



COLORADO
Department of Revenue
Taxation Division

Office of Tax Policy
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Denver, CO 80217-0087

DOR_TaxPolicy@state.co.us

GIL 18-011

July 18, 2018

XXXXXX
Attn: XXXXXX
XXXXXX
XXXXXX

Re: Sales Tax / Water / Vending Machines

Dear XXXXXX,

You submitted a request for guidance regarding the applicability of sales tax to water dispensed from a vending machine.

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, but 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 1 CCR 201-1, 24-35-103.5.

The Department treats this request as a general information letter. It is important to remember that general information letters, such as this one, are general discussions of tax law and are not binding on the Department. If Company would like the Department to issue a private letter ruling on the issue raised here, Company can submit a request and pay the fee in compliance with Department Rule 1 CCR 201-1, 24-35-103.5.

Issue

Is the sale of water and ice dispensed from a vending machine subject to sales or use tax?

Background

You state that you own a liquor store and bar that are located on the same property in a rural part of Colorado. You have a vending machine that dispenses

water and ice. The vending machine is not located inside either the store or bar but is located in the immediately adjacent area. You state the vending machine provides filtered water and ice to local residents.

Discussion

There are two general tax statutes related to the sale of water. The first makes a general distinction between the sale of water as tangible personal property, which is subject to sales and use tax, and the sale of water as a services, which is generally not subject to sales tax.¹ Department regulation 39-26-102.15 states that water delivered in “bottles, wagons, tanks or other containers” is considered the sale of tangible personal property. On the other hand, water sold from “pipes, conduits, ditches or reservoirs” is classified as the sale of a service.² For example, the sale of water by a public utility delivered through its water supply system to residential and commercial customers is considered the sale of service.

The distinction is that owning and operating a complex municipal and privately owned water systems, although providing tangible personal property to consumers, consists predominantly of the use and maintenance of a complex capital intensive enterprise. The substantial capital investment involved in creating and maintaining a municipal water system or ditch system distinguishes it from retail sales of smaller amounts of drinking water, whether pre-bottled or bottled by the customer.

In this case, the filtered water is offered for sale in discrete quantities that are more accurately classified under regulation 39-26-102.15 as the sale of tangible personal property.

We note that this regulation references water delivered in containers provided by the retailer and the water you provide is dispensed into containers provided by the customer. This distinction does not alter the result because the reference to containers in the regulation is more of a descriptive element intended to characterize a type of transaction in which water is more of a discrete unit as opposed to water provided as a public utility service.³

The second tax statute relevant to this issue is that which exempts the sale of “food”. Food sold from vending machines is exempt from tax. “Food” is defined as food and food products that qualify as food under the federal Supplemental

¹ §§ 39-26-104 and 204 C.R.S.

² Regulation 39-26-102.15.

³ For example, water sold from wagons is also treated as a sale of tangible personal property rather than the sale of a service. The Department acknowledges water sold from a reservoir, ditch, or in pipes is sold in units, such as acre feet or gallons. As in other areas of sales tax law, it is difficult to draw clear lines between transactions that are the sale of services and those transactions that are the sale of property.

Nutrition Assistance Program (SNAP).⁴ This program defines “food” to include bottled water sold for human consumption.⁵ As in the case of the Department’s regulation, the Department views this federal requirement of water in a bottle more as a descriptive element and not as a limitation that excludes water dispensed into containers that the customer provides. Thus, the sale of water dispensed from vending machines into containers provided by customers is properly classified as the sale of food and, therefore, exempt from tax.⁶

The application of tax to the sale of ice is the same as water. The sale of ice is clearly the sale of tangible personal property and not the sale of a service. The only question then is whether the sale of ice is exempt as the sale of food. The federal SNAP program treats the sale of crushed or block ice as food.⁷ Moreover, Special Regulation 23 states, “[i]ce sold for human, domestic home consumption is exempt from sales tax under 39-26-102(4.5), C.R.S.” You stated that the ice is sold to local residents. Ice from a vending machine is presumably for human consumption and, therefore, exempt from tax.

An important exception to the food exemption is the sale of food by restaurants, bars, and other similar establishments.⁸ Food, including water, sold by bars and restaurants is subject to tax. For example, water sold in a plastic bottle by a bar to customers is subject to tax. This exception is relevant because you indicated that the vending machine is located just outside the bar. There may be a factual issue of whether the ice and water are sold by the bar as opposed to a sale distinct from the bar business. This said, the fact that the water and ice are sold in bulk, are intended for offsite use, and the transaction is paid for through the vending machine and not in the bar all together suggests that these sales are separate from the bar business and, thus, not taxable.

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.

⁴ § 39-26-102(4.5), C.R.S.

⁵ “Is bottled water eligible for SNAP benefits?” FDA publication dated 7/8/2011, updated 3/15/2018 at https://asktheexpert.custhelp.com/app/answers/detail/a_id/5264. However, § 39-26-102(4.5), C.R.S. expressly excludes carbonated water sold in a container from the definition of food and, therefore, the sale is subject to tax. The Department assumes for purposes of this letter that the water at issue is not carbonated.

⁶ Food sold from vending machines is not subject to tax. § 39-26-714, C.R.S.

⁷ “Is crushed or block ice eligible for purchase with SNAP benefits?” FDA publication dated 7/8/2011, updated 3/15/2018 at https://asktheexpert.custhelp.com/app/answers/detail/a_id/5263.

⁸ § 39-26-104(1)(e), C.R.S.

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/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