

The Service Occupation Tax is a tax imposed upon servicemen engaged in the business of making sales of service in this State, based on the tangible personal property transferred incident to sales of service. See 86 Ill. Adm. Code Part 140. (This is a GIL.)

April 30, 2013

Dear:

This letter is in response to your letter dated April 15, 2013, 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:

We are requesting technical assistance on an anonymous basis for a company ("Company") with operations in the state of Illinois. Please find below the Company description and technical questions regarding the appropriate application of Illinois sales tax law.

Company Description:

1. Company is a national retailer with hundreds of retail locations throughout the U.S.
2. Company owns, manages, and/or leases real estate property through which it conducts its retail business.
3. Company has entered into an agreement with a Facilities Management Services Firm ("FMSF") to provide Fixed Fee Services, Ad Hoc Materials, and Variable Fee Services.
4. FMSF is in the business of providing such services for the owners, managers, and operators of commercial, banking, educational, medical, retail and industrial real estate properties. FMSF is registered with the Illinois Department of Revenue.
5. Company requires standard repair, maintenance, and administration on a monthly basis at its retail locations for which the FMSF charges a monthly fixed fee for services ("Fixed Fee Services").
6. Fixed Fee Services invoices are for direct labor, administrative services, customer service, overhead, and profit.
7. Company requires standard repair and maintenance on a monthly basis at its retail locations for which the FMSF charges for materials used on an as needed basis ("Ad Hoc Materials").
8. Ad Hoc Materials invoices are for materials and profit.

9. Company requires specialized repair and maintenance at its retail locations (“Variable Fee Services”). The FMSF provides specialized repair and maintenance and also identifies third-parties to perform some of these services for the Company.
10. Variable Fee Services invoices are for labor, materials, and profit.

Fixes Fee Services:

1. The Fixed Fee Services are billed on a monthly basis and include the following: direct labor, administrative services, customer service, overhead at 8%, and profit at 10.42%. The Fixed Fee Services agreement includes 8 hours of direct labor per month per location. The Fixed Fee Services are inclusive of:
 - a. Fixed Fee Services provided 24 hours a day, 7 days per week, 365 days per year
 - b. FMSF Technician Services
 - i. Twenty (20) HVAC certified technicians dedicated only to Company
 - c. HVAC Services
 - i. All preventative maintenance
 - ii. HVAC capital projects
 - iii. All service calls to include general repairs as requested by Company or recommended by contractor
 - d. Site Inspection and Repair
 - i. HVAC
 - ii. Light electrical
 - iii. Bulb replacement
 - iv. Ballast replacement
 - v. Roof inspection
 - vi. General handyman & repair services
 - vii. All interior and exterior lighting
 - viii. Light plumbing
 - ix. Building envelope
 - x. Paint touch ups and repairs
 - xi. Parking lot repairs
 - xii. Sign repair
 - xiii. Repairs within skill set of technician
 - e. Program Administration with Dedicated Resources.
 - i. Project Director
 - ii. Three (3) Customer Service Representatives
 - iii. Two Administrators
 - f. Administration and Other Services
 - i. Call center dedicated to repair and maintenance administration
 - ii. Administration of customer service database
 - iii. Uploading of all property and historical data into database
 - iv. Dedicated operational support staffing
 - v. 24/7/365 fulfillment center support
 - vi. Scheduled site evaluation
 - vii. Project coordination
 - viii. Emergency response
 - ix. Property maintenance consultation program

Ad Hoc Materials

1. Ad Hoc Materials are purchased by the FMSF and resold to Company.
2. Ad Hoc Materials are utilized by the FMSF on an as needed basis when providing services under its Fixed Fee Services agreement.
3. FMSF purchases materials, on an as needed basis, from stores including STORE1, STORE2, and STORE3. The FMSF pays sales tax to the stores for these materials.
4. FMSF purchases materials, routinely needed, in bulk and issues a resale certificate at the time of purchase.
5. FMSF charges Company for materials and sales tax as the bulk purchases are allocated to a particular work order.
6. FMSF charges a 12% profit on the total sales price, before sales tax, of material resold to Company.

Variable Fee Services

1. The Variable Fee Services invoices, for services provided by FMSF and third parties, separately state and itemize the following components:
 - a. Carpet repair exceeding skill set of technician and cleaning
 - b. General cleaning (daily or roll-out services)
 - c. Electrical/plumbing exceeding skill set of technician or service requiring permit
 - d. Elevator/escalator
 - e. Exterminating
 - f. Fire & safety
 - g. Glass repair
 - h. Landscaping repair
 - i. Doors and locks exceeding skill set of technician
 - j. Mold mediation
 - k. Painting (projects)
 - l. Parking lot repair (other than pot hole repair)
 - m. Roof repair exceeding skill set of technician
 - n. Sign repair exceeding skill set of technician or at heights exceeding the reach of a 18' ladder working height
 - o. Snow removal
 - p. General supplies
 - q. Window washing
 - r. Services not provided by Fixed Fee Services based technicians
 - s. Services provided by Fixed Fee Services technicians in excess of 8 hours per location per month is billed at \$46.00 per hour
 - t. Store purchased materials, including sales tax, utilized by the FMSF for specialized repair and maintenance, purchased from vendors such as STORE1, STORE2, and STORE3
 - u. Bulk purchased materials, including sales tax, utilized by the FMSF for specialized repair and maintenance
 - v. Third party services, including labor, materials, and sales tax, for specialized repair and maintenance

- w. Profit at 12% of total sales price, excluding any sales taxes passed through by FMSF from their third parties or directly charged by FMSF for materials and/or labor.
- x. Company review and approval of proposals is required for Variable Fee Services performed by either the FMSF or third parties. Certain services have thresholds which do not require Company approval such as carpet cleaning, plumbing, and HVAC. Emergency work does not require approval

Technical Questions:

Fixed Fee Services

- A. Is the monthly charge for Fixed Fee Services subject to sales tax?
- B. Are any of the Fixed Fee Services components subject to sales tax?
 - a. Direct Labor
 - b. Administrative Services
 - c. Customer Service
 - d. Overhead
 - e. Profit
- C. If the monthly charge for Fixed Fee Services is subject to sales tax, would any of the components be exempt if separately invoiced?
- D. If profit is subject to sales tax, would it be exempt if more accurately defined on the invoice as management fee, consulting fee, administrative fee, processing fee, etc.?

Ad Hoc Materials

- A. Are store purchased materials, including sales tax paid to the store and resold by FMSF to Company subject to sales tax?
- B. Are bulk purchased materials resold by FMSF to Company subject to sales tax?
- C. Is profit charged on store materials, including sales tax, subject to sales tax?
- D. Is profit charged on bulk materials, including sales tax, subject to sales tax?
- E. If any of the Ad Hoc Materials components (materials, sales tax and profit) are subject to sales tax, would they be exempt if separately invoiced?
- F. If profit is subject to sales tax, would it be exempt if more accurately defined on the invoice as management fee, consulting fee, administrative fee, processing fee, etc.?

Variable Fee Services

- A. Are any of the Variable Fee Services components subject to sales tax?
 - a. Carpet repair exceeding skill set of technician and cleaning
 - b. General cleaning (daily or roll-out-services)
 - c. Electrical/plumbing exceeding skill set of technician or service requiring permit
 - d. Elevator/escalator
 - e. Exterminating
 - f. Fire & safety
 - g. Glass repair
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 - i. Doors and locks exceeding skill set of technician
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- k. Painting (projects)
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 - n. Sign repair exceeding skill set of technician or at heights exceeding the reach of a 18' ladder working height
 - o. Snow removal
 - p. General Supplies
 - q. Window washing
 - r. Services not provided by Fixed Fee Services based technicians
 - s. Services provided by Fixed Fee Services technicians in excess of 8 hours per location per month billed at \$46.00 per hour
 - t. Store purchased materials, including sales tax, utilized by FMSF for specialized repair and maintenance, purchased from vendors such as STORE1, STORE2, and STORE3
 - u. Bulk purchased materials, including sales tax, utilized by the FMSF for specialized repair and maintenance
 - v. Third party services, including labor, materials, and sales tax, for specialized repair and maintenance
 - w. Profit at 12% of total price, excluding sales tax
- B.** Is profit charged on labor subject to sales tax?
- C.** Is profit charged on store materials, including sales tax, subject to sales tax?
- D.** Is profit charged on bulk materials, purchased for resale, subject to sales tax?
- E.** Is profit charged on the gross amount of third party invoices subject to sales tax?
- F.** Whether FMSF is required to issue a resale certificate to its third parties performing services?
- G.** Whether FMSF is required to collect sales tax on the gross amount of the third party's invoice?
- H.** If any of the Variable Fee Services components are subject to sales tax, would they be exempt if separately invoiced?
- I.** If profit is subject to sales tax, would it be exempt if more accurately defined on the invoice as management fee, consulting fee, administrative fee, processing fee, etc.?

We appreciate your assistance with these technical questions. If you have any questions or require any additional information please contact me at XXX.

DEPARTMENT'S RESPONSE:

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.

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.

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.

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 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. Registered de minimis servicemen are authorized to pay Service Occupation Tax (which includes local taxes) based upon their cost price of tangible personal property transferred incident to the sale of service. Such servicemen should give suppliers resale certificates and remit Service Occupation Tax using the Service Occupation Tax rates for their locations. Such servicemen also collect a corresponding amount of Service Use Tax from their customers, absent an exemption.

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 86 Ill. Adm. Code 140.108.

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.

We are unable to provide answers to each of your questions. As you can see from the above explanations on the Retailers' Occupation Tax, construction contractors and the Service Occupation Tax, the answers to most of your questions are dependent on the facts in each particular case and cannot be answered without knowing the actual arrangements between all the parties involved.

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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,

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