



COLORADO

Department of Revenue

Taxation Division

Office of Tax Policy
P.O. Box 17087
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DOR_TaxPolicy@state.co.us

GIL-14-003

January 23, 2014

XXXXXXXXXXXXXX
ATTN: XXXXXXXXX

Re: Domestic Jet Fuel Used in International Flights

Dear XXXXXXXXXX,

You submitted on behalf of XXXXXXXXXX ("Company") a request for guidance to determine whether airlines that purchase domestic fuel for international flights will be eligible for a refund of the sales taxes paid.

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 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 airlines that purchase domestic fuel for international flights eligible for a refund of the sales taxes paid?

Background

Company makes the following representations. Bonded jet fuel, which originates from another country, enters into the United States through a free trade zone area under bond. Bonded jet fuel is considered foreign merchandise outside the authority of U.S. commerce unless it is sold for domestic use. Bonded jet fuel used in international flights is treated as exempt from Colorado sales taxes. However, no foreign crude oil is being imported into Denver International Airport and the fuel company at DIA de-bonded their fuel effective November 1, 2013. Therefore, there is no available bonded fuel for international flights.

Discussion

Fuel used in commercial aviation is exempt from Colorado excise tax.¹ Fuel that is exempt from excise tax is subject to sales tax.² In general, Colorado has authority to levy sales tax on sales that occur in Colorado.³ A sale occurs when either possession or ownership passes to the buyer.⁴ Company operates a commercial airline and has substantial physical presence in Colorado. The fuel is delivered to Company into the tanks of its aircraft in Colorado. Thus, based on the limited information we have, the sale of fuel occurs in Colorado.

Sales tax is a tax on transactions. Events that occur subsequent to the sale generally do not alter the sales tax liability created at the time of the transaction.⁵ For example, a buyer located in Colorado incurs sales tax liability if it takes possession or ownership in Colorado, even though the buyer later moves the goods outside Colorado or consumes the goods outside Colorado.⁶

There are two sales tax exemptions that are related to the issue you raise, but neither applies to the specific facts you have described. First, Colorado exempts transactions when the buyer takes delivery of the goods outside Colorado and uses the property outside Colorado.⁷ This does not appear to be the case in the facts you provided because Company takes possession of the fuel in Colorado.

Colorado also exempts property that the United States Constitution or federal law prohibits the state from taxing.⁸ For example, the Commerce Clause and Foreign Commerce Clause of the Constitution place restrictions on Colorado's authority to levy taxes on interstate and foreign commerce. However, neither of these prohibitions applies to the transactions at issue here. Courts have interpreted these clauses not to prohibit imposition of state sales taxes when the events that constitute the sale occur in the taxing state. For example, in *Shell Oil Company v Director of Revenue (Missouri)*, 732 S.W.2d 178 (Mo. 1987), the Missouri Supreme Court dismissed a claim by a fuel retailer who argued that the Commerce Clause prohibited states from levying sales tax on fuel sold to commercial airlines for interstate flights. The Court held that states have the right to tax transactions that occur within their boundaries and the sale and delivery of the fuel occurred in the taxing state. ("Since this Court has found the sale(s) to be intrastate in character, this challenge [base on the Commerce Clause] evaporates.")

¹ §39-27-102(1)(IV)(B), C.R.S. This statute, as well as department regulations and other publications, can be viewed at www.Colorado.org/revenue/tax > Taxes > Tax Library.

² §§39-26-104(1)(a) and 715(1)(a) (I), C.R.S.

³ §39-26-102(9), C.R.S. ("A retail sale includes all sales within the state ..."); 39-26-104(1)(a), C.R.S. (Sales tax is applied to all retail sales.)

⁴ Department Rule 39-26-102.10.

⁵ See, Department General Information Letter (GIL) 07-033 citing *Southern California Edison Co. v. State Board of Equalization*, 7 Cal 3d 652 102 Cal Rptr 766, 498 P2d 1014 (1972) (retailer not entitled to sales tax refund for a price adjustment made subsequent to sale and based on damages paid by retailer to purchaser). General information letters, regulations, and other department publications can be viewed at www.Colorado.gov/revenue/taxes > Tax Library.

⁶ See, Department rule 39-26-704.2(3) ("Sales of tangible personal property located within this state at the time of sale and delivered within this state are taxable, irrespective of the ultimate destination of the property sold, or where the parties to the contract of sale are located, or where the contract was made or accepted or the funds paid.")

⁷ See, Department Rule 39-26-704.2(4).

⁸ See, Department Rule 39-26-704.2(1).

Similarly, in *Wardair Can Inc. v. Florida Department of Revenue*, 477 US 1 (1986), the Supreme Court rejected a claim that the Foreign Commerce Clause and other federal law prohibited states from levying a sales tax on fuel used by commercial airlines for international flights.

For these reasons, Colorado sales tax applies to fuel sold in Colorado to commercial airlines even if the fuel is later used for international flights.

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,

Office of Tax Policy
Colorado Department of Revenue