ST 12-0011-PLR 11/21/2012 USE TAX

This letter concerns the use of carbon excavated from property owned by an electric generating facility and used by that facility as fuel to generate electricity. See 86 Ill. Adm. Code 150.101. (This is a PLR.)

November 21, 2012

Dear:

This letter is in response to your letter dated September 13, 2012, in which you request a Private Letter Ruling, and your subsequent correspondence concerning the purchase of the real estate at issue in this letter. 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.

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 COMPANY1 (FEIN: X; Account ID: XX) 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 COMPANY1 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:

On behalf of our client, COMPANY1 (the "Company"), we respectfully request the Illinois Department of Revenue to issue a Private Letter Ruling pursuant to 2 Ill. Adm. Code 1200.110 with respect to the factual situation set forth below.

General Information

1. Enclosed please find an original Form IL-2848, Power of Attorney, authorizing COMPANY2 to represent the Company before the Illinois Department of Revenue (the "Department").
2. This Private Letter Ruling ("PLR") is not requested with regard to hypothetical or alternative proposed transactions. This PLR is requested to determine the Retailers' Occupation Tax consequences of the actual business practices of the Company.
3. Neither the Company nor any member of the Company is currently engaged in litigation with the Department in regard to this or any other tax matter.
4. The Company is not currently under audit by the Department in regard to this or any other tax matter.
5. To the best knowledge of the Company the Department has not previously ruled regarding this matter for the Company. In addition, the Company has not submitted the same or similar issue to the Department.

6. The Company requests that certain information be deleted from the PLR prior to dissemination to others. The Company requests that their respective names addresses, location of the facility, the description of the facility, and the name of its representative be deleted.
7. The Company is not aware of any authority contrary to the authorities referred to and cited below.

Statement of Material Facts

1. COMPANY1 is a generation and transmission cooperative, which owns and operates a coal-fueled electric generation facility in COUNTY, Illinois, together with related transmission facilities. COMPANY1 is a not-for profit corporation operating on a cooperative basis in the generation of electricity for its members, who are electric distribution cooperatives who are likewise not-for profit corporations operating on a cooperative basis.
2. COMPANY1 acquired approximately XXX acres of real estate in COUNTY, Illinois (the "real Estate") pursuant to a certain Contract for Purchase of Real Estate dated MONTH XX, 20XX (the "Contract"). The Seller of the Real Estate under the Contract, and its predecessors in title, used the Real Estate in connection with its coal mining activities prior to the sale of the Real Estate to COMPANY1. Initially, COMPANY1 held title to the Real Estate in [sic] special purpose, single-member limited liability company of which COMPANY1 was the sole member and owner; however, COMPANY1 has since conveyed the Real Estate from the single-member limited liability company to COMPANY1. Therefore, all right, title and interest in and to the Real Estate is wholly owned by COMPANY1.
3. In connection with its coal mining activities, the Seller processed, or "washed", the raw coal before shipping the coal. During this "washing" process, water is added to the raw coal as it goes through a crushing, screening and separating process to remove soil, clay, rock and other foreign material from the raw coal. A byproduct material produced from the "washing" process is a liquid containing a mixture of soil, clay and rock suspended in the water used in the "washing" process. This byproduct is commonly referred to as "coal refuse slurry" (the "Slurry").
4. The Slurry also contains a certain amount of coal suspended in the Slurry; however, the suspended coal is typically not economically feasible to recover for beneficial use in most coal-fueled electric generation facilities. The coal suspended in the Slurry is commonly referred to as "Carbon."
5. The Slurry containing the Carbon was discharged into a series of ponds, where the Carbon suspended in the Slurry settled out of the Slurry and deposited on to the bottom of the ponds. The other solids suspended in the Slurry also settled out of the Slurry on to the bottom of the ponds. Over many years, this process deposited a large layer of the Carbon intermixed with the other suspended solids on to the bottom of the ponds.
6. The Carbon can be reclaimed from the ponds by excavating and dredging the material from the bottom of the ponds. The material excavated and dredged from the bottom of the ponds is first dried and then some is further processed through special equipment designed to separate the Carbon from the soil, clay, rock and other foreign material from the Carbon [sic]. The Carbon that is extracted through this process is capable of being used as fuel in certain types of the coal-fueled electric generation facilities using Fluidized Bed Combustion technology.

7. Fluidized Bed Combustion technology, or "FBC", is a combustion technology that suspends solid fuels on upward-blowing jets of air during the combustion process, resulting in a turbulent mixing of gas and solids, much like a bubbling fluid, which provides more effective chemical reactions and heat transfer. Coal-fueled electric generation facilities using FBC are more flexible than conventional coal-fueled electric generation facilities (such as facilities using pulverized coal boiler technology) because they can be fueled by various qualities of coal containing various constituencies.
8. The Company's coal-fueled electric generation facility uses FBC, and is capable of using the Carbon produced through [sic] above described process as fuel for the generation of electricity.
9. The Company will extract and process the material excavated and dredged from the ponds located on its Real Estate to produce the Carbon as described above, and then use the Carbon as fuel in its coal-fueled electric generation facility.
10. The Company has closed the purchase of the Real Estate, and the Seller of the Real Estate has been paid in full for the Real Estate. The Seller will not receive any compensation of any sort arising out of or connected with the Company's excavation, dredging, extraction, processing or use of the Carbon as described above.
11. The Company will not sell or offer for sale to any third party any of the Carbon produced by its excavation, dredging, extraction, or processing activities described above. All of the Carbon produced by the activities described above will be used exclusively as fuel in the Company's coal-fueled electric generation facility located in COUNTY, Illinois for the purpose of generating electricity.

Ruling Requested

On behalf of the Company, we respectfully request the Illinois Department of Revenue to rule that the Company's excavation, dredging, extraction and processing of Carbon from ponds located on its Real Estate and the subsequent use of the Carbon as fuel in the Company's coal-fueled electric generation facility for the purpose of generating electricity will not be subject to Illinois Retailer's [sic] Occupation Tax or Illinois Use Tax.

Relevant Authorities

Illinois Retailers' Occupation Tax is imposed upon persons engaged in Illinois in the business of selling at retail tangible personal property (See 86 Ill. Adm. Code 130.101). Illinois Use Tax is imposed on purchasers by taxing the use of tangible personal property in Illinois purchased at retail from a retailer (See 86 Ill. Adm. Code 150.101.) "Purchase at retail" means the acquisition of the ownership of, or title to, tangible personal property through a sale at retail. 86 Ill. Adm. Code 150.201(b). "Sale at retail" means any transfer of the ownership of or title to tangible personal property to a purchaser, for the purpose of use, and not for the purpose of resale in any form as tangible personal property . . . . . for a valuable consideration (See 86 Ill. Adm. Code 150.201(d).

In ST 07-0001-PLR (May 1, 2007), the Department concluded that where the taxpayer was mining coal that the taxpayer owned, and then using that coal as fuel in the taxpayer's own coal fueled electric generation facility, the taxpayer did not purchase the coal at retail from a retailer. The Department noted that (a) the taxpayer held title to and

ownership of the coal both before and after it was mined, (b) the coal was conveyed from the mine to the electric generating facility without any exchange of consideration, and (c) Illinois Retailers' Occupation Tax and Illinois Use Tax are both limited to items purchased at retail from a retailer. Therefore, the Department ruled that Illinois Retailers' Occupation Tax or Illinois Use Tax did not apply to the coal mined from the taxpayer's mine and used in the taxpayer's electric generating facility because there was no purchase or sale at retail from the retailer.[1]

In this instance, the Company has acquired title and ownership of Real Estate as described above. Carbon deposited and embedded at the bottom of ponds located on the Real Estate will be excavated and dredged by the Company from these ponds, and then extracted and processed by the Company as fuel for use in the Company's own electric generation facility to generate electricity. At all times, the Company will own and possess its own Real Estate, and will not be transferring any tangible personal property to or from any third party for any consideration in any form. The Company will have title to and ownership of the Carbon before and after the Carbon is excavated, dredged, extracted and processed from the Company's Real Estate. The Company will then use the Carbon as fuel for generating electricity at its electric generating facility. Therefore, there will be no sale or purchase at retail of the Carbon from any retailer.

Because the Illinois Retailer's [sic] Occupation Tax and Illinois Use Tax are only imposed on the transfer or use of tangible personal property purchased at retail from a retailer, the Company's excavation, dredging, extraction and processing of the Carbon, and subsequent use of the Carbon as fuel for generating electricity at its own electric generating facility should not be subject to Illinois Retailer's [sic] Occupation Tax or Illinois Use Tax.

Conclusion
We respectfully request that the Department issue a ruling stating that the Company's excavation, dredging, extracting and processing of Carbon from the Company's Real Estate and then using that Carbon as fuel for generating electricity at the Company's electric generating facility will not be subject to Illinois Retailer's [sic] Occupation Tax or Illinois Use Tax for the reasons stated above. If the Department cannot make such a ruling, we request that the Department contact us at XXXX to determine what additional information is required or allow the taxpayer to rescind this ruling request.

Thank you.

DEPARTMENT'S RULING:

Retailers' Occupation Tax is imposed upon persons engaged in this State in the business of selling at retail tangible personal property at the rate of 6.25%. See 86 Ill. Adm. Code 130.101. A corresponding Use Tax is imposed on purchasers by taxing the use of tangible personal property purchased at retail from retailers. See 86 Ill. Adm. Code 150.101.

Based on your representations and the documents provided, COMPANY1 purchased the real estate on which the carbon (that settled over many years out of the coal refuse slurry and was deposited onto the bottom of the ponds) is located. COMPANY1 owns the coal-fueled electric generating facility

in which the carbon will be used as fuel. As a preliminary matter, based on your representations in paragraph 10 and the documents provided, we agree that the carbon was part of the real property purchased by COMPANY1.

You have represented that COMPANY1 will excavate, dredge, extract, and process the carbon located on COMPANY1's property and use it in COMPANY1's electric generating facility. Because COMPANY1 will have title to and ownership of the carbon both before and after it is excavated, by virtue of owning the real property on which it was deposited, there would be no change of ownership and no sale of the carbon being used in COMPANY1's electric generating facility.

It is the Department's position that there is no Retailers' Occupation or Use Tax due on the carbon excavated, dredged, extracted, and processed from COMPANY1's real property and used in COMPANY1's electric generating facility as described in this letter request.

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 the factual representations recited in this ruling.

I hope this information is helpful. 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 or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Terry D. Charlton
Chairman, Private Letter Ruling Committee

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[1] We note similar reasoning in Arizona Taxpayer Ruling LR2001-004 (2001), where the taxpayer had constructed a natural gas fired electric generating plant, and all the natural gas used to fuel the facility was acquired through the taxpayer's ownership of a working interest in natural gas well(s) reserve(s). Therefore, the taxpayer did not purchase its gas from a retailer. The Arizona Department of Revenue state that: "When a person produces gas for their own use there is no transfer of title or possession of tangible personal property for a consideration, hence, there is no sale … When the taxpayer consumes natural gas that came from wells in which it has a working interest, there has been no use or consumption in this state of tangible personal property that was purchased from a retailer or utility business… The Department rules that the use tax does not apply to natural gas that is consumed by the taxpayer in its electric generating plant when such gas was withdrawn from out-of-state wells in which it has a working interest." (See Arizona Private Taxpayer Ruling LR2001-004 (2001).