

Illinois Retailers' Occupation Tax is imposed upon gross receipts from the sale of tangible personal property to end-users and no deductions shall be taken by a taxpayer from gross receipts on account of the cost of the property sold, the cost of materials used, labor costs, or any other expense whatsoever. See 86 Ill. Adm. Code 130.410. (This is a GIL).

October 28, 2009

Dear Xxxxx:

This letter is in response to your letter dated August 11, 2009, 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](http://www.tax.illinois.gov) to review regulations, letter rulings and other types of information relevant to your inquiry.

Based on your email dated October 6, 2009, we are responding with a GIL. In your letter you have stated and made inquiry as follows:

On behalf of our client COMPANY,<sup>i</sup> we hereby request a letter ruling regarding the sales tax treatment of the business transactions described below.

COMPANY is a wholesale company whose core business is to provide its customers carbon dioxide (both in liquid and gaseous form) for use in beverage carbonation systems, commonly known as soda fountains. COMPANY's customers include restaurants, convenience stores, movie theaters, theme parks and sports venues.

#### **I. BULK CO<sub>2</sub> TANK/HIGH PRESSURE CYLINDER RENTAL AND BULK LIQUID/GAS CO<sub>2</sub> SALES**

COMPANY delivers CO<sub>2</sub> to customers that is stored in a stainless steel cryogenic tank installed at the customer's premises ('Bulk CO<sub>2</sub> Tank') while gas CO<sub>2</sub> is delivered to customers in portable cast iron steel containers ('High Pressure Cylinder'). The customer connects the Bulk CO<sub>2</sub> Tank or the High Pressure Cylinder to its beverage carbonation machine (a soda fountain) where the liquid or gas CO<sub>2</sub> is mixed with water and soda syrup (obtained by the customer from a third party vendor) to produce a fountain soda.<sup>ii</sup> COMPANY's customers sell fountain sodas to their patrons, each of whom pays sales tax, as appropriate, on his or her purchase of the fountain soda.

When the liquid CO<sub>2</sub> in a Bulk CO<sub>2</sub> Tank or gas CO<sub>2</sub> in a High Pressure Cylinder runs out, COMPANY refills it and continues to do so until the relationship terminates. Upon termination, the customer is obligated to return the Bulk CO<sub>2</sub> Tank or High Pressure Cylinder to COMPANY.

COMPANY therefore engages in two transactions with its customers. First it rents the Bulk CO<sub>2</sub> Tanks and High Pressure Cylinders and second, it sells liquid and gas CO<sub>2</sub>.<sup>iii</sup> We request a letter ruling that details Illinois' sales tax treatment of the following:

- 1) Rental of the Bulk CO<sub>2</sub> Tanks and High Pressure Cylinders (which hold liquid and gas CO<sub>2</sub>, respectively) to COMPANY's customers;
- 2) Sale of the liquid or gas CO<sub>2</sub> to COMPANY's customers;<sup>iv</sup>
- 3) Whether the total invoiced amount is subject to Illinois sales tax if the invoice does not separately state the rental charge and the sales charge for the CO<sub>2</sub>.

## **II. FEES, CHARGES AND SURCHARGES**

In addition, a COMPANY customer may be charged the following fees, charges and surcharges: (a) delivery fees for delivering liquid CO<sub>2</sub> or High Pressure Cylinder containing gas; (b) energy/fuel surcharge; (c) hazardous materials fees (for handling hazardous materials and regulatory compliance); (d) Bulk CO<sub>2</sub> Tank inspection and/or permit fee (also for regulatory compliance); and (e) personal property tax charge<sup>v</sup>. We request a letter ruling that details Illinois' sales tax treatment of the following:

- 4) Fees, charges and surcharges charged in connection with the rental of Bulk CO<sub>2</sub> Tanks and High Pressure Cylinders and the sale of liquid and gas CO<sub>2</sub>.

Thank you very much for your time and consideration. Please feel free to contact us if you would like more information or have any questions.

## **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 at retail to purchasers for use or consumption. See 86 Ill. Adm. Code 130.101. In Illinois, Use Tax is imposed on the privilege of using, in this State, any kind of tangible personal property that is purchased anywhere at retail from a retailer. See 86 Ill. Adm. Code 150.101. These taxes comprise what is commonly known as "sales" tax in Illinois.

Illinois Retailers' Occupation Tax (sales tax) is imposed upon gross receipts from the sale of tangible personal property to end-users and gross receipts is defined to mean all the consideration received by sellers valued in money whether received in money or otherwise, but not including the value of or credits given for like kind traded-in property. In computing Retailers' Occupation Tax liability, no deductions shall be taken by a taxpayer from gross receipts on account of the cost of the property sold, the cost of materials used, labor costs, or any other expense whatsoever. See 86 Ill. Adm. Code 130.410.

Generally, fees, charges and surcharges, for example, hazardous material fees and energy or fuel surcharges, relating to the sale of CO<sub>2</sub>, or other bottled gases are costs of doing business subject to the tax. The question of whether delivery fees or charges may be deducted by retailers in

calculating Retailers' Occupation Tax liability depends not upon the separate billing of such delivery charges but upon whether the charges are included in the selling prices of the property or are agreed to by purchasers and retailers separately from the selling price of the property.

The best evidence that delivery charges were agreed to separately and apart from selling prices, are separate and distinct contracts for freight or shipping. Alternatively, documentation in the records of sellers that purchasers had options of taking delivery of the property at sellers' locations, for the agreed purchase prices, or having delivery made by sellers for the agreed purchase prices plus ascertainable delivery charges, may suffice.

To the extent that delivery charges are not reflective of the costs of delivery and such charges exceed the costs of shipping, transportation or delivery, the excess charges are subject to tax. See section 130.415(d).

When customers do not have the option of furnishing and providing their own tanks when purchasing bottled gases, there is an inseparable link between the sale of the gases and the furnishing of the tanks. Therefore, any charge for the tanks is included in "gross receipts" received from the sale of the gases. Those "gross receipts" would be subject to tax, unless the purchaser documents the sale as an exempt sale, such as a sale for resale.

When a person purchases an item of tangible personal property with the intention of reselling it to a purchaser for use or consumption, that person engages in conduct equivalent to holding himself out as a retailer. This makes the initial purchase a purchase for resale, and the subsequent sale is a taxable sale at retail subject to Illinois Retailers' Occupation and Use Tax liabilities. See 86 Ill. Adm. Code 130.201 and 130.210.

For general information regarding resale certificates, the Department's regulation for resale certificates, "Seller's Responsibility to Obtain Certificates of Resale and Requirements for Certificates of Resale," is found at 86 Ill. Adm. Code 130.1405.

When customers do have the option of furnishing and providing their own tanks when purchasing bottled gases and are not required to rent or otherwise pay for use of the seller's tanks, the seller is considered to be leasing or renting the tanks to the purchaser.

The State of Illinois taxes leases differently for Retailers' Occupation Tax and Use Tax purposes than the majority of other states. For Illinois sales tax purposes, there are two types of leasing situations: conditional sales and true leases.

A conditional sale is usually characterized by a nominal or one dollar purchase option at the close of the lease term. Stated otherwise, if lessors are guaranteed at the time of the lease that the leased property will be sold, this transaction is considered to be a conditional sale at the outset of the transaction. Persons who purchase items for resale under conditional sales contracts can avoid paying tax to suppliers by providing certificates of resale that contain all the information set forth in 86 Ill. Adm. Code 130.1405. All receipts received by a person under a conditional sales contract are subject to Retailers' Occupation Tax at the time they are received. See 86 Ill. Adm. Code 130.2010.

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. 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. As end users of tangible personal property located in Illinois, lessors owe Use Tax on their cost price of such property. The State of Illinois imposes no tax on rental receipts. Consequently, lessees incur no tax liability.

As stated above, 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. If the lessors already paid taxes in another state with respect to the acquisition of the tangible personal property, they would be exempt from Use Tax to the extent of the amount of such tax properly due and paid in such other state. See subsection (a)(3) of 86 Ill. Adm. Code 150.310.

Under Illinois law, lessors may not “pass through” their tax obligation to the lessees as taxes. However, lessors and lessees may make private contractual arrangements for a reimbursement of the tax to be paid by the lessees. If lessors and lessees have made private agreements where the lessees agree to reimburse the lessors for the amount of the tax paid, then the lessees are obligated to fulfill the terms of the private contractual agreements.

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.

I hope this information is helpful. If you require additional information, please visit our website at [www.tax.illinois.gov](http://www.tax.illinois.gov) or contact the Department’s Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Richard S. Wolters  
Associate Counsel

RSW:mzk

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<sup>i</sup> COMPANY is located at CITY/STATE. This issue, as it regards COMPANY, is not presently under investigation or audit by the Illinois Department of Revenue, nor is COMPANY presently pursuing any protest, litigation or negotiation on the issue with the Illinois Department of Revenue. Please see the attached power of attorney, including the undersigned, as COMPANY’s representative.

<sup>ii</sup> In some cases, the gas delivered to COMPANY’s customers is a blend of CO<sub>2</sub> and nitrogen, or pure nitrogen. This gas is used to carbonate and propel beer through a tap system. Like a soda, COMPANY’s customer sells a beer to its patron, each of whom pays sales tax, as appropriate, on his or her purchase of the beer.

<sup>iii</sup> COMPANY provides its customers with a variety of purchasing plans. The Budget Plan allows COMPANY’s customers to rent a Bulk CO<sub>2</sub> Tank together with an annual allotment of liquid CO<sub>2</sub> at a low flat monthly rate. Under this plan, the customer’s invoice details only the flat monthly rate, rather than separately stating the charges for the Bulk CO<sub>2</sub> Tank and liquid CO<sub>2</sub> sale. COMPANY’s other purchasing plans separately state the charges for Bulk CO<sub>2</sub> Tank rental and liquid CO<sub>2</sub> sale. Consequently, and as requested in paragraph (3), we would like you to rule whether the customers who choose the Budget Plan must pay sales tax on the entire invoiced amount because the invoice is not separately stated.

<sup>iv</sup> Please note that some COMPANY customers own their own Bulk CO<sub>2</sub> Tank. In those cases, COMPANY’s only role is to sell the liquid CO<sub>2</sub> to the customer. Nonetheless, the liquid CO<sub>2</sub> is used as described above.

<sup>v</sup> The personal property tax charge is an additional cost of providing the tank. COMPANY must pay the personal property tax charge on its ownership of the Bulk CO<sub>2</sub> Tanks. That charge is then passed on to the customer in the ordinary course of business together with a bundled tax preparation service charge imposed by COMPANY.