

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. (This is a GIL).

August 20, 2009

Dear Xxxxx:

This letter is in response to your letter dated December 2, 2008, and our telephone discussion on June 11, 2009. 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:

We are contacting you on behalf of our client (or the Company) in order to respectfully request a letter ruling from the Illinois Department of Revenue regarding the taxability of COMPANY's products and services in Illinois.

COMPANY is a network services and broadband access provider. The Company resells broadband internet access and connectivity circuits, which it packages with other products and services. The Company works with its clients, usually retail companies or multi-site businesses, to create broadband-enabled networks that match and satisfy the client's specific needs and efficiency requirements. COMPANY also offers network reliability and connectivity management, network security support, and advanced network equipment maintenance and support.

Currently, approximately 54% of COMPANY's sales are for direct internet access. The Company works with third party network partners, typically telecommunications providers and exchange carriers, in order to resell and market internet access for each client's wide area network (WAN). COMPANY will also help clients transform any of their business sites into wireless access 'hotspots', utilizing Wireless fidelity (Wi-Fi) internet service. Various broadband access technologies are used to provide this

service, such as Digital Subscriber Line (DSL), Cable, Plain Old Telephone Service (POTS) and Ethernet.

COMPANY also offers a multi-carrier networking service that provides clients with a specially-tailored connection to a WAN maintained by the Company. The Company utilizes different networking and data transfer technologies like Multi Protocol Label Switching (MPLS), Asynchronous Transfer Mode (ATM), and Frame Relay to create personalized network areas. COMPANY examines the client's business site or sites and consults with staff in order to design a tailored network; the Company then orders a broadband connection from one of its network partners. Once this order is completed, the Company sends third-party technicians to install the proper networking and broadband connection equipment. This network connection allows access to various business and internet applications. The Company also offers Client Support Teams to help maintain these networks and remotely troubleshoot any issues. Charges for the installation of equipment and other tangible property is separately-stated and billed from service charges.

COMPANY offers a Virtual Private Network (VPN) service. This service combines broadband internet access with security appliance software to form secure connectivity between endpoints using the public internet as the backbone medium. The broadband component includes resold services from the Company's partners, which can include various local exchange carriers, cable operators and other telecommunications providers. Through the VPN service, the Company maintains remote access to device configuration, deployment and management of the client's network.

The Company offers a web-based video management system that utilizes the Company's existing infrastructure. This product is designed to be used in conjunction with video cameras around a client's business site to provide real-time surveillance from any network-accessible location.

The Company also offers other value-added services in conjunction with their various products and service lines. COMPANY offers secure internet gateway services wherein the Company reroutes and monitors information sent over a client's WAN. The Company also offers specialized support and management services for retail clients, including dynamic signage, wiring service and Wi-Fi implementation. COMPANY also offers proactive, remote circuit monitoring and will work with underlying third-party carriers in order to restore service in the event of a system failure or network outage.

The Company is not currently registered with any state jurisdiction as a local exchange carrier or telecommunications provider. COMPANY does not lease ('collocate') any network elements from local exchange carriers, nor has it ever engaged in any interconnection agreements, paid intercarrier compensation, or received any line sharing discounts. COMPANY has no central office and does not possess or build any telecommunications facilities or lines itself. No services currently sold or marketed by the Company provide customers with telephone service or telephone end user demarcation points; the Company merely provides internet access and/or networking solutions for businesses. Furthermore, no NXX codes have been assigned to COMPANY.

COMPANY desires to register to do business in Illinois and file sales and use tax returns. We believe some of the Company's products and services may be subject to sales and use taxes in Illinois and we wish to get a clearer understanding of the

taxability of these products and services for purposes of registering with the state. Therefore, we would appreciate your guidance on the taxability of COMPANY's products and services, which include:

1. Direct internet access, including Wi-Fi service, provided through third-party network partners
2. Multi-carrier networking service and WAN connection, also provided in conjunction with network partners and third-party technicians
3. Virtual Private Network services for corporate clients
4. Web-based video management and security systems
5. Secure internet gateway and monitoring services
6. Specialized retail support and management services
7. Remote network circuit monitoring and maintenance

At your earliest convenience, please provide us with a letter ruling addressing the taxability of COMPANY's products and services described above. Please mail the letter ruling to my attention at the following address:

If you have any questions, please call me. Your assistance with this matter is greatly appreciated.

DEPARTMENT'S RESPONSE:

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 35 ILCS Sections 630/3 and 630/4. Telecommunications retailers collect tax from end users and remit it to the Department. See 86 Ill. Adm. Code 495.140. "Telecommunications", in addition to the meaning ordinarily and popularly ascribed to it, includes, without limitation, messages or information transmitted through use of local, toll and wide area telephone service; private line services; channel services; telegraph services; teletypewriter; computer exchange services; cellular mobile telecommunications service; specialized mobile radio; stationary two way radio; paging service; or any other form of mobile and portable one-way or two-way communications; or any other transmission of messages or information by electronic or similar means, between or among points by wire, cable, fiber-optics, laser, microwave, radio, satellite or similar facilities. See 35 ILCS 630/2(c).

Interstate and intrastate telecommunications that originate or are received in this State are subject to Telecommunications Excise Tax. Interstate telecommunications means all telecommunications that either originate or terminate outside the State. This includes telecommunications that originate or terminate outside of the United States. Consumers paying foreign taxes on telecommunications may take credit for such taxes in the same manner as taxes paid to other states. See 86 Ill. Adm. Code 495.115 and 495.130.

Retailers of telecommunications are persons who engage in the business of making sales of telecommunications at retail. 86 Ill. Adm. Code 495.110. "Sale at retail" means the transmitting, supplying or furnishing of telecommunications and all services and equipment provided in connection therewith for a consideration. The Telecommunications Excise Tax must be collected from a taxpayer by a "retailer maintaining a place of business in this State." The Department may, in its discretion, upon application, authorize the collection of the tax by any retailer not maintaining a place of business within this State, who, to the satisfaction of the Department, furnishes adequate security to insure collection and payment of the tax. Such retailer shall be issued, without charge, a permit to

collect such tax. When so authorized, it shall be the duty of such retailer to collect the tax upon all of the gross charges for telecommunications in this State in the same manner and subject to the same requirements as a retailer maintaining a place of business within this State. The permit may be revoked by the Department at its discretion. 35 ILCS 630/2(I).

A retailer maintaining a place of business in this State must collect and remit to the Department the tax imposed by the Act. The retailer shall be liable for the tax whether or not the tax has been collected by the retailer. 35 ILCS 630/5.

If a person who originates or receives telecommunications in this State claims to be a reseller of such telecommunications, the person is required to apply to the Department for a resale number. The applicant must state facts which show the Department why the applicant is not liable for tax on his purchases. The act or privilege of originating or receiving telecommunications in this State cannot be made tax free on the ground of being a sale for resale unless the person has an active resale number from the Department and furnishes that number to the retailer in connection with a sale to such person. 35 ILCS 630/8.

If a person originating or receiving telecommunications in this State elects not to apply for a resale number, the act or privilege of originating or receiving telecommunications in this State by such person cannot be made tax free. If a reseller is purchasing telecommunications services from a retailer and has not provided the retailer with an active resale number, the retailer is responsible for collecting the tax from the reseller for calls originating or terminating in this State.

In Illinois, effective July 1, 2008, telecommunications purchased, used, or sold by a provider of Internet access to provide Internet access are subject to the federal moratorium on state-imposed telecommunications taxes. See ST 09-0065 (GIL), which can be viewed on the Department's website.

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. 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 and Use Taxes do not apply to sales of service that do not involve the transfer of tangible personal property to customers. However, if tangible personal property is transferred incident to sales of service, this will result in either Service Occupation Tax liability or Use Tax liability for the servicemen depending upon his activities. For your general information see 86 Ill. Adm. Code 140.101 through 140.109 regarding sales of service and Service Occupation Tax. Services that involve the transfer of tangible personal property (such as, for example, written reports, other tangible media and training manuals) incident to a sale of service may be subject to either Service Occupation Tax liability or Use Tax liability.

Information or data that is electronically transferred or downloaded is not considered the transfer of tangible personal property in this State. See 86 Ill. Adm. Code 130.2105(a)(3). However, canned computer software is considered taxable tangible personal property regardless of the form in which it is transferred or transmitted, including tape, disc, card, electronic means or other media. See 86 Ill. Adm. Code 130.1935. If the computer software consists of custom computer programs, then the sales of such software may not be taxable retail sales. See Section 130.1935(c).

Custom computer programs or software are prepared to the special order of the customer. The selection of pre-written or canned programs assembled by vendors into software packages does not

constitute custom software unless real and substantial changes are made to the programs or creation of program interfacing logic. See Section 130.1935(c)(3).

If transactions for the licensing of computer software meet all of the criteria provided in Section 130.1935(a)(1), neither the transfer of the software or the subsequent software updates will be subject to Retailers' Occupation Tax. A license of software is not a taxable retail sale if:

- A) It is evidenced by a written agreement signed by the licensor and the customer;
- B) It restricts the customer's duplication and use of the software;
- C) It prohibits the customer from licensing, sublicensing or transferring the software to a third party (except to a related party) without the permission and continued control of the licensor;
- D) The licensor has a policy of providing another copy at minimal or no charge if the customer loses or damages the software, or permitting the licensee to make and keep an archival copy, and such policy is either stated in the license agreement, supported by the licensor's books and records, or supported by a notarized statement made under penalties of perjury by the licensor; and
- E) The customer must destroy or return all copies of the software to the licensor at the end of the license period. This provision is deemed to be met, in the case of a perpetual license, without being set forth in the license agreement.

Please note that acceptance of a software license agreement by clicking "accept" while online is not considered "acceptance" sufficient enough to constitute a written agreement signed by the licensor and the customer for purposes of subsection (a)(1)(A) of Section 130.1935.

Charges for updates of canned software are fully taxable pursuant to Section 130.1935. If the updates qualify as custom software under Section 130.1935(c), they may not be taxable. But, if maintenance agreements provide for updates of canned software, and the charges for those updates are not separately stated and taxed, then the whole agreement would be taxable as sales of canned software.

Assuming that any services provided, such as installation, phone support, training, and seminars do not require the transfer of tangible personal property to the recipients of those services, charges for such services are exempt if they are separately stated from the selling price of canned software. See Section 130.1935(b). If computer software training or other support services are provided in conjunction with a sale of custom computer software or a license of computer software, the charges for that training are not subject to tax.

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

RSW:mzk