

STATE OF COLORADO

DEPARTMENT OF REVENUE

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John Hickenlooper
Governor

Roxanne Huber
Executive Director

GIL-11-003

April 5, 2011

XXXXXXXXXXXXXX
ATTN: XXXXXXXX
XXXXXXXXXXXXXX
XXXXXXXXXXXXXX

Re: Taxability of Administrative Fees / Sales Tax

Dear XXXXXXXX,

You submitted on behalf of XXXXXXXXXXXXXXXXXXXX ("Auctioneer") a request for guidance on the application of sales tax to administrative fees. The 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 the taxpayer, and requires payment of a fee. For more information about general information letters and private letter rulings, please see Department regulation 24-35-103.5 at www.taxcolorado.org > FYI/Publication > Rulings.

The department initially treats your request as one for 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 regulation 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

Is sales tax applicable to administrative fees, which are stated separately on a buyer's invoices?

Background

Auctioneer conducts the sale of new and used tangible personal property, of which regularly consists industrial equipment, motor vehicles, agricultural equipment, in addition to other tangible personal property. Auctioneer does not hold the title to the property at any point. Rather, the owner of the property cosigns the property to Auctioneer for auction. Auctioneer acts as the selling agent and acquires a power of attorney to carry out title transfers and

registrations. Once the auction is complete, the buyer tenders payment to Auctioneer. Auctioneer deducts its fee from the proceeds and remits the balance to the owner. In some cases, Auctioneer has tangible personal property they sell in their own name.

Auctioneer is considering implementing a fee structure to compensate for value-added services provided to purchasers. Some of these value-added services included: referrals to shipping, financing, insurance and extended warranty vendors; opportunity for purchasers to inspect auction items on the internet or at auction site; guarantee of clear titles to purchasers or a full refund; access to Wi-Fi during auction; assistance loading property into purchaser's vehicle; streamlining buyer registration by providing ID cards; and access to a 21 language website that offers an auction calendar, equipment inventory and specifications including high resolution photos, on-line bidding, historical auction results and shipping arrangements. To compensate for these services, Auctioneer will charge an administrative fee of 10 percent on the final selling price for items sold at \$2,500 or less or 2.5 percent administrative fee on the final selling price for items sold at \$2,500 or greater, up to a maximum of \$950 per item purchased.

Discussion

Colorado imposes sale and use tax on the sale and use, storage, or consumption of tangible personal property. §39-26-104(10)(a), C.R.S. With certain exceptions not relevant here, Colorado does not levy tax on the sale of services. However, nearly all sales of taxable tangible personal property have some type of labor and overhead cost components. For example, retailer typically employs sales staff who provide services to customers by assisting customers with their purchases. Retailers may also provide customers parking, an in-store Internet kiosk from which to place orders, and other services and amenities that customers may find useful. Retailers recover these labor and overhead costs in the price of the goods sold. These costs generally are an inseparable part of the sales price and the retailer cannot exclude them from the sales tax calculation by separately charging for them on an invoice.

However, not all charges made in connection with the sale of taxable goods are included in the sales tax calculation. In *AD Stores v Department of Revenue*, 19 P.3d 680 (Colo. 2001), the Colorado Supreme Court held that charges for dress alteration are "separable" from the sale of a finished dress and, therefore, are excluded in the sales tax calculation. One of the principal factors the department considers when evaluating whether a service is "separable" is whether the buyer has the option to obtain the goods without also purchasing the service. Auctioneer fees, such as those you have described, are generally not optional and are typically viewed as inseparable from the sales transaction. As such, these fees are included in the sales tax calculation.

The majority of other states we reviewed follow a similar approach. See, for example, California Sales Tax Counsel Ruling 3/16/88 No. 115.0010 (Auctioneer's 10% "buyer premium," which is added to the purchase price, is included in the sales tax calculation); Illinois Private Letter Ruling No. ST 92-0576-PLR, 11/12/1992 (Auctioneer's 10% "buyer premium," which is considered service fee or cost of doing business, is included in the sales tax calculation); Texas Policy Letter Ruling No. 9003L0996A11, 03/30/1990 (Auctioneer's 2%

- 10% "buyer's fee" is included in sales tax calculation); Minnesota Sales Tax Newsletter 12/01/2002 No. 62 (Auctioneer's premium charge is similar to a commission and increases the sales price of the item making it part of the sales price and is subject to sales tax).

Miscellaneous

Pursuant to state law and department regulation 24-35-103.5, noted above, the Department will make public a redacted version of this letter. Your letter requesting this general information letter is not made public. I enclose a proposed redacted version of this letter. Please contact me within 60 days from the date of this letter if you have any questions, comments, or objection concerning the redacted letter.

I hope this is helpful. Please feel free to contact me if you have any questions.

Sincerely,

Neil L. Tillquist
Colorado Department of Revenue