion of knowledgeable and experienced department staff and can be a valuable resource in making informed decisions regarding your tax obligations. However, these letters are not binding on the department. §24-35-103.5, C.R.S.

Issues
You ask if the following are taxable:

1. Restocking fees.
2. Travel and expenses charged by your vendor and passed on to your customers.
3. Training held on site at the customer's address.
4. Rental of equipment.

Discussion
Restocking Charges.
Sales tax is due on the sale of a tangible personal property. Because sales tax is a tax on a transaction, events that occur after the transaction generally do not relieve the seller or buyer from the obligation to pay, collect, and remit the tax. One exception to this rule is when the seller accepts the return of the goods and refunds the full purchase price and tax to the buyer. See, §39-26-102(5) ("The taxpayer may take credit … for an amount equal to the sales price of property returned by purchaser when the full purchase price thereof is refund whether by cash or credit."); DOR Regulation (39-) 26-102.5. Seller claims the credit on its next sales tax return by subtracting the full purchase price from the net taxable sales line on the return.

The department does not have a regulation expressly addressing restocking charges. States differ on how they treat these charges for tax purposes. Some states separate the refund into two transactions: the first transaction is the refund of the full purchase price and the second transaction a charge for the service of restocking the goods. Because the restocking service is not taxable, these states allow a refund of the full amount of tax paid on the original sale transaction. However, these states require the seller to distinguish between restocking charges that reflect the cost of repackaging and readying the property for resale (non-taxable restocking charges) from taxable "restocking charges," handling charges, or other similar fees that are charged to reflect the purchaser's use of the property, a repurchase of the property by the seller at a lower purchase price, or simply a policy to refund less than the full purchase price to discourage consumers from returning goods. Whether, and to what extent, "restocking charges" are assessed for any one or more of these reasons can be confusing, difficult to determine in an objective manner, and contentious. Finally, other states treat restocking charges as a reduction in the full purchase price and, therefore, either do not allow any tax refund (because the full purchase price was not refunded) or allow only a partial tax refund to the extent of the net purchase price refunded to the buyer (purchase price minus restocking fee).

In Colorado, a retailer is not entitled to any tax refund if it charges a restocking fee. This approach is appropriate for three reasons. First, the statute expressly states that the retailer must refund the "full" purchase price in order to receive a refund of the sales tax. The buyer who is charged a restocking fee is, in fact, receiving less than a full refund of the purchase price and, therefore, the express terms of the statute have not been met. The department assumes the legislature was deliberate in using term, "full" purchase price, to express its intentions. Had the legislature intended a more expansive refund policy allowing for partial refunds of tax, the language of subsection 102(5) would have been more general. Compare, Alabama Revenue Ruling 01-006, 07/03/2001.

Second, although some arguments have been made that there are actually two transactions taking place – the first being the refund of the full purchase price and the second being a new and separate transaction for the retailer's service of restocking - this is not the most natural or common understanding of the transaction. The refund is a single transaction in which the buyer returns the goods and the retailer refunds only a portion of the purchase price. In other words, the retailer does not first issue a full refund and then negotiate a separate transaction for restocking charges. Nor would creating a separate transaction render a different result. The refund of less than the full purchase price is inseparable from the restocking fee. The retailer does not agree to accept the return of the goods without also requiring as a condition of its refund that the buyer agree to pay the restocking fee. Moreover, the buyer receives no benefit from the second transaction, so cannot be considered to be entering into a second, separate, transaction.

Finally, this approach avoids the uncertainty and complexity otherwise encountered by both the taxpayer and department in determining whether, and to what extent, the restocking fee is truly a fee for the expense of restocking or, in fact, a fee for the buyer's use of the property, depreciation of the goods, or simply a reduction of the full purchase price.

Travel and Expenses

Your company apparently purchases tangible personal property from a vendor who charges you for travel and other expenses. You pass those charges on to your customers. More details regarding these transactions would be necessary in order to give any guidance, and

this guidance is likely to require a private letter ruling rather than a general information request. In general, however, charges for costs (whether directly incurred or incurred by third-parties) that are passed on to the ultimate consumer must be included in the calculation of tax. See, §39-26-102(12) ("[T]he sales tax imposed on the full purchase price of articles sold after manufacture or after having been made to order and includes the full purchase price for materials used and services performed in connection therewith,…"). Charges for services and other non-taxable items that are "separable" from the sale transaction are not included in the calculation of tax. *A.D. Stores v. Department of Revenue*, 997 P.2d 1241 (Colo.1999).

Training at customer's address

As is the case with travel and expenses, more information is necessary in order to provide specific guidance on the taxability of training. In addition, such guidance is likely to require a private letter ruling. In general, however, training is a service and, if separable and separated from the sale of taxable goods or services, is not taxable. *A.D. Stores v. Department of Revenue*, 997 P.2d 1241 (Colo.1999). For example, a retailer that sells machinery and, at the option of the customer, training for use of the equipment, should collect tax only on the charge for the equipment. However, if the retailer requires the customer to purchase the training as part of the sale of the equipment, then the charge for training must be included in the calculation of tax because the training is not separable from the sale of the equipment.

Rental of equipment

Rental of equipment is generally taxable. For leases that are for more than three-years in duration, the sales or use tax is assessed on each lease payment (as opposed to collected at the beginning of the lease). For leases that are three-years or less (short term leases), the retailer is considered the consumer of the goods and, therefore, must pay tax at the time the retailer acquires the property rather than on each lease payment. The retailer who enters into a short term lease with a customer can request permission from the department to acquire the property without paying tax and collect the tax from the customer on the lease payments. §39-26-102(23) and 713, C.R.S.

Exemptions that apply to the sale of goods also apply to the lease of goods. For example, the lease of equipment to a government entity is exempt from tax because government entities are exempt from sales tax when purchasing goods for government use. §39-26-704, C.R.S. The lease of certain therapeutic devices is exempt because the sale of such equipment is exempt from tax. §39-26-717, C.R.S. There are many other exemptions.

Please note that the Department of Revenue 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. Visit our web site at www.revenue.state.co.us for more information about state and local sales taxes.

Pursuant to state law, the Department will make public a redacted version of this letter. Your letter requesting this informational letter is not made public. See, §24-35-103.5(13), C.R.S. The regulation governing private letter rulings and informational letters is available on our web site at: http://www.revenue.state.co.us/taxstatutesregs/3921reg24-35-103.5.html. I enclose a proposed redacted version of this letter. Please contact me within 60 days from the date of this letter if you have any questions, comments or concerns about the redacted letter.

I hope this is helpful. Please feel free to contact me if you have any questions.

Sincerely,

Office of Tax Policy
Colorado Department of Revenue