

Music or video that is electronically downloaded is not considered the transfer of tangible personal property in this State. See 86 Ill. Adm. Code 130.2105. (This is a GIL.)

May 13, 2011

Dear Xxxxx:

This letter is in response to your letter dated February 25, 2011, in which you request a Private Letter Ruling. 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:

FIRM submits this Request for a Private Letter Ruling pursuant to 2 Ill. Adm. Code 1200.110 on behalf of its client ('Taxpayer'), regarding the application of Chicago Home Rule Municipal Retailers' Occupation Tax ('Chicago ROT') on products purchased via the Internet and shipped or delivered from outside Illinois to a Chicago location.

I. Facts

Taxpayer is incorporated and headquartered outside Illinois. Taxpayer is a retailer of consumer electronics and electronically delivered products, such as digital goods and electronically delivered prewritten computer software.

Taxpayer sells digital goods (such as downloadable books, movies and music), electronically delivered prewritten computer software, and consumer electronics over the Internet. Taxpayer maintains the digital goods and electronically delivered prewritten computer software that it sells via its website on servers outside Illinois. Taxpayer does not fulfill or in any way facilitate its online sales through a business location in the State. Taxpayer maintains all inventory of consumer electronics sold through its online store outside the State. Taxpayer's customers may return a product purchased online to a retail store in Illinois. Taxpayer's customers, however, may access its online store from computers or other devices located in Chicago and other Illinois locations. As such, Taxpayer makes Internet sales to customers located

throughout Illinois, including Chicago. When Taxpayer makes a taxable Internet sale to a customer in Illinois, Taxpayer collects Illinois use tax from the customer and remits such tax to the State.

Taxpayer also sells consumer electronics at brick and mortar stores located throughout the United States and abroad. Taxpayer has stores located in Chicago. When Taxpayer makes an over-the-counter sale of consumer electronics at its Chicago stores, Taxpayer collects and remits the appropriate State sales tax and Chicago ROT. Taxpayer does not sell any electronically delivered products at any of its brick and mortar stores, including those in Chicago.

II. Issue

Whether a vendor's online sales to Chicago residents, which are not fulfilled or facilitated by a business location or servers in Chicago or any other Illinois location, are subject to Chicago ROT.

III. Law and Discussion

Imposition of Chicago Municipal Retailers [sic] Occupation Tax

Illinois imposes sales tax (i.e. Retailer's [sic] Occupation Tax) on persons engaged in the selling of tangible personal property to buyers for use or consumption measured by the seller's gross receipts from such sales made in the course of the seller's business and use tax on the privilege of using in the state any tangible personal property that is bought anywhere at retail from a retailer. ILCS Ch. 35 §§ 120/2 and 105/3. As authorized under state law, Chicago imposes the Chicago ROT upon all persons engaged in the business of selling tangible personal property at retail in the City of Chicago. The Chicago ROT is imposed on the gross receipts from sales at a rate of 1.25%. ILCS § 5/8-11-1; Mun. Code of Chicago § 3-40-010(a). The legal incidence of the Chicago ROT is on the seller. Ill. Admin. Code § 270.101(b). However, sellers are authorized to reimburse themselves for their Chicago ROT liability by passing the tax on to customers by separately stating the tax as an additional charge. *Id.* The Illinois Department of Revenue enforces and administers the Chicago ROT. ILCS § 5/8-11-1.

Sourcing of Chicago Municipal Retailers [sic] Occupation Tax

Unlike the state sales tax, which is sourced on a destination-basis, the Chicago ROT is imposed at the point where the occupation of selling occurs. Ill. Admin. Code. §§ 130.605(a) and 270.115(a), (c)(2). Enough of the selling activity must occur within the home rule municipality to justify concluding that the seller is engaged in business within the home rule municipality with respect to that sale. Ill. Admin. Code. § 270.115(a). The most important factor in determining if a retailer is engaged in the business of selling in the municipality is the acceptance of the order or other contracting action in the making of a sale. *Id.* at § 270.115(b). The Chicago ROT applies to a sale if an order is accepted at the seller's place of business in Chicago and the purchaser receives possession of the property in Illinois.¹ *Id.* Delivery of the property within Chicago is not necessary for a seller to incur ROT liability. *Id.* at § 270.115(c).

Application to Taxpayer

In light of the foregoing, Taxpayer is not liable for Chicago ROT on its online sales to residents of Chicago. Taxpayer does not have a business location in Chicago that is related in any manner to its online sales, thus the acceptance of online purchases and all other selling activities related to such purchases do not occur at a place of business within the City. Further, the Taxpayer's servers that house the products downloaded from the online store are located outside Illinois. Therefore, because the selling activities related to all Internet sales consummated between Taxpayer and Chicago residents occur outside Chicago, the Taxpayer is not liable for the Chicago ROT. Conversely, Taxpayer must pay the Chicago ROT on taxable transactions deemed to occur at its Chicago stores because the selling activities related to those sales occur within Chicago.

IV. Proposed Private Letter Ruling

Taxpayer seeks confirmation that it is not liable for the Chicago ROT on Internet sales made to Chicago residents. Taxpayer does not facilitate the online sales in Chicago. It has neither any business location nor servers in Chicago or any other Illinois locality related to its online sales. Accordingly, the occupation of selling related to the transactions at issue occurs outside Chicago and Illinois. Further, the presence of Taxpayer's stores in Chicago, unrelated to Taxpayer's online transactions at issue, does not create a Chicago ROT liability for such transactions.

To the best of the knowledge of both the Taxpayer and FIRM the Department has not previously ruled on the same or a similar issue for the Taxpayer or a predecessor, or whether the Taxpayer or any representatives previously submitted the same or a similar issue to the Department but withdrew it before a letter ruling was issued.

* * * * *

Please direct your favorable reply and ruling letter to my attention. Should you have any questions or require any additional information, please call me. A conference is hereby requested prior to the Department of Revenue's final ruling on this matter in the event it is considering reaching any conclusion that would otherwise be inconsistent with the analysis set forth in this Request for Private Letter Ruling.

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 and has decided to respond with a General Information Letter.

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.

The sale of electronic downloads of music or video from the Internet is not considered the sale of tangible personal property for purposes of liability under the Retailers' Occupation Tax Act and Use Tax Act. Please note that canned computer software is considered to be tangible personal property regardless of the form in which it is transferred or transmitted, including tape, disc, card, electronic means, or other media. Computer software that is purchased via a download over the Internet, assuming it does not meet the specific requirements of licensed software under Section 130.1935(a)(1), is taxable as a retail sale in Illinois. See 86 Ill. Adm. Code 130. 1935.

In general, the imposition of the various local sales taxes in Illinois takes effect when "selling" occurs in a jurisdiction imposing a tax. See for example 86 Ill. Adm. Code 270.115(b). The local tax rate, if any, is fixed by the location where the sale takes place, not the delivery location. The fact that the item being sold is shipped from an out-of-State location or from another Illinois location is immaterial for purposes of the imposition of local taxes if the sale occurs in an Illinois jurisdiction imposing a local tax. For these transactions, the local tax imposed in the jurisdiction where the sale occurs will be incurred.

If a sale occurs outside the State, but the property being sold is located in an inventory of the retailer which is located in an Illinois jurisdiction that has imposed a local tax (see, for example, Section 270.115(b)(3)), then the location of the property at the time of sale will determine where the seller is engaged in business for the purpose of determining the imposition of applicable local sales taxes. In situations in which both the sale and the location of the property being sold at the time of the sale are outside of the State of Illinois, such sales would only be subject to the Illinois Use Tax at the rate of 6.25%.

Although the regulation cited above (86 Ill. Adm. Code 270.115) deals with the municipal home rule taxes, the principles outlined in this regulation apply to all local taxes administered by the Department. Lastly, I wanted to point out, contrary to the statement in your letter, Illinois sales tax is not sourced on a destination basis.

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

DMB:msk

¹ The Department will assume that the seller has accepted the purchase order at the place of business at which the seller receives such purchase order from the purchaser in the absence of clear proof to the contrary. Ill. Admin. Code. § 270.115(b)(2).