

**Document Number:** 23-67  
**Tax Type:** Retail Sales and Use Tax  
**Description:** Exemption: Data Center - Equipment Delivered To Storage Facility; First Use  
Administration: Refund - Limitation Amount  
**Topic:** Appeals  
**Date Issued:** 06-01-2023  
June 1, 2023

Re: § 58.1-1821 Refund Application: Retail Sales and Use Tax

Dear \*\*\*\*\*:

This is in response to your letter submitted on behalf of \*\*\*\*\* (the "Taxpayer") in which you request that the Virginia retail sales and use tax refunds requested for the periods June 2014 through December 2014 ("Refund Period A"), January 2015 through March 2017 ("Refund Period B") and April 2017 through April 2018 ("Refund Period C") be granted. I apologize for the delay in responding to your appeal.

### FACTS

In 2014, the Taxpayer began purchasing equipment to establish a data center in Virginia. The purchased equipment was delivered to a logistics and storage facility located in Virginia, but not to the site of the data center. The Taxpayer believes it paid sales tax to its vendors on the purchase of equipment that qualified for the data center exemption and filed a refund request with the Department.

While refunds were granted for some of the purchases, audit staff determined that the data center exemption did not apply to certain purchases at issue because the equipment was delivered to a storage facility, rather than being delivered directly to the Taxpayer's data center. The audit staff also concluded items of equipment purchased from \*\*\*\*\* (the "Vendor") were not eligible for a refund.

The Taxpayer maintains that the exemption applies to the equipment purchases at issue and requests that the refunds be granted for all refund periods. The Taxpayer argues that the equipment purchased and itemized on the invoices is directly used within the data center. The

Taxpayer provided invoices and its Memorandum of Understanding with the Virginia Economic Development Partnership Authority in support of the refund requests.

The Taxpayer also contested the audit findings for specific transactions in several refund periods. In regards to Refund Period A, the Taxpayer maintains that the Vendor remitted the sales tax collected but used credit balances to offset the period's tax making it appear that the Vendor did not remit all of the sales tax due for these periods. The Taxpayer asserts that the amount an invoice disallowed in Refund Period C was properly included on the invoice listing and a refund should be issued.

## DETERMINATION

### Data Center Exemption

*Virginia Code* § 58.1-609.3 18 provides, in pertinent part, that beginning July 1, 2010, and ending June 30, 2035, retail sales and use tax does not apply to:

Computer equipment or enabling software purchased or leased for the processing, storage, retrieval, or communication of data, including but not limited to servers, routers, connections, and other enabling hardware, including chillers and backup generators used or to be used in the operation of the equipment exempted in this paragraph, provided that such computer equipment or enabling software is **purchased or leased for use in a data center** that (i) is located in a Virginia locality, (ii) results in a new capital investment on or after January 1, 2009, of at least \$150 million, and (iii) results in the creation on or after July 1, 2009, of at least 50 new jobs by the data center operator and the tenants of the data center, collectively, associated with the operation or maintenance of the data center provided that such jobs pay at least one and one-half times the prevailing average wage in that locality. [Emphasis added.]

The refund request review resulted in a determination that the data center exemption does not apply to certain equipment purchased by the Taxpayer because the equipment was delivered to a storage facility in Virginia, rather than being delivered directly to the Taxpayer's data center in Virginia. As such, the refund request was denied in part.

*Virginia Code* § 58.1-602 defines storage as "any keeping or retention of tangible personal property for use, consumption or distribution in the Commonwealth, or for any purpose other than sale at retail in the regular course of business." In the absence of a temporary storage exemption, tangible personal property placed in storage is subject to the retail sales and use tax. Generally, the retail sales and use tax applies to tangible personal property stored in the Commonwealth because an exemption for stored property does not exist in most instances. In a limited instance, *Virginia Code* § 58.1-609.3 1 provides an exemption from the sales and use tax for personal property purchased by a contractor that is temporarily stored in Virginia pending shipment to another state or country.

Similarly, the data center exemption applies when the criteria of the statute have been met. The criteria does not include a requirement that a data center must use purchased items immediately. In fact, the exemption specifically applies to the purchase of eligible equipment and software either “used or to be used” in the operation of the data center. The terms infer two types of purchase transactions: purchases used immediately and those to be used later.

Further, the rationale used to deny the refund conflicts with the intent of the data center exemption. The exemption applies when (i) the purchaser operates a qualifying data center, (ii) the tangible personal property purchased is for use in the qualifying data center, and (iii) the property is of the kind stated in the statute. The statute does not require that the property be delivered directly to the data center in order to qualify for the exemption.

In addition, the Taxpayer’s customers rely on the dependability of the data center to keep records secure and accessible. Under these conditions, a data center must be ready to repair, expand, or upgrade its systems contemporaneously. Keeping equipment and supplies in reserve is an essential part of data center operations. Prohibiting data centers from purchasing items for future use would significantly diminish the incentive the exemption is intended to provide.

The Department has previously addressed the issue of delivery and storage of data center equipment in Public Document (P.D.) 21-126 (9/21/2021). The Tax Commissioner ruled that the delivery of batteries, otherwise eligible for the exemption, to storage facilities for later use in a data center could be purchased exempt of the retail sales and use tax.

The Taxpayer operates a qualifying data center in Virginia, has been issued the data center retail sale and use tax exemption certificate by the Department, and can purchase or lease tangible personal property used in its data center exempt of the tax by presenting the exemption certificate to its vendors at the time of the purchases. Delivery of the equipment at issue to the storage facility until the Taxpayer’s data center was prepared to accept delivery does not preclude the Taxpayer from purchasing the equipment exempt of the tax as provided *Virginia Code* § 58.1-609.3 18.

### Refund Limitations Amount

A review of the Vendor’s sales and use tax returns by the Department for the refund period at issue found the Vendor did not remit sufficient sales tax to the Department to cover the refund requested by the Taxpayer. The Taxpayer argues the Vendor’s tax remittances were lower than the taxes collected for the period because it used credit balances from prior periods to offset taxable sales in the refund period, thereby reducing the taxable sales that were reported.

In response to legislation enacted in 2016, which prohibits a purchaser from receiving interest on a refund claim for sales and use tax when certain conditions are present, the Department issued the Guidelines for Retail Sales and Use Tax Refund Claim Procedures (the “Guidelines”),

published as P.D. 17-98 (6/12/2017). Pursuant to the Guidelines, there are two procedures in which a taxpayer may request a refund of retail sales and use tax erroneously remitted to the Commonwealth. The first procedure details the refund process for or from a dealer. The second procedure details the refund process from the Department. In order to apply for a refund from the Department, a taxpayer must first seek the refund through the dealer procedure.

The Guidelines further state that the Department “will not refund any amount of sales tax that was not remitted.” Pursuant to Title 23 of the Virginia Administrative Code 10-210-3040, the refund amount is limited to the net amount of state and local tax remitted to the state on an exempt transaction. According to the regulation, “if a dealer filed a timely return and deducted dealer’s discount for the period for which the refund is claimed, the amount of refund will be reduced by the dealer’s discount taken.” The regulation provides no other criteria as to when a refund would be reduced.

Based on the invoice, the Taxpayer remitted the full amount of the sales tax to the Vendor. The Vendor appears to have reported the transaction on its sales and use tax return. However, credits for overpaid tax remitted in transactions from previous periods reduced the amount of tax remitted with the return. The Department’s position that the refund due to the Taxpayer must be reduced by the credits claimed by the Vendor is not supported by the regulation or the guidelines.

As indicated above, 23 VAC 10-210-3040 does not provide for a refund limitation beyond the amount of the dealer’s discount taken by a dealer. Further, a refund amount is limited to the net amount of state and local tax remitted to the state on an exempt transaction. This means only adjustments directly related to the specific exempt transaction can be considered to determine a limitation on a refund. Credits for overpayments on other transactions from previous periods claimed by a dealer in the same period are not directly related the exempt transaction for which a refund has been requested.

#### Purchase from Vendor

The Taxpayer alleges the Department denied a refund for Period C based on the lack of an invoice indicating the property was exempt. The Department denied the refund based on this invoice for Period B. The Appeals and Rulings staff and the audit staff reviewed the Taxpayer’s information submitted on appeal, and the invoice indicates an exempt purchase and qualifies for a refund for Period B.

### **CONCLUSION**

Based on this determination, the exemption applies to the Taxpayer’s purchases of equipment used in a qualifying data center in Virginia regardless of whether such equipment is delivered to a storage facility prior to delivery to the data center.

With respect to the refunds for audit periods, the Department's audit staff will review the information submitted by the Taxpayer for the audit periods make any adjustments to the refund requests as stated herein and in accordance with the Guidelines for Retail Sales and Use Tax Refund Claim Procedures, published as P.D. 17-98 (6/12/2017).

The audit staff will contact the Taxpayer regarding the documentation needed to complete the review and final adjustments. The Taxpayer must provide the documentation within 45 days of being contacted by the auditor. If the documentation is not received within the timeframe allotted, no adjustments will be made. No additional time will be allotted for the Taxpayer to provide the documentation.

The *Code of Virginia* sections, regulation and public documents cited are available on-line at [www.tax.virginia.gov](http://www.tax.virginia.gov) in the Laws, Rules and Decisions section of the Department's web site. If you have any questions about this response, you may contact \*\*\*\*\* in the Department's Office of Tax Policy, Appeals and Rulings, at \*\*\*\*\*.

Sincerely,

Craig M. Burns  
Tax Commissioner

AR/3784.W

**Related Documents:**

[17-9821-126](#)

**Last Updated 09/08/2023 08:17**