

Exempt organizations can make only certain limited amounts of sales without incurring Retailers' Occupation Tax liability. 86 Ill. Adm. Code 130.2005. (This is a PLR).

September 26, 2007

Dear Xxxxx:

This letter is in response to your letter dated December 18, 2006, 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 1200.1120. 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.

Review of your request disclosed that all the information described in paragraphs 1 through 8 of Section 1200.110 appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to ABC for the issue or issues presented in this ruling, and is subject to the provisions of subsection (e) of Section 1200.110 governing expiration of Private Letter Rulings. Issuance of this ruling is conditioned upon the understanding that neither ABC 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:

ABC requests a ruling on the proper treatment of transactions under the Illinois Retailers' Occupation (ROT). The issues are:

- (1) Is ABC required to collect ROT on over-the-counter sales of condoms?
- (2) Is ABC required to collect ROT on over-the-counter sales of emergency contraception, commonly referred to as 'Plan B'?

A. *STATEMENT OF FACTS*

1. Taxpayer Information:

Taxpayer

Agent Under Attached Power of Attorney

## 2. Detailed Description of the Taxpayer

ABC, an Illinois not-for-profit corporation organized under Illinois law in good standing, was formerly known as XYZ. ABC is a tax-exempt health care clinic with an 'E number' from the Illinois Department of Revenue ('Department'). Attached are copies of the Articles of Incorporation Bylaws, and the determination by the Internal Revenue Service showing ABC's IRC §501(c)(3) status.

ABC provide women's reproductive health services, education and advocacy for women of all ages at all periods of their lives in the following Illinois counties: COUNTIES. ABC has been providing reproductive services to the area for forty years. Nationally, ORGANIZATION is the largest provider of women's health care in the United States. ABC offers education programs and literature to the public and to its patients. ABC offers health services including: pregnancy testing; physical examinations; breast examinations; pelvic examinations; mid-life services; testing for sexually transmitted infections; and testing for urinary tract infections. ABC offers birth control including birth control pills, Depo-Provera, IUD, diaphragms, Ortho Evra (patch), Nuva Ring, foam, natural family planning, condoms and emergency contraception commonly known as 'Plan B'. ABC also provides counseling on all women's health issues.

ABC currently sells condoms both by prescription to patients and over-the-counter to non-patients. ABC will be selling Plan B both by prescription and over-the-counter. Plan B is a dually labeled drug that is available over the counter [sic] and by prescription. Plan B is made up of the same types of hormone as birth control pills and is used to prevent pregnancy when taken within the appropriate time frame. The Food and Drug Administration has approved over-the-counter sales of Plan B to women 18 and over without a prescription. Plan B will be available to women under the age of 18 by prescription. Since Plan B is dually labeled, the Plan B that is offered for sale over-the-counter to those above the age of 18 is the same Plan B that is prescribed to those under age 18.

## 3. Business Reason for the Transactions and Description and Facts Relating to the Transactions

(a) Is ABC required to collect ROT on over-the-counter sales of condoms?

ABC currently sells condoms over-the-counter to non-patients of ABC. ABC has been charging the lower rate of tax on all over-the-counter sales of condoms and remitting the tax collected to the Department. ABC seeks a ruling whether it is completely exempt from collecting ROT on the over-the-counter sale of condoms under 86 Ill. Adm. Code 130.2005(b)(1)(B) or other applicable section.

(b) Is ABC required to collect ROT on over-the-counter sales of emergency contraception, commonly referred to as 'Plan B'?

Once ABC receives the drug Plan B it will be offered for sale over-the-counter. ABC seeks a ruling whether it is completely exempt from collecting ROT on the over-the-counter sale of the drug Plan B under 86 Ill. Adm. Code 130.2005(b)(1)(B) or other applicable section.

4. The Power of Attorney authorizing INDIVIDUAL to request this ruling on behalf of ABC is attached.
5. The information requested is for future taxing periods including taxes for calendar year 2007. There is currently no audit or litigation pending in the Department involving the taxpayer and any issue in this request.
6. To the best of the knowledge of both the taxpayer and the taxpayer's representative the Department has not previously ruled on the same of [sic] similar issue for the taxpayer or a predecessor, and this issue was never submitted to the Department by the taxpayer.

*B. RULING REQUESTED*

ABC respectfully requests a ruling as to the following:

- (1) Are ABC over-the-counter sales of condoms subject to ROT?
- (2) Are ABC over-the-counter sales of emergency contraception, commonly referred to as 'Plan B' subject to ROT?

*C. STATEMENT OF SUPPORTING AUTHORITIES AND ANALYSIS*

Generally, retail sales are taxed under 86 Ill. Adm. Code Section 130 et seq. Certain exemptions apply for hospital sales. Section 130.2005(b)(1) states as follows:

1) Hospital Sales

A) Nonprofit hospitals which qualify as exclusively charitable institutions are not taxable when selling food or medicine to their patients in connection with the furnishing of hospital service to them, nor on the operation of restaurant facilities which are conducted primarily for the benefit of the hospital's employees, and which are not open to the public. However, sales made in a hospital cafeteria which is open to the public will be taxable sales.

B) In the case of hospitals which qualify as charitable institutions, such hospitals are not taxable when selling drugs to anyone because this is for the relief of the sick (which is the hospital's primary purpose) and so is 'primarily for the purpose of' such hospitals, thus qualifying such transactions for tax exemption. However, a hospital or hospital auxiliary incurs Retailers' Occupation Tax liability when selling candy, chewing gum, tobacco products, razor blades and the like at retail even when such items are sold only to patients because (unlike food and medicine) these items are not necessary to the furnishing of hospital service, and they are competitive.

C) The same distinctions apply to nonprofit sanitarium and nonprofit nursing homes when they qualify as exclusively charitable institutions.

86 Ill. Adm. Code 130.2005(b)(1). This exemption is also applicable to health care clinics that have received an E number from the Department. Illinois PLR, No. ST-99-0044-GIL, 1999 Ill. PLR LEXIS 50. Section 130.2005(b)(1)(B) provides that such hospitals (health care clinics) are not taxable when selling *drugs to anyone* because this

is for the relief of the sick (which is the hospital's primary purpose) and so is 'primarily for the purpose of' such hospitals, thus qualifying such transactions for tax exemption. 86 Ill. Adm. Code 130.2005(b)(1)(B) (emphasis added).

It is unclear what is meant by 'drugs' under 86 Ill. Adm. Code 130.2005(b)(1)(B). Under Section 130.2020, even hospitals that sell tangible personal property over-the-counter to purchasers for use or consumption apart from rendering of services, incur Retailer' Occupation Tax liability on the receipts from those sales. 86 Ill. Adm. Code 130.2020. Under Section 130.310, the sale of food drugs [sic] and medical appliances are taxed at a lower rate. Condoms are taxed at a lower rate and Plan B would be taxed at a lower rate since it is a drug if these items are taxable at all. 86 Ill. Adm. Code 130.310. It is unclear whether drugs for purposes of Section 130.2005 are the same as drugs for purposes of 130.310.

In addition to the other services it provides, ABC operates health care clinics. ABC has received an E number from the Department. Section 130.2005(b)(1)(B) should provide that ABC is not taxable when selling Plan B, a drug, to anyone because this is for health care (which is the health care provider's primary purpose) and so is 'primarily for the purpose of' such health care provider, thus qualifying such transactions for an exemption from Retailers' Occupation Tax liability. Since condoms are treated as a drug under Section 130.310, condoms should be treated the same under Section 130.2005(b)(1)(B). As such, ABC's over-the-counter sale both of condoms and Plan B should be considered exempt from Retailers' Occupation Tax.

#### *D. STATEMENT OF CONFLICTING AUTHORITIES AND ANALYSIS*

Both the taxpayer and the taxpayer's representative are not aware of any precedential [sic] authority which is directly contrary to the ruling requested herein.

#### *E. CONCLUSION*

ABC is a health care clinic with an E number from the Department. Condoms and Plan B should be considered drugs and the sale of both further the purpose for which ABC was created. As such, the over-the-counter sale of condoms and Plan B by ABC should be exempt from Retailers' Occupation Tax liability under 86 Ill. Adm. Code 130.2005(b)(1)(B).

If there should be any questions, or if additional information is required, please contact the undersigned.

### **DEPARTMENT'S RESPONSE**

Organizations and institutions that are both operated and organized exclusively for charitable, religious, or educational purposes are, as a general matter, subject to Retailers' Occupation Tax upon their own sales of tangible personal property. However, there are three limited exceptions where such organizations are authorized to engage in a restricted amount of retail selling activity without incurring Retailers' Occupation Tax liability.

These limited amounts of selling are described in the Department's regulation "Persons Engaged in Nonprofit Service Enterprises and in Similar Enterprises Operated as Businesses, and Suppliers of Such Persons" at 86 Ill. Adm. Code 130.2005(a)(2) through (a)(4). An exempt

organization may engage in (1) sales to members, (2) noncompetitive sales, and (3) certain occasional dinners and similar activities (two fundraisers a year) without incurring Retailers' Occupation Tax liability. In regard to sales to members, the population to which sales are made is limited to persons specifically associated with that exempt organization and must be for the primary purpose of the selling organization.

As you have pointed out, Section 130.2005(b)(1) goes into more detail regarding hospital sales. Nonprofit hospitals that qualify as exclusively charitable institutions are not taxable when selling medicine to their patients in connection with the furnishing of hospital services to them. You also noted that one of our letters, ST 99-0044-GIL advises that the regulation would also be applicable to health care clinics that have received an E-number from the Department. To the extent that ABC would carry out the same type of medical treatment as a hospital or health care clinic, where medication would be part of the treatment at the hospital or clinic (e.g. injections, pain relief), it would qualify to sell the medication tax free as part of the service provided.

However, when an exempt organization makes competitive sales, such as a campus bookstore selling books in competition with an off-campus bookstore, those sales are subject to sales tax. Therefore, sales of condoms and Part B drugs sold by ABC in competition with pharmacies, for example, would be subject to sales tax. Having said this, both the condoms and Part B drugs would be eligible for the lower 1% rate of tax.

The factual representations upon which this ruling is 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 factual representations recited in this ruling are correct and complete. This Private Letter Ruling is revoked and will cease to bind the Department 10 years after the date of this letter under the provisions of 2 Ill. Adm. Code 1200.110(e) or earlier if there is a pertinent change in statutory law, case law, rules or in the factual representations recited in this ruling.

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.tax.illinois.gov](http://www.tax.illinois.gov) or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Terry D. Charlton  
Chairman, Private Letter Ruling Committee

TC/MPM:msk