



# COLORADO

Department of Revenue

Taxation Division

Office of Tax Policy  
P.O. Box 17087  
Denver, CO 80217-0087

dor\_taxpolicy@state.co.us

PLR 23-006

December 1, 2023

XXXXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXX

Via Electronic Mail: XXXXXXXXXXXXXXXX

Re: Sales or Use Taxation of Subscription-based Membership

Dear XXXXXXXXXXXXXXXX:

You submitted a request for a private letter ruling on behalf of XXXXXXXXXXXX (“Company”), regarding the sales or use taxation of subscription-based membership, 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

Whether the fee that Company charges for a subscription-based membership, the primary benefit of which is to provide the purchaser with free delivery on future orders that meet specific conditions, is subject to state sales or use tax.

### Conclusion

No, the fee that Company charges for a subscription-based membership, the primary benefit of which is to provide the purchaser with free delivery on future orders that meet specific conditions, is not subject to state sales or use tax.

### Background<sup>1</sup>

Company operates an online marketplace that connects purchasers with third-party retailers that sell goods (“Retailers”) and independent third parties that provide delivery and related services (“Couriers”). Company also processes the payment for the transactions associated with

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<sup>1</sup> 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.

these orders. Company's marketplace can be accessed through its website or through its app (together "Marketplace"). Company is headquartered and incorporated outside the state.

As part of the operation of its online marketplace, Company enters into agreements with retailers in Colorado and throughout the United States to allow retailers to list their products for sale to purchasers on its Marketplace. Purchasers can browse Company's online Marketplace for products available for sale by retailers and can select items to purchase from Retailers that will be picked, packed, and delivered by third-party Couriers.

Company charges purchasers who buy items on the Marketplace a delivery fee for the delivery by couriers of any goods and for any related services ("Delivery Fee"). The Delivery Fee is charged to the purchaser as a separately stated fee that can vary based on order price and time of delivery.

In addition to the Delivery Fee, Company charges purchasers a separately stated service fee ("Service Fee") for the fulfilling and handling of the order and a busy pricing fee during peak delivery hours ("Busy Pricing Fee"). The Service Fee is treated as a handling fee because it covers the cost of fulfilling the purchaser's order.

In lieu of delivery, purchasers may also make purchases on the Company's Marketplace and select a pick-up option for many Retailers. In these cases, Company may charge a small pick-up fee for the ordered items to be picked and packed for the purchaser. The Company's website specifically states that there are pick-up options for purchasers.

Purchasers also have the option to sign up for an annual or monthly delivery Membership whereby purchasers are charged a one-time annual (\$XX.XX) or monthly (\$X.XX) flat fee in exchange for unlimited delivery of goods purchased from retailers through the marketplace ("Membership"). Purchasers do not need a Membership to shop with Company. Membership purchasers enjoy the following benefits on every order across the United States:

- Unlimited free delivery for all orders above \$XX;
- 5% credit back on eligible pickup orders;
- No pickup or Service Fees for pickup orders;
- Reduced Service Fees on every order; and
- No Busy Pricing Fees during peak delivery hours.

For non-Membership purchasers, Delivery Fees typically start at \$X.XX per order. In addition, Membership purchasers who place an order below \$XX are still charged a Delivery Fee.

## Discussion

Colorado imposes a sales tax on retail sales of tangible personal property.<sup>2</sup> Colorado does not tax services, except for certain services specifically included in statute.<sup>3</sup> Transportation services, including delivery, are not among the services explicitly subject to tax. Additionally, charges for

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<sup>2</sup> Section 39-26-104(1)(a), C.R.S

<sup>3</sup> *A.D. Store Co., Inc. v. Executive Dir. of Dept. of Rev.*, 19 P.3d 680 (Colo. 2001)

transportation services are not subject to tax if they are separable from the sales transaction and stated separately on a written invoice or contract.<sup>4</sup> Services are generally “separable” when the nature of the service remains the same whether contracted for at the time of purchase or at a later date, and when the service can be contracted for at the initial purchase or at a later time.<sup>5</sup> Charges for transportation services are separable from the sales transaction if they are performed after the taxable property is offered for sale and the seller allows the purchaser the option either to use the seller’s transportation services or use alternative transportation services.<sup>6</sup> Services are “separately stated” if the fees are listed separately in a written sales contract, retailer’s invoice, or other written document issued in connection with the sale.<sup>7</sup>

Company charges purchasers who buy items on its marketplace several fees, including a Delivery Fee, a Service Fee, and, on some orders, a Busy Pricing Fee. Company offers an optional Membership that primarily provides unlimited free deliveries on certain orders and secondarily reduces the service fee or busy pricing fee. The Membership is not required to shop with the Company and can be purchased at any time. As stated in the background section, the primary benefit of the Membership is unlimited free deliveries on certain orders. Company’s delivery service functionally remains the same for Membership subscribers and non-subscribers alike, with the time and method in which the delivery services are paid for being the only substantial difference. Because the nature of the delivery and other services provided in exchange for the Membership remains the same whether contracted for at the time of purchase or at a later date and the services can be contracted for at the time of the customer’s initial purchase or at a later time, and because the Membership is invoiced separately on either a monthly or yearly basis, the fee for the Membership is both separable and separately stated and is not subject to state sales or use tax.

### **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](http://tax.colorado.gov) for more information about

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<sup>4</sup> Paragraph (1) of 1 CCR 201-5, Special Rule 18.

<sup>5</sup> *A.D. Store Co., Inc. v. Executive Dir. of Dept. of Rev.*, 19 P.3d 680, 684 (Colo. 2001); see also paragraph (1)(b) of 1 CCR 201-5, Special Rule 18.

<sup>6</sup> Paragraph (1)(b) of 1 CCR 201-5, Special Rule 18.

<sup>7</sup> Paragraph (1)(c) of 1 CCR 201-5, Special Rule 18.

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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.**