

This letter concerns the taxation of computer software transactions. See 86 Ill. Adm. Code 130.1935. (This is a GIL.)

October 5, 2010

Dear Xxxxx:

This letter is in response to your letter dated July 27, 2010, 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:

I work for COMPANY, which provides indirect tax calculation services for clients. I am currently researching product taxability issues connected with sales and use taxes, and I hope you can help me with a particular question on the taxability of certain transactions.

Specifically, I am researching the sales tax treatment of application service providers (ASPs). ASP's are entities that deploy, host and manage access to a packaged application. The ASP is maintained on external servers in a centrally managed facility. Multiple parties can access this application through the internet or network on a subscription basis. All the information and code for the ASP is maintained on the servers in the facility; no software is installed or maintained on the subscriber's computer. The subscriber is allowed access to the application and information hosted in the ASP, but cannot access any of the software programming.

According to ILCS § 120/2-25, computer software is defined, in part, as 'data or instructions to be used directly or indirectly in a computer to bring about a certain result in any form in which those statements, data or instructions may be embodied, transmitted or fixed, by any method now known or hereafter developed.' Ill. Admin. Code 130.1935(a) states that 'computer software means all types of software, including [...] applicational.' This seems to include ASPs in that an ASP will provide data from a database that is transmitted to the subscribing customer via internet. However, a

subscriber is not paying for the software of an ASP; rather they are paying for the information or data contained in the database that is accessed through the ASP (which, according to 86 Ill. Admin Code 130.2105(a)(3), would be electronically transferred information and therefore exempt). In addition, an ASP is not designed to provide data which will cause a computer to act in a certain manner. The true purpose of an ASP is to provide access to stored data via the internet. Therefore, it is doubtful that an ASP is computer software.

I have encountered some difficulty in researching how the Dept. of Revenue taxes the transaction of ASP subscriptions. There are many private letter rulings and general information letters on computer software, canned software and custom software, but none that discuss ASPs. As recently as June 2009, the Dept. of Revenue has consistently declined to state whether ASPs are taxable software or non-taxable services, and refers inquiring taxpayers to the general computer software statutes and regulations (see, e.g., ST 09-0085-GIL).

Based on the lack of clarity on this issue, I am asking for a ruling on the taxability of ASPs that may be relied upon by our clients. There are not statutory or regulatory provisions that directly apply to this transaction. Furthermore, the current regulations on computer software do not apply to ASPs because ASPs are not software as defined in ILCS § 120/2-25. I believe that a ruling on the taxability of ASPs is absolutely necessary in order for accurate reporting and remittance of sales tax by a taxpayer.

If there is any other information required by your office in considering this request, I will be happy to provide it. Thank you in advance for your time and assistance, and I look forward to hearing from you.

DEPARTMENT'S RESPONSE:

As stated in ST 09-0085 (GIL), the Department believes that the proper forum for providing guidance regarding transactions involving computer software Application Service Providers (ASPs) is through a formal administrative rulemaking process rather than through individual inquires such as letter ruling requests. The Department at present is in the process of researching the nature and type of services and products provided by ASPs, including discussions with industry participants. The Department has found, based on the discussions to date and previous letters received by the Department, that there is no universal agreement regarding the nature of services or products that ASPs provide to their customers.

When the Department it has completed its review of the products or services ASPs provide to their customers, it intends to propose regulations for adoption. Until that time, ASPs will have to determine, based on the definition contained in Section 2-25 of the Retailers' Occupation Tax Act, whether the products they sell or lease are "computer software."

Very truly yours,

Richard S. Wolters
Associate Counsel