

Construction contractors who physically incorporate tangible personal property into real estate owned by exempt organizations or governmental entities that hold tax exempt "E" numbers can purchase such property tax free by providing their suppliers with the certification described in 86 Ill. Adm. Code 130.2075(d). See 86 Ill. Adm. Code Section 130.2075. (This is a PLR.)

May 18, 2011

Dear Xxxxx:

This letter is in response to your letter dated February 17, 2011 in which you request a Private Letter Ruling. 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 ABC 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 ABC 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. Introduction

The purpose of this letter is to request a Private Letter Ruling from the Illinois Department of Revenue (the 'Department') pursuant to 2 Ill. Adm. Code 1200.110 concerning the applicability of 86 Ill. Adm. Code 130.2075(d) to purchases of tangible personal property by a construction contractor engaged by ABC, a non-member Illinois not-for-profit corporation, to construct a facility on real estate owned by the Housing Authority, a governmental entity exempt from the Illinois Retailers' Occupation Tax and Use Tax and which has an active exemption number ("E' number") from the Department. A copy of IL-2848, Power of Attorney is attached.

Based on the facts presented below, please confirm that the construction contractor engaged by ABC is permitted to purchase tangible personal property for incorporation into the Housing Authority's real estate free from the Illinois Retailers' Occupation Tax

and may claim the exemption from the Illinois Retailers' Occupation Tax and the Illinois Use Tax upon providing its suppliers with the certifications required by 86 Ill. Adm. Code 130.2075(d)(4). There is no audit or litigation pending with the Department regarding this issue. To the best of the knowledge of both ABC and its representatives, the Department has not previously ruled on this issue or a similar issue for ABC or a predecessor.

II. Statement of Facts

A. Governmental Entity Affiliate

ABC is a non-member Illinois not-for-profit corporation and an Affiliated Entity of the Housing Authority by virtue of the fact that the Housing Authority caused the formation of ABC under Illinois state law and the Housing Authority participates in the governance of ABC with one member of the three member Board of Directors being an employee of the Housing Authority. As used in this letter, the term 'Affiliated Entity' has the meaning set forth in the Notice PIH-2007-15 (HA), issued June 20, 2007, by the U.S. Department of Housing and Urban Development Office of Public and Indian Housing ('HUD').

ABC has submitted a Form 1023 application for determination of 501(c)(3) tax exempt status to the Internal Revenue Service. However, a determination letter has not yet been issued by the Internal Revenue Service. ABC expects that, if it receives a positive determination from the Internal Revenue Service, such determination would be effective as of October 4, 2010, the date that ABC was incorporated.

ABC has also submitted an application to the Department for exemption from the Illinois Retailers' Occupation Tax and Use Tax. However, a determination has not yet been made by the Department.

B. Development and Construction of FACILITY.

ABC is the developer of FACILITY, a proposed four story [sic], mixed use [sic] facility in a low income [sic] census tract in CITY, Illinois in order to provide affordable housing for low income [sic] senior citizens and to provide community and economic development services and community health services for residents and the surrounding community.

The total development budget for the *FACILITY* project is projected to be \$ and is funded as follows: \$ in private equity investment and \$ from the Housing Authority. The Housing Authority is providing \$ in public housing development funds, \$ of Tax Increment Financing funds; and \$ of a design grant award from the FOUNDATION to finance the development and construction of the *FACILITY* project by ABC.

The Housing Authority paid an architect for construction drawings and bidding. ABC plans to enter into a contract with an architect for construction administration and value engineering.

On DATE, ABC entered into the General Contractor Contract with a general contractor for the construction of the facility.

C. Ownership of Real Estate and Improvements.

The Housing Authority owns the real estate on which the facility will be constructed. The assembled project site consists of approximately # square feet of real estate owned by the Housing Authority. Approximately # square feet was previously owned by the Housing Authority and an additional # square feet was acquired by the Housing Authority through eminent domain.

On DATE, the Housing Authority entered into a 99 year [sic] Ground Lease with ABC to construct the facility and ABC will own the improvements to the real estate after the facility has been constructed.

The proposed four-story mixed-use facility will include a total of 74 units of affordable rental housing for low income [sic] senior citizens on the second, third and fourth floors, along with # square feet [sic] of commercial space on the ground/first floor.

The residential space will consist of: (i) # one-bedroom public housing units for senior citizens earning up to 80% of Area Median Income; and (ii) # one and two bedroom project based Housing Choice Voucher units, also for senior citizens earning up to 80% of Area Median Income.

The commercial space will consist of: (i) a main lobby; (ii) office spaces for ABC and two other not-for-profit affiliated entities of the Housing Authority; (iii) a health and wellness center anticipated to be operated by the Foundation; (iv) a state of the art community center for use by the residents and the community for conferences, meetings, programs, banquets, and other special events; and (v) retail space for a green grocery store or cooperative.

On DATE, ABC entered into a master lease, as the master lessor, of the commercial space at the facility with the Housing Authority, as the master lessee.

D. Regulatory Use and Operating Restrictions.

ABC entered into a Declaration of Restrictive Covenants with the Housing Authority on DATE in favor of HUD which subjects the real estate owned by the Housing Authority to low-income use restrictions to assure HUD that ABC complies with applicable public housing requirements in connection with the development, operation and maintenance of the facility.

In addition, ABC entered into a Regulatory and Operating Agreement with the Housing Authority to ensure that, after the facility is constructed, the public housing units in the facility will be maintained and operated in accordance with applicable public housing requirements and will be eligible to receive operating subsidies from the Housing Authority which will be provided to the Housing Authority by HUD pursuant to Section 9 of the United States Housing Act of 1937.

ABC also entered into a Purchase Option and Right of First Refusal Agreement with the Housing Authority which provides the Housing Authority with the option to purchase the facility after the termination of the 99 year [sic] Ground Lease in order to continue to use the facility for public housing.

III. Statement of Authorities – Applicability of 86 III. Adm. Code 130.2075(d)

ABC has entered into a contract with a general contractor 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. 86 Ill. Adm. Code 130.1940 and 130.2075. The term 'construction contractor' includes general contractors and subcontractors and specialized contractors. 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 Illinois Use Tax on the cost price of that tangible personal property. 86 Ill. Adm.Code [sic] 130.1940 and 86 Ill. Adm. Code 130.2075. See, e.g., ST 10-0066-General Information Letter (August 10, 2010).

However, Section 130.2075(d)(1) provides that a contractor incorporating tangible personal property into real estate owned by an exempt organization or governmental body that possesses a valid 'E' number at the time of sale is exempt from the Illinois Retailers' Occupation Tax and Use Tax. In claiming the exemption, the contractor must provide its supplier with the documentation described in the regulation. 86 Ill. Adm. [sic] Code Section 130.2075(d)(1). See, e.g., ST 09-0124-General Information Letter (September 9, 2009).

The construction contractor engaged by ABC will be incorporating tangible personal property into real estate owned by the Housing Authority, a governmental body that possesses a valid 'E' number and is exempt from the Illinois Retailers' Occupation Tax and Use Tax. The real estate is subject to a Declaration of Restrictive Covenants with the Housing Authority in favor of HUD. The construction contractor has been engaged by an affiliated entity of the Housing Authority and will be constructing a facility designed by the Housing Authority with public housing units and financed in significant part with public housing funds from the Housing Authority. The facility is subject to public housing regulatory use and operating restrictions imposed on ABC by the Housing Authority in a Regulatory and Operating Agreement.

To the best of our knowledge, there are no authorities contrary to ABC's position.

IV. Ruling Requested

ABC hereby respectfully requests a Private Letter Ruling that the construction contractor engaged by ABC is permitted purchase [sic] tangible personal property for incorporation into the Housing Authority's real estate free from the Illinois Retailers' Occupation Tax, and is permitted to claim the exemption from the Illinois Retailers' Occupation Tax and Use Tax upon providing its suppliers with the certifications required by 86 Ill. Adm. Code 130.2075(d)(4). ABC understands that the general contractor, in accordance with 86 Ill. Adm. Code 130.2075(d)(4), will be required to provide its suppliers with the Housing Authority's 'E' Number and certification that such purchases are for conversion into real estate owned by the Housing Authority.

If you have any questions or need any additional information, please do not hesitate to contact us.

DEPARTMENT'S RULING:

Generally, contractors are the end users of the materials that they physically incorporate into tangible personal property and owe Use Tax on those materials. See 86 Ill. Adm. Code 130.2075

which can be found on the Department's website. Section 130.2075(d)(1) of the regulation states that contractors incorporating tangible personal property into real estate owned by a governmental body are exempt from tax.

Section 130.2075(d)(4) states that:

“A supplier claiming exemption hereunder shall have among his records a certification from the purchasing contractor stating that his purchases are for conversion into real estate under a contract with a church, charity, school or governmental body, identifying the church, charity, school or governmental body that is involved by name and address and stating on which date his contract was entered into. The supplier shall also have among his records the active exemption number issued by the Department to the organization for which the purchasing contractor is acting.”

The words “purchases are for conversion into real estate” mean purchases of tangible personal property by a construction contractor who will affix such property to a building structure so that it is permanently incorporated into that structure as an integral part thereof. Some examples of qualifying building materials include lumber, bricks, insulation, doors, and plumbing systems. See 86 Ill. Adm. Code 130.1940.

In your specific case, you state that ABC is the developer of a project to construct a facility on land owned by the Housing Authority (“Housing Authority”). Further, you state that ABC entered into a 99-year Ground Lease with the Housing Authority and that ABC will own the improvements to the real estate once the facility has been constructed. According to your letter, ABC entered into a contract with a general contractor that provides for both the sale and installation of tangible personal property that is permanently affixed or incorporated into a structure.

Based upon these representations, the exempt entity (the Housing Authority) was not the party who entered into the construction contract; rather, it was ABC. The exempt entity (the Housing Authority) will not own the structure into which the tangible personal property to be purchased will be incorporated; rather, it will be ABC. The fact that ABC also entered into a Purchase Option and Right of First Refusal Agreement with the Housing Authority which provides the Housing Authority with the option to purchase the facility after the termination of the 99-year Ground Lease, does not change ownership of the improvements. That Agreement merely provides the Housing Authority with an “option to purchase”. Once the facility is constructed, ABC will own the facility. In that situation, ABC would not be able to purchase the building materials for incorporation into the facility tax-free because it will be the (non-exempt) entity who owns the constructed facility.

The factual representations upon which this ruling are 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 in the factual representations recited in this ruling.

I hope this information is helpful. If you have further questions concerning this Private Letter ruling, you may contact me at 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.

Very truly yours,

Terry D. Charlton
Chairman, Private Letter Ruling Committee

TDC/DMB:msk