

This letter discusses the tax liability of construction contractors. See 86 Ill. Adm. Code 130.1940. (This is a GIL.)

December 23, 2009

Dear Xxxxx:

This letter is in response to your letter dated March 30, 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:

This letter is a request for information regarding sales and use tax laws in your state. We are a New York State corporation registered to do business in your state. I am writing today to request a ***private letter ruling*** regarding the taxable and non-taxable portions of our business, so that we can be in compliance with the rules and laws in your state.

ABC designs and installs wireless communication systems that enhance radio signal strength within buildings. Attached is a general description of the services that ABC performs. For the majority of our work, we are retained by one customer. This customer purchases the fully installed system from us and then resells the system to the end customer in the building or facility. Our customer is not the owner of the building. Our customer provides us with a Multi-jurisdiction Sales Tax Exemption Certificate stating the 'buyer' as a reseller. A handful of other customers would be a direct sale of the installed system within their building or facility. Do these two situations have different sales tax laws? Certain components of the system such as the bi-directional amplifiers are expensive and can be removed by the owner, but removal of the bi-directional amplifiers would render the system non-operational, but not the amplifier itself. The cabling that runs through ceilings and walls is more difficult to remove. Do these types of components differ with regard to sales tax?

We do not do construction. We provide consulting, design and installation, and integration services. Clarity is needed as to whether or not the system or parts of the system are considered tangible property or a real property improvement. If the customer provides us with a resale certificate, are we still subject to use tax on our purchases? Equipment is drop shipped to the installation site. Is shipping taxable or non-taxable and who pays the tax? The major aspects of our work billed to our customers are consulting, installation, materials, shipping and travel. We occasionally make service calls.

We request and appreciate a timely response, in writing to the above address, pertaining to **all** aspects of our work mentioned above with regard to sales and use tax. Thank you for your consideration in this matter. If you should have any further questions, we can be reached by email.

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). The Department requested additional information required by Section 1200.110, but did not receive the additional information requested. Therefore, the Department will respond with a GIL.

SALES AND USE TAXES

Based upon the descriptions of the varied types of sales and services that your business engages in, we cannot give you specific answers since those answers will depend upon what type of sales or services your business is engaged in each specific instance. We have provided some general information below that may be helpful.

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 which can be found on the Department's website. 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 the Department's regulation at 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 the purchases occur outside Illinois, purchasers must self assess their Use Tax liability and remit it directly to the Department.

Please be advised that Section 1 of the Retailers' Occupation Tax Act (35 ILCS 120/1) provides that construction contracts for the improvement of real estate consisting of engineering, installation, and maintenance of voice, data, video, security, and all telecommunications systems, do not constitute engaging in a business of selling tangible personal property at retail within the meaning of the Act if they are sold at one specified contract price. Rather, such contractors incur tax liability on their cost price of such systems. See the information provided in this letter regarding construction contracts and 86 Ill. Adm. Code 130.1940(c)(3).

DROP SHIPMENT AND SALE AT RESALE

For general information regarding drop shipments and resale certificates, please see the Department's regulations regarding Drop Shipments at 86 Ill. Adm. Code 130.225 and Seller's Responsibility to Obtain Certificates of Resale and Requirements for Certificates of Resale at 86 Ill. Adm. Code 130.1405.

SERVICE OCCUPATION TAX

In regards to the consulting and designing your company provides, 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 the Department's regulation at 86 Ill. Adm. Code 140.101 through 140.109 regarding sales of service and Service Occupation Tax, which can be found on the Department's website.

Under the Service Occupation Tax Act, businesses providing services (i.e. servicemen) are taxed on tangible personal property transferred as an incident to sales of service. The purchase of tangible personal property that is transferred to the service customer may result in either Service Occupation Tax liability or Use Tax liability for the servicemen depending upon his activities. The serviceman's liability may be calculated in one of four ways: (1) separately stated selling price of tangible personal property transferred incident to service; (2) 50% of the servicemen's entire bill; (3) Service Occupation Tax on the servicemen's cost price if the servicemen are registered de minimis servicemen; or (4) Use Tax on the servicemen's cost price if the servicemen are de minimis and are not otherwise required to be registered under Section 2a of the Retailers' Occupation Tax Act.

Using the first method, servicemen may separately state the selling price of each item transferred as a result of the sale of service. The tax is then calculated on the separately stated selling price of the tangible personal property transferred. If the servicemen do not separately state the selling price of the tangible personal property transferred, they must use 50% of the entire bill to the service customer as the tax base. Both of the above methods provide that in no event may the tax base be less than the servicemen's cost price of the tangible personal property transferred. See the Department's regulation at 86 Ill. Adm. Code 140.106.

The third way servicemen may account for their tax liability only applies to de minimis servicemen who have either chosen to be registered or are required to be registered because they incur Retailers' Occupation Tax liability with respect to a portion of their business. See 86 Ill. Adm. Code 140.109. Servicemen may qualify as de minimis if they determine that the annual aggregate cost price of tangible personal property transferred as an incident of the sale of service is less than 35% of the total annual gross receipts from service transactions (75% in the case of pharmacists and persons engaged in graphics arts production). Servicemen no longer have the option of determining whether they are de minimis using a transaction by transaction basis.

The final method of determining tax liability may be used by de minimis servicemen that are not otherwise required to be registered under Section 2a of the Retailers' Occupation Tax Act. Such de minimis servicemen handle their tax liability by paying Use Tax to their suppliers. If their suppliers are not registered to collect and remit tax, the servicemen must register, self-assess and remit Use Tax to the Department. The servicemen are considered to be the end-users of the tangible personal property transferred incident to service. Consequently, they are not authorized to collect a "tax" from the service customers. See the Department's regulation at 86 Ill. Adm. Code 140.108.

CONSTRUCTION CONTRACTS

If a person or business is contractually required to purchase tangible personal property for incorporation into real estate, then it would be acting as a construction contractor. 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, contractors incur Use Tax liability for such purchases based upon the cost price of the tangible personal property. See the Department's regulations at 86 Ill. Adm. Code 130.1940 and 86 Ill. Adm. Code 130.2075. Persons from other states who act as construction contractors in Illinois by permanently affixing tangible personal property to real estate owe Illinois Use Tax on the cost price of the tangible personal property affixed to that real estate.

The Illinois Use Tax Act provides, that in order to prevent multi-state taxation, the Use Tax does not apply to the use, in Illinois, of tangible personal property acquired outside of this State and caused to be brought into this State by a person who has already paid a tax in another state in respect to the sale, purchase, or use of such property, to the extent of the amount of such tax properly due and paid in such other state. See subsection (a)(3) of the Department's Regulation at 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.

As noted previously, contracts involving video data and security have specific rules. See 86 Ill. Adm. Code 130.1940(c)(3).

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

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