

Membership fees are not gross receipts from the sale of tangible personal property. Membership fees are gross receipts received in exchange for an intangible. See 86 Ill. Adm. Code 130.401(d) and 86 Ill. Adm. Code 140.101. (This is a PLR.)

September 14, 2017

Dear Xxxxx:

This letter is in response to your letter dated May 22, 2017 in which you requested 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, 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, 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:

COMPANY (the “Company”), an affiliate of COMPANY 1, respectfully submits this request, pursuant to 2 Ill. Admin. Code 1200.110, for a Ruling from the Illinois Department of Revenue (“Department”) regarding the applicability of Illinois Retailers’ Occupation Tax, Use Tax, Service Occupation Tax, and Service Use Tax to sales of the membership program more fully described below.

As required by 2 Ill. Adm. Code § 1200.110, Company provides the following disclosures: (1) Company is not under audit by the Department; (2) Company is not engaged in litigation with the Department; (3) to the best of the Company’s knowledge, the Department has not previously ruled on the same issue for the Company or a predecessor, except as discussed herein; (4) Company has not previously submitted the same issue to the Department for a letter ruling and withdrawn the request before a

letter ruling was issued; (5) this request for a Ruling describes all authorities relevant to the request. This Ruling is intended to address current and future tax periods to which the facts described below apply. Company requests the opportunity to delete any identifying information prior to public dissemination of the Ruling.

By way of background, on November 24, 2014, Company submitted a request to the Department regarding the applicability of Illinois Retailers' Occupation Tax, Use Tax, Service Occupation Tax, or Service Use Tax to another membership program offered by Company known as PROGRAM ("PROGRAM" or "PROGRAM Membership"). The "PROGRAM Ruling Request," is attached hereto as Exhibit A. On April 30, 2015 the Department issued a General Information Letter in response to the PROGRAM Ruling Request. The "PROGRAM Information Letter" is attached hereto as Exhibit B. In the PROGRAM Information Letter, the Department explained that the receipts from the sale of the PROGRAM Membership did not constitute the sale of tangible personal property or a taxable service. Therefore, because the Retailers' Occupation Tax, Use Tax, Service Occupation Tax, and Service Use Tax are imposed when tangible personal property is being transferred to the customer or there is a taxable service provided; the sale of the PROGRAM Membership would not be subject to Illinois Retailers' Occupation Tax, Use Tax, Service Occupation Tax, or Service Use Tax. Based on the Department's rationale, the new membership program, described below in more detail, should not be subject to Illinois Retailers' Occupation Tax, Use Tax, Service Occupation Tax or Service Use Tax.

I. FACTS

Company offers a membership program known as PROGRAM 1 Add- On ("PROGRAM 1" or "PROGRAM 1"). The membership program is available to existing PROGRAM members for an additional membership fee.

PROGRAM 1 allows members to shop for groceries, everyday essentials, favorites from local shops and restaurants on COMPANY 1 (the "Website") in select cities. Customers may sign up for a free month trial membership and thereafter a paid monthly membership. Participants in the PROGRAM 1 membership program are referred to as "PROGRAM 1 Members" or "PROGRAM 1 Members." In order to be an PROGRAM 1 Member, a customer is also required to have an PROGRAM (separate membership available for \$\$\$ a month or \$\$\$ annually and agree to the PROGRAM Terms & Conditions to activate their PROGRAM 1 membership.)¹ While an PROGRAM Membership is a prerequisite to purchasing PROGRAM 1 a participant in PROGRAM may decide to purchase PROGRAM 1 at any time during their PROGRAM Membership. Further, the fees for the PROGRAM and PROGRAM 1 memberships are separately stated on each participant's bill. The current benefits of PROGRAM 1 include:

- Delivery – PROGRAM 1 members are entitled to receive same day or next day scheduled delivery. Free delivery is available on PROGRAM 1 orders

¹ A copy of the PROGRAM Terms & Conditions is attached hereto as Exhibit C.

over \$\$\$, as well as other discounted shipping benefits on eligible PROGRAM 1 purchases made on the Website. Products eligible for these shipping benefits are designated as PROGRAM 1 on the Website's product pages.

- PROGRAM 1 Items – PROGRAM 1 Members receive access to the PROGRAM 1 groceries, everyday essentials, and selections from neighborhood shops and restaurants. Examples include fresh produce, meats, dairy, frozen items, and household essentials such as soap and detergents. Customers that are not PROGRAM 1 Members may purchase other items (other than perishable items) on the Website for a regular or PROGRAM shipping charge. While the PROGRAM 1 catalog is “exclusive” to PROGRAM 1 Members, many of the items available in the catalog are not exclusive.
- PROGRAM 1 Deals – PROGRAM 1 Members receive discounts on certain items of tangible personal property. For example, PROGRAM 1 Members can purchase certain fruits and vegetables at a discount. The suite of products offered to PROGRAM 1 Members at a discount continues to change based on availability.

II. ISSUES

- A. Is the PROGRAM 1 membership subject to Illinois Retailers' Occupation Tax, Use Tax, Service Occupation Tax, or Service Use Tax when sold to a customer located in Illinois?
- B. Is Company's provision of a free, one-month trial period of an PROGRAM 1 membership to Illinois customers subject to Retailers' Occupation Tax, Use Tax, Service Occupation Tax, or Service Use Tax?

III. ANALYSIS

A. PROGRAM Information Letter

In the PROGRAM Ruling Request submitted by Company, Company described the PROGRAM Membership and the benefits which include: (1) free two-day shipping and other shipping benefits; (2) access to PROGRAM Instant Videos which can be viewed an unlimited number of times for no additional costs; (3) the ability to borrow certain electronic books from the PRODUCT Owner's Lending Library; (4) unlimited access to PROGRAM Music; (5) unlimited access to storage for photos in the CLOUD; (6) flat rate shipping of \$\$\$ for heavy/bulky items in PROGRAM Pantry; (7) discounts on certain items through PROGRAM Pricing; and (8)

the ability for PRODUCT owners to receive one free e-book per month. In the PROGRAM Information Letter, the Department stated that the Illinois Retailers' Occupation Tax and Use Tax are imposed on the sale or use of tangible personal property. Likewise, the Service Occupation Tax and Service Use Tax are imposed on transfers of tangible personal property incident to sales of a service. Specifically, the Department stated that the sale of a membership is not a sale of tangible personal property, but rather a membership is a right to receive certain benefits at a later time and therefore would not be subject to Retailers' Occupation Tax, Use Tax, Service Occupation Tax, or Service Use Tax. Based on the guidance provided in the PROGRAM Information Letter, Company determined that the sale of a PROGRAM Membership is not subject to Illinois Retailers' Occupation Tax, Use Tax, Service Occupation Tax, or Service Occupation Use Tax.

B. PROGRAM 1

Consistent with the Department's guidance in the PROGRAM Information Letter, PROGRAM 1 offers members several benefits including: (1) same day or next day delivery, free delivery on orders over \$\$\$ and other discounted shipping benefits; (2) access to PROGRAM 1 items; and (3) discounts on certain PROGRAM 1 items. Similar to PROGRAM, none of the PROGRAM 1 benefits are subject to Illinois Retailers' Occupation Tax, Use Tax, Service Occupation Tax, or Service Use Tax. The primary PROGRAM 1 benefit and the main reason customers become PROGRAM 1 Members is to obtain prepaid shipping. While one of the additional benefits of PROGRAM 1 is discounts on PROGRAM 1 items, a large portion of the items offered through PROGRAM 1 constitute nontaxable food items in Illinois.² As a result, because both PROGRAM and PROGRAM 1 qualify as a notaxable membership, sales of PROGRAM 1 memberships, like PROGRAM Memberships, are not subject to Illinois Retailers' Occupation Tax, Use Tax, Service Occupation Tax, or Service Use Tax.

IV. CONCLUSION

Company respectfully requests confirmation from the Department of the following:

- A. Sales of PROGRAM 1 memberships to Illinois customers are not subject to Illinois Retailers' Occupation Tax, Use Tax, Service Occupation Tax, or Service Use Tax.

² 35 Ill. Comp. Stat. 120/2-5(35-5).

- B. The free, one-month trial PROGRAM 1 membership provided to Illinois customers is not subject to Illinois Retailers' Occupation Tax, Use Tax, Service Occupation Tax, or Service Use Tax.

If any of the facts or analysis provided in this ruling request requires clarification, please do not hesitate to contact me. Additionally, we reserve the option to withdraw the request before a response is completed.

DEPARTMENT'S RESPONSE:

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. 86 Ill. Adm. Code 130.101. The Use Tax Act imposes a tax upon the privilege of using in this State tangible personal property purchased at retail from a retailer. 86 Ill. Adm. Code 150.101. If no tangible personal property is being transferred to the customers, then neither Illinois Retailers' Occupation Tax nor Use Tax would apply. Likewise, the Service Occupation Tax Act and Service Use Tax are imposed on the transfer of tangible personal property incident to sales of service. 86 Ill. Adm. Code 140.101 and 160.101. If no tangible personal property is being transferred to customers incident to the services being provided, then neither Illinois Service Occupation Tax nor Service Use Tax would apply.

Generally, the Department does not consider receipts from the sale of membership fees to be gross receipts from the sale of tangible personal property. Rather, a membership fee is considered an intangible, which is not subject to Retailers' Occupation Tax or Use Tax liability. 86 Ill. Adm. Code 130.401(d). This is the case when the sale of membership rights does not include the transfer of tangible personal property. However, if the membership charge entitles the customer to receive an item of tangible personal property or to receive a service and tangible personal property is transferred incident to that service, then that charge may result in either Retailers' Occupation Tax liability, Service Occupation Tax liability or Use Tax liability.

Based upon the information you provided in your letter, it appears that customers who become PROGRAM 1 members do not receive any tangible personal property as part of their membership in the PROGRAM 1 program. As such, none of the PROGRAM 1 benefits are subject to the Illinois Retailers' Occupation Tax Act, the Use Tax Act, the Service Use Tax Act or Service Occupation Tax Act. Similarly, it appears that your customers who receive the free, one-month trial PROGRAM 1 membership also do not receive any tangible personal property as part of the trial PROGRAM 1 membership. Thus, the free, one-month trial PROGRAM membership would also not be subject to the four tax Acts listed above.

The Department's regulation "Public Information, Rulemaking and Organization" provides that "[w]hether to issue a private letter ruling in response to a letter ruling request is within the discretion of the Department. Further, the Department's regulations regarding Private Letter Rulings provide that "[i]f there is case law or there are regulations dispositive of the subject of the request, the Department will decline to issue a letter ruling on the subject." 86 Ill. Adm. Code 1200.110(a)(3)(D). The Department believes that its position with respect to the sale of memberships that do not include the transfer of tangible personal property is quite clear – the Department considers those types of sales of memberships to be sales of intangibles not subject to tax. The Department will no longer issue private letter rulings regarding membership programs unless the letter raises a unique issue.

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 S. Wolters
Chairman, Private Letter Ruling Committee

RSW:DMB:bkl