



COLORADO
Department of Revenue

Taxation Division
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GIL-15-003

January 27, 2015

XXXXXXXXXXXXXXXXX
Attn: XXXXXXXXXXXXX
XXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXX

Re: Cloud Service Plans

Dear XXXXXXXXXXXX,

You submitted on behalf of XXXXXXXXXXXX ("Company") a request for guidance to determine whether Colorado sales or use tax is applicable to cloud service plans.

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 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 on the taxpayer, and requires payment of a fee. For more information about general information letters and private letter rulings, please see Department Rule 24-35-103.5 at www.colorado.gov/revenue/tax > Tax Library > Rulings.

The Department initially treats your request as one of 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 Department Rule 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

Are Company's charges for cloud service plans subject to Colorado sales or use tax?

Background

Company manufactures solar-powered wireless cameras. Company also sells cloud service plans that allow customers to send and view photos on the camera by accessing Company's website. The cloud service relies on a mobile telecommunications carrier to

transmit the data from the customer's camera to Company's servers. Company sells two types of plans. The first plan is a Wi-Fi enabled cloud service using the customer's Wi-Fi network to transmit images from the camera to Company's cloud storage. The second type of plan is a cellular network cloud service using the cellular phone service to transmit images from the camera to Company's cloud. Company asserts that it purchases a cellular phone data plan from a cellular phone company and resells the data plan to the customer as part of the cloud service package. The cellular data plan is considered machine-to-machine and there is no voice service with the plan. The cellular company does not charge Company sales tax on charge for the data plans.

Discussion

A customer's use of Company's cloud storage to store and view images raises the question of whether the software, service, or servers are subject to Colorado sales tax. Colorado does not levy sales or use tax on the sale or use of computer software used by application service providers.¹ An application service provider means an entity that retains custody over or hosts computer software for the use by third parties. Although we do not decide the issue here, it appears likely that Company is an application service provider. Therefore, the Department would treat the customer's use of Company's computer software as a non-taxable charge. To the extent the charge is for use of the Company's servers, the Department would likely not assert that the customers are engaged in the a taxable rental of Company's servers if control over the servers primarily rests with Company. Even if this was a taxable rental of such servers, the Department would likely not assert that there was a taxable use in Colorado if the servers are located outside Colorado.

Colorado does not impose sales tax on most services, with the notable exception of intrastate telephone and telegraph services.² Company's cloud service raises the possibility that Company may be the "provider" of intrastate telephone and telegraph services. Company uses a cellular telephone service to transmit the data from the customer's camera to Company's servers. Colorado's tax on intrastate telephone and telegraph services is levied on "telephone and telegraph services, whether furnished by public or private corporations or enterprises for all intrastate telephone and telegraph... service."³ Department Regulation (39)26-104.1(c)(l)(a) defines telephone and telegraph services to include, but not be limited to:

On or after August 1, 2002, all telephone and telegraph services except those services defined as mobile telecommunications services under 4 United States Code section 124(7), which are intrastate telephone and telegraph service are subject to the tax imposed by C.R.S. 39-26-106, whether furnished by public, private, mutual, cooperative, or governmental corporations or agencies. The term "service" includes but is not limited to additional listings, joint-user service, non-talking circuits, leased circuits and facilities, local exchange service (whether on a flat or measured basis), information charges, service connection charges, and any other charges assessed or passed on to the consumer with the exception of

¹ §39-26-102(15)(c), C.R.S.

² §39-26-104(1)(c), C.R.S.

³ Ibid.

charges for installation or repair which are taxed according to the Special Regulation on Contractors. Telephone service is taxable whether either local or toll calls are made or telegrams are sent from telephone pay stations.

There is some debate about whether data service provided by mobile telecommunication providers constitutes telephone or telegraph service. However, the Department has for many years defined intrastate telephone service to include non-talking circuits. Therefore, the Department would likely view charges for data plans by mobile telecommunication providers as telephone service. If the transmission pathway involves both intrastate and interstate telephone service and the charge for the intrastate service is not separately stated, then the entire charge is subject to sales tax.

Company represents that it purchases the telephone service for resale. An entity is considered a telecommunications services reseller if it (1) incorporates purchased telecommunications and (2) the entity can be reasonably expected to contribute to the Universal Services Fund ("USF") from those offerings. There is an exemption to this requirement if the reseller is a *de minimis* telecommunications provider or if it is a system aggregator. A provider meets the *de minimis* requirement if they are not a common carrier and would provide less than \$10,000 to the USF. All providers of telecommunications services, including wholesalers and resellers, are required to file a Form 499-A. Additionally, the reseller must provide the wholesaler with a sign annual certification of its reseller status, and the wholesaler must file this annual certification with its own Form 499-A. If Company does file FCC Form 499-A or is not considered a *de minimis* telecommunications provider, the Department will likely view Company's purchase of the data plans from a mobile telecommunications provider as a taxable retail sale in which Company is the user and consumer of the data plans in delivering the service to their customers.

Finally, the Department would likely not view the charge for cloud Wi-Fi as a charge for intrastate telephone or telegraph service. The transmission from the camera to the customer's Wi-Fi network is not a transmission service made by Company; it is the customer's own Wi-Fi network providing the data transmission.

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.

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/revenue/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,

Neil L. Tillquist
Colorado Department of Revenue