

# STATE OF COLORADO



DEPARTMENT OF REVENUE  
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GIL-2008-034

December 16, 2008

XXXXXXXXXXXXXXXXXX.  
Attn: XXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXX

Re: Taxability of Internet games

Dear XXXXXXXXXXXX,

This letter is in response to your letters of July 9, August 25, and September 2, 2008, in which requested tax guidance regarding the sale of samples, Internet gaming lessons, and carbonated and noncarbonated energy drinks. I apologize that it has taken so long to reply to your request. Colorado enacted legislation governing requests for tax advice and the department recently promulgated a regulation that sets forth the process for submitting requests. See, §24-35-103.5, C.R.S. and Department regulation (24)-35-103.5. Pursuant to this regulation, the department issues both private letter rulings and general information letters. Private letter rulings are issued in response to specific factual settings, are binding on the department, and require payment of a fee. General information letters are issued in response to general tax questions and are not binding on the department. You can view this regulation on-line at:

<http://www.revenue.state.co.us/taxstatutesregs/3921reg24-35-103.5.html>

I will initially treat this as a request for general information letter. If you would like a private letter ruling, please take a moment to review the regulation and resubmit your request with the necessary information.

## Issue

1. Are samples that are given to independent retailers and their customers subject to sales tax?
2. Are fees charged for Internet gaming lessons subject to sales tax?
3. Is the downloadable starter kit subject to sales tax?

4. Is the Company subject to any business activity tax, such as income, franchise, business and occupational, gross receipts, or other similar taxes?
5. Is the sale of carbonated and noncarbonated energy drinks subject to sales tax?

## **Background**

A company you represent is located outside of Colorado and is registered with Colorado to collect sales tax on behalf of its independent business owners who sell in Colorado. The company gives free samples of its product to entice sellers and consumers to purchase the company's product. The independent retailers and consumers are not under any obligation to purchase the product.

Another company you represent provides poker gaming lessons over the Internet. The entity and servers used to provide this service will be located in another state. Individuals will be offered varying levels of training and charged according to the skill level. Individuals will be able to purchase a starter kit which is downloaded over the Internet. Individuals who purchase the highest skill level of training can refer other individuals to this service and the entity will pay the individual for those referrals.

## **Discussion**

### *Samples*

Colorado levies sales tax on the sale of tangible personal property. §39-26-104(1), C.R.S. If a company does not receive compensation for the samples, the distribution of samples is not subject to sales tax. However, the company's acquisition of such samples is subject to use tax. Compare, e.g. Colorado Revenue Bulletin No. 92-13, 07/01/1992. Use tax is computed on the company's cost of acquisition of the sample. See, *International Business Machines v. Charnes*, 374 601 P2d 622 (Colo. 1979).

### *Internet Gaming Lessons*

Colorado levies sales and use tax on tangible personal property. 39-26-104(1), C.R.S.. In Special Regulation 7 (Computer Software), the department classified electronically transmitted computer software as non-tangible personal property. Therefore, fees charged for such software are not subject to sales.

Moreover, services are generally not subject to sales and use tax. See, Department Special Regulation 52 regarding service enterprises.

Colorado levies a income tax on nonresident individuals, nonresident partners, and foreign corporations who or that have nexus with Colorado and derive income from sources within Colorado. §39-22-109, 203, and 301, C.R.S. The Department will address issues of nexus only in response to a request for private letter ruling.

### *Carbonated and noncarbonated energy drinks*

Finally, you ask whether carbonated and noncarbonated energy drinks are exempt as food products. Whether an item qualifies as food depends on whether it meets the definition of food under the federal Food Stamp Act. The Department of Agriculture,

Food and Nutrition Service has issued a number of determinations on whether certain items qualify as a food product. Food supplements do not qualify as exempt food products. Energy drinks are generally considered a nonexempt food supplement. See, Food Stamp Program Eligible Food Determinations, dated January 18, 2005.

**Miscellaneous**

You can access this publication as well as a host of other useful tax resources by visiting our web site at: [www.revenue.state.co.us](http://www.revenue.state.co.us) and go to Taxation > Resources/Publications.

Please note that the Department does not administer local sales taxes for home-rule cities and the taxes they levy may be different than those levied by the State of Colorado. Please contact these home-rule cities for more information about their taxes.

Finally, the Department must publish on its web site redacted versions of its general information letters. Your letter requesting this letter is not published. I enclose a redacted version of this letter. Please let me know within 60 days of the date of this letter whether you have any suggested changes to the redacted version.

Respectfully,

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