ST 05-0027 05/04/2005 FOOD

This letter discusses various taxes applicable to a food service company. See 86 Ill. Adm. Code 130.310 and 130.2070. (This is a GIL.)

May 4, 2005

Dear Xxxxx:

This letter is in response to your letter dated September 23, 2004, 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.ILTAX.com 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 am conducting research on business tax laws in the state of Illinois in effort to ensure compliance with your state's taxing regulations. I would like your department's formal verification of the tax statutes that I have researched and clarification on a few questions.
>
> The type of company I am doing research for is a new Foodservice Company (resident Limited Partnership) who would be contracted by the owners of a sporting arena in CITY to sell Food, Beverage (alcoholic and non-alcoholic) and Retail items to customers at the arena. Within the arena, the company would be providing food, beverage and retail in the form of concession stands, concession vending in the seats of the arena, a formal restaurant and in skybox suites. Customers would also have the opportunity to throw private parties at the arena and have them catered by our company.
>
> The items for your review are listed below.
>
> **PROPERTY TAX**
>
> **1.** It is my understanding that there is no Tangible or Intangible Property Tax in the state of Illinois.

INCOME TAX

2. Our company's legal entity is a resident Limited Partnership that is actually comprised of other multiple partnerships. It is my understanding that we would be required to file an annual Partnership Return for State Income Tax filing. Please confirm.

3. It is also my understanding that because the return is a partnership return, it would be purely informational (i.e. no tax would actually have to be paid). Each return, at each level of the partnership would continue to be informational until you got to an individual (rather than a partnership or corporation). The individuals would then have to file and pay their respective income tax. Please confirm.

4. It is my understanding that there is no income tax return to be filed at the city/county level.

SALES TAX

5. It is my understanding that ALL items that my company resells to a customer are taxed at a **8.5% State Sales tax**. We collect and remit this sales tax to the state every month. Items for resale to the customer would include: Food, Beverage, Tobacco Products, Liquor, Retail, Equipment Rental, Flowers, and Labor etc. Please confirm.

6. In addition to the **8.5% State of Illinois Rate** mentioned above, it is my understanding that we would collect and remit and additional **1.25% Food and Beverage** Sales tax rate specifically to the CITY. Thus making our total Sales tax rate for Food and Beverage items **9.75%** and for ALL other items, **8.5%**. Please confirm

7. There is no special sales tax rate for tobacco or liquor items. Please confirm.

8. It is my understanding that all flat rate service charge percentages that our company would keep and not payout to the employee IS subject to sales tax (for example a 19% service charge on a sky box suite bill). Any tips or gratuities that ARE paid directly to the employee are NOT subject to sales tax. Please confirm.

9. Our company may sometimes hire Subcontractors to sell certain items for us. Then we pay them a commission based on a percentage of their total sales and we keep the rest of the revenue. Who is responsible for collecting and paying the sales tax in these instances? Here is my understanding based on 2 different scenarios:

- In some instances, WE would buy the product they are selling.
- In other instances, THEY buy the product they are selling.
- It is my understanding that in the cases where WE bought the product for resale, WE are responsible for remitting 100% of the sales tax collected to the state.
- In the cases where the subcontractor buys the product, THEY would be responsible for remitting 100% of the sales tax collected to the state.

Other people have argued that the subcontractor would pay the sales tax on their portion of the sales only and we would pay the sales tax on our portion of the sales. Still others have argued that the subcontractor would remit 100% of the sales tax ALL the time regardless of whether the purchased the product or not. Please clarify which is the correct way to handle.

10. The owners of the arena decided they want to sell all-inclusive tickets to large groups for certain events. The ticket price includes revenue items that belong to the arena owner (such as admission, event program, etc.) but the tickets also include my company's revenue items (such as food and beverage). Sales tax is also included in the price.

In these instances, the arena owner deals directly with and collects money from the customer. Then our company, in turn, has to collect from the arena owner for the food and beverage portion (rather than collecting from the customer directly).

Who is responsible for collecting and remitting 100% of the sales tax for scenarios like this?

My understanding is that the arena owner is responsible for collecting and remitting 100% of the sales tax because they are the ones initially collecting it from the customer.

Others have argued that the arena owner would only remit the tax on their portion of the sale and we would remit the tax on our portion of the sale.

Please clarify.

USE TAX

11. It is my understanding that any food, beverage (alcoholic & non-alcoholic), and retail items that my company would purchase from a vendor for resale to a customer would be Use tax exempt. Please confirm.

12. Any other items that my company purchases from a vendor to run the business ARE subject to **8.5% Use** tax. These would include items like: cleaning supplies, linen, paper napkins, plastic utensils, menus, china, guest checks, office supplies, kitchen equipment, smallwares, and equipment rental. Please confirm.

13. Any items that are subject to Use tax are subject to **the 8.5% use tax** rate regardless of what state they might be purchased and shipped from. Please confirm.

14. The vendor who we purchase from is responsible for collecting and remitting the correct percentage of use tax to the state. Please confirm.

15. If a vendor is NOT charging us correct Use tax percentage, what is the proper course of action? Please advise.

16. Please clarify if the tobacco items we purchase for resale are subject to us paying **8.5%** Use tax.

17. Since we are NOT a wholesaler of tobacco products and since we would buy our tobacco products in-state. It is my understanding that there is nothing we would have to file at the end of each month pertaining to tobacco products. Please confirm.

18. Paper items that are vehicles for the food and beverage we sell (for example, nacho boats, plastic plates, hot dog foil wrappers, concession beer cups) are considered to be part of the resale item and therefore NOT subject to Use tax when we purchase them from the vendor. Please Confirm.

19. Non-food group catering items (such as flowers, or linen rental) that we purchase/rent specifically for a private party and charge directly to the customer are NOT subject to Use tax when we purchase them from the vendor. Please confirm.

WITHHOLDING

20. CITY has NO employee withholding at the city/county level-only the state. Please confirm.

21. Because a large number of the working population in Illinois actually lives in Indiana, it would be necessary to get setup with the state of Indiana for Employee withholding as well. Please clarify what forms (if any) Indiana residents would have to complete and file when hired by us in Illinois.

22. Would Indiana residents have to file personal income tax in both Indian and Illinois? Please clarify.

Please review each item above and provide formal written confirmation or clarification for each. Also, if there are any other statutes or taxing requirements that I have left out, please just let me know. You can send the documentation to my address listed below. Thank you in advance with your assistance in this matter and feel free to contact me with any questions.

DEPARTMENT'S RESPONSE:

This letter addresses your questions regarding Sales and Use Taxes. A separate letter will be sent to you to answer your Income Tax questions. It is important to note, the person or entity making the sale is responsible for collecting and remitting the taxes to the Department. If, as stated in your request, the Arena owner makes an "all inclusive" sale, then the Arena owner would be the responsible party for collecting and remitting the appropriate taxes on that sale. On the other hand, if a vendor is hired to makes sales within the Arena, then the vendor is the responsible party for collecting and remitting the appropriate taxes on its sales.

For general information purposes, the Illinois sales and use tax system is unique because it codifies four separate taxes: The Retailers' Occupation Tax, (86 Ill. Adm. Code 130.101 et seq.), the Use Tax, (86 Ill. Adm. Code 150.101 et seq.), the Service Occupation Tax, (86 Ill. Adm. Code 140.101 et seq.), and the Service Use Tax, (86 Ill. Adm. Code 160.101 et seq.).

The Retailers' Occupation Tax is what is commonly referred to in other locales as "sales" tax. However, the Retailers' Occupation Tax is not a sales tax, but rather an occupation tax. The

Retailers' Occupation Tax is imposed on persons engaged in the business of selling tangible personal property at retail. The complement of the Retailers' Occupation Tax is the Use Tax, which is essentially a privilege tax imposed upon the privilege of using, in Illinois, tangible personal property purchased anywhere at retail. The current tax rate is 6.25% plus any local taxes if applicable. The general merchandise tax rate, which includes the local occupation taxes collected by the State for sales that occur in CITY is 8.50%. We cannot provide you with any information regarding any food and beverage tax imposed and collected by CITY since the Department does not administer that tax. Please contact the CITY for information concerning that tax.

An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers.

Another type of retailer is the retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in Illinois" is described in 86 Ill. Adm. Code 150.201(i). This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax on the purchase of the out-of-State goods and have a duty to self-assess their Use Tax liability and the customer must remit the amount directly to the State. The Use Tax rate is 6.25%.

For general information regarding Retailers' Occupation Tax on food and drugs please refer to the Department's regulations located at 86 Ill. Adm. Code 130.310. In addition, you may wish to review the Department's regulations regarding meal vendors, which may be found at 86 Ill. Adm. Code 130.2145. You are correct that there is no special sales tax rate for tobacco or liquor items.

For information regarding gratuity and mandatory service charges, please refer to 86 Ill. Adm. Code 130.2145(d). As stated above, the person or entity making the sale is responsible for collecting and remitting the appropriate taxes. In response to sales which are sold as "all inclusive" please see 86 Ill. Adm. Code 130.2145(c)(2)(B).

Please be advised that the regulations governing sales for resale are contained in 86 Ill. Adm. Code Section 130.210. Please note Subsections (c) and (d). Section (c) indicates that sales for resale cannot be made tax-free unless the purchaser has an active registration number or resale number and give such number to the supplier, as well as certify that the sale is a sale for resale. When property is bought for the purpose of resale, presentation of a resale number (along with a Certificate of Resale) is sufficient.

Consumable items and supplies used to operate a business are subject to Use Tax. For general information regarding Use Tax, please see 86 Ill. Adm. Code 150. Items subject to the Use Tax purchased from an out-of-State vendor would be subject to the State Use Tax rate of 6.25%.

Tobacco products are treated as tangible personal property and are subject to sales tax. If you are not a wholesaler or distributor of tobacco products, then there is no required filing at the end of

each month pertaining to your tobacco sales, other than the reporting and filing requirements under the Retailers' Occupation Tax Act.

The taxability of napkins, lids, and paper cup items, depends on how they are used. Please see 86 Ill. Adm. Code 130.2070. If a restaurant uses them on-premises in lieu of more durable goods, they are fully taxable. However, they are considered nontaxable sales for resale if they are transferred to customers in the restaurant's carryout or delivery business. If a restaurant uses them in both ways, it can provide its supplier with a percentage Certificate of Resale specifying the percentage of sales which are taxable. See Section 130.1405.

For general information concerning non-food group catering items please refer to 86 Ill. Adm. Code 130.2145.

I hope this information is helpful. If you require additional information, please visit our website at www.ILTAX.com or contact the Department's Taxpayer Information Division at (217) 782-3336. If you are not under audit and you wish to obtain a binding PLR regarding your factual situation, please submit a request conforming to the requirements of 2 Ill. Adm. Code 1200.110 (b).

Very truly yours,

Edwin E. Boggess
Associate Counsel

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