

When a construction contractor permanently affixes tangible personal property to real property, the contractor is deemed the end user of that tangible personal property. As the end user, the contractor incurs Use Tax on the cost price of that tangible personal property. See 86 Ill. Adm. Code 130.1940 and 86 Ill. Adm. Code 130.2075. (This is a GIL.)

June 15, 2012

Dear:

This letter is in response to your letter dated May 11, 2012, 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:

COMPANY is currently a subcontractor to a General Contractor (our Customer) on a project within Illinois. As there are differing interpretations between the parties as to the taxation of this project, we would like to receive a GIL to determine whether COMPANY's methodology in applying the tax is sound, or whether a going-forward change is needed. In effect, the GIL would resolve the question of 'how does tax apply to this transaction'?

Nature of the Project in Question:

The project involves the construction, by COMPANY, of a tank to be located in Illinois. The purpose of the tank is for fire protection purposes. The owner of the tank (end-user) is reopening a facility which had previously been shut down by a former owner's bankruptcy. The owner's business involves the production of alternative fuels. To our knowledge, we are unaware of any exemptions for the owner (type of business), the nature of the work (new industry in Illinois) or the use of the tank (fire protection). The work by COMPANY involves attaching personal property to the real estate of the owner.

COMPANY's Position/Methodology:

This matter appears to turn on whether the attachment of the personal property (the tank) to the real property is *permanent* or not. COMPANY takes the position that the attachment is *NOT permanent*, and that the tank remains personal property even after attachment to the realty, as described below:

A. Physical attachment of personal property:

1. The tank to be attached in Illinois is made of welded carbon steel, and will have a concrete foundation poured; and
2. A device called an Anchor Bolt will be used on the tank to attach it to the concrete foundation. An anchor bolt, as an example, is about 4' long. 2' of the anchor bolt is inside the concrete. The other 2', which are outside of the concrete, are attached to the tank itself by a device called an Anchor Chair. An Anchor Chair is welded directly onto the tank, and receives the anchor bolt attachment.

B. Is the attachment '*permanent*' or not?

1. The tank for this project is capable of being moved, notwithstanding the concrete foundation and anchor bolts used. To be movable, the anchor chairs would have to be knocked off the tank (which would destroy the originally used anchor chairs). This would liberate the tank from the foundation. The tank (250,000 Gallon capacity) is too large to be moved intact—all in one piece. Therefore, the tank would be torn down by using a cutting torch to remove the tank panels which were originally welded on-site to form the tank. After the tank panels had been cut out, they would be shipped to the new location. The old welds would be ground off, and a new round of tank erection and new welding of the tank panels could commence (with a new foundation, new anchor bolts, new anchor chairs). In a tear down and move scenario, the real estate (i.e., the earth itself) at the now- former tank site would have no damage (in fact, the concrete foundation that remained would be ideal for a storage building, such as a pole barn). Additionally, the tank panels themselves would not be damaged during the tear down and would need little more than light touch-up paint before being reassembled;
2. As a point of contrast, this 250,000 Gallon tank could NOT be moved in one piece. However, if it were a smaller tank, say a 50,000 Gallon tank (which has a 20' diameter and is 24' tall) it could be loaded on a single flatbed truck, and with 'oversize' permits, shipped anywhere for reinstallation. COMPANY has also moved larger tanks that were near a body of water via air bags, and has also moved numerous tanks to a different location in the same vicinity (i.e., the same industrial complex) in one piece with a crane on wheels. Finally, COMPANY has also moved larger tanks intact by using two flatbed trucks driving side-by-side, with one truck in 'Drive' and the other truck in 'Neutral'.

C. Methodology –based on foregoing:

1. Since COMPANY has the capability to move these tanks, we consider them to be personal property. Accordingly, COMPANY treats the sale as

a retail transaction, and incurs Retailers' Occupation Tax liability. COMPANY retains the amount of Sales Tax paid to it by its Customers to reimburse itself for the ROT liability incurred (and such liability is computed on the full contract amount); and

2. The methodology used was established based on readings of ST-10-0123-GIL (which describes a Construction Contractor selling TPP that is not permanently affixed and remains personal property), along with Illinois Title 86, Section 130-1940 (b)(2).

General Contractor (COMPANY's Customer)'s Position:

1. The General Contractor's position is that the personal property, when attached to the realty, becomes real property itself. This position is based on the following:
 - A. The size of the tank (250,000 gallons) makes it impractical to move. If it is secured by anchor bolts and a concrete foundation, it has become a part of the realty;
 - B. There is no intent on the part of the Owner to ever move the fire protection tank. Instead, there is intent by the Owner that the tank which provides fire protection is a permanent and necessary part of the facility; and
 - C. In support of our Customer's position, I will note anecdotally that when businesses fail, the fire protection water tanks are never moved, in our experience. Either the Banker who is handling the foreclosure doesn't realize that the tanks can be moved (or that there is a Used Tank market in which the foreclosed property's tank could be sold), or they take the long-term view that the next buyer of the plant facility will also need a fire protection tank, so they leave it in place and sell it along with the buildings and land;
2. Essentially, the General Contractor believes that ST 10-0033-GIL (which describes a construction contractor permanently affixing tangible personal property to real property) should govern this transaction; that the subcontractor's liability for Use Tax will be based on the cost of the materials; and that the subcontractor should recoup that cost by including it in the lump sum contract amount (i.e., raise its price to recover the tax.)

Closing Comments:

In closing, other states use alternative criteria for determining personal property vs. real property when it comes to tanks, based on parameters such as size of tanks; the type of materials used (i.e, wood vs. steel tanks); whether the tank was prefabricated or not; the difficulty (or ease) in removing the personal property once it has been attached; damage, if any, to the real property and the removed personal property after detaching; and whether the personal property 'loses its identity' upon installation. I have tried to

incorporate some of these specifics into the narrative. I would welcome your phone call at the number above if any of these alternative criteria are helpful in determining the Illinois criteria: *permanently* attached, or not.

DEPARTMENT'S RESPONSE:

The General Information Letters you cite – ST 10-0033 and ST 10-0128 – provide the law on situations where tangible personal property is, and is not, permanently incorporated into real estate, respectively. These types of determination are very fact intensive.

In ST 08-0003-PLR, the Department discusses at length the analysis the Department makes in determining whether tangible personal property is affixed or incorporated into real estate. The question in the PLR was whether certain property was permanently attached to real estate and therefore qualified for the building materials exemption under Section 5k of the Retailers' Occupation Tax Act. The PLR states:

“Cooling Tower System, Water Chemical Feed System & Water Re-circulating System:

Cooling Tower System and Water Re-circulating System: The cooling tower is a fiberglass rectangular mechanical draft cooling tower that utilizes counter flow to cool the circulating water for the Project. You have represented that the cooling tower system, pumps, and re-circulating pipes are constructed within structural steel frameworks that are permanently affixed to concrete foundations and piers by anchor bolts embedded in the concrete. The cooling tower, pumps, and water recirculating pipes qualify for the exemption.

Circulating Water Chemical Feed System: There are several tanks, vessels and associated pumps, foundations, piping, and housings integrated into the circulating water chemical feed system. You have represented that all of these are constructed of steel and concrete, and are permanently affixed to concrete foundations with flange connection, steel collars, and anchor bolts embedded in the concrete. The tanks, vessels, associated pumps, foundations, piping, and housing qualify for the exemption.”

Although we cannot give you a binding opinion in a GIL, you may want to review the letter discussed above to understand what facts the Department looks at for similar items.

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,

Richard S. Wolters
Associate Counsel