

STATE OF COLORADO

DEPARTMENT OF REVENUE

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Bill Ritter, Jr.
Governor

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Executive Director

GIL-2008-033

December 29, 2008

XXXXXXXXXXXXXXXXXX
Attn: XXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

Re: XXXXXXXXXXXXXXXXXXXX

Dear XXXXXXXXX,

Your firm represents XXXXXXXXXXXXXX ("Taxpayer") which requests a determination regarding the applicability of sales tax to the sale of furniture and other tangible personal property. The Department issues both general information letters and private letter rulings. General information letters provide general guidance on tax issues and are not binding on the department. Private letter rulings typically address the applicability of tax to a specific set of facts, are binding on the department, and require payment of a fee. For more information about letters and rulings, please see Department Regulation 24-35-103.5, which you can view on our web site at:

www.revenue.state.co.us and go to Taxation>Resources/Publication>Regulations

Your request does not conform to the requirements for private letter ruling request. I will initially treat your request as one for a general information letter. However, please let me know if you would like to resubmit this as a private letter ruling request.

Issue

Is the sale of furniture and other tangible personal property purchased by a condominium developer subject to sales tax even though the developer paid sales tax when it purchased the furniture?

Background

You represent on behalf of your client the following facts. Taxpayer is a developer and builder engaged in the construction and sale of condominiums. It does not hold a

retailer's sales tax license issued by the Department. Taxpayer has constructed 65 condominium units in a resort town located in Colorado. Taxpayer states that it has been authorized by the Colorado Real Estate Commission to sell up to XXX fractional interests in these condominiums. Any of the condominium units can be placed into a resort trading network through Resort Condominiums International, Inc. The local city ordinance allows these units to be rented nightly. Taxpayer purchased furniture and other tangible personal property (furnishings") to furnish the condominiums prior to sale to fractional interest owners. Taxpayer sells the furnishings to the interest owners as part of the purchase of the real property. Taxpayer pays sales tax when it purchases the furnishing, but does not collect sales tax from fractional interest owners when it sells the fractional interests. Taxpayer does not issue a separate bill of sale for the furnishings.

Although not particularly clear in your letter, we assume that either or both the fractional interest owners and Taxpayer rent condominium units in which they have an interest to third-parties.

Discussion

Taxpayer has been previously advised by the Department that it owes sales tax relating to the furnishings. Taxpayer believes it does not owe the tax and asks for a "determination" to that effect. The department does not issue determinations except in resolution of a protest of an assessment or of a rejection of a refund claim. See, generally, §39-21-103, et seq, C.R.S. Taxpayer's letter is not a protest of either an assessment or of a rejection of a refund claim. This letter does not constitute a determination within the meaning of §39-21-103 or 104, C.R.S.

Taxpayer posits three arguments. It asserts that Department Regulation (39)26-102.15, which exempts from tax property that has no intrinsic value, applies because Taxpayer has not charged a mark up for the furnishings and the furnishings have not increased in value from the time it purchased the furnishing to the time of sale to fractional interest owners. Taxpayer further argues that Colorado Revenue Determination No. 81, in which the Department determined that a hotel's purchase of furniture was not an exempt wholesale purchase because the hotel was the providing a service and that the renting of rooms to guest was not a rental of the furnishing, applies to its circumstances. Finally, Taxpayer argues that applying sales tax to the sale to fractional interest owners is double taxation and, therefore, prohibited.

The sale of tangible personal property in Colorado is generally subject to sales tax. See, §39-26-104, C.R.S. Purchases made by a retailer who, at the time of the purchase, intends to resell the goods are exempt wholesale purchases. See, §39-26-104 (sales tax applies to sales at "retail"); §39-26-102(9) (wholesale sales are not retail sales). See, also, Department FYI Sales 1 for a discussion of how to document an exempt wholesale purchase. If Taxpayer believes that it erroneously paid sales tax to its suppliers, it may submit a claim for refund. See, Department Form DR 0137. In general, an entity that purchases goods for resale must obtain a retailer's sales tax

license from the Department. See, Department Form DR 100 (Business Registration Form).

Taxpayer's reliance on regulation (39)26-102.15 is misplaced. Unlike income tax which is computed on the gain of a sale, sales tax is computed on the purchase price and it is irrelevant whether the retailer has marked up the goods or the value or price of the goods has not increased after it was purchased by the retailer. §39-26-104(1)(a) (sales tax on the purchase price paid) and §39-26-102(7)(a) (purchase price is the price to the consumer); compare, e.g. Texas Comptroller's Decision No. 16,448, 11/12/1985 (sales tax due regardless of whether retailer makes a profit on sale).

Colorado Revenue Determination No. 81 is also clearly inapposite in cases where the units are not rented. A hotel is providing a service and, as such, is deemed the consumer of the furnishings used to provide that service. In contrast, an owner of real property who sells furnishings together with the real property is not providing a service, but, rather, is a retailer of tangible personal property. Compare, *Telluride Resort and Spa, L.P. v. Colorado Department of Revenue*, 40 P3d 1260 (Colo.2002).

A taxpayer may make a tax exempt wholesale purchase of tangible personal property from suppliers if the taxpayer, at the time of such purchase, intends to rent the personal property to third parties. However, if the taxpayer, prior to the resale, uses the item, then the taxpayer is liable for use tax, which is computed on the purchase price paid to its supplier. For example, a retailer who makes a tax exempt wholesale purchase of furnishings with the intent to resell the furnishings, but later, prior to such sale, rents the unit with the furnishings, taxpayer has used the furnishings and is liable for use tax calculated on the purchase price paid to the supplier. Please also note that the rental of living accommodations for less than thirty consecutive days is subject to sales tax. See, §39-26-104(f), 102(11), and 704(3) C.R.S. County lodging tax and local marketing district taxes, if any, apply to the rental of accommodations.

If, after the taxpayer rents the condominium unit, taxpayer then sells the unit to a fractional interest owner, the sale of the fractional interest in the furnishings is subject to sales tax, regardless of whether taxpayer has previously paid sales or use tax on such furnishings. Taxpayer's taxable use of the furnishing to provide living accommodations (and furnishings) for rent is a separate taxable transaction from the subsequent sale of the furnishing to fractional owners and does not constitute impermissible double taxation. See, e.g., *American Multi-Cinema, Inc. v. City of Westminster and Susan S. Stubbs, as Finance Director for the City of Westminster.*, 910 P2d 64 (Colo.1995); *A.B. Hirschfeld Press, Inc. v. The City and County of Denver, et al*, 806 P2d 917 (Colo. 1991).

Miscellaneous Matters

Please note that the department does not collect sales and use taxes for “home-rule” cities and counties. You can find a list of these jurisdictions by visiting our web site at:

www.revenue.state.co.us (go to Taxation > Forms > Businesses > Sales and Use > DRP 1002)

Contact those governments for information about their taxes.

This general information letter represents the advice of experienced members of the Department’s staff. However, it is not binding on the department. Enclosed is a redacted version of this ruling. Pursuant to statute and regulation, this redacted version of the ruling 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 version of the ruling.

Sincerely,

Neil L. Tillquist
Colorado Department of Revenue
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