ST 09-0011-PLR 12/07/2009 FOOD

Where an establishment sells both food which has been prepared for immediate consumption and grocery-type items and also provides facilities for on-premises consumption, the lower rate of tax can be charged on the grocery-type items if the selling areas are separated and served by separate means of collection. See 86 Ill. Adm. Code 130.310 and 130.ILLUSTRATION C. (This is a PLR.)

December 7, 2009

Dear Xxxxx:

This letter is in response to your letter dated March 20, 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 to review regulations, letter rulings and other types of information relevant to your inquiry.

Review of your request disclosed that all the information described in paragraphs 1 through 8 of Section 1200.110 appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to COMPANY for the issue or issues presented in this ruling, and is subject to the provisions of subsection (e) of Section 1200.110 governing expiration of Private Letter Rulings. Issuance of this ruling is conditioned upon the understanding that neither COMPANY nor a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request. In your letter you have stated and made inquiry as follows:

> I am writing to request a Private Letter Ruling. Our question is whether the Company's sales of bakery products through its bakery portion of its retail store front would be subjected to the reduced sales tax rate while the food consumed in the 'café' portion of the bakery would be subjected to the higher tax rate. Currently, COMPANY is charging the higher tax rate for all sales.
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> COMPANY bakes all their own items and sells food that is prepared for immediate consumption (i.e. individually wrapped bakery products) and bulk foods. Over 50% of all sales at the bakery are from sales over the counter. The establishment also has a 'café' where it conducts sit-down table service. '
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> The Illinois Department of Revenue generally relies on the term 'physically portioned' as in separated or divided by a tangible barrier to determine the rate of tax charges. We

are unclear of whether its ‘café’ area would be qualified as ‘physically portioned’ and are enclosing photographs of the area. If need be, a separate register would be used as a means of collection of receipts at the higher tax rate of any items sold strictly to the ‘café’ area.

This letter is not in response to any ongoing audit, protest, appeal, or litigation involving the COMPANY, but request for clarification.

Your help and response would be greatly appreciated.

DEPARTMENT RULING:

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. Illinois imposes a Use Tax 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 two taxes are complimentary in nature and together are commonly referred to as the “sales tax”. The sales tax rate is 6.25%, plus any applicable local taxes. A reduced sales tax rate of 1%, plus any applicable local taxes, is imposed, however, on the sale of food if certain conditions apply.

For your information and reference, the Department’s regulation on the reduced tax rate under the Retailers’ Occupation Tax Act applicable to food, drugs, medicines and medical appliances can be found on the Department’s website at www.tax.illinois.gov. Under “Quick Links,” click on “Laws/Regs/Rulings.” The regulation is found under Part 130, in Section 130.310. (86 Ill. Adm. Code 130.310) This regulation was recently revised to clarify the taxation of food. Alcoholic beverages, soft drinks, candy, and food that is prepared for immediate consumption are taxed at the regular sales tax rate of 6.25%, plus any applicable local taxes. Generally, a 1% sales tax rate, plus any applicable local taxes, is applied to food prepared for consumption off the premises where sold.

Food is defined as “any solid, liquid, powder or item intended by the seller primarily for human consumption, whether simple, compound or mixed, including foods such as condiments, spices, seasonings, vitamins, bottled water and ice.” See Section 130.310(c)(1).

As stated in Section 130.310(b), the manner in which food is taxed (other than alcoholic beverages, soft drinks, and candy which are always taxed at the high rate) depends upon 2 distinct factors that must both be considered in determining if food is taxed at the high rate as "food prepared for immediate consumption" or the low rate as "food prepared for consumption off the premises where sold."

The first factor is whether the retailer selling the food provides premises for consumption of food. If so, a rebuttable presumption is created that all sales of food by that retailer are considered to be prepared for immediate consumption and subject to tax at the high rate. As a result of this presumption, even bulk food could potentially be taxable at the high rate. However, this presumption is rebutted if a retailer demonstrates that:

(A) the area for on-premises consumption is physically separated or otherwise distinguishable from the area where food not for immediate consumption is sold; and

(B) the retailer has a separate means of recording and accounting for collection of receipts from sales of both high and low rate foods.

The second factor is the nature of the food item being sold. If it is food prepared for immediate consumption, it is taxable at the rate of 6.25% plus any applicable local taxes. If it is food prepared for consumption off the premises where sold, then it is taxable at the rate of 1%, plus any applicable local taxes, provided that the conditions set forth under items (A) and (B) above are met. (See 86 Ill. Adm. Code 130.310(b))

With respect to physical separation, the Department generally relies on the plain meaning of the term "physically separated" as in separated or divided by a tangible barrier. An eat-in-area that is partially isolated from the general sales area of a store by the arrangement of display cases, service counters, or stub walls would qualify as "physically separated." Based on the pictures and other information provided by COMPANY, it appears that the café area for on-premises consumption is physically separated or otherwise distinguishable from the bakery area where food not for immediate consumption is sold.

COMPANY must also have a separate means of recording and accounting for collection of receipts from sales of both high and low rate foods. This would include cash registers that separately identify high rate and low rate sales, separate cash registers, or any other method by which the tax on high and low rate sales are recorded at the time of collection. See 86 Ill. Adm. Code 130.310(b)(1)(B). As long as COMPANY complies with these provisions it will satisfy the requirements for separately recording and accounting for collection of these receipts at different rates.

In addition to having an area for on-premises consumption that is physically separated and establishing a separate means of recording and accounting for the collection of receipts, COMPANY must determine which items are subject to the high rate of tax and which items are subject to the low rate of tax. The Department's regulations provide guidance on this at 86 Ill. Adm. Code 130.310(c) and (d). The high rate of tax applies to all soft drinks (Section 130.310(d)(6)), candy (Section 130.310(d)(7)), alcoholic beverages (Section 130.310(d)(5)), and food prepared for immediate consumption (Section 130.310(c)(2)), regardless of where these items are sold on the premises. Food prepared for immediate consumption means food that is prepared or made ready by a retailer to be eaten without substantial delay after the final stage of preparation by the retailer. "Food prepared for immediate consumption" includes, but is not limited to: all food sold for consumption on the premises where sold; all hot foods, whether sold in a restaurant, delicatessen, grocery store, discount store, concession stand, bowling alley, vending machine or any other location; sandwiches, either hot or cold, prepared by a retailer to the individual order of a customer; salad, olive or sushi bars offered by a retailer at which individuals prepare their own salads (hot or cold); and all coffee, tea, cappuccino and other drinks prepared by a retailer for individual consumption, whether hot or cold. See 86 Ill. Adm. Code 130.310(c)(2)(A).

"Food prepared for immediate consumption" does not include: doughnuts, cookies, bagels or other bakery items prepared by a retailer and sold either individually or in another quantity selected by the customer, provided they are for consumption off the premises where sold; whole breads, pies and cakes prepared by a retailer, even when prepared to the individual order of a customer; sandwiches that are prepared by a retailer and placed in a deli case or other storage unit; cold salads, jellos, stuffed vegetables or fruits sold by weight or by quart, pint or other quantity by a retailer; cheese, fruit, vegetable or meat trays prepared by a retailer, either to the individual order of a customer or premade and set out for sale; food items sold by a retailer that are not prepared or otherwise manufactured by that retailer, such as pre-packaged snacks or chips, unless these items will be consumed on the premises where sold (e.g., in a sandwich shop). See 86 Ill. Adm. Code 130.310(c)(2)(B) However, these items are taxable at the low rate only if the retailer has a separate

means of recording and accounting for high and low rate sales, and the retailer provides no on-premises facilities for consumption of the food or, if the retailer does provide such facilities, they are physically separated or otherwise distinguishable from the area where food not for immediate consumption is sold.

In addition, please see Section 130.Illustration C, which is a decision tree to assist in making high rate/low rate determinations.

The factual representations upon which this ruling is based are subject to review by the Department during the course of any audit, investigation, or hearing and this ruling shall bind the Department only if the factual representations recited in this ruling are correct and complete. This Private Letter Ruling is revoked and will cease to bind the Department 10 years after the date of this letter under the provisions of 2 Ill. Adm. Code 1200.110(e) or earlier if there is a pertinent change in statutory law, case law, rules, or the factual representations recited in this ruling.

If you have any questions concerning this Private Letter Ruling, you may contact me at (217) 782-2844. If you have further questions related to the Illinois sales tax laws, please visit our website at www.tax.illinois.gov or contact the Department's Taxpayer Information Division at (217) 782-3336.

Sincerely,

Terry D. Charlton
Chairman, Private Letter Ruling Committee

TDC/SJM/msk