

Lessors of tangible personal property under true leases in Illinois are deemed end users of the property to be leased. See 86 Ill. Adm. Code 130.220. (This is a GIL.)

September 30, 2008

Dear Xxxxx:

This letter is in response to your letter dated May 13, 2008, 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.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

Our client has engaged ABC for the purpose [sic] requesting a General Information Letter for the scenario described below. Please send your response to my attention at ADDRESS.

Company Background:

Our client 'Company' is headquartered and has its main warehouse in CITY/STATE. The Company also has a storage facility located in STATE1, and sales offices in STATES. The Company does not have inventory in STATES. The Company rents cell phones to individuals and companies located in the US for use in COUNTRIES. The Company has customers throughout the United States. Sales tax is not paid upon the purchase of phones because most states consider this type of transaction a purchase for resale. The cell phones are shipped directly from a wholesaler to the STATE warehouse where they are stored, repaired, memory cleaned, and prepared for usage prior to shipping the product to the customer. The Company charges sales tax in states where the rental of tangible personal property is considered a taxable transaction. The taxability of a transaction is based upon the customer's delivery address. The Company charges tax to customers located in STATES.

Transaction Background:

The typical customer that uses the Companies [sic] services are people who travel outside the United States where their personal cell phone will not function due to mobile phone service provider system incompatibility. Consumers contact The Company either by phone or through a web site to arrange for the rental of a mobile phone. The rental term is based upon the date the phone is received by the customer through the date the phone is returned to The Company. The amount charged can be a daily, weekly or monthly rate. There is also a separate charge for airtime usage. Upon return of the phone to the CITY/STATE warehouse The Company 'sanitizes' the phone by clearing the call logs and memory to insure that the previous renter's usage information is not passed along to the next renter. The useful life of a phone is approximately four years. Phones are used by multiple consumers located throughout the United States. Phones are constantly entering and leaving Illinois and other states as part of short-term rental agreements. While the phone's primary usage takes place outside this country, it is possible for the phone to be used within the United States.

In addition to renting phones to individuals The Company also rents to other companies. Some companies will keep a 'pool' of phones on site for use by their employees when traveling overseas. In these cases the phones may be in the possession of a company for over year [sic] at a time. The Company does not currently have any customers in Illinois that use this business model.

Based upon our understanding of Illinois law the purchase of tangible personal property to a purchaser who will act as a lessor of such tangible personal property is a sale at retail and is subject to Retailers' Occupation Tax. We also understand that the rental of tangible personal property is not subject to the Retail Occupancy [sic] Tax.

It would be very difficult for the Company to monitor whether the same phone is used by customers located in Illinois. As soon as a phone is available for usage it is rented to the next customer regardless of where they are located. Normally very little air time is used in the United States; the majority of airtime is incurred overseas.

Based upon Illinois law it would appear that The Company owes use tax on the cost of phones delivered to customers located in Illinois. We now ask for guidance to the following questions:

1. If a phone has been used by customers outside of Illinois do we still owe use tax upon the phone when it enters Illinois for the first time?
2. Is there a time period of use outside of Illinois that would preclude use tax being due on the phone once it is brought into Illinois?
3. If a phone has been used in Illinois and use tax has been paid do we owe additional use tax when the phone enters Illinois a second time?
4. If we collected sales tax upon the rental charges of a phone that was first used outside of Illinois can we take a credit for tax collected against the use tax due upon entry into Illinois?
5. Knowing that the useful life of a phone is approximately 4 years is there a methodology that the state accepts for accruing use tax on a depreciated value instead of using the original cost of the tangible personal property?

6. Since the Company will not be able to track which phones have entered Illinois and which phones have not entered Illinois is there an accepted procedure for accruing use tax based upon apportionment of sales by state or some other factor?

Thank you for your attention in this matter. If you have any questions, please call me.

DEPARTMENT'S RESPONSE:

The Illinois Retailers' Occupation Tax Act imposes a tax upon persons engaged in this State in the business of selling tangible personal property to purchasers for use or consumption. See 86 Ill. Adm. Code 130.101. The Use Tax Act imposes a tax upon the privilege of using in this State tangible personal property purchased at retail from a retailer. See 86 Ill. Adm. Code 150.101. If no tangible personal property is being transferred to the customers, then no Illinois Retailers' Occupation Tax or Use Tax would apply.

In Illinois, lessors of tangible personal property under a true lease, except for automobiles leased for terms of one year or less, are considered to be the end users of the property to be leased. See 86 Ill. Adm. Code 130.220 and 130.2010. As the end users of tangible personal property located in Illinois, lessors incur Use Tax on the lessors' cost price of the property. Since lessors are considered the end users of the property and have paid the Use Tax, no Retailers' Occupation Tax is imposed upon the rental receipts and the lessees incur no Use Tax liability for the rental charges. In Illinois, a true lease generally has no buy out provision at the close of the lease. If a buy out provision does exist, it must be a fair market value buy out option in order to maintain the character of the true lease.

As mentioned, in the case of a true lease, the lessors of the property being used in Illinois would be the parties with Use Tax obligations. The lessors would either pay their suppliers, if their suppliers were registered to collect Use Tax, or would self-assess and remit the tax to the Department. The Use Tax Act provides that in order to prevent actual or likely multi-state taxation, the Use Tax does not apply to the use of tangible personal property in this State of tangible personal property that is acquired outside this State and caused to be brought into this State by a person who has already paid a tax in another state in respect to the sale, purchase, or use of that property, to the extent of the amount of the tax properly due and paid in the other state. See 86 Ill. Adm. Code 150.310(a)(3). In addition, depreciation is allowed for out-of-State use. See 86 Ill. Adm. Code 150.110. If Use Tax is paid by the lessor on property leased in Illinois, the lessor would not be liable for Use Tax on the property if it is subsequently leased in Illinois by the lessor.

As stated above, the State of Illinois imposes no Retailers' Occupation Tax or Use Tax on rental receipts. Moreover, since a lessee under a true lease incurs no tax liability on the lease of tangible personal property, the lessee generally incurs no such tax liability on any related lease charges such as late payment fees, disposition fees, lease termination fees, service fees, or legal fees.

You mention in your letter that there is also a separate charge for airtime usage. The Telecommunications Excise Tax is imposed upon the act or privilege of originating or receiving intrastate or interstate telecommunications in Illinois at the rate of 7% of the gross charges for such telecommunications purchased at retail from retailers. See 86 Ill. Adm. Code 495.100. The telecommunications retailer collects the Telecommunications Excise Tax. If the Telecommunications

Excise Tax is not paid to the telecommunications retailer then the telecommunications customer must self-assess the Telecommunications Excise Tax liability and remit the amount directly to the State.

This tax must be collected from persons by “retailers maintaining a place of business in Illinois.” 35 ILCS 630/5. “Gross charges” means the amount paid for the act or privilege of originating or receiving telecommunications in this State and for all services and equipment provided in connection therewith by a retailer, valued in money whether paid in money or otherwise, including cash, credits, services and property of every kind or nature, and shall be determined without any deduction on account of the cost of such telecommunications, the cost of materials used, labor or service costs or any other expense whatsoever. However, gross charges do not include charges for customer equipment, including such equipment that is leased or rented by the customer from any source, wherein such charges are disaggregated and separately identified from other charges in the books and records of the retailer. See 86 Ill. Adm. Code 495.100.

Please note, both interstate and intrastate telecommunications that originate or are received in this State are subject to Telecommunications Excise Tax. However, a taxpayer that has paid a tax in another state on interstate telecommunications, or to another foreign jurisdiction on a call that originates or terminates outside of the United States, shall be allowed a credit against the tax imposed under the Telecommunications Excise Tax Act on the tax properly due and paid. See 86 Ill. Adm. Code 495.130.

Beginning on January 1, 2003, the Department began collecting most municipal telecommunications taxes. See 35 ILCS 636, Simplified Telecommunications Tax Act. If telecommunications originates or terminates in a municipality that has a Simplified Municipal Telecommunications Tax, local telecommunications tax may apply. Telecommunication retailers are also subject to the Telecommunications Infrastructure Maintenance Fee. See 35 ILCS 35/635.

The Mobile Telecommunications Sourcing Conformity Act became effective in Illinois on August 1, 2002. The Act was passed for the purpose of implementing the federal Mobile Telecommunications Sourcing Act, codified at 4 U.S.C. Sections 116 through 126. The Act applies to “any tax, charge, or fee levied by the State or a taxing jurisdiction within this State as a fixed charge for each customer or measured by gross amounts charged to customers for mobile telecommunications services, regardless of whether the tax, charge, or fee is imposed on the vendor or customer of the service and regardless of the terminology used to describe the tax, charge, or fee.”

Section 20(b) of the Act provides that “[a]ll charges for mobile telecommunications services that are deemed to be provided by the customer’s home service provider under this Act are authorized to be subjected to tax, charge, or fee by the taxing jurisdictions whose territorial limits encompass the customer’s place of primary use, regardless of where the mobile telecommunications services originate, terminate, or pass through, and no other taxing jurisdiction may impose taxes, charges, or fees on charges for such mobile telecommunications services.” “Place of primary use” means “the street address representative of where the customer’s use of the mobile telecommunications service primarily occurs, which must be: (i) the residential street address or the primary business street address of the customer; and (ii) within the licensed service area of the home service provider.”

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.

Very truly yours,

Richard S. Wolters
Associate Counsel

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