

General Information Letter: Alternative apportionment may not be granted on a petition that does not conform to the regulatory requirements.

October 26, 2010

Dear:

This is in response to your letter dated September 23, 2010 in which you request permission to use an alternative method of allocation or apportionment. Department of Revenue ("Department") regulations require that the Department issue only two types of letter rulings, Private Letter Rulings ("PLRs") and General Information Letters ("GILs"). 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 against 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. GILs do not constitute statements of Department policy that apply, interpret or prescribe the tax laws and are not binding against the Department. See 2 Ill. Adm. Code 100.1200(b) and (c).

Your letter states as follows:

COMPANY, Inc. is a STATE corporation doing business as a construction subcontractor. The Company rarely does business outside the State of STATE.

During 2009 the Company was awarded a construction contract in Illinois. This is the first and only time the Company has been contracted to perform a job in Illinois. The contract in Illinois produced a gross loss for the Company of \$1,336,960. However, overall the Company net operating income in its 1120S of \$10,777,631 (Line 21, 1120S) based on profits from all of its operations.

Based on this, the apportionment methods prescribed by IITA, Sections 304(a) through 304(d) and (h) do not fairly reflect the Company's business activity in Illinois and in fact represent a grossly distorted picture of the Company's earnings (in this case a lack thereof) in Illinois. Due to the facts as outlined above, the Company has used an alternative method, based on net income (loss) to report its earnings in Illinois.

We are sending this letter on behalf of the Company to respectfully request that the alternative method based on net income (loss) be allowed in order to more accurately reflect the fact that the Company experienced a large gross loss in Illinois in 2009.

RULING

Section 304(f) of the Illinois Income Tax Act ("IITA"; 35 ILCS 5/304(f)) states:

If the allocation and apportionment provisions of subsections (a) through (e) and of subsection (h) do not fairly represent the extent of a person's business activity in this State, the person may petition for, or the Director may, without a petition, permit or require in respect of all or any part of the person's business activity, if reasonable:

- (1) Separate accounting;
- (2) The exclusion of any one or more factors;

- (3) The inclusion of one or more additional factors which will fairly represent the person's business activities in this State; or
- (4) The employment of any other method to effectuate an equitable allocation and apportionment of the person's business income.

Department Regulations Section 100.3390(b) states as follows regarding the petition for alternative apportionment:

The petition procedures provided in this Section are exclusive means by which a taxpayer may petition for an alternative apportionment formula. Any attempt to invoke an alternative apportionment formula by a method or procedure other than as specified in this Section shall not be considered a valid petition under IITA Section 304(f). Pursuant to Section 304(f), the Director has sole and exclusive authority to grant a petition for an alternative apportionment formula.

Department Regulations Section 100.3390(e) states as follows regarding the time for filing a petition:

A taxpayer petition for use of a separate accounting method or any other alternative apportionment method will not be considered by the Director unless such petition has been timely filed. A taxpayer who petitions the Director for an alternative apportionment formula does so subject to the Department's right to verify, by audit of the taxpayer's return and supporting books and records within the applicable statute of limitations, the facts submitted as the basis of the petition. A petition for alternative allocation and apportionment is timely filed if the petition is filed:

- (1) 120 days prior to the due date of the tax return (including extensions) for which permission to use such alternative method is sought. A taxpayer who does not petition more than 120 days prior to the due date of the original return must file the return and pay tax according to the statutorily approved allocation or apportionment method.
- (2) as an attachment to a return amending an original return which was filed using the statutory allocation and apportionment rules. A taxpayer who has not filed a petition for alternative apportionment under subsection (e)(1) or whose subsection (e)(1) petition has been rejected, may thereafter file such petition with an amended return and the Department will consider the petition along with any other issues raised in the claim for refund pursuant to the procedures set forth at Section 100.9110 of this Part.
- (3) as part of a protest to a notice of deficiency issued as a result of the audit of the taxpayer's return and supporting books and records; provided that the audit adjustments being protested result in the need for the petition for alternative apportionment. Alternative apportionment may not be raised in a protest to a notice of deficiency if such petition could have been submitted under subsection (e)(1) or (e)(2) above (i.e. the petition for an alternative apportionment formula is not necessitated by the proposed adjustments made to the taxpayer's return during the course of the audit).

Applying the provisions above to the facts stated in your letter, your petition has not been filed 120

days prior to the extended due date of Taxpayer's 2009 return. In addition, both your letter and the Taxpayer's return indicate that the Taxpayer did not file its original return and pay tax according to the statutorily approved allocation or apportionment method. Therefore, your petition is not timely and will not be considered. In order to file a timely petition under Regulations Section 100.3390(e), you should first file an amended Form IL-1120-ST-X using the statutorily prescribed apportionment formula to compute and pay the required amount of Illinois tax. You may then file a second amended return including your petition for alternative apportionment as the basis of a claim for refund.

You may note, however, that even if your letter had contained a timely filed petition, the facts as stated therein do not establish that the apportionment provisions of IITA Sections 304(a) through (e) do not fairly represent the extent of Taxpayer's business activity in Illinois. Regulations Section 100.3390(c) sets forth a taxpayer's burden of proof:

Burden of Proof. A departure from the required apportionment method is allowed only where such methods do not accurately and fairly reflect business activity in Illinois. An alternative apportionment method may not be invoked, either by the Director or by a taxpayer, merely because it reaches a different apportionment percentage than the required statutory formula. However, if the application of the statutory formula will lead to a grossly distorted result in a particular case, a fair and accurate alternative method is appropriate. The party (the Director or the taxpayer) seeking to utilize an alternative apportionment method has the burden [of] going forward with the evidence and proving by clear and cogent evidence that the statutory formula results in the taxation of extraterritorial values and operates unreasonably and arbitrarily in attributing to Illinois a percentage of income which is out of all proportion to the business transacted in the State. In addition, the party seeking to use an alternative apportionment formula must go forward with the evidence and prove that the proposed alternative apportionment method fairly and accurately apportions income to Illinois based upon business activity in this State.

In addition, Regulations Section 100.3390(d) states:

A petition will be summarily rejected if its sole basis for support rests on the fact that an alternative method reaches a different apportionment percentage than the required statutory formula.

In this case, your petition contains as its sole basis for support the fact that a separate accounting method reaches a different apportionment percentage than the required statutory formula. Therefore, even if your petition had been timely it must be summarily rejected according to Regulations Section 100.3390(d).

As stated above, this is a GIL. A GIL does not constitute a statement of policy that applies, interprets or prescribes the tax laws, and it is not binding on the Department. If you wish to obtain a PLR which will bind the Department, please submit a request conforming to the requirements of 2 Ill. Adm. Code 100.1200 and 86 Ill. Adm. Code 100.3390.

Sincerely,

Brian L. Stocker
Associate Counsel (Income Tax)