

When a construction contractor permanently affixes tangible personal property to real property, the contractor is deemed the end user of that tangible personal property. As the end user, the contractor incurs Use Tax on the cost price of that tangible personal property. See 86 Ill. Adm. Code 130.1940 and 86 Ill. Adm. Code 130.2075. (This is a GIL.)

April 21, 2008

Dear Xxxxx:

This letter is in response to your letter dated July 5, 2007, in which you request information. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.tax.illinois.gov to review regulations, letter rulings and other types of information relevant to your inquiry.

In your letter you have stated and made inquiry as follows:

ABC is hereby requesting a private letter ruling in regards to the collection and payment of sales tax on custom made products.

We specializes [sic] in fabricating custom stained and etched glass panels for windows, door lites, and wall art. We are a small company that opened in 2001, with an average of 750,000 in sales a year, and a staff of 5 full time and 5 part time employees.

This tax issue arose when a client insisted that no tax should be due if we installed in their home. Recently more clients have asked us to handle the install and we would like to make sure that we are charging correctly.

I would like a ruling in regards to whether or not I charge sales tax on the products that are made and installed in a customers [sic] home or business. Currently the company is charging sales tax on the 100% of products, and no tax on the service of design and install.

Would my company be considered a construction contractor according to the Illinois Department of Revenue Regulations (Title 96 [sic] Part 130 Section 130.1940). If we are deemed a construction contractor, is it true that no tax should be charged the client?

And, if we follow this procedure, then in the install cases, is it true that we would file Use Tax on the materials and supplies purchased for manufacturing only?

To the best knowledge as the shareholder of ABC there are not any ending audits and/or litigation with the Illinois Department of Revenue. There is, also, no previous ruling issues and/or submitted for the company.

We have itemized the types of glasswork we produce, and divided per residential and commercial.

In the attached descriptions we have separated our sale types:

RESIDENTIAL: A - E would remain a permanent fixture in the home.

A) Decorative art glass installed on top of existing thermo pane windows in a home.

Our panel is mounted with the use of glazing points and silicone.

B) Decorative art glass, 1" thermo pane units, installed in an entryway with trim.

- 1) If we install in the home
- 2) If the builder picks up to do the installation
- 3) If we deliver to a wood working company for install
- 4)

C) Glass Backsplashes, glued to the wall, or mounted with metal standoffs.

- 1) If we install
- 2) If the client picks up and installs
- 3) If we ship to a client in Illinois
- 4) If we ship to a client in another state

D) Decorative art glass installed in cabinet doors.

- 1) If we install in the home
- 2) If the client picks up the glass, or doors with the glass attached.

E) Decorative glass countertops

F) Art glass hung on a wall, with a frame, or over a fireplace is mounted with metal standoffs. Note: This would normally be taken if house sold.

COMMERCIAL:

G) Glass Signs of company name and logo, this would normally be taken if the company moved.

The following are some statement of authorities in regard to the questions raised above. It is hard for us to decide pro and con as we are totally confused at this point and really cannot find a definitive answer to our type of business.

ST 96 -2065-GIL. [sic] A company whose primary business is imprinting artistic images in glass. Tax Liability was incurred by taxpayers in those types of situations dependent on whether the tangible personal property is being permanently affixed to real estate by the sellers.

ST 06 0115-GIL- Break out the materials and installation of product under separate contracts and charge the customer sales tax on the material contract.

ST 05-0023-PRL [sic] Company would stop charging sales tax on installed product to customers and file use tax returns for tax on materials from vendors.

Your assistance in this matter would be appreciated greatly.

DEPARTMENT'S RESPONSE

The Department's regulation "Public Information, Rulemaking and Organization" provides that "[w]hether to issue a private letter ruling in response to a letter ruling request is within the discretion of the Department. The Department will respond to all requests for private letter rulings either by issuance of a ruling or by a letter explaining that the request for ruling will not be honored." 2 Ill. Adm. Code 1200.110(a)(4).

After reviewing the nature of your inquiry, it is the Department's position that we must decline to issue a Private Letter Ruling. The ruling you request is very fact intensive and will depend upon the specific contractual obligations with the customer in each of the scenarios presented in your letter. Consequently, we do not have enough information to provide you with specific answers. However, we hope the following will be helpful in addressing your questions.

Please be advised persons who take tangible personal property and permanently affix it to real estate in Illinois act as construction contractors and incur Use Tax liability on their cost price of tangible personal property they physically incorporate into realty. They owe Use Tax because they are considered the end users of the materials they take off the market to permanently affix to real estate, G. S. Lyon & Sons Lumber & Mfg. Co. v. Department of Revenue, 23 Ill.2d 180 (1961).

However, construction contractors act as retailers and incur Retailers' Occupation Tax liabilities when they sell items over-the-counter or they sell items that remain tangible personal property when installed. When contractors act both as contractors and retailers of building materials, they can give a certification to suppliers that they, the contractors, will self-assess and pay tax if they do not know at the time of purchase how they will use the tangible personal property. Please refer to 86 Ill. Adm. Code 130.1940, as well as 130.2075(b)(1) and (2), which may be found on the Department's Internet website.

Please note Section 130.2075(b)(2) explains that "the purchaser may not give such certification to his supplier unless the purchaser, if he will convert the tangible personal property into real estate in this State, agrees to, and does, assume the liability for reporting and paying the tax to the Department in the same form (Illinois Retailers' Occupation Tax, and local Retailers' Occupation Tax if applicable) in which the supplier would have reported and paid such tax if the supplier had accounted for the tax to the Department." Therefore if the purchaser converts the tangible personal property into real estate, he must include its cost price on his sales tax return as taxable receipts and pay applicable local Retailers' Occupation Tax in addition to the State Retailers' Occupation Tax.

Although we cannot give you specific answers, if the items you install remain portable after installation, then you would be considered to be making a retail sale of tangible personal property. For example, the art glass hung on a wall with a frame is generally not considered converted into real estate and would be a sale of tangible personal property. Your installation charge would be part of the selling price upon which sales tax would be calculated unless a separate contract for such installation charge existed according to 86 Ill. Adm. Code 130.450. If, on the other hand, the items are permanently affixed, then you would be considered a construction contractor regarding them.

It is important to note that since construction contractors are the end users of the materials that they permanently affix to real estate, their customers incur no Use Tax liability and the construction contractors have no legal authority to collect the Use Tax from their customers. However, many construction contractors pass on the amount of their Use Tax liabilities to customers in the form of

higher prices or by including provisions in their contracts that require customers to “reimburse” the construction contractor for his or her tax liability. Please note that this reimbursement cannot be billed to a customer as “sales tax,” but can be listed on a bill as a reimbursement of tax. The choice of whether a construction contractor requires a tax reimbursement from the customer or merely raises his or her price is a business decision on the construction contractor’s part.

Notwithstanding, when you contract to create custom glass signs on the special order of a particular customer and the sign has use or value (other than salvage value) only to such purchaser, a special order situation exists and the transaction is subject to tax under the Service Occupation Tax Act. Who is liable for the tax in these situations depends upon the method chosen by you (as the serviceman) in calculating your Service Occupation Tax liability. See 86 Ill. Adm. Code 130.2000 and 140.101.

Retailers’ Occupation Tax and Use Tax do not apply to receipts from sales of personal services. Under the Service Occupation Tax Act, servicemen are taxed on tangible personal property transferred incident to sales of service. For your general information see 86 Ill. Adm. Code Part 140 regarding sales of service and Service Occupation Tax.

The purchase of tangible personal property that is transferred to service customers may result in either Service Occupation Tax liability or Use Tax liability for the servicemen, depending upon which tax base the servicemen choose to calculate their liability. Servicemen may calculate their tax base in one of four ways: (1) separately stated selling price; (2) 50% of the entire bill; (3) Service Occupation Tax on cost price if they are registered de minimis servicemen; or, (4) Use Tax on cost price if the servicemen are de minimis and are not otherwise required to be registered under Section 2a of the Retailers’ Occupation Tax Act.

Using the first method, servicemen may separately state the selling price of each item transferred as a result of sales of service. The tax is based on the separately stated selling price of the tangible personal property transferred. If servicemen do not wish to separately state the selling price of the tangible personal property transferred, those servicemen may use the second method where they will use 50% of the entire bill to their service customers as the tax base. Both of the above methods provide that in no event may the tax base be less than the cost price of the tangible personal property transferred. Under these methods, servicemen provide their suppliers with Certificates of Resale when purchasing the tangible personal property to be transferred as a part of the sales of service. Upon selling their product, they are required to collect the corresponding Service Use Tax from their customers. See 86 Ill. Adm. Code 140.106.

The third way servicemen may account for their tax liability only applies to de minimis servicemen who have either chosen to be registered or are required to be registered because they incur Retailers’ Occupation Tax liability with respect to a portion of their business. Servicemen may qualify as de minimis if they determine that their annual aggregate cost price of tangible personal property transferred incident to sales of service is less than 35% of their annual gross receipts from service transactions (75% in the case of pharmacists and persons engaged in graphic arts production). See, 86 Ill. Adm. Code 140.101(f). This class of registered de minimis servicemen is authorized to pay Service Occupation Tax (which includes local taxes) based upon their cost price of tangible personal property transferred incident to sales of service. Servicemen that incur Service Occupation Tax collect the Service Use Tax from their customers. They remit the tax to the Department by filing returns and do not pay tax to suppliers. They provide suppliers with Certificates of Resale for the property transferred to service customers. See 86 Ill. Adm. Code 140.108.

The final method of determining tax liability may be used by de minimis servicemen that are not otherwise required to be registered under Section 2a of the Retailers’ Occupation Tax Act.

Servicemen may qualify as de minimis if they determine that their annual aggregate cost price of tangible personal property transferred incident to sales of service is less than 35% of their annual gross receipts from service transactions (75% in the case of pharmacists and persons engaged in graphic arts production). Such de minimis servicemen may pay Use Tax to their suppliers or may self assess and remit Use Tax to the Department when making purchases from unregistered out-of-State suppliers. De minimis servicemen are not authorized to collect "tax" from their service customers because they, not their customers, incur the tax liability. These servicemen are also not liable for Service Occupation Tax. It should be noted that servicemen no longer have the option of determining whether they are de minimis using a transaction by transaction basis. See 86 Ill. Adm. Code 140.109.

Note, however, it appears from the nature of your business that you are registered as required under Section 2a of the Retailer's Occupation Tax Act. Therefore, you would not be able to avail yourself of this fourth method of determining tax liability on special order transactions.

I hope this information is helpful. If you require additional information, please visit our website at www.tax.illinois.gov or contact the Department's Taxpayer Information Division at (217) 782-3336. If you are not under audit and you wish to obtain a binding PLR regarding your factual situation, please submit a request conforming to the requirements of 2 Ill. Adm. Code 1200.110 (b).

Very truly yours,

Debra M. Boggess
Associate Counsel

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