

STATE OF COLORADO

DEPARTMENT OF REVENUE
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GIL-12-004

April 4, 2012

XXXXXXXXXXXXXXXXXXXXX
ATTN: XXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

Re: Taxability of fluoride varnishes and informational DVD presentations

Dear XXXXXXXXXXXXXXXX,

You submitted on behalf of XXXXXXXXXXXXXXXX ("Company") a request for guidance on the collection of sales and use tax on the sale of fluoride varnishes and informational DVD presentations to dentists. We apologize for the delayed response to your inquiry.

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 on 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 > 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 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

1. Is the sale of fluoride varnishes to dentists exempt from Colorado sales and use tax?
2. Are sales of informational DVD presentations to dentist's offices subject to Colorado sales and use tax?

Background

Company is a retailer of dental supplies and equipment with nexus in Colorado. Company sells an array of fluoride varnishes to dentists. The item in question is painted onto the surface of a patient's tooth and is semi-durable, remaining on the tooth for up to six months. The purpose of this varnish is to reduce tooth hypersensitivity or to help prevent cavities.

Additionally, Company sells informational DVD presentations used to help a dentist explain a particular procedure to their patients. The company that produces these videos is introducing a new product whereby Company will be hosting the presentations as a cloud based streaming video service. Dentist's patients will view the presentation at the dentist's office. There is no means to save or copy the presentation. This service will be sold to dental practices with the cost based on the number of simultaneous connections allowed.

Discussion

The Department does not have a regulation or publication that specifically addresses your inquiry. The following is a general discussion of the tax issues surrounding your request. If you would like a specific ruling on the issues you raise, you can request a private letter ruling by submitting a private letter ruling request and fee in compliance with regulation 24-35-103.5.

Fluoride Varnishes

Colorado imposes sales tax on the sale of tangible personal property. §39-26-104, C.R.S. There are a number of tax exemptions that apply to medically-related items, although, not all drugs, medical supplies, and equipment are exempt. See, §39-26-717, C.R.S.

In general, vendors who sell to medical service providers are retailers and must collect sales tax on nonexempt sales. Medical service providers include doctors, dentists, hospitals and medical clinics, nursing homes and other similar entities. Because the principal focus of the medical service provider is the sale of services, they are considered the consumers of the equipment and supplies they purchase, with a few exceptions, some of which are discussed below. Thus, the sale of nonexempt items to these medical service providers is treated as a retail sale, not wholesale sale. See, FYI Sales 68 Medical and Dental Supplies and Equipment at www.taxcolorado.com > Tax Information > FYI Publications > Sales.

Sales of material furnished by a dentist as part of a professional service to a patient are exempt from sales and use tax. §39-26-717(1)(k), C.R.S. In order to qualify for this exemption, the material must have a medical purpose, be furnished by a licensed provider or someone under the provider's direction, and the material must leave the dentist's office with the patient. For more information about this exemption, see, FYI Sales 68, which is available on our web site at: www.taxcolorado.com and go to Tax Information > FYI Publications > Sales.

Streaming Informational Videos

There are at least two common issues relating to video products: is the video product tangible personal property and, even if it is tangible personal property, is the “true object” of the transaction a non-taxable service. As noted above, Colorado levies sales and use tax on the sale, use, storage, or consumption of tangible personal property. §39-26-104(1) and 202, C.R.S. Tangible personal property is statutorily defined as “corporeal personal property.” §39-26-102(15), C.R.S. Corporeal is typically defined as that which is physical, tangible, or material in nature.¹ In contrast, intangible personal property does not have a physical existence and is conceptual in nature, such as a contract, stock, and goodwill.

Clearly, the sales of magazines, as well as books, music and movies either in form of paper, CD, DVD, or celluloid are subject to tax. Moreover, the electronic delivery of music or movies is not a sale of an intangible concept, but, rather, the sale of something that is part of the real world and, therefore, tangible. However, the taxability of electronically transmitted goods is a complex and controversial area of taxation. Among other things, we note that beginning July 1, 2012, electronically transmitted computer software is not subject to sales or use tax. See, §39-26-102(), C.R.S. Given the complexity of this issue of whether a magazine delivered electronically is tangible personal property, the department will not provide specific guidance on this issue in the context of a general information letter. Again, you can request to have the department consider this issue as a private letter ruling.

The second issue to consider is whether the transaction is considered the sale of a service even though some tangible personal property is transferred to the buyer. For example, when a company engages a film producer to produce an original film, the initial charge for the first film is not subject to tax because the Department views the “true object” of the transaction to be the artistic service of film production. On the other hand, when the company repeatedly sells the same film, those sales are subject to tax because the “true object” of the purchase is for the copies of film rather than the sale of a service. See, FYI Sales 52 Service Enterprises for more information.

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.

¹ Merriam-Webster Desk Dictionary (1995); American Heritage College Dictionary, 3rd Ed. 1993.

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.

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

Sincerely,

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