

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.)

December 21, 2009

Dear Xxxxx:

This letter is in response to your letter dated June 5, 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.

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:

A letter ruling is requested pursuant to Title 86, Part 130, Section 130.940 [sic] on whether customers should be charged Sales tax on the purchase of counter tops from a retailer who contracts with a company that both manufactures and installs counter tops. This section states that 'a construction contractor does not incur Retailers' Occupation Tax liability as to receipts from labor furnished and tangible personal property incorporated into a structure as integral part', but 'the construction contractor incurs Use Tax on the cost price of the tangible personal property that is incorporated into real estate'.

Issue:

Does COMPANY only need to pay Use tax if they both install and manufacture the counter tops? If COMPANY does pay Use tax on a [sic] the cost of the materials for a certain counter top, does the customer have to pay Sales tax on the same counter top?

Statement of Facts:

COMPANY both manufactures and installs custom counter tops. In instances where COMPANY both manufacturers and installs the counter tops, then the Company currently pays Use tax on the counter tops. If, however, COMPANY does not install the countertops, then the company does not pay Use tax and the customer pays Sales tax.

Opinion:

A letter ruling is requested pursuant to Title 86, Part 130, Section 130.940 [sic] on whether customers should be charged Sales tax on the purchase of counter tops from a company that both manufactures and installs the counter tops, when that company pays Use tax on that counter top.

Investigations & Contact:

To the best of our knowledge the Illinois Department of Revenue has not previously ruled on the same or similar issue for COMPANY. Also COMPANY has not previously submitted this issue and withdrew the request before a ruling was issued. The [sic] best of our knowledge there are no authorities contrary to our views. At this point in time, we are unaware of any pending investigations from the Illinois Department of Revenue concerning this advisory opinion. In addition, COMPANY is not pursuing the Illinois Department of Revenue on any issue. If you have any other questions, please call me.

DEPARTMENT'S RESPONSE:

The Department's regulation "Public Information, Rulemaking and Organization" provides that "[w]hether to issue a private letter ruling in response to a letter ruling request is within the discretion of the Department. The Department will respond to all requests for private letter rulings either by issuance of a ruling or by a letter explaining that the request for ruling will not be honored." 2 Ill. Adm. Code 1200.110(a)(4). Your letter provides insufficient information regarding the contractual agreements between the COMPANY and the parties selling the counter tops to the ultimate consumers. The contractual agreements between the parties selling the counter tops and the ultimate consumers are also unclear. Therefore, it is the Department's position that we must decline to issue a Private Letter Ruling. However, we hope the following will be helpful in addressing your question.

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. If the purchases occur in Illinois, the purchasers must pay the Use Tax to the retailer at the time of purchase. The retailers are then allowed to retain the amount of Use Tax paid to reimburse themselves for their Retailers' Occupation Tax liability incurred on those sales.

If a customer purchases tangible personal property, or in your case counter tops, over-the-counter without installation, then the retailer owes Retailers' Occupation Tax and must collect the corresponding Use Tax from the customer. If a customer purchases counter tops over-the-counter and separately contracts for installation of the cabinets, then the retailer owes Retailers' Occupation Tax and must collect the corresponding Use Tax from the customer on the sale of the cabinets. The separately contracted for installation of the cabinets is a separate service and no tax is incurred by the customer on the installation charges. See 86 Ill. Adm. Code 130.450.

A contract that provides for both the sale and installation of tangible personal property that is permanently affixed or incorporated into a structure 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.

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.

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.

The Department is reviewing its rules on construction contractors and is considering amending its rules to more fully explain the parties' tax liabilities when a construction contractor or retailer contracts with another party to manufacture and permanently affix or incorporate into a structure tangible personal property.

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:msk