

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.)

January 8, 2009

Dear Xxxxx:

This letter is in response to your letter received by the Department on September 9, 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:

I am an Illinois resident artist. I have two instances of sales this year for which I am unsure whether sales tax is required to be collected/paid. I would appreciate your official opinion on them:

1. Was paid in cash by the local (CITY, Illinois) ABC for painting mural backgrounds for four of their animal exhibits.
2. Allowed the use of an image of one of my paintings for the cover of the GUIDE. Payment for use of the image is a half-page ad in the guide: the Convention and Visitors Bureau has given me the dollar value of the ad which I will report as income.

Again, I would like to know if I should include these two transactions with my 'normal' art sales in my annual Illinois Sales Tax submission.

DEPARTMENT'S RESPONSE:

Unfortunately you did not provide the Department with enough information regarding your contractual agreement with the ABC for the painting of mural backgrounds in order for the Department to respond to your first instance of sale (for example, whether the murals were painted on

canvas or some other tangible personal property, or whether they were incorporated into real estate by being painted on walls of a building) because the tax liability varies based on the situation. However, we hope that you will find the following information helpful.

Construction Contractor

A contract to incorporate tangible personal property into real property is considered a construction contract. The tax liabilities regarding construction contractors in Illinois may be found at 86 Ill. Adm. Code 130.1940 and 130.2075 on the Department's Internet website. The term construction contractor includes general contractors, subcontractors, and specialized contractors such as landscape contractors.

In Illinois, construction contractors are deemed end users of tangible personal property purchased for incorporation into real property. As end users of such tangible personal property, these contractors incur Use Tax liability for such purchases based upon their cost price of the tangible personal property. See 86 Ill. Adm. Code 130.1940 and 86 Ill. Adm. Code 130.2075. For example, an artist who is painting a mural on the side of a building would incur Use Tax on the paint or any other tangible personal property applied to the side of the building.

Therefore, any tangible personal property that a construction contractor purchases that will be permanently affixed to or incorporated into real property in this State will be subject to Use Tax. If such contractors did not pay the Use Tax liability to their suppliers, those contractors must self assess their Use Tax liability and pay it directly to the Department. If the contractors have already paid a tax in another state regarding the purchase or use of such property, they will be entitled to a credit against their Illinois Use Tax liability to the extent that they have paid tax that was properly due to another state. See 86 Ill. Adm. Code 150.310. The Illinois Use Tax rate incurred by an out-of-State construction contractor on purchases of materials from an unregistered supplier located outside of this State is generally 6.25% as described in subsection (c) of Section 130.2075.

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.

Art Work

Generally, the sale of art work, even on a commissioned basis, is a transfer of tangible personal property subject to the Retailers' Occupation Tax. In order for the art work not to be subject to Retailers' Occupation Tax, it must be of no commercial value to anyone other than the purchaser. Instances wherein this would occur are very limited. An example of this type of art work might be a commissioned portrait of the purchaser. However, works as fungible as, for instance, still life paintings (painted on a canvas or other tangible personal property), even if specifically commissioned and of unusually large scale, would have commercial value to someone other than the person by whom they are commissioned. Therefore, such art work would generally be subject to the Retailers' Occupation Tax.

Use/license of an image

The Illinois Retailers' Occupation Tax Act imposes a tax upon "persons engaged in the business of selling at retail tangible personal property, including computer software, and including photographs, negatives, and positives that are the product of photoprocessing, but not including products of photoprocessing produced for use in motion pictures for public commercial exhibition." 35 ILCS 120/2.

If you are selling photographs, whether at art fairs or elsewhere in Illinois, you are "engaged in the business of selling at retail" and, thus, incur Retailers' Occupation (i.e., Sales Tax) liability on your gross receipts from such sales. See 86 Ill. Adm. Code 130.2000 concerning Persons Engaged in the Printing, Graphic Arts or Related Occupations, and Their Suppliers. Artists who engage in selling art objects at retail should register like any other retailer, file sales tax returns and otherwise comply with the Retailers' Occupation Tax Act. Please refer to 86 Ill. Adm. Code 130.1910(a). However, you should not have to pay tax on items that you purchase for the purpose of resale, so long as you give your vendor a certificate of resale that contains the information required by 86 Ill. Adm. Code 130.1410.

On the other hand, if you give your customer a "license" to use a photographic image in a specific number of situations or for a specified frequency, and the customer is required to return the photograph to you, there would be no sale at retail and no tax upon the receipts received from your customer. However, you as the user, would owe tax on the purchase of the film and the price charged on the development of the photograph, etc. when it is done by an outside photoprocessing laboratory. When you do the photoprocessing in-house, you would also owe tax on the sensitized paper, and any other tangible personal property that is physically incorporated into the product of photoprocessing.

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,

Debra M. Boggess
Associate Counsel

DMB:msk