

The exemption from Retailers' Occupation Tax on fuel used or consumed by vessels used primarily for the transportation of property on waterways applies only to such vessels on rivers bordering this State. See 86 Ill. Adm. Code 130.315. (This is a PLR.)

July 16, 2015

Dear Mr. XXXX:

This letter is in response to your letter dated February 23, 2015, 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.

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 COMPANY A 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 COMPANY A 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:

I am a Vice President of COMPANY A, an OUT OF STATE corporation ("COMPANY A" the "Taxpayer" or "we") from which COMPANY B ("COMPANY B") has sought reimbursement for Illinois Sales Tax, Cook County Gasoline and Diesel Fuel Tax and City of Chicago Gallonage Tax that COMPANY B has paid in connection with two transactions in which COMPANY B sold fuel to COMPANY A in December 2013.

We believe that these sales were exempt from the Illinois Sales Tax/Retailers' Occupation Tax ("ROT") as Nontaxable Transactions under Section 130.120 (e) of the ROT, Illinois Consolidated Laws, Title 86: Revenue, Part 130, being "within the protection of the Commerce Clause of the Constitution," and that as exempt under the ROT and ROT regulations on this

basis, they are also exempt from the County Motor Fuel Tax and any City of Chicago Gallonage taxes, each of which is clearly subject to the same Commerce Clause protections.

Our request

By this letter request (“Request”) COMPANY A asks that the Illinois Department of Revenue (the “Department”) provide a private letter ruling to COMPANY A confirming that the purchases described below were not subject to these taxes. A power of attorney for NAME (“NAME”), authorizing your discussions of the issues involved with NAME, is attached.

Discussion & Discussion of Authorities

Pursuant to Illinois Administrative Code Section 1200.110, we submit the following:

1. Statement of the Material Facts and Other Information Pertinent to the Request

COMPANY A purchased diesel fuel from COMPANY B for the vessel YYYY on both December 1 and December 22, 2013 (the “Vessel”), due to a winter storm that prevented the Vessel purchasing fuel at their usual re-fueling location in Indiana. The Vessel had travelled from Lake Michigan to the COMPANY B fueling site at the DOCK, located on navigable waters in close proximity to where the Calumet River empties into Lake Michigan. The deliveries were made from a COMPANY B floating rack to the Vessel while afloat in the Calumet River. COMPANY B invoiced the Taxpayer for Illinois Sales Tax, Cook County Diesel Tax and City of Chicago Gallonage taxes for the diesel fuel purchased, on December 1 and December 22, 2013. The Vessel entered Illinois to refuel, and exited Illinois immediately after refueling. Other than these two refueling operations, the Vessel had no 2013 contact with the State of Illinois.

2. Contracts, Licenses, Agreements and Other Documents Relevant to the Request

We attach to this submission copies of the COMPANY B invoices for December 1 and December 22, 2013, showing COMPANY B’s record of the taxes collected, and a memorandum from NAME, our outside legal counsel, summarizing his efforts to obtain Departmental clarifications, and the IDOR advice to NAME that COMPANY A should submit a request for a private letter ruling to the Department of Revenue, Legal Services Office, in order to obtain “a legal interpretation of the law.”

3. Identification of Tax Period at Issue and Whether an Audit or Litigation is Pending

The COMPANY A tax period at issue is that which includes December 2013. There is no COMPANY A audit or litigation pending regarding the subject matter of this ruling request.

4. Whether the Department has Ruled on the Same Issue for the Taxpayer

To the best of COMPANY A's knowledge, the Department has not previously ruled on the same or a similar issue for the Taxpayer or for a predecessor, and neither the Taxpayer nor any of its representatives have previously submitted the same or similar issue to the Department but withdrew them before a ruling was issued.

5. Statement of Authorities Supporting the Taxpayer's Views

5.1 Summary.

The Illinois Revenue Code states that the Illinois Sales Tax/Retailer's Occupation Tax ("ROT") "does not apply to receipts from sales... that are within the protection of the Commerce Clause of the Constitution of the United States," 86 Ill. Adm. Code 130.120(e). We believe that the decision by the Appellate Court of Illinois, Second District, in American River Transportation Co. v. Bower, 351 Ill App. 3d 208, 813 N.E.2d 2 1090, appeal denied, 212 Ill 2d 528, 938 N.E. 459 (2004) provides the governing Illinois authority and prohibits the collection of any of three taxes under the general Commerce Clause exemption.

These COMPANY A transactions are exempted by 86 Ill. Code 130.120(e) because an Illinois state or local tax must meet four criteria to be upheld as permitted under the Commerce Clause. And, the facts of the COMPANY A Illinois involvements were such that at least one, and perhaps several, of these criteria were not met for the COMPANY A transactions.

5.2 The Complete Auto Transit and American River cases.

As stated in the Supreme Court's opinion in Complete Auto Transit v. Brady, 430 U.S. 274 (1977) to be sustained in the face of a Commerce Clause challenge a tax being imposed by an individual state must be such that:

- (1) the taxpayer or transaction has a substantial nexus with the state;
- (2) the tax in application must be fairly apportioned;
- (3) the tax must not discriminate against interstate commerce; and
- (4) the tax must be fairly related to the services provided by the state.

In the American River case the Illinois Department of Revenue ("Revenue") sought to impose the Illinois use tax on taxpayer American River Transportation Company ("American") purchases of diesel fuel and

supplies that were used by American tugboats operating on the Mississippi, Illinois and Ohio Rivers. The American tugboats spent at least 50 percent of their time pushing barges in Illinois waters, but never docked at any Illinois port.

The Circuit Court for Du Page County held for American, and Revenue appealed. The Appellate Court of Illinois, Second District, held for American in an opinion that was released for publication in August 2007. Revenue's appeal of the Appellate Court decision to the Illinois Supreme Court was denied without an opinion.

In applying the Complete Auto Transit tests in the American River case, the Appeals Court held that tugboats that purchased fuel in Missouri and operated in Illinois, Mississippi and Ohio waters were not subject to the Illinois sales and use tax provisions. Revenue had argued that use tax was due. The trial court's decision, that the application of the use tax would violate the Commerce Clause prohibition, was affirmed, and Illinois Supreme Court denied Revenue's appeal.

The Appeals Court acknowledged that the tugboats had substantial nexus with Illinois since they spent at least 50 percent of their time in Illinois waters even though they never docked in Illinois. But with reference to the Complete Auto Transit test, imposition of the Illinois sales and use tax had no relation to any services provided by Illinois in relation to the tugboats. The waters were all navigable waterways of the United States that were maintained by the United States, not by Illinois.

COMPANY A's presence in Illinois on Calumet Rive [sic] navigable waters, accessed from the Lake Michigan during a winter storm emergency, was significantly less than that of the tugboats in the American River case. But, even assuming that the first three prongs of the Complete Auto Transit test were satisfied by COMPANY A, the fourth was not. For the Illinois tax to be upheld it must be fairly related to the services provided by the State of Illinois.

Here, as in American River, the imposition of each tax would fail under the Commerce Clause because the tax had no relation to any services provided by the State of Illinois. While COMPANY A's vessel received diesel fuel at COMPANY B's floating racks, Illinois provided no services to that vessel. The Calumet River at that location is a navigable waterway of the United States and it is maintained by the United States, viz., the United States Corp of Engineers, and not by the State of Illinois.

The Illinois Department of Revenue has taken the position that the Commerce Clause protection requirements for Illinois sales and similar taxes are fully satisfied by the section 130.315 (Rivers Bordering Illinois) exemption, and that the section 130.120(e) exemption (within the Commerce Clause of the United States) does not provide any additional protection for fuel and other tangible personal property sales in which the purchaser takes delivery in Illinois. See, Illinois, Department of Revenue, Publication 104 (Common Sales Tax and E911 Exemptions, "Interstate commerce") (November 2011).

7 Identification of any Specific Trade Secret Information to be Deleted from Ruling

There is no specific trade secret information that the Taxpayer requests be deleted from the publicly disseminated version of the private letter ruling. The Taxpayer requests that all identifying information be deleted.

8 Signature

COMPANY A

DEPARTMENT'S RESPONSE:

This response is limited to the application of the Retailers' Occupation Tax Act and any applicable local taxes administered by the Department. If you wish to obtain a ruling regarding the application of the Cook County or City of Chicago taxes that you mentioned in your letter, you will have to contact their respective tax Departments.

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. 35 ILCS 120/2; 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. 35 ILCS 105/3; 86 Ill. Adm. Code 150.101. These taxes comprise what is commonly known as "sales" tax in Illinois. If the purchases occur in Illinois, the purchasers must pay the Use Tax to the retailer at the time of purchase. The retailers are then allowed to retain the amount of Use Tax paid to reimburse themselves for their Retailers' Occupation Tax liability incurred on those sales. If the purchases occur outside Illinois and the seller is not registered to collect Illinois Use Tax, purchasers must self assess their Use Tax liability and remit it directly to the Department. As a general proposition, sales tax applies to sales of tangible personal property in Illinois, unless one can document an exemption.

Retailers' Occupation Tax does not apply to sales of fuel consumed or used in the operation of ships, barges or vessels which are used primarily in or for the transportation of property or the conveyance of persons for hire on rivers bordering on this State if such fuel is delivered by the seller to the purchaser's barge, ship or vessel while it is afloat upon such

bordering river. See 86 Ill. Adm. Code 130.315. This exemption from Retailers' Occupation Tax applies only to vessels while afloat upon rivers bordering this State. The exemption does not apply to rivers that do not border Illinois, such as the Illinois River and the Calumet River. The exemption also does not apply to any portion of Lake Michigan. It is our understanding that the vessel was afloat in the Calumet River at the time of sale. Thus, even though the vessel may have been in navigable waters of the United States, you were not entitled to this exemption because the vessel, at the time of refueling was not afloat upon a bordering river. The sale of fuel occurred in Illinois and is subject to Retailers' Occupation Tax and any applicable local taxes administered by the Illinois Department of Revenue.

Please note that though your letter states that the vessel exited Illinois immediately after refueling, the sale is taxable because you took possession of the fuel while in Illinois. Where tangible personal property is located in this State at the time of its sale (or is subsequently produced in Illinois), and then delivered in Illinois to the purchaser, the seller is taxable if the sale is at retail. The sale is not deemed to be in interstate commerce if the purchaser or his representative receives the physical possession of the property in this State. This is so notwithstanding the fact that the purchaser may, after receiving physical possession of the property in this State, transport or send the property out of the State for use outside the State or for use in the conduct of interstate commerce. See 86 Ill. Adm. Code 130.605(a).

We believe that your situation and *American River Transportation Co. v. Bower*, 351 Ill. App. 3d 208, 813 N.E. 2d 1090 are distinguishable. In *American River*, the court held that the Commerce Clause precluded the Department from collecting Use Tax from the company for fuel and supplies used by its line haul vessel tugboats when they purchased fuel in Missouri and spent 50% of their time in Illinois. The court pointed out that the boats never docked in any Illinois port and never received any services from Illinois so as to warrant the collection of Use Tax. However, in *American River*, smaller tugboats, called harbor service tugs purchased fuel in Illinois and paid use tax on these purchases. See *American River*, 351 Ill. App. 3d at 211. The Court notes that when fuel is purchased in Illinois, the appropriate taxes should be paid. *Id.* at 213. Here, your company made fuel purchases while afloat in Illinois, from an Illinois retailer. The sale was subject to Retailers' Occupation Tax. Therefore, you owe the corresponding Use Tax on the purchase.

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 in 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,

Richard Wolters
Chairman, Private Letter Ruling Committee

RSW:CJB:mdb

