

ST 16-0021-GIL 05/31/2016 DELIVERY CHARGES

This letter discusses transportation and delivery charges in light of the decision in *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 919 N.E.2d 926 (2009). See 86 Ill. Adm. Code 130.415. (This is a GIL.)

May 31, 2016

Dear Xxxxxx:

This letter is in response to your letter dated January 26, 2016, 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:

I am writing to see if you can verify on the two attached invoices if the service, startup/installation or freight charges should have included sales tax. We invoiced our customer and included sales tax. Our customer hired a company to review the sales tax they paid and they are now saying that according to ILAC130.415(d), ILAC140.141 and ILAC130.450(b) we should not have charged sales tax on the highlighted lines of the attached invoices. Can you please confirm if we should or should not have charged sales tax on the highlighted lines of invoices XXXXXXXX-IN and XXXXXXXX-IN.

DEPARTMENT’S RESPONSE:

It is unclear as to what specific items on the invoices you attached to your letter you are referencing because the invoices attached did not contain any highlighted lines. In addition, we are

unable to determine from the information contained on the invoices what is actually being provided. Notwithstanding, we hope that you find the following helpful, and you may also visit the Department's website to search for letters the Department has issued on the subject matter about which you are concerned.

Sales Tax:

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 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. See 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.

Construction Contractors:

If a person or business enters into a contract to permanently incorporate tangible personal property into real estate, then that person or business would be acting as a construction contractor. In Illinois, construction contractors are deemed end users of tangible personal property purchased for incorporation into real property. As end users of such tangible personal property, contractors incur Use Tax liability for such purchases based upon their cost price of the tangible personal property and generally pay tax to their suppliers. See 86 Ill. Adm. Code 130.1940 and 86 Ill. Adm. Code 130.2075. It is important to note that since construction contractors are the end users of the materials that they permanently affix to real estate, their customers incur no Use Tax liability and the construction contractors have no legal authority to collect the Use Tax from their customers.

Service Transactions:

Retailers' Occupation and Use Taxes do not apply to sales of service. Under the Service Occupation Tax Act, businesses providing services (i.e., servicemen) are taxed on tangible personal property transferred as an incident to sales of service. See 86 Ill. Adm. Code 140.101. The purchase of tangible personal property that is transferred to the service customer may result in either Service Occupation Tax liability or Use Tax liability for the servicemen depending upon his activities. The serviceman's liability may be calculated in one of four ways:

- (1) separately stated selling price of tangible personal property transferred incident to service;
- (2) 50% of the serviceman's entire bill;
- (3) Service Occupation Tax on the serviceman's cost price if the serviceman is a registered de minimis serviceman; or
- (4) Use Tax on the serviceman's cost price if the serviceman is de minimis and is not otherwise required to be registered under Section 2a of the Retailers' Occupation Tax Act.

Transportation and Delivery Charges:

The Department's regulation regarding transportation and delivery charges, 86 Ill. Adm. Code 130.415, was recently amended to incorporate the provisions of *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 919 N.E.2d 926 (2009). At issue in *Kean* was whether shipping charges for certain Internet purchases of tangible personal property were subject to Illinois sales tax. The court found that an "inseparable link" existed between the sale and delivery of the merchandise plaintiffs purchased from Wal-Mart's Internet store. Thus, the court in *Kean* concluded that the outgoing transportation and delivery charges were part of the gross receipts subject to the Retailers' Occupation Tax.

As *Kean* notes, outgoing transportation and delivery charges are part of the gross receipts subject to Retailers' Occupation Tax when there is an inseparable link between the sale of tangible personal property and the outgoing transportation and delivery of the property. The regulation clarifies that an inseparable link exists when the transportation and delivery charges are (1) not separately identified to the purchaser on the contract or invoice or (2) when the transportation and delivery charges are separately identified to the purchaser on the contract or invoice, but the seller does not offer the purchaser the option to receive the tangible personal property in any manner except by the payment of transportation and delivery charges added to the selling price of the item (e.g., the seller does not offer the purchaser the option to pick up the tangible personal property or the seller does not offer, or the purchaser does not qualify for, a free transportation and delivery option). See 86 Ill. Adm. Code 130.415(b)(1)(B)(ii).

Except for cases in which an inseparable link exists, outgoing transportation and delivery is otherwise considered a service separate and distinct from the sale of tangible personal property and is excluded from the gross receipts subject to the Retailers' Occupation Tax.

The amended regulation provides that retailers who have computed their tax liability for transportation and delivery charges according to the provisions of either the old rule or the amended rule for periods between the *Kean* decision (November 19, 2009) and April 1, 2016 (the effective date of the new rules) shall be considered to have properly collected and remitted tax on those charges. See the Department's regulation at 86 Ill. Adm. Code 130.415(b)(1)(A)(i). The regulation further provides that if a seller of tangible personal property offers the purchaser free transportation and delivery of the property or free transportation and delivery of property for which the purchaser qualifies (e.g., purchases of \$50 or more receive free delivery), or the option to pick up the property, any separately identified transportation and delivery charges chosen by the purchaser (e.g., amounts paid for expedited transportation and delivery) will be nontaxable, as long as the selling price of the tangible personal property neither increases nor decreases depending on the method chosen by the purchaser to obtain the merchandise. When the selling price of the tangible personal property increases or decreases, the transportation and delivery charges will be subject to Retailers' Occupation Tax to the extent those charges exceed the actual cost of the outgoing transportation and delivery.

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

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