ST 00-0027-PLR 11/03/2000 SALE AT RETAIL

Because caterers are retail vendors of tangible personal property pursuant to 86 Ill. Adm. Code 130.2145(a), sales of coffee they make are sales at retail. (This is a PLR).

November 3, 2000

Dear Xxxxx:

This Private Letter Ruling, issued pursuant to 2 Ill. Adm. Code 1200 (see http://www.revenue.state.il.us/legalinformation/regs/part1200), is in response to your letter of September 6, 2000. Review of your request for a Private Letter Ruling disclosed that all information described in paragraphs 1 through 8 of subsection (b) of Section 1200.110 (see http://www.revenue.state.il.us/legalinformation/regs/part1200) appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to COMPANY for the issue or issues presented in this ruling. Issuance of this ruling is conditioned upon the understanding that neither COMPANY 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:

As counsel for and on behalf of COMPANY, an Illinois corporation, we hereby respectfully request, pursuant to 2 Ill. Admin. Code Section 1200.110, a private letter ruling from the Illinois Department of Revenue, which confirms that the transaction described below is subject to Illinois Service Occupation Tax ('SOT') and Service Use Tax ('SUT').

There is no particular tax period at issue for this ruling request. The Company is not under audit and is not involved in any litigation with the Department of Revenue. To the best of my knowledge, and to the best of the Company's knowledge, the Department has never ruled on the issues discussed in this request (or on any similar issue) for the Company or its predecessors. In this connection, neither the Company nor any of its representatives has ever submitted this or any similar issue for a ruling by the Department. The Company is unaware of any authority contrary to the views expressed in this request.

FACTS

The Company provides a first-class COFFEE service at various Illinois hotels and convention centers who host conferences and trade shows. The Company's clientele operate trade booths at these events. One primary reason clients regularly hire the Company is that the Company provides an invaluable marketing tool for its clients. Because many of the clients' businesses rely on the amount of traffic in its convention booths, the sound, smell and taste of the COFFEEs keep the attendees in the booth

longer while allowing the client more time to make sales and sales presentations. The Company, as part of its marketing efforts on behalf of its clients, hands out mugs displaying its respective client's name, address and telephone number to the attendees.

An essential part of the Company's marketing service is the impression it leaves with the attendees. For example, the Company's employees wear formal attire while serving the COFFEEs. Further, the COFFEE machine has a highly decorative antique appearance. At the choice of the client, the machine can be encased in a very grand and lavish gold, platinum, brass or copper cover to promote a gala atmosphere at the event. I have enclosed a photograph showing one of the Company's employees at an event.

The clients pay the Company an amount based on the approximate number of people expected to attend an event, not the number of COFFEEs served. The Company's total annual cost of property transferred as part of its marketing service is far less than 35% of the total annual gross receipts from the sales of its marketing services.

LAW

In general, the Retailers' Occupation Tax ('ROT') is imposed on persons engaged in the business of selling tangible personal property at retail. 35 ILCS 120/2. By contrast, the SOT is imposed on persons engaged in the business of making sales of services. 35 ILCS 115/1. The SOT is not imposed on the service itself; instead, it is based on the selling price of the tangible personal property transferred as an incident to a sale of a service by a service provider. 35 ILCS 115/3-40. A service provider maintaining a place of business in Illinois or authorized to collect tax is required to collect the SUT from the purchaser and the purchaser is required to pay the SUT to the service provider. 35 ILCS 110/3-40; Ill. Admin. Code tit. 86, § 160.115; Ill. Admin. Code tit. § 160.101(g). However, where a service provider is not required to be registered as a retailer under the ROT, he may elect not to be subject to the SUT or SOT if the aggregate annual cost price of property transferred as an incident to the sale of service is less than 35% of the aggregate annual total gross receipts from all sales of services. 35 ILCS 110/2; 35 ILCS 115/2; Ill. Admin. Code tit. 86, § 140.101. If this election is made, the purchase of property by the service provider is subject to the ROT and Use Tax ('UT'). 35 ILCS 110/2. The supplier would then collect the UT from the service provider and remit the tax collected to the state. 35 ILCS 115/81; Ill. Admin. Code tit. 86, § 140.101.

DISCUSSION

In general, although Illinois statutes explain how a service provider is taxed, they do not elaborate on who qualifies as a service provider. 35 ILCS 110/3-10; 35 ILCS 115/3-10. However, in applying the SOT and SUT, Illinois courts have employed several criteria in developing guidelines for determining who is and is not a service provider. Some of the relevant criteria are: (1) the primary occupation of the service provider. Ingersoll Milling

Machine Co. v. Department of Revenue, 405 Ill. 367, 370 (1950); (2) the buyer's motive for selecting the particular seller. Id. At 373; (3) the ratio between the cost of materials and the ultimate sales price. See e.g., Wallender-Dedman Co. v. Department of Revenue, 15 Ill.2d 485, 487 (1959); (4) whether the service, skill, and artistic ability used in the preparation of such goods are more valuable than the materials in the articles sold. Id.; and (5) whether the business is selling personal property at retail, in which service is incidental, or selling services in which supplying materials or making retail sales is incidental. Mahon v. Nudelman, 377 Ill. 331, 335 (1941).

Based on the facts set forth above, it is clear that the Company is a service provider. The Company satisfies the relevant criteria that courts use in determining whether the SOT and SUT apply. First, the primary occupation of the Company is to provide a first-class marketing service. Although the Company provides a tangible product (COFFEE) as part of this service, the Company's primary role is to enhance the environment at trade shows and conventions attended by the Company's clients. The presence of the Company at a convention or trade show, especially in light of the attire worn by the Company's employees and the equipment used by the Company (please see the enclosed photograph), serves as a direct marketing tool for the Company's clients by improving the overall atmosphere at a trade show or convention.

Second, these marketing services are the client's motive for selecting the Company. Marketing involves making a client's customer feel good and having those feelings associated with the client's services or goods. The Company uses COFFEE as a primary vehicle in achieving its marketing goal. The employees wearing tuxedos, the extravagant COFFEE cover, and the presence of servers serving a high-class beverage such as COFFEE enhance the overall atmosphere of a customer's experience in a client's booth. As a result, a customer may prolong his or her stay in a client's booth, which, in turn, allows the client to make more sales. Furthermore, as part of the Company's marketing service, each cup of COFFEE is served in a mug, provided by the client, with the client's name, address and telephone number printed on it.

Third, the cost of property transferred by the Company in providing its marketing service is minimal when compared to total selling price for the marketing service. For instance, the cost of the espresso, syrup and milk used in brewing the COFFEE relative to the fee that the Company charges per attendee is approximately 1%. Thus, the cost of the materials transferred by the Company pales in comparison to its total gross receipts.

Fourth, the marketing service provided by the Company is more valuable to a client than the COFFEE itself. If a client wanted to serve a beverage at its booth, it could easily hand out cans of soda. However, it is not the beverage that the client seeks. Rather, it is the marketing service provided by the Company.

Fifth, the COFFEE sales are incidental to the service provided. Again, the COFFEEs served are merely a means for the Company to market the client's goods or services at the client's trade booth. Thus, the rendering of the Company's unique marketing

service is the object desired and the COFFEE is merely an incidental part of that service.

The Company is unlike traditional caterers who incur ROT liability. Ill. Admin. Code tit. 86, § 130.2145(a)(2). Where a traditional caterer is more concerned with the quality of the meals served, the Company is more concerned with the quality of the service provided. The Company's services at an event has a similar effect to an ice sculpture. Ice sculptures add an elegant feeling to a room, much like the service provided by the Company. In short, the Company's clients pay for the marketing services provided by the Company rather than merely the COFFEE itself. Accordingly, the Company is a service provider subject to SOT or SUT rather than a retailer subject to ROT.

Further, because the Company is a service provider whose total cost price for the COFFEEs transferred as an incident to the sale of its marketing services is less than 35% of the total gross receipts from its services, the Company may elect not to be subject to the SOT or SUT pursuant to Ill. Admin. Code tit. 86, § 140.101. As a result, the Company would pay UT to its supplier on the cost price of any materials (i.e. espresso, syrup, milk) transferred as part of its service.

REQUEST FOR RULING

Pursuant to 2 Ill. Admin. Code Section 1200.110, it is respectfully requested that the Department of Revenue issue a private letter ruling which confirms that:

(1) The Company is a service provider for SOT and SUT purposes and not a retailer subject to ROT on its gross receipts; and

(2) To the extent that the Company's annual aggregate cost price of the property transferred as an incident to the sale of its services is less than 35% of the aggregate annual gross receipts from all sales of services, the Company may elect to pay UT on the cost price of any property transferred as part of its services.

If you concur, please issue your favorable ruling to the undersigned. If you do not concur, please advise so that we may discuss your reasoning before an adverse ruling is issued. A Power of Attorney authorizing our representation of the Company is enclosed.

We cannot issue the ruling you request because we do not agree that the transactions of your client, COMPANY, are service transactions subject to the Illinois Service Occupation Tax. We conclude that COMPANY's transactions as described in your letter are retail sales whose gross receipts are subject to Retailers' Occupation Tax liability.

Caterers are retail vendors of tangible personal property pursuant to 86 Ill. Adm. Code 130.2145(a). As a retail sale transaction, the entire gross receipts are subject to Retailers' Occupation Tax liability and no deductions are allowed for costs of doing business such as the cost of property sold, the cost of materials used, labor or service costs, overhead costs, or any other expenses whatsoever. Please refer to 86 Ill. Adm. Code 130.410. The fact that COMPANY's employees wear tuxedos and that the COMPANY equipment presents a highly decorative appearance does not transform the transaction from a retail sale into a sale of service.

We have carefully reviewed your argument and examined the case law you cited. We note these cases were decided prior to the enactment of the Service Occupation Tax Act so the issues therein were not whether contested transactions were subject to tax under the Service Occupation Tax Act or Retailers' Occupation Tax Act but whether they were subject to any tax at all as retail transactions. These decisions generally follow a principle set out in Ingersoll Milling Machine Co. v. Department of Revenue, 405 Ill. 367, 370 (1950) where the Supreme Court said "In determining whether or not tax liability exists in this particular case the question is presented as to what is the primary occupation of the appellee. The tax sought to be imposed is an occupation tax and not a sales tax, and, to determine the taxability of the particular sale herein involved, the real occupation of the appellee must be observed to determine its liability for tax."

We believe that COMPANY's primary occupation is the retail sale of COFFEE coffee. COMPANY is not in the business of providing unique skills in a transaction so that it would constitute a sale of service where the furnishing of tangible personal property is merely incidental.

The facts 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 material facts as recited in this ruling are correct and complete. This ruling will cease to bind the Department if there is a pertinent change in statutory law, case law, rules or in the material facts 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 (217) 782-2844. If you have further questions related to the Illinois sales tax laws, please visit our website at www.revenue.state.il.us or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Karl W. Betz
Associate Counsel

KWB:msk
Enc.