ST 13-0033-GIL 07/30/2013 OCCASIONAL SALE

> When persons sell tangible personal property which they are not otherwise engaged in the business of selling, such transactions may be occasional sales not subject to ROT. See 86 Ill. Adm. Code 130.110. (This is a GIL.)

July 30, 2013

Dear:

This letter is in response to your letter dated June 21, 2013, 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:

> On behalf of our client (hereinafter "Buyer"), we respectfully request a General Information Letter ("GIL") regarding the application of the Illinois Retailers' Occupation Tax and Use Tax treatment to a transaction involving the sale of tangible personal property by a purchaser to a seller through an intermediary pursuant to Illinois regulatory requirements. All facets of the transaction took place in Illinois. In order to facilitate your review of the information necessary to respond to the requested GIL, we have presented the request in the following format:
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> I. Overview and Description of the Transaction
> II. Pertinent Authority
> III. Analysis
> IV. Ruling Requested
>
> I. Overview and Description of the Transaction
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> Seller operates a regulated business and does not hold itself as being engaged (or does not habitually engage) in selling tangible personal property at retail. Several months ago, Seller entered into a purchase agreement ("Purchase Agreement") with Buyer to purchase a portion of Seller's operating equipment and capital assets ("tangible personal property"). Seller will use the purchased tangible personal property for use or consumption in the operation of its day to day business and will not resell the tangible personal property.
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> To ensure compliance with Treasury Department regulations, we wish to inform you that, unless expressly stated otherwise in this communication (including any attachments) any tax advice that may be contained in this communications is not

intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code or applicable state or local tax law provisions or (ii) promoting, marketing or recommending to another party any tax-related matters addressed herein.

Due to Illinois regulatory requirements, the Seller is not allowed to sell the tangible personal property directly to Buyer. The state requires the Seller to transfer the assets to an intermediary who will then transfer the assets to the Buyer. Thus, per the Purchase Agreement, Seller and Buyer entered into an Asset Purchase and Sale Agreement (Tri-Transaction Agreement) with a third party intermediary ("Intermediary"). This Tri-Transaction Agreement is included with the Purchase Agreement as an exhibit; the Purchase Agreement states tangible personal property will be purchased pursuant to the Tri-Transaction Agreement.

The Tri-Transaction Agreement specified the following contractual obligations upon the agreements execution:

1. Wire Transfer: Upon execution of the Tri-Transaction Agreement, Buyer will wire transfer the purchase price ("Purchase Price") for tangible personal property to Intermediary.
2. First Transaction: Upon completion of the Wire Transfer from Buyer to Intermediary, Seller will sell, assign, transfer, and convey to Intermediary, and Intermediary will purchase, acquire and accept from Seller the tangible personal property. Seller will deliver to Intermediary a Bill of Sale and Intermediary will wire transfer the Purchase Price to Seller.
3. Second Transaction: Immediately following the First Transaction, Intermediary will sell, assign, transfer, and convey to Buyer, and Buyer will purchase, acquire, and accept from Intermediary the tangible personal property. Intermediary will delivery to Buyer a Bill of Sale.[1]

Regarding the role and obligations of Intermediary, the Purchase Agreement and Tri-Transaction Agreement clearly stipulated the following:

1. Intermediary was contractually required to immediately convey the tangible personal property to Buyer upon receipt from Seller;
2. Intermediary had no liability for title warranties to Buyer;
3. Intermediary was contractually required to re-convey the purchase price it received from Buyer to Seller and to apply it only towards Buyer's purchase of Seller's tangible personal property;
4. Intermediary was contractually precluded from keeping any portion of the purchase price received from Buyer or from charging Buyer a mark-up;
5. Intermediary did not pay any closing costs related to the transaction.

II. Pertinent Authority

The Illinois Retailers' Occupation Tax Act imposes a tax upon persons engaged in this State in the business of selling tangible personal property at retail. 35 ILCS 120/2. The Retailers' Occupation Tax Act Section 120/1 provides that "sale at retail" means:

> Any transfer of the ownership of or title to tangible personal property to a purchaser, for the purpose of use or consumption, and not for the purpose of resale in any form as tangible personal property to the extent not first subjected to a use for which it was purchased, for valuable consideration.

The Illinois Use Tax Act imposes a privilege tax for the privilege of using, in this State, tangible personal property purchased at retail from a retailer. 35 ILCS 105/3. The Illinois Use Tax Act Section 105/2 provides that "retailer" means:

> Every person engaged in the business of making sales at retail as defined in this Section.

The Illinois Use Tax Act Section 105/2 provides that "sale at retail" means:

> Any transfer of 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 to the extent not first subjected to a use for which it was purchased, for a valuable consideration.

A person does not incur Retailers' Occupation Tax liability on the isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as being engaged (or who does not habitually engage) in selling such tangible personal property at retail. 35 ILCS 120/1. Consequently, the purchaser of that tangible personal property does not incur a corresponding Use Tax liability on that purchase. 35 ILCS 105/2.

In 2002, the Illinois Appellate Court for the First District applied the substance over form doctrine to a transaction involving the sale of an aircraft by a non-retailer to a purchaser for use or consumption through the use of a third party intermediary in an IRC section 1031 like-kind exchange.[2] But for the presence of the intermediary, the transaction would have qualified for the occasional sale exemption. In determining that the substance over form doctrine applied to the transaction and the sale was substantively between the seller and the buyer, the court considered whether the following guidelines were met:

1. The intermediary was merely acting as a conduit in facilitating the like-kind exchange;
2. The intermediary was contractually required to re-convey title to the aircraft to the end purchaser upon receipt from the non-retailer/initial seller;
3. The intermediary had no liability for warranties to the end purchaser;
4. The intermediary was contractually required to re-convey the purchase price it received from the end purchaser and apply it towards the like-kind exchange;
5. The intermediary was contractually precluded from keeping any portion of the purchase price received from the end purchaser; and
6. The intermediary did not pay any closing costs.

III. Analysis

The sale of tangible personal property without the use in Intermediary would qualify as an occasional sale

Seller sold tangible personal property used in the day to day operation of its business. Such tangible personal property was ultimately purchased by Buyer as end user for use in the day to day operations of its business and not for resale. Neither Seller nor Buyer holds itself out as being engaged, or habitually engaging, in selling this type of tangible personal property at retail. Thus, absent the presence of Intermediary in this transaction, the isolated or occasional sale exemption would apply and neither Buyer nor Seller would incur the Retailers' Occupation Tax or the corresponding Use Tax.

But for Illinois law, Intermediary would not have been a party to the transaction

Seller and buyer entered into a Purchase Agreement for the sale and conveyance of tangible personal property. Illinois regulations do not permit the Seller and Buyer to sell the operating assets to each other. An Intermediary was required to be used to sell the assets from Seller to Purchaser. Pursuant to these requirements, Seller and Buyer entered into the Tri-Transaction Agreement with Intermediary. This Tri-Transaction Agreement define the limited role of Intermediary (discussed in detail below), as a party to the transaction that had no beneficial interest in the sale of tangible personal property. But for the requirements under Illinois regulations, Intermediary would not have been a party to the transaction.

J1 Aviation, Inc. v. Illinois Dept. of Revenue ("J1 Aviation") is relevant and persuasive authority

Both J1 Aviation and the facts in this GIL consist of a Seller and a Buyer to a transaction that would otherwise qualify for the occasional sale exemption but for the insertion of a 3rd party intermediary. In both fact patters, the 3rd party intermediary is present solely to comply with a government regulation. Additionally, the 3rd part intermediary in both cases has no beneficial interest in the transaction and, per the below analysis, had a defined limited role of a conduit. Because the fact patterns in J1 Aviation and this case are analogous, J1 Aviation is both relevant, and persuasive authority in the determination of whether substance over form may apply to the transaction between Seller and Buyer.

Per the written agreements, Intermediary had a defined limited role of conduit

The Purchase Agreement and Tri-Transaction Agreement limit the role of Intermediary to the mere facilitation of a transaction substantively between Buyer and Seller by including provisions that clearly stipulate the following:

1. Intermediary had a defined limited role as a conduit with no beneficial interest in the transaction;
2. Intermediary was required to immediately convey the tangible personal property to Buyer upon receipt from Seller;
3. Intermediary had no liability for title warranties to Buyer;

4. Intermediary was contractually required to re-convey the purchase price it received from Buyer to Seller and to apply it only towards Buyer's purchase of Seller's tangible personal property;
5. Intermediary was contractually precluded from keeping any portion of the Purchase Price received from Buyer or from charging Buyer a mark-up;
6. Intermediary did not pay any closing costs related to the transaction.

These guidelines are consistent with those analyzed by the court in J1 Aviation in determining the treatment of a third party intermediary that facilitates a transaction between a Buyer and Seller pursuant to government regulations. All guidelines established by the Appellate Court in J1 Aviation are met. Thus, the substance over form doctrine may be applied to this transaction, and Intermediary's conduit role must be ignored for tax purposes.

Substance over form doctrine applies to this transaction and the transaction is exempt from Retailers' Occupation Tax and Use Tax under the occasional sale exemption

The sale of tangible personal property from Seller to Buyer would be an exempt occasional or isolated sale if Intermediary had not been a party to the transaction. Intermediary was a party to this transaction solely because of Illinois regulations. Intermediary had a defined limited role in the transaction its role has met all guidelines established by the court in J1 Aviation to be treated as a conduit; the substance over form doctrine may be applied to this transaction and the Intermediary's role must be ignored for tax purposes. Thus, the isolated or occasional sale exemption applies to this transaction and neither Buyer nor Seller should incur the Retailers' Occupation Tax or the corresponding Use Tax.

IV. Ruling Requested

Based on the above statements, please confirm our understanding of the following:

1. Absent the presence of Intermediary in this transaction, the isolated or occasional sale exemption would apply and neither Buyer nor Seller would incur the Retailers' Occupation Tax or the corresponding Use Tax.
2. The substance over form doctrine applies to this transaction and the transfer of property through conduit Intermediary must be ignored for tax purposes.
3. The isolated or occasional sale exemption applies to this transaction and neither Buyer nor Seller should incur the Retailers' Occupation Tax or the corresponding Use Tax.

Your assistance in this matter is greatly appreciated. If you have any questions or require further information to complete this GIL, please do not hesitate to contact me at X.

DEPARTMENT'S RESPONSE:

The Department is unable to provide the rulings you request in response to a request for a General Information Letter. You do not identify the Illinois regulatory requirements that necessitate the use of the arrangement described in you letter. I would note that the Department takes into consideration the court's holding and reasoning in *JI Aviation, Inc. v. Illinois Dept. of Revenue*, 335 Ill. App. 3d 905 (1st Dist. 2002) when conducting audits of like-kind exchanges pursuant to Section 1031 of the Internal Revenue Code. We cannot state in the context of a GIL whether the Department would apply *JI Aviation* in the type of situation described in your letter.

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

[1] The wire transfer, first transaction, and second transaction are subsequently referred to as the "transaction."
[2] See J1 Aviation, Inc. v. Illinois Dept. of Revenue, 335 Ill. App. 3d 905 (1st Dist. Nov. 14, 2002.)