

A construction contractor who sells tangible personal property that is not permanently affixed or incorporated into a structure and remains tangible personal property incurs Retailers' Occupation Tax. See 86 Ill. Adm. Code 130.1940. (This is a GIL.)

December 22, 2010

Dear Xxxxx:

This letter is in response to your letter dated October 22, 2010, and received in this office on December 6, 2010, 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](http://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:

On behalf of a client (Taxpayer) of this firm who desires to remain anonymous, we seek advice regarding Sales and Use Tax related to certain transactions. Our inquiry relates to the tax treatment of a construction contractor's purchase and sale of items that remain tangible personal property after installation. This issue is not currently the subject of any audit or review by the Illinois Department of Revenue.

#### **FACTS AND RESEARCH**

Taxpayer is a contractor that remodels existing commercial buildings. The work performed results in a capital improvement of the facility. Taxpayer acts in the capacity of a contract manager or project manager – the employees of the company vary [sic] rarely ever perform any direct physical work on the buildings. Instead, almost all of the work is performed by various subcontractors and suppliers that are hired by Taxpayer.

Taxpayer invoices the customer for the entire project amount which includes work performed by Taxpayer as well as all costs billed by each subcontractor used on the project. However, unlike traditional general contractors and project managers that charge a markup on any materials and/or work performed by subcontractors, Taxpayer's contracts are unique in that there is no markup on any work performed by subcontractors or items purchased from suppliers. Although Taxpayer is responsible for managing the work of and payments to the subcontractors and suppliers, Taxpayer receives no financial gain for these activities. The charges from the subcontractors and suppliers are passed directly through to the customer and since there is no markup Taxpayer is merely reimbursed for these charges. Taxpayer provides copies of all

subcontractor and supplier invoices to the end customer as evidence of the amounts paid.

Based on the tax laws contractors (and subcontractors) are considered the consumer of materials incorporated into the building and should pay tax upon purchase or accrue and remit use tax. Therefore any subcontractors performing work on real property are responsible for the tax due on materials but do not invoice tax when billing Taxpayer.

Likewise, these charges that are subsequently invoiced to Taxpayer's customer would not have any separately invoiced amount for sales or use tax.

## **OPINION REQUESTED**

The question and opinion requested is in regards to other suppliers that do not perform work or install items that are incorporated into real property, but instead sell and may or may not also install items that remain tangible personal property after installation, such as furniture, equipment, certain fixtures, and window blinds. Our understanding of the laws is that since these items remain tangible personal property after installation, the tax laws applicable to contractors (consumer of materials) do not apply and these are instead considered retail sales once invoiced to Taxpayer's customer. Taxpayer should issue a resale certificate to these vendors and then invoice sales tax to Taxpayer's customer on the selling price of these items. Please confirm that this is correct.

Secondly, because Taxpayer's contract structure is unique and it does not mark up any of these items but is instead reimbursed for the total price paid, can Taxpayer just pay sales tax to the seller/installer (instead of using a resale certificate) and then pass along the total cost (both selling price plus tax paid) to the end customer? In this situation tax would be paid to all suppliers and Taxpayer would not collect any tax from the end customer. We feel that this is a reasonable approach since there is no loss of revenue for the state (the tax amount would not be any different since the selling price to Taxpayer is the same as Taxpayer's selling price to the end customer) but would like to know if this method is acceptable. If so, is the documentation currently provided to Taxpayer's customer (copies of all subcontractor and supplier invoices) sufficient, or is there additional documentation that would be required so that Taxpayer's customer can support the fact that tax was indeed paid on these items, since their purchase invoice from Taxpayer would not include any tax?

We appreciate your consideration and prompt response on this matter. Should you have any questions or require any additional clarification, please contact me.

## **DEPARTMENT'S RESPONSE:**

Although we cannot give you a specific answer in the form of a General Information Letter, we hope you find the following 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. The tax is measured by the seller's gross receipts from retail sales made in the course of such business. "Gross receipts" means the total selling price or the amount of such sales. The retailer must pay Retailers' Occupation Tax to the Department based upon its gross receipts, or actual amount received, from the sale of the tangible personal property. 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 35 ILCS 105/3; 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 retailer does not collect the Use Tax from the purchaser for remittance to the Department, the purchaser is responsible for remitting the Use Tax directly to the Department. See 86 Ill. Adm. Code 150.130.

When a person purchases items of tangible personal property with the intention of reselling them to purchasers for use or consumption, that person engages in making retail sales of tangible personal property. This makes the initial purchase a purchase for resale, and the subsequent sale is a taxable sale at retail subject to Illinois Retailers' Occupation and Use Tax liabilities. See 86 Ill. Adm. Code 130.201 and 130.210.

The resale exemption is applicable when making sales to a purchaser who will in turn sell the tangible personal property. For general information regarding resale certificates, the Department's regulation for resale certificates, "Seller's Responsibility to Obtain Certificates of Resale and Requirements for Certificates of Resale," is found at 86 Ill. Adm. Code 130.1405.

The Department's regulation at 86 Ill. Adm. Code 130.1940(b)(1) addresses situations when a construction contractor sells tangible personal property without installation. Further, Section 130.1940(b)(2) addresses situations when a construction contractor sells tangible personal property that is not permanently affixed or incorporated into a structure and remains tangible personal property, even if the construction contractor installs the property as part of a construction contract. Obvious examples of the type of tangible personal property that remains tangible personal property after installation are refrigerators, gas and electric stoves, washing machines and clothes dryers.

As you can see from the Department's regulations, noted above, a construction contractor incurs Retailers' Occupation Tax liability when he sells furniture and furnishings, curtains, drapes, floor covering (except when he cements or otherwise permanently affixes the floor covering to a portion of the building), trade fixtures and machinery (unless, in the case of machinery, Section 130.2115(b) applies) to purchasers for use or consumption, with or without installation by the seller, whether or not the seller furnishes and installs such items as a part of a construction contract. See 86 Ill. Adm. Code 130.1940(b)(2).

Thus, a construction contractor who purchases tangible personal property to sell to customers (not to be permanently affixed or incorporated into real estate), may purchase that tangible personal property for resale. When he sells the tangible personal property to his customers, he is required to file returns with the Department and remit Retailers' Occupation Tax, as well as any applicable local occupation tax.

I hope this information is helpful. If you require additional information, please visit our website at [www.tax.illinois.gov](http://www.tax.illinois.gov) or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

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Associate Counsel

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