

IT 15-0006 GIL – 7/13/2015 – Sales Outside the Ordinary Course of Business (Bulk Sales)

Bulk sales reporting is not required for repossessions of collateral.

July 13, 2015

Re: IITA Section 902(d) Bulk Sales

Dear Mr. XXXX:

This is in response to your letter dated June 3, 2015 in which you request a written determination that the transaction described in your letter is exempt from Section 902(d) of the Illinois Income Tax Act ("IITA" ; 35 ILCS 5/101 *et seq.*) and the companion provision of the Retailers' Occupation Tax Act ("ROTA" ; 35 ILCS 120/5j).

The nature of your request and the information you have provided require that we respond with a General Information Letter (GIL). A GIL is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 86 Ill. Adm. Code 1200.120(b) and (c), which may be viewed on the Department's web site at www.Iltax.com.

Your letter states as follows:

We represent a Client who seeks to purchase assets from a lender who foreclosed on an operating enterprise. The operating enterprise may have outstanding tax liabilities. Our client seeks assurance that as buyer he will not be subject to liability by IDOR.

Would you please confirm that the holding from Letter No. IT 92-208, 1992 WL 489017, dated November 19, 1992 still controls the situation and provide guidance as to whether the parties have any other reporting responsibilities under the circumstances highlighted below.

Our Client (Buyer) has an agreement in principle to buy all of the assets of an operating enterprise. The seller for this transaction is a third party lender who had retained an Article 9 security interest in all of the assets of the business. After a period of time, the enterprise defaulted on the loan contract and the lender retook possession of all of the assets that had been pledged. A security agreement was executed and an appropriate UCC financing statement was filed to perfect the security interest of the borrower, who is no longer operating the enterprise and the assets.

Are we correct that repossession of collateral under a U.C.C Article 9 security agreement does not fall within the framework of tax-avoidance transactions the type of which bulk sales withholding under IITA 902(d) was designed to prevent? The Letter cited above indicates it would therefore be the policy of the Department of Revenue to not enforce bulk sales withholding under 902(d) with respect to such transfers. This treatment would be consistent with the policy the Department of Revenue has previously taken with regards to sales of collateral following repossession pursuant to UCC Article 9 in the Department of Revenue Letter Ruling #860090, dated January 22, 1986. Special procedures exist for the successor to minimize exposure from the predecessor. These procedures are described at subparts (a)(4) and (b) of 86 Ill. Adm. Code 130.1701.

If the successor does no more than repossess or foreclose on property that is the subject of a note and mortgage or security interest, the situation is not subject to the bulk sales reporting requirements because no “sale or transfer” within the statutory meaning has occurred. Please refer to 86 Ill. Adm. Code 130.170(g)(3).

Please let us know what additional information is needed to confirm in writing that Buyer is not liable for former owner’s payroll taxes and that this transaction as proposed is not subject to bulk sales withholding or reporting under current IDOR rules and regulations.

RULING

Section 902(d) of the Illinois Income Tax Act (“IITA” ; 35 ILCS 5/902(d)) states in part:

If any taxpayer, outside the usual course of his business, sells or transfers the major part of any one or more of (A) the stock of goods which he is engaged in the business of selling, or (B) the furniture or fixtures, or (C) the machinery and equipment, or (D) the real property, of any business that is subject to the provisions of this Act, the purchaser or transferee of such assets shall, no later than 10 days after the sale or transfer, file a notice of sale or transfer of business assets.

The same language appears in Section 5j of the Retailers’ Occupation Tax Act. (“ROTA” ; 35 ILCS 120/5j. Interpreting that provision, Department of Revenue Regulations Section 130.1701(g)(3) (86 Ill. Adm. Code 130.1701) provides:

g) Examples of situations where bulk sales reporting is not required:

...

3) A repossession of equipment and inventory by a lender upon default by a borrower does not constitute a transfer within the meaning of the Bulk Sales provisions of the Act. For example, when a company is in default on a loan for business furniture and fixtures and the holder of the security interest forecloses and enters the business to repossess the furniture and fixtures, bulk sales reporting is not required.

In Letter Ruling IT 92-208 (November 19, 1992), the Department ruled that bulk sales withholding under IITA Section 902(d) does not apply to a repossession of collateral under a U.C.C. Article 9 security agreement. The Department reasoned that such a transfer does not constitute the type of tax-avoidance transaction to which the bulk sales reporting and withholding rules were intended to apply.

Therefore, you are correct that repossession of collateral under a U.C.C Article 9 security agreement does not implicate the bulk sales rules under IITA Section 902(d) and ROTA Section 5j.

As indicated 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 have further questions

regarding this GIL, feel free to contact me at (217) 782-7055. If you have further questions related to Illinois income tax laws, visit our website at www.revenue.state.il.us or contact the Department's Taxpayer Information Division at (217) 782-3336.

Sincerely,

Brian L. Stocker
Staff Attorney (Income Tax)