ST 03-0023-PLR 10/02/2003 ENTERPRISE ZONES

A "qualified sale" is a sale of building materials that will be incorporated into real estate as part of a project for which a Certificate of Eligibility for Sales Tax Exemption has been issued. See 86 Ill. Adm. Code 130.1951. (This is a PLR.)

October 2, 2003

Dear Xxxxx:

This Private Letter Ruling, issued pursuant to 2 Ill. Adm. Code 1200 (see www.revenue.state.il.us/Laws/regs/part1200/), is in response to your letter of April 18, 2003. 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 appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to XXX for the issue or issues presented in this ruling. Issuance of this ruling is conditioned upon the understanding that neither XXX 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:

On behalf of XXX, we respectfully request the Illinois Department of Revenue (the 'Department') issue a Private Letter Ruling ('PLR') pursuant to 2 Ill. Adm. Code Section 1200.110 with respect to the following factual situation.

General Information

1. Enclosed please find an original executed Form IL-2848, Power of Attorney, authorizing us (the 'Representative') to represent XXX before the Department.

2. This PLR is not requested with regard to hypothetical situations or alternative proposed transactions. This PLR is requested to determine the Retailers' Occupation Tax and Use Tax consequences of the actual business practices of XXX.

3. XXX is not currently engaged in litigation with the Department in regard to this or any other tax matter.

4. The Department has not previously ruled regarding this matter for XXX and XXX has not previously submitted the same or similar issues to the Department,

5. XXX requests that certain information be deleted from the PLR prior to dissemination to others. XXX requests that its name, address, location of its

headquarters, description of products being purchased and the name of the Representative be deleted.

6. XXX knows of no authority contrary to the authorities referred to and cited below.

7. XXX is not currently under audit by the Department in regard to any tax matter.

Statement of Material Fact

XXX was formed on December 19, 2001 by BBB. Following the formation of XXX, AAA acquired a 50% membership interest in XXX. XXX is developing an project (the 'Project') that will be located in LOCATION, Illinois (the 'Project Site'). XXX will own, and through contractual arrangements, manage, operate and maintain, the Project. XXX is currently in the process of obtaining the required permits for the Project and construction is expected to commence in June 2003. The Project will add hours of clean energy to the generation mix in Illinois, enough to supply approximately 20,000 households, as well as add revenues and jobs to a rural part of Illinois. An enterprise zone in which the Project will be located (the 'Enterprise Zone') is currently in existence and is in the process of being expanded to accommodate the Project. The GROUP ratified the proposal for the expansion of the Enterprise Zone in November 2002 and each township of LOCATION has approved such expansion. Final state approval of the Enterprise Zone expansion is expected in the near future.

Pursuant to a power purchase agreement with DDD (the 'Utility') dated Apri126, 2002 (the 'PPA'). XXX will sell to the Utility electricity produced from the Project over an approximately 20-year term. XXX and the Utility have also entered into an Interconnection Agreement (the 'Interconnection Agreement'), pursuant to which certain interconnection facilities will be constructed to permit the interconnection of the Project with the transmission system of the Utility in order to permit the delivery of electricity. The Utility is a unit of GGG and provides service to the population of the State of Illinois.

XXX will enter into a supply and installation agreement (the 'Supply and Installation Agreement') with a third party vendor EQUIPMENT to be used by the Project. Pursuant to the Supply and Installation Agreement, XXX will purchase from the third party vendor, EQUIPMENT.

XXX will also enter into a balance of plant, engineering, procurement and construction agreement (the 'Balance of Plant Agreement') with a third-party vendor of certain supporting facilities and related equipment (the 'Supporting Facilities Retailer', and together with the Third party vendor, the 'Retailers') to be constructed and installed at the Project. Pursuant to the Balance of Plant Agreement, XXX will purchase EQUIPMENT.

Please refer to Attachment A attached hereto for a more detailed description of the Equipment.

Rulings Requested

The Representative, on behalf of XXX, respectfully requests a binding PLR from the Department confirming that:

1. The procedures established by XXX and each Retailer meet the Department's requirements as provided in 86 Ill. Adm. Code Section 130.1951 in order to qualify for the sales tax exemption for the sale of building materials to be incorporated into real estate located within the Enterprise Zone.

2. The materials identified in Attachment A are 'building materials' for the purposes of Section 5k of the Occupation Tax Act in order to qualify for the sales tax exemption for the sale of building materials to be incorporated into real estate located within the Enterprise Zone.

Relevant Authorities and Analysis

The Illinois Retailers Occupation Tax Act (35 ILCS 120) (the 'Occupation Tax Act') imposes a tax on persons engaged in the business of making retail sales of tangible personal property to purchasers for use or consumption. This tax is measured by a seller's gross receipts. The Illinois Use Tax imposed by the Illinois Use Tax Act (35 ILCS 105) (the 'Use Tax Act') is a privilege tax imposed on the privilege of using any kind of tangible personal property that is purchased anywhere at retail (86 Ill. Adm. Code 150.101(a)). The tax imposed by the Use Tax Act shall not apply to the use of tangible personal property in Illinois if the seller of such tangible personal property would not be taxable under the Occupation Tax Act, despite all of the elements of the sale occurring in the State of Illinois (86 Ill. Adm. Code 150.101(c)). Pursuant to Section 5k of the Occupation Tax Act, a retailer who makes a 'qualified sale' of 'building materials' to be incorporated into real estate located in an enterprise zone established under the Illinois Enterprise Zone Act (20 ILCS 655) by, among other things, remodeling, rehabilitation, or new construction, may deduct receipts from such sales in the calculation of gross receipts.

Procedures and Documentation

In order to qualify for the exemption provided by Section 5k of the Occupation Tax Act, certain procedural and documentation requirements must be satisfied. First, building materials must be sold and purchased in a 'qualified sale'. Under the Occupation Tax Act, a 'qualified sale' is a sale of building materials for incorporation into real estate located in an Illinois enterprise zone by way of, among other things, rehabilitation, remodeling or new construction, as part of a building project for which a Certificate of Eligibility for Sales Tax Exemption has been issued by the administrator of the enterprise zone in which the project is located. The Occupation Tax Act further provides that the Certificate of Eligibility for Sales Tax Exemption must contain the following information:

A) a statement that the building project identified in the Certificate meets all of the requirements for the building materials exemption contained in the enterprise zone ordinance of the jurisdiction in which the building project is located;

B) the location or street address of the building project that is the subject of the Certificate; and

C) the signature of the administrator of the enterprise zone in which the building project is located.

In addition, the Occupation Tax Act requires that a retailer obtain a certification from the purchaser (the ‘Purchaser Certificate’) containing:

A) a statement that the building materials being purchased are being purchased for incorporation into real estate located in an Illinois enterprise zone;

B) the location or address of that real estate;

C) the name of the enterprise zone in which that real estate is located;

D) a description of the building materials being purchased for incorporation into that real estate;

E) the date of the purchase; and

F) the purchaser's signature.

XXX and each Retailer in this case satisfy all of the conditions of the Occupation Tax Act and Ill. Adm. Code 130.1951, and therefore, each Retailer should qualify for an exemption from collecting sales tax on the materials described on Attachment A hereto to the extent such materials are building materials sold for incorporation into real estate located in an enterprise zone. XXX and each Retailer have established certain procedures to comply with the procedural and documentation requirements set forth above. First, prior to the purchase of any of the materials listed on Attachment A hereto, XXX will obtain a fully executed Certificate of Eligibility for Sales Tax Exemption from the administrator of the enterprise zone stating that the requirements for the building materials exemption contained in the ordinance relating to the Enterprise Zone have been met. Such Certificate will also list the street address of the Project. In addition, XXX shall deliver to each Retailer for incorporation into each Retailer's records, a fully executed Purchaser Certificate containing a statement that the materials being purchased are being incorporated into real estate located in the Enterprise Zone, the address of the Project, the name of the Enterprise Zone, a description of the materials being purchased, and the date of such purchase.

Building Materials

Section 5k of the Occupation Tax Act requires that the materials described on Attachment A be ‘building materials’ for the physical incorporation into real estate in order for the sales of such materials to be deducted from each Retailer's calculations of taxable gross receipts.

In recent decisions, the Department has found that turbine generators, electrical transformers, electric cabling, piping and other materials that are permanently affixed to real estate at gas fired electric generating facilities qualify as ‘building materials’ for purposes of Section 5k of the Occupation Tax Act. See Private Letter Ruling ST 00-0013 (July 7, 2000), Private Letter Ruling ST 01-0040 (September 24, 2001) and Private Letter Ruling ST 01-0045 (October 26, 2001). In these Private Letter Rulings, the Department specifically found that combustion turbine generators permanently affixed to the foundation with anchor bolts and hardwired to underground and above ground electrical cabling qualify as building material.

The facts and issues in Private Letter Rulings ST 00-0013 (July 7, 2000), ST 01-0040 (September 24, 2001) and 01-0045 (October 26, 2001) are virtually identical to the building material-related issues in this PLR request, notwithstanding the fact that the Project is electric generating facility and not a gas fired electric generating facility. The Equipment and other materials described in Attachment A will (i) be permanently and physically affixed to the real estate upon which the Project is located and/or (ii become part of the Project's complex system. Please refer to Attachment B hereto for details on the method of affixation. Removal of the materials after affixation, including the anchor bolts affixing the EQUIPMENT to the foundations, would result in substantial damage to the materials and the real estate.

In addition, other important factors demonstrate that the materials described on Attachment A hereto should qualify as building materials. The location of each of the EQUIPMENT has been specifically selected after a detailed analysis of data. As mentioned above, the weight of afully assembled EQUIPMENT is WEIGHT, which demonstrates that the Project is not intended to be moved from location to location. The EQUIPMENT will remain stationary and shall constitute the Project during the Project's existence. Furthermore, in the event of a future sale of the Project by XXX or a foreclosure of the Project by any lender, equipment provider, or other lienholder of the Project, the size and weight, stationary nature and specialized functions of the EQUIPMENT would make it impractical for the Project to be sold in a manner other than as an integrated operating project at the project site.

As the exemption from the Retailers' Occupation Tax has generally applied to turbines and related equipment at gas fired electric generating facilities, such exemption should apply to similar equipment at generating facilities. The EQUIPMENT and additional equipment described on Attachment A should be considered building materials to be physically incorporated into real estate.

Conclusions

1. The procedures established by each Retailer and XXX meet the Department's requirements as provided in 86 Ill. Adm. Code Sec. 130.1951 in order to qualify for the sales tax exemption for the sale of building materials to be incorporated into real estate located within the Enterprise Zone.

2. The materials identified in Attachment A are ‘building materials’ for purposes of Section 5k of the Occupation Tax Act and meet the Department's requirements as provided in 86 Ill. Adm. Code Section 130.1951 in order to qualify for the sales tax exemption for the sale of building materials to be incorporated into real estate located within the Enterprise Zone.

If the Department cannot conclude that the procedures above conform to the Department's regulations or the materials described on Attachment A do qualify as ‘building materials’, I request the Department contact me to determine what additional information is required or allow XXX to rescind this ruling request.

We will be happy to provide copies of any agreement or contract discussed in this PLR request and would welcome the opportunity to review the same with you. Please contact me with any questions or to schedule a meeting to discuss any aspect of this ruling request. We appreciate your response on these issues. Thank you.

Effective January 1, 2002, the Retailers' Occupation Tax was amended to remove the requirement that retailers must be located within a jurisdiction establishing an enterprise zone in order to deduct sales receipts from the sale of building materials to be incorporated into real estate in such enterprise zone. Effective August 6, 2002, further changes were made to 35 ILCS 120/5k that sets forth the exemption. See 86 Ill. Adm. Code 130.1951.

Under the new legislation the exemption now applies to "qualified sales" of building materials. A "qualified sale" is a sale of building materials that will be incorporated into real estate as part of a project for which a Certificate of Eligibility for Sales Tax Exemption has been issued. As long as the following documentation is provided, purchases can be made tax-free at any location. The administrator of the enterprise zone in which the building project is located must issue the Certificate of Eligibility for Sales Tax Exemption. To document the exemption, the purchaser must provide the retailer with a Certificate of Eligibility for Sales Tax Exemption which contains:

1) a statement that the building project identified in the Certificate meets all the requirements for the building material exemption contained in the enterprise zone ordinance of the jurisdiction in which the building project is located,
2) the location or address of the building project, and
3) the signature of the administrator of the enterprise zone in which the building project is located.

The purchaser must also provide the retailer with a certification that contains:

1) a statement that the building materials are being purchased for incorporation into real estate located in an Illinois enterprise zone,
2) the location or address of the real estate into which the building materials will be incorporated,
3) the name of the enterprise zone in which that real estate is located,
4) a description of the building materials being purchased, and
5) the purchaser's signature and date of purchase.

The new law also provides that the municipalities or counties that created the enterprise zone into which the building materials will be incorporated may neither require nor prohibit the purchase of building materials from any retailer or class of retailers in order to qualify for the exemption.

In your letter, you state that each retailer involved satisfies all of the above conditions. You further state that your client will obtain a fully executed Certificate of Eligibility for Sales Tax Exemption from the administrator of the enterprise zone. Your client will deliver a fully executed Purchaser Certificate to each retailer pursuant to the above requirements. Pursuant to these representations, sales of building materials made in compliance with the scenario set forth in your letter will qualify for the enterprise zone exemption.

In the next part of the analysis we must determine whether the items being incorporated are building materials as defined in the regulations. Section 130.1951(a) states, in part, as follows:

7) In order to qualify for the deduction, the materials being purchased must be building materials. That is, they must be purchased for physical incorporation into real estate.

The wind turbine generators and towers that are erected on a steel reinforced concrete foundation and are attached by two rows of steel bolts qualify as building materials. The transformers that are bolted onto a steel reinforced concrete pad qualify as building materials. The cable collection system where power and fiber optic data cables are buried at a depth of approximately five feet qualifies as a building material. The substation, consisting of a control house, bus poles, capacitor bank rack and transformer, that is bolted to a concrete foundation qualifies as a building material. The plumbing electrical, septic and water systems, and building remodeling of the operation and maintenance building qualify as building materials. The meteorological towers that are bolted to a concrete foundation qualify as building materials. The sensor masts, lightning protection, sensors and FAA lights that are bolted to the tower qualify as building materials.

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,

Melanie A. Jarvis
Associate Counsel

MAJ:msk