

STATE OF COLORADO

DEPARTMENT OF REVENUE
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GIL-12-008

May 29, 2012

XXXXXXXXXXXXXXXXXX
ATTN: XXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

Re: Sales to Native American Tribal Members and Tribal Governments

Dear XXXXXXXXXXXX,

You submitted on behalf of XXXXXXXXXXXXXXXX ("Company") a request for guidance on the application of sales tax on sales made to Native American tribal members and Native American tribes.

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.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 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.

Background

Company requests guidance on a number of questions relating to sales and delivery of items to Native American tribal members on tribal lands. Company operates a number of retail stores but none are located on tribal lands. Company does not have its own delivery vehicles. Customers have the option of picking up products at Company's retail stores or have the Company arrange for a third party common carrier to deliver the product to the customer. In the latter case, Company separately states the delivery charge on the customer's invoice. Company pays the third party common carrier the amount collected from the customer. Company does not mark up the common carrier's delivery charge.

Company's products are offered for sale unassembled. Customers have the option of either assembling the product themselves, have Company personnel assemble the product at the Company's facilities, or direct customers to third party companies who will deliver and assemble the product for customers at the customer's location. Company's charges for assembly are separately stated.

Discussion

1. Define "Sales made off the reservation".

Pursuant to Special Regulation-Sales 15 ("SR-15")¹, a sale of tangible personal property to a Native American tribal member is exempt from sales tax if the sale occurs on the tribal member's Native American tribal lands. See Response to Question 3, below, regarding when a sales occurs. Thus, sales to non-tribal members are not exempt even if the sale occurs on tribal lands. Similarly, sales to tribal members are not exempt if the sales occur off the member's tribal lands.

2. Are all Native American Tribes recognized in Colorado as sales tax exempt if ownership takes place on tribal land?

The exemption applies to all federally recognized tribal reservations. There are two federally recognized Native American tribes in Colorado: the Southern Ute Tribe and the Mountain Ute Tribe. These Native American tribal lands are located in the southwestern corner of Colorado. As noted above, sales tax exemption for sales on tribal lands depends on a number of factors.

3. When does title pass to the purchaser and does delivery by a common carrier make a difference in the title passing process? If so, what is the difference and does that influence the sales tax calculation?

Colorado imposes sales tax on the "sale" of tangible personal property. §39-26-104, C.R.S. A "sale" generally occurs when and where the buyer takes possession of the goods. W.Hellerstein, *State Taxation* ¶ 18.02[2][e] (Warren, Gorham & Lamont, 3d Ed. 2009 at ¶ 18.02[2][f.]); *Leggett & Platt, Inc. v. Ostrum*, 251 P.3d 1135, 1143 (Colo. App. 2010), *cert. denied*, 2011 WL 2463156 (Colo. 2011); "transfer of physical possession of goods is a constitutionally permitted taxable event, regardless of technical considerations regarding the time and place of passage of title which might turn on the degree of control short of transfer of physical possession." When the retailer makes the arrangement for delivery by a third party, such as a common carrier, and bills the customer for the transportation charge, the buyer is taking delivery at the time and place where the common carrier delivers the item to the buyer.

¹ You can view this special regulation, as well as other regulations, FYI's, and GILs referred to in this letter, on the department's web site at www.taxcolorado.com > Tax Library and then select either "Rules and Regulations," "FYIs Publications," or "Rulings."

The purchase price on which sales tax is calculated includes all charges that are inseparable from the sale. §39-26-102(12), C.R.S. Services that occur after the sale are generally considered separable and not taxable. *A.D Stores v Department of Revenue*, 19 P3d 680 (Colo. 2001). Under Special Regulation-Sales 18 (SR-18), charges for transportation services for delivery of tangible personal property between the retailer and buyer are not taxable if they are both (1) separable from the sales transaction, and (2) stated separately on a written invoice or contract. "Transportation charges" include carrying, handling, delivery, mileage, freight, postage, shipping, trip charges, stand-by, and other similar charges or fees. Such charges are separable from the sales transaction if they are performed after the taxable property is offered for sale and the buyer is not required to use retailer's transportation services. Of course, if the sale of the goods is exempt from tax, such as sales to tribal members on tribal lands, then charges for transportation services are also exempt from tax regardless of whether the charges are separable or separately stated on the invoice.

4. When can assembly charges be exempted from sales tax when selling to Native American tribes or tribal members?

The Department has not specifically addressed in any publication or regulation the taxability for assembly charges. As a general rule, Colorado does not levy sales or use tax on services. §39-26-104(1)(a), C.R.S. However, charges for services are included in the sales tax calculation if they are part of goods made to order. §39-26-102(12), C.R.S. (defining sales price to include labor costs for goods made to order). In general, services performed after a product is fully manufactured are excluded from the sales tax calculation. Services performed prior to the production of an item in its final form are included in the purchase price of the item and are part of the sales tax calculation, regardless of whether the charges are separately stated. *A.D. Stores, supra*.

As in the case of transportation services, the entire transaction is exempt from sales tax, including any charges for assembly, if the sale is exempt because it is made to a tribal member on tribal land.

5. What records must be provided to validate a sales transaction as exempt from sales tax? What records must be kept by the retailer to support the exemption from sales tax for tax audit purposes? If there is a tax exemption for common carriers delivering merchandise on tribal land, what is the delivery company responsible for in terms of paperwork and should records be copied and returned to the retailer?

Pursuant to regulation (39-) 26-105.1(c), the retailer has the burden of establishing by objectively verifiable evidence that a sale is exempt. Exempt organizations or individuals must be able to prove to the satisfaction of the vendor that they are exempt. In the case of a sale made to a tribal member on Native American tribal lands, the buyer must provide the retailer evidence of both membership in the Native Tribal organization, such as a tribal identification card, and the retailer must maintain evidence that delivery was made on the member's tribal land. The seller must retain records that objectively establish the facts upon which retailer relies to sell its product exempt of tax. Records

pertaining to transactions involving sales or use tax liability must be preserved for at least three years.

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,

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