

This letter concerns tax imposed on tangible personal property transferred incident to sales of service. See 86 Ill. Adm. Code Part 140. (This is a GIL.)

July 23, 2009

Dear Xxxxx:

This letter is in response to your letter dated January 23, 2009, 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 writing to request your opinion as to whether a certain type of transaction would subject the buyer or seller to Illinois Retailers Occupation Tax or Use Tax. The details of the transaction are as follows:

1. The taxpayer fabricates new propane tank truck bodies for sale to its customers. TAXPAYER also remounts used customer supplied propane tanks onto a new cab and chassis. Some of our customers supply the new cab and chassis upon which we remount their used propane tank. Our customers are located across the United States.

The transaction in question involves a customer which operates in approximately 34 states in the United States and is headquartered outside of Illinois. Customer has a transportation division which is a common carrier licensed with the Department of Transportation. Customer supplies TAXPAYER with their existing propane tank and their new cab and chassis (purchased separately by Customer). TAXPAYER supplies additional materials and labor to produce a completed propane tank vehicle.

In the past, TAXPAYER shipped the completed vehicle from its plant within Illinois to Customer outside of Illinois via a third party common carrier (for use outside of Illinois). Since Customer's division is also a common carrier it wishes

to save on transportation costs by performing the transportation services itself to deliver the product to its facilities outside of Illinois. Customer's division (as common carrier) would pick up the vehicle at TAXPAYER's plant in Illinois and deliver it to its own facilities outside of Illinois. Customer is a substantial customer of TAXPAYER. TAXPAYER stands to lose this business if it must charge and collect Illinois sales tax on these transactions. If TAXPAYER loses this business from Customer, TAXPAYER may not be able to continue in business.

2. TAXPAYER obtains purchase orders from its customers. The purchase orders detail the delivery instructions. In addition, a uniform bill of lading is used for shipping. The bill of lading will show that the seller, TAXPAYER, as the consignor or the shipper. Customer is the consignee, customer is also the common carrier and is required to transport the vehicle to a point outside of Illinois (not to be returned to a point within Illinois).
3. The transaction described above is for the tax year 2009. The taxpayer is not currently under audit or involved in pending litigation with the Department of Revenue.
4. To the best knowledge of the taxpayer the Department has not previously ruled on the same or a similar issue for the taxpayer or a predecessor, and the taxpayer has not previously submitted the same or a similar issue to the Department but withdrew it before a letter ruling was issued.
5. Title 86, Part 130, Section 130.605 (b)(2) of the Illinois Department of Revenue Regulations states 'The seller does not incur Retailers' Occupation Tax liability with respect to the proceeds from the sale of an item of tangible personal property to a common carrier by rail or motor that receives physical possession of property in Illinois and that transports the property, or shares with another common carrier in transporting the property, out of Illinois on a standard uniform bill of lading showing the seller of the property as the shipper or consignor of the property to a destination outside Illinois, for use outside Illinois'.

Section 130.605 (d) states 'Nor does the tax apply to gross receipts from sales in which the seller, by carrier (when the carrier is not also the purchaser) or by mail, under the terms of his agreement with the purchaser, delivers the goods from a point in this State to a point outside this State not to be returned to a point within this State. The fact that the purchaser actually arranges for the common carrier or pays the carrier that effects delivery does not destroy the exemption. However, it is critical that the seller is shown as the consignor or shipper, the exemption will not apply'.

Section 130.605 (e) states 'The place at which title to the property passes to the purchaser is immaterial. The place at which the contract of sale or contract to sell is negotiated and executed and the place at which the purchaser resides are also immaterial. Sales of the type described in subsections (c) and (d) are deemed to be within the protection of the Commerce Clause of the Constitution of the United States'.

The above references would seem to grant exemption from the Retailers' Occupation Tax, except for the fact that the purchaser and carrier are the same. The fact that, pursuant to the contract, the tangible personal property which is the

subject of the sale is required (and in fact will be) delivered to a point outside of Illinois (not to be returned to Illinois) should be the overriding factor in the transaction. This fact should exempt the transaction from taxation and fall within the protection of the Commerce Clause. The transaction should not be 'tainted' because the purchaser wishes to save transportation costs by transporting the property itself. This decision to try to save transportation costs, which can be significant, should not put the purchaser at a disadvantage to a purchaser who does not transport the property itself.

6. The only authority contrary to the taxpayer's views seems to be the Department of Revenue's own regulation Section 130.605(d) which provides for an exemption from the tax for 'sales in which the seller, by carrier (when the carrier is not also the purchaser) or by mail, under the terms of his agreement with the purchaser, delivers the goods from a point in the State to a point outside this State not to be returned to a point within this State'.
7. Taxpayer requests that its name and the name be deleted from the publicly disseminated version of the private letter ruling.

We respectfully request that you consider the facts of this case and issue a private letter ruling exempting the above described transaction from the Illinois Retailers' Occupation Tax. Should you require further information, please do not hesitate to contact the undersigned.

DEPARTMENT'S RESPONSE:

The Department's regulation "Public Information, Rulemaking and Organization" provides that "[w]hether to issue a private letter ruling in response to a letter ruling request is within the discretion of the Department. The Department will respond to all requests for private letter rulings either by issuance of a ruling or by a letter explaining that the request for ruling will not be honored." 2 Ill. Adm. Code 1200.110(a)(4). The Department declines to issue a Private Letter Ruling in response to your request. We hope, however, the following will be helpful in addressing your request.

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.

As you point out in your letter, the Department's regulation at 86 Ill. Adm. Code 130.605(d) provides for an exemption for the "sales" tax for sales in which the seller, by carrier (when the carrier is not also the purchaser) or by mail, under the terms of his agreement with the purchaser, delivers the goods from a point in the State to a point outside this State not to be returned to a point within this State. Pursuant to this regulation, if the carrier is also the purchaser, this exemption would not be available.

It is my understanding, through my telephone conversation with you, that in the transactions involving the specific customer about which you inquire, the customer does not purchase from your client either its existing propane tank or its new cab and chassis (all of which have been purchased outside Illinois). Rather, this customer simply supplies these items to your client who supplies additional material and labor to produce a completed propane tank vehicle (e.g., your client provides the service of assembling the items provided by your client's customer and your client may transfer

tangible personal property incident to that service). Accordingly, a transaction, as you have described in your letter, would not be subject to the Retailers' Occupation Tax Act but, rather, may be subject to either Service occupation Tax liability or Use Tax liability.

Notably, the 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 servicemen's entire bill; (3) Service Occupation Tax on the servicemen's cost price if the servicemen are registered de minimis servicemen; or (4) Use Tax on the servicemen's cost price if the servicemen are de minimis and are 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.

For determining the tax to be collected from your client's customers in the first three service situations described above, see 86 Ill. Adm. Code 160.115.

In addition to the exemption provided in 86 Ill. Adm. Code 130.605(b)(3) that you referenced in your letter, your client's customers should be aware that a temporary storage exemption is available in this State. A temporary storage exemption from the imposition of use tax is available where tangible personal property is "acquired outside this State that, subsequent to being brought into this State and stored here temporarily, is used solely outside this State or is physically attached to or incorporated into other tangible personal property that is used solely outside this State, or is altered by converting, fabricating, manufacturing, printing, processing or shaping, and, as altered, is used solely outside this State." See 86 Ill. Adm. Code 150.310(a)(4).

As you can see, this exemption only applies to transactions in which the materials are acquired outside this State and after their temporary stay in Illinois are shipped out of Illinois and used solely outside Illinois. When the property is sold in this State or is located in Illinois at the time of sale, the temporary storage exemption does not apply. In that situation, that transaction would be an Illinois retail sale subject to Retailers' Occupation Tax liability. Temporary storage is not applicable in transactions where there is Retailers' Occupation Tax liability because the exemption is limited to situations where the only liability that can be involved is Use Tax. See 86 Ill. Adm. Code 150.310(b) which can be found on the Department's website.

In order to properly document the temporary storage exemption, the purchaser should give certificates to the seller which state that the tangible personal property is acquired outside Illinois and brought into Illinois only temporarily for storage, or for converting, fabricating, manufacturing, printing, processing, or shaping, and is subsequently shipped out of Illinois to be used solely outside the State of Illinois.

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,

Debra M. Boggess
Associate Counsel

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