ST 20-0003-PLR 06/03/2020 PARKING EXCISE TAX

This letter discusses the taxability of commercial leases under the Parking Excise Tax. 86 Ill. Adm. Code 195.115(f). (This is a PLR.)

June 3, 2020

Dear Xxxx:

This letter is in response to your letter dated December 24, 2019, 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:

> The purpose of this letter ("Letter") is to request a private letter ruling under 86 Ill. Admin. Code § 1200.110 on behalf of COMPANY on which COMPANY may rely. Specifically, COMPANY requests a private letter ruling that, for purposes of the Illinois Parking Excise Tax Act (the "Act," 35 ILCS 525/10-1, *et seq.*), the rental payments COMPANY receives with respect to triple net leases of land, as described below, are not subject to tax under the Act.
>
> No parking tax audit or litigation is pending with the Illinois Department of Revenue (the "Department") involving COMPANY. Neither COMPANY nor any representatives of COMPANY have previously submitted a ruling request related to the same or similar issues to those presented below to the Department but withdrew them before a letter ruling was issued.
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> A power of attorney authorizing the undersigned to represent COMPANY with respect to this ruling request is attached.

Relevant Facts

COMPANY leases land held for future use in its power line rights of way to third parties for storage of motor vehicles, trucks, and trailers. The leases are typically triple net leases of

land, vesting operation and control of the property in the leases and making the lessees responsible for upkeep, maintenance, paving, fencing, gates, and real estate taxes. Because power lines and towers are located in the rights of way, the leases preclude tenants from erecting significant structures, generally limit use to storing vehicles, require approvals from COMPANY before making certain changes, and allow COMPANY limited access rights to service power lines and towers in the right of way. Under the leases, the lessees retain all operational control over any storage of vehicles. Attached is a representative lease agreement with names redacted. Pertinent provisions of the lease are summarized below:

- The lease is a 5-year lease. Lease § 1.
- A flat monthly rental is charged that does not vary with the number of vehicles, or whether any vehicles at all, are stored at that location. Lease § 3.
- Tenant is liable for its proportionate share of real estate taxes imposed on the leased premises. Lease § 4.
- Tenant agrees to maintain the premises at its sole cost and expense. Lease § 6.
- Tenant is obligated to perform at its sold cost and expense any and all necessary paving, grading, landscaping, cutting, mowing, snow and ice removal. *Id*.
- Tenant is obligated to provide its own utilities. Lease § *Id*.
- "Tenant assumes all of the responsibilities normally identified with the ownership of the Leased Premises, including, but not limited to, responsibility for the condition of the Leased Premises, such as the operation, repair, replacement, maintenance and management of the Leased Premises, including, without limitation, repairs to all buildings, structures, fixtures, equipment and other property thereat…." *Id*.
- Tenant may make alterations (including paving, filling, and installing gates and fences) to the premises, at its sole cost and expense, upon approval of COMPANY. Lease § 9(a), (b) and (d).
- Tenant agrees that it "shall conduct *its operations* on the Leased Premises in compliance with all applicable Environmental Laws." Lease § 15.
- All equipment and other property installed upon the Leased Premises by Tenant shall remain property of Tenant. Lease § 28.

Relevant Portions of the Statute

Under the Act, tax is imposed on—

The privilege of using in this State a parking space in a parking area or garage for the use of parking one or more motor vehicles, recreational vehicles, or other self-propelled vehicles, at the rate of:

1. 6% of the purchase price for a parking space paid for an hourly, daily, or weekly basis; and

2. 9% of the purchase price for a parking space paid for on a monthly or annual basis. (35 ILCS 525/10-10(a).

"*Parking area or garage*" means "any real estate, building, structure, premises, enclosure or other place, whether enclosed or not, except a public way, within the State, where motor vehicles, recreational vehicles, or other self-propelled vehicles, are stored, housed or parked for hire, charge, fee or other valuable consideration in a condition ready for use, or

where rent or compensation is paid to the owner, manager, operator or lessee of the premises for the housing, storing, sheltering, keeping or maintaining motor vehicles, recreational vehicles, or other self-propelled vehicles. "Parking area or garage" includes any parking area or garage, whether the vehicle is parked by the owner of the vehicle or by the operator or an attendant." 35 ILCS 525/10-5.

"*Charge or fee paid for parking*" means "the gross amount of consideration for the use or privilege of parking a motor vehicle in or upon any parking lot or garage in the State, *collected by an operator* and valued in money, whether received in money or otherwise, including cash, credits, property, and services, determined without any deduction for costs or expenses, but not including charges that are added to the charge or fee on account of the tax imposed by this Act or on account of any other tax imposed on the charge or fee." *Id*. (Emphasis supplied.)

"*Operator*" means "any person who engages in the business of *operating* a parking area or garage, or who, directly or through an agreement or arrangement with another party, collects the consideration for parking or storage of motor vehicles, recreational vehicles, or other self-propelled vehicles, at the parking place. This includes, but is not limited to, any facilitator or aggregator that collects from the purchaser the charge or fee paid for parking. 'Operator' does not include a bank, credit card company, payment processor, booking intermediary, or person whose involvement is limited to performing functions that are similar to those performed by a bank, credit card company, payment processor, or booking intermediary." *Id*. (Emphasis supplied.)

Analysis

Summary of Arguments

- The Tax is imposed with respect to the purchase or lease of a parking space from an operator—not on rental payments for land leases where the tenant is in control of the leased premises.
- The leases in the question are triple net leases for land that the tenant, not COMPANY, operates and controls.
- Imposition of the taxes on triple net leases would cause every triple net lease to a tenant of a big box retail store, entire office building, factory or warehouse that includes land surrounding the building for employees or customers to park to be subject to parking tax.

Detailed Arguments

The Tax is imposed only when it is collected by an operator. The Tax is imposed only when it is collected by an operator. The lessor of triple net leased property is no [sic] an operator. In a triple net lease, all operations of, and control over, the property are vested in the tenant. The fact that the tenant uses some of all of the property for parking vehicles does not convert the landlord into an operator. This is entirely distinct from taxing self parked vehicles in a lot owned or operated by a third party, when the third party exercises control over the facility. Further, there is no tax imposed for leasing land for a fixed monthly rent without regard to the number of vehicles parked or the duration that each such vehicle is parked and where the lessor has no knowledge or control over the vehicles brought in or out, the number of

vehicles that will be parked at the site, the duration that any particular vehicle will be at the site, and whether the property stored is exempt (because, for example it is [sic] trailer that is not self-propelled).

The leases are triple net leases of land, not leases of parking spaces. COMPANY does nothing more than lease land to its tenants. Under the leases, COMPANY does not operate or control the premises -- the tenant controls the premises subject to certain approvals by COMPANY and allowing COMPANY certain access rights to service power lines and towers in the right of way. Specifically, the lessee is responsible for upkeep, maintenance, paving, fencing, gates, and real estate taxes. Further, COMPANY has no control over or knowledge of the number of vehicles to be stored on the premises, the timing of how long any individual vehicle will be stored, ingress or egress of vehicles, or whether exempt property such as trailers that are not self-propelled will be stored on the poperty [sic]. As such, COMPANY is not an "operator" within the meaning of the Act. Notably, the definition of a "parking lot or garage" expressly contemplates that the operator may be a lessee rather than the lessor of the property.

Tax would apply to every retail tenant where parking is available. If the tax were to apply to triple net leases, then it would apply to most leases to tenants of big box retail stores, entire office buildings, factories or warehouses that includes land surrounding the building for employee or customer parking. Such facilities are commonly triple net leased from real estate investors, and invariably have adjoining parking that is included in the lease. Even a tenant in a strip mall will have parking rights associated with its lease of a store front. It cannot be the case that the lessee in such a situation must pay the Tax to its landlord merely because the premises includes spaces that the tenant's customers or employees can use to park their cars. Yet, that would be the inevitable result of subjecting triple net lease of land to the tax.

COMPANY is not aware of any authorities contrary to the requested ruling.

Thank you for your consideration of this request. Please do not hesitate to contact me if you have any questions, or would like any additional information. *We respectfully request a conference in the event you tentatively conclude that an adverse ruling would be warranted.*

DEPARTMENT'S RESPONSE:

Beginning January 1, 2020, the Parking Excise Tax Act ("Act") [35 ILCS 525] imposes a tax on the privilege of using in this State a parking space in a parking area or garage for the use of parking one or more motor vehicles, recreational vehicles, or other self-propelled vehicles. 35 ILCS 525/10-10(a). The tax is imposed upon the person purchasing and using a parking space in a parking area or garage and collected from the purchaser by the operator of the parking area or garage. 35 ILCS 525/10-10(b).

The Department recently adopted rules implementing the Act. 86 Ill. Adm. Code 195, effective May 13, 2020; 44 Ill. Reg. 9222, May 29, 2020. The rules address, among others, lessors of commercial real estate (Section 195.110(g)), lessors of storage units (Section 195.110(h)), persons engaged in the business of renting real estate (Section 195.115(f)), and occasional sales of parking spaces (Section 195.115(g)).

Section 195.115(f) of the rule states: “The tax imposed by the Act shall not apply to:

f) a person engaged in the business of renting real estate that leases real estate to a lessee that may park motor vehicles, recreational vehicles or self-propelled vehicles for the lessee's own use and not for the purpose of sub-leasing parking spaces for consideration. This person is not engaged in the business of operating a parking area or garage.

EXAMPLE 1: A car dealership leases real estate from a person to park the dealership's excess inventory. The lessor is not engaged in the business of operating a parking area or garage.

EXAMPLE 2: A car dealership leases real estate from a person to park motor vehicles for the purpose of making retail sales of the motor vehicles. The lessor is not engaged in the business of operating a parking area or garage.

EXAMPLE 3: A railroad company leases real estate to a municipality. The municipality makes improvements on the property to permit commuters to park their motor vehicles on the real estate. The railroad company is not engaged in the business of operating a parking area or garage;”

The Department finds that when COMPANY leases real estate pursuant to the triple net lease described in its request and attached as an exhibit, COMPANY falls squarely within the exemption contained in Section 195.115(f) and Example 1, is not engaged in the business of operating a parking area or garage, and is not required to collect the tax from the lessee.

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:rkn