



COLORADO

Department of Revenue

Taxation Division

Office of Tax Policy
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PLR 23-001

January 13, 2023

XXXXXXXXXX
XXXXXXXXXX
XXXXXXXXXX
XXXXXXXXXX

Via Electronic Mail: XXXXXXXXXXX

Re: Sales of tangible personal property to a construction contractor who holds a contractor's exempt certificate (DR 0163).

Dear XXXXXXXXXXX:

You submitted a request for a private letter ruling on behalf of XXXXXXXXXXX (the "Company"), regarding sales of grass seed, erosion control blankets, and fertilizer to a construction contractor, to the Colorado Department of Revenue ("Department") pursuant to 1 CCR 201-1, Rule 24-35-103.5. This letter is the Department's private letter ruling. This ruling is binding on the Department to the extent set forth in 1 CCR 201-1, Rule 24-35-103.5. It cannot be relied upon by any taxpayer other than the taxpayer to whom the ruling is made.

Issue

1. Whether sales of grass seed are exempt from sales tax as construction and building materials if the sale is made to a construction contractor who provides Company with a current contractor's exempt certificate (DR 0163).
2. Whether sales of erosion control blankets are exempt from sales tax as construction and building materials if the sale is made to a construction contractor who provides Company with a current contractor's exempt certificate (DR 0163).
3. Whether sales of fertilizer are exempt from sales tax as construction and building materials if the sale is made to a construction contractor who provides Company with a current contractor's exempt certificate (DR 0163).

Conclusions

1. Yes, sales of grass seed are exempt from sales tax as construction and building materials if the sale is made to a construction contractor who provides Company with a current contractor's exempt certificate (DR 0163).

2. Yes, sales of erosion control blankets are exempt from sales tax as construction and building materials if the sale is made to a construction contractor who provides Company with a current contractor's exempt certificate (DR 0163).

3. No, sales of fertilizer are not exempt from sales tax as construction and building materials if the sale is made to a construction contractor who provides Company with a current contractor's exempt certificate (DR 0163).

Background¹

Company is a retailer that sells grass seed, erosion control blankets, and fertilizer. On occasion, Company sells those products to construction contractors who present Company with a current Contractor's Exempt Certificate (DR 0163). Company works with customers to select the right grass seed mixture based on the job site's region and growing conditions. Company's erosion control blankets are large open-weave blankets made from a combination of synthetic and biodegradable materials such as coconut and straw. Company offers a range of high-performance fertilizers which are mixed with existing topsoil to enrich the soil, assist with moisture retention, and improve growing conditions for vegetation.

Discussion

Unless a specific exemption applies, Colorado generally imposes a sales tax on retail sales of tangible personal property. The term "tangible personal property" means "corporeal personal property," and generally embraces all goods, wares, merchandise, products and commodities, and all tangible or corporeal things and substances that are dealt in and capable of being possessed and exchanged.² Tangible personal property does not include property that loses its identity when it becomes an integral and inseparable part of the realty and is removable only with substantial damage to the premises.³

For sales and use tax purposes, contractors are regarded as retail purchasers of the tangible personal property they will build into realty pursuant to a construction contract.⁴ This means they must pay sales and use taxes on their acquisition of such property. However, Colorado exempts the sales and use of construction and building materials to contractors and subcontractors for use in the building, erection, alteration, or repair of structures, highways, roads, streets, and other public works owned and used by:

- (a) The United States government, the state of Colorado, its departments and institutions, and the political subdivisions thereof in their governmental capacities only;

¹ Paragraph (4)(b)(ii) of 1 CCR 201-1, Rule 24-35-103.5 requires the request for a private letter ruling to include a statement of facts. This section generally recites the statement of facts provided in the request, which is not an indication that the Department found such facts relevant to its analysis. Some relevant facts may be omitted to ensure confidentiality as required by section 24-35-103.5(5), C.R.S. The terms used in this section to describe the factual background are generally those of the requester.

² Section 39-26-102(15)(a)(I), C.R.S.

³ Paragraph (2)(a) of 1 CCR 201-4, Rule 39-26-102(15).

⁴ Paragraph (2) of 1 CCR 201-5, Special Rule 10.

(b) Charitable organizations in the conduct of their regular charitable functions and activities; or

(c) Schools, other than schools held or conducted for private or corporate profit.⁵

To facilitate this exemption, the Department issues contractors a certificate of exemption indicating that the contractor's purchase of construction or building materials is for a purpose stated above and is, therefore, exempt from sales or use tax.⁶ The Department provides a form to apply for an exemption certificate and has the authority to verify that the contractor is entitled to the issuance of the certificate.⁷ A retailer may rely on the exemption certificate and not charge sales tax on the construction and building materials when the exemption certificate is presented at the time of purchase.⁸

The phrase "construction and building materials" is not defined in statute or rule. Because the exemption applies to materials used to build structures or public works, the Court of Appeals has explained that the plain meaning of the phrase "construction and building materials" suggests that the materials must lose their identity and become a permanent part of the realty.⁹ The Court of Appeals' analysis is consistent with the Department rule that products that become an integral and inseparable part of the realty and are removable only with substantial damage to the premises lose their identity as tangible personal property.¹⁰

While the exemption has generally applied to the purchase of materials such as wood, cement, concrete, metals, bricks, and clay used in the construction of buildings, the construction of structures, roadways, and other public works contemplated in the exemption can include landscaped areas. Landscape construction generally involves altering the land to make it visibly functional; for example, flattening it, improving drainage for erosion control, or enhancing the overall aesthetic of the property by installing vegetation. Landscaped areas are constructed using components like those sold by Company: grass seed and erosion control blankets, which, similar to wood or metal, become a permanent part of the realty. Therefore, Company's sales of grass seed and erosion control blankets are exempt from sales tax as construction and building materials if the sale is made to a construction contractor who provides Company with a current contractor's exempt certificate.

However, landscape construction does not generally include regular maintenance of the landscaped areas after construction. Landscape maintenance includes applying fertilizer, a substance that is added to soil to improve the growth of vegetation. Because fertilizer does not contribute to landscape construction, but instead is a part of landscape maintenance, Company's sales of fertilizer are not exempt from sales tax as construction and building materials if the sale is made to a construction contractor who provides Company with a current contractor's exempt certificate.

⁵ Section 39-26-708(1) and (2), C.R.S.

⁶ Section 39-26-708(3), C.R.S.

⁷ To obtain an exemption certificate for each tax-exempt construction project, the contractor must complete and submit the Contractor Application for Exemption Certificate (DR 0172) to the Department of Revenue.

⁸ See 1 CCR 201-4, Rule 39-26-105-3, for rules regarding documenting exempt sales.

⁹ *Bd. of Cnty. Comm'rs of the Cnty. of Rio Blanco v. ExxonMobil*, 192 P.3d 582, 587 (Colo. App. 2008).

¹⁰ See Paragraph (2)(a) of 1 CCR 201-4, Rule 39-26-102(15).

Miscellaneous

This ruling is premised on the assumption that Company has completely and accurately disclosed all material facts, that all representations are true and complete, and that Company has otherwise complied with the requirements of section 24-35-103.5, C.R.S., and the rules promulgated pursuant thereto. The Department reserves the right, among others, to independently evaluate Company's facts, representations, and assumptions. The ruling is null and void if any such fact, representation, or assumption is incorrect and has a material bearing on the conclusions reached in this ruling. This ruling is binding on the Department and is subject to modification or revocation, in accordance with 1 CCR 201-1, Rule 24-35-103.5.

The Department administers state and state-administered local sales and use taxes. This letter does not address sales and use taxes administered by self-collected home-rule cities. You may wish to consult with those local governments that administer their own sales or use taxes about the applicability of those taxes. Visit our website at tax.colorado.gov for more information about state and local sales taxes.

Thank you for your request.

Sincerely,

Office of Tax Policy
Colorado Department of Revenue

This ruling cannot be relied upon by any other taxpayer other than the taxpayer to whom the ruling is made.