

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.)

October 4, 2011

Dear Xxxxx:

This letter is in response to your letter dated September 13, 2011, 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 have a client that presently has retail customers located in the State of Illinois and seeks clarity as to whether my client has tax nexus in Illinois and if so, would like to avail themselves of the terms of Illinois’ voluntary disclosure program.

A description of my client’s business in Illinois:

My client is located in STATE and operates a 24/7 call center for national retailers with multi-site locations. These retailers call my client to request on-demand repair and maintenance services, such as plumbing and electrical, at any one of their retail locations. My client will then engage and dispatch a company located near the retail location to perform the required service. The local company will invoice my client for time and materials including sales tax. My client will then invoice the national retailer for the time and material with an up charge for the dispatching and services provided.

Example:

A retail store located in a mall in Chicago, Illinois has a leaking faucet in its bathroom. The store manager calls my client, in STATE, to request the repair, my client engages a plumbing contractor in the Chicago area. The plumbing contractor fixes the leak and

invoices my client. My client then invoices the headquarters of the retailer (not located in Illinois) for the repair services at an amount slightly higher than the plumbing contractor's charges to my client.

Based on the above, my client and I would like guidance as to the tax nexus of my client's business activities as described. As mentioned earlier, if tax nexus exists, then my client is willing to participate in the voluntary disclosure program.

The following is information you require to make a determination as to Voluntary Disclosure:

1. My client began doing business in Illinois in 2002.
2. My client is a STATE based logistics company that coordinates contracted labor on an as-needed basis for its national customers that may have locations in Illinois.
3. My client does not own or lease property in Illinois.
4. My client does not perform any marketing activities in Illinois.
5. My client does not have payroll, inventory, personal property or a physical presence in the State.
6. My client has not been contacted by the Illinois Department of Revenue or the Multistate Tax Commission.
7. My client has not filed nor remitted any type of tax to Illinois.
8. The estimated taxable sales for the last four years are approximately \$4,800,000.
9. My client proposes to file the necessary tax returns in order to be compliant with State law.
10. My client's year end is December 31.
11. My client will utilize the allocation factors in preparation of the Illinois Business Tax Returns and therefore estimates a minimum tax liability.
12. My client files a Subchapter S Corporation Federal tax return.
13. My client does not make deliveries into the State.
14. My client does not have any outstanding liabilities with the State.

Your assistance in this matter is greatly appreciated.

DEPARTMENT'S RESPONSE:

This response does not address any issues raised in your letter regarding the Illinois Business Income Tax Act and voluntary disclosure under such Act. A copy of your letter has been provided to the Income Tax Division in the Legal Services Office of the Department.

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.

Construction Contractors

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.

If subcontractors are utilized and are acting as construction contractors, the transaction between the general contractors and the subcontractors is not a taxable transaction. The subcontractors incur Use Tax liability on any tangible personal property that they purchase for incorporation into real estate. If, however, general contractors make purchases of tangible personal property and then contract to have subcontractors install that tangible personal property, the general contractors incur Use Tax liability on that tangible personal property.

Maintenance Agreements

The taxation of maintenance agreements is discussed in subsection (b)(3) of Section 140.301 of the Department's administrative rules under the Service Occupation Tax Act. See 86 Ill. Adm. Code Sec. 140.301(b)(3). The taxability of agreements for the repair or maintenance of tangible personal property depends upon whether charges for the agreements are included in the selling price of the tangible personal property. If the charges for the agreements are included in the selling price of the tangible personal property, those charges are part of the gross receipts of the retail transaction and are subject to tax. In those instances, no tax is incurred on the maintenance services or parts when the repair or servicing is performed. A manufacturer's warranty that is provided without additional cost to a purchaser of a new item is an example of an agreement that is included in the selling price of the tangible personal property.

If agreements for the repair or maintenance of tangible personal property are sold separately from tangible personal property, sales of those agreements are not taxable transactions. However, when maintenance or repair services or parts are provided under those agreements, the service or

repair companies will be acting as service providers under provisions of the Service Occupation Tax Act that provide that when service providers enter into agreements to provide maintenance services for particular pieces of equipment for stated periods of time at predetermined fees, the service providers incur Use Tax based on their cost price of tangible personal property transferred to customers incident to the completion of the maintenance service. See 86 Ill. Adm. Code 140.301(b)(3). The sale of an optional maintenance agreement or extended warranty is an example of an agreement that is not generally a taxable transaction.

Service Occupation Tax

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 of 86 Ill. Adm. Code 140.101 through 140.109 regarding sales of service and Service Occupation Tax.

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. See 86 Ill. Adm. Code 140.101. 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 serviceman's entire bill; (3) Service Occupation Tax on the serviceman's cost price if the serviceman is a registered *de minimis* serviceman; or (4) Use Tax on the serviceman's cost price if the serviceman is a *de minimis* serviceman and is not otherwise required to be registered under Section 2a of the Retailers' Occupation Tax Act.

The provision of professional or consulting services that do not include the transfer of tangible personal property with the provision of such services does not result in Service Occupation Tax or Use Tax liability. The transfer of any tangible personal property such as, for example, written reports, tangible media (CDs) and training manuals incident to a sale of service would result in Service Occupation Tax liability or Use Tax liability. See 86 Ill. Adm. Code 140.01 *et seq.* In regards to workshops or training classes when tangible personal property may be transferred to participants, please see the Department's regulations on the taxation of seminar materials at 86 Ill. Adm. Code 140.129.

When a serviceman contracts out all or a portion of the service that he will provide, he is acting as a primary serviceman in a multi-service situation. As a primary serviceman, he engages the services of a secondary serviceman in order to obtain all or part of the product and services desired by the service customer. See 86 Ill. Adm. Code 140.145 to determine the tax incurred in these situations.

Nexus

The definition of a "serviceman maintaining a place of business in Illinois" is set forth at 86 Ill. Adm. Code 160.105(f). An out-of-state "serviceman maintaining a place of business in this State" is required to register with the State as an Illinois Service Use Tax collector. The serviceman must collect and remit Service Use Tax to the State of Illinois on behalf of its Illinois customers. Under Section 160.105(f), an Illinois agent or representative operating in this State under the company's authority would give the State nexus over the out-of-state serviceman. As an out-of-state serviceman maintaining a place of business in Illinois, a company is required to register in Illinois as a Service Use Tax collector and remit tax to the Department on behalf of its Illinois customers.

The United States Supreme Court in *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax laws. The Supreme Court has set out a 2-prong test for nexus. The first prong is whether the Due Process Clause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. *Quill* at 1910. The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause.

A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis, will trigger Use Tax collection responsibilities. Please refer to *Brown's Furniture, Inc. v. Wagner*, 171 Ill.2d 410, (1996).

The final type of serviceman is the out-of-State serviceman that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A serviceman in this situation does not incur Service Occupation Tax on sales of service into Illinois and is not required to collect Service Use Tax on behalf of its Illinois customers. However, the serviceman's Illinois customers will still incur Service Use Tax liability on the purchase of the goods and have a duty to self-assess and remit their Service Use Tax liability directly to the State.

Voluntary Disclosure

If your client is concerned that it may owe Illinois sales tax, it may want to contact the Department's Board of Appeals. The Board of Appeals administers a voluntary disclosure program that can provide for limited liabilities for participants who come forward and disclose their liabilities. Please see 86 Ill. Adm. Code 210.126 for information about the voluntary disclosure program.

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

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