

ST 20-0016-GIL 02/20/2020 GROSS RECEIPTS

This letter explains the taxation of transportation and delivery charges applied to deliveries of rock (see 86 Ill. Adm. Code 130.415). This is a GIL.

February 20, 2020

Dear Xxxx:

This letter is in response to your letter dated October 25, 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.

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:

We are following up on the April meeting where we suggested that the Department’s attempt to extend sales tax to delivery charges when our members deliver sand, rock, or gravel to customers is improper and should be reversed.

As a reminder, before *Kean v Walmart* truckers who delivered sand, gravel, or stone were not taxed on delivery charges as long as tax was paid on materials and the delivery charge was separately agreed to. With the rules change following *Kean* and its “inseparable link” concept, the Department believes the delivery charges became taxable. As we stated, we do not think that ROT can be extended to services without action by the General Assembly.

We raise this question now because we have a member who is under audit and would like to take advantage of the current amnesty program but believes he cannot because the auditor will not close the audit until our issue is resolved. We are certain there are others in the same situation who should have the opportunity to pay their taxes before the current amnesty closes.

At our April meeting, DEPARTMENT EMPLOYEE offered the alternative of printing on the invoice that the product can be picked up at the quarry. We appreciate the offer. However, many of our members who haul from quarries keep their books and records in the front pocket of their bib overalls. We anticipate many late and incorrect returns that will cause problems for both the department and our members.

It seems to us that the best way to deal with this situation is to treat these transactions – for truckers who simply haul from a quarry – as Service Occupation Tax transactions. That says that the primary business is hauling of the rock, sand or gravel and that the sale of the gravel is incidental to the service transaction. The trucker would then pay tax to the quarry and build it into what he charges the customer. That seems to us to arrive at the right result under Illinois law. The transfer of tangible personal property is taxed as ROT, while the service of delivering the tangible personal property is not taxed unless and until the General Assembly extends sales tax to services.

For you, it means fewer returns and far fewer incorrect returns, notices and bills. For us it means less dealing with truckers who have notices and bills from you.

We acknowledge that a trucker who keeps an inventory of product will have to register as a retailer and that there are limitations as to what retail activities a trucker can be involved in and maintain his status as a service provider subject to SOT. We would be prepared to engage in an education campaign with our members over the decisions they would have to make about how they do business. We would like to do that in consultation with the Department.

DEPARTMENT'S RESPONSE:

Your letter requests that the Department rule that persons who sell and deliver rock, sand or gravel be treated as servicemen. You urge us to treat the sale of the rock merely as an incident to the performance of a service, i.e., the delivery of the rock. You assert that in these circumstances, the serviceman could simply pay Use Tax to the quarry on the cost price of the rock or gravel, and pass its tax costs onto its customers as part of its overall service charge. In other words, you suggest that the person be treated as an unregistered de minimis serviceman (applicable only if the person makes no sales subject to Retailers' Occupation Tax). See, 86 Ill. Adm. Code 140.108. In this case, delivery would not be taxable. See, for example, 86 Ill. Adm. Code 140.301 (b)(1)(B).

The Department is unable to issue the ruling which you request. The Department's longstanding determination is that persons who in any manner advertise, solicit, offer for sale or hold themselves out to the public to be a seller of rock or gravel are considered retailers and are subject to Retailers' Occupation Tax. Although delivery is generally part of these transactions, the true object of the transaction nevertheless remains a retail sale, not a delivery service. In these cases, such persons must register with the Department as retailers, provide Certificates of Resale to the quarry, and file returns and remit Retailers' Occupation Tax on their selling price of the rock.

Case law has long supported this position. See, *Sprague v. Johnson*, 195 Ill. App. 3d 798 (1990). In that case, Sprague was determined to be a retailer of rock. Customers would telephone the company to order the rock. Sprague would then drive to the quarry, where it purchased the rock.

Sprague paid the quarry tax on the rock. The rock was then delivered to the customer, who was billed by Sprague for the rock (with no markup over quarry costs). The court determined that under these circumstances, Sprague was a retailer of rock and incurred Retailers' Occupation Tax. It was immaterial that Sprague did not itself maintain an inventory of rock. You have not presented the Department with a legal or factual basis upon which to distinguish your transportation company members from the transportation company in the *Sprague* case. Accordingly, we must conclude that your transportation company members are retailers subject to Retailers' Occupation Tax.

As you note in your letter, whether delivery charges become part of the selling price of the rock depends upon the manner in which these transactions are structured by the taxpayer. The Department's regulation regarding transportation and delivery charges can be found at 86 Ill. Adm. Code 130.415 and incorporates the decision rendered in *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 in *Kean* that an "inseparable link" existed between the sale and delivery of the merchandise plaintiffs purchased from Wal-Mart's Internet store. Thus, the court concluded that the outgoing transportation and delivery charges were part of the gross receipts subject to the Retailers' Occupation Tax. 86 Ill. Adm. Code 130.415(b)(1)(B)(i). An inseparable link exists when (a) the transportation and delivery charges are not separately identified to the purchaser on the contract or invoice or (b) 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 property in any manner except by the payment of transportation and delivery charges added to the selling price of an 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). 86 Ill. Adm. Code 130.415(b)(1)(B)(ii). In contrast, if the customer can purchase the tangible personal property without payment of transportation or delivery charges to the retailer, then an inseparable link does not exist, and the delivery charges should not be included in the selling price of the tangible personal property. 86 Ill. Adm. Code 130.415(b)(1)(B)(ii)-(iii).

When this regulation was promulgated, the Department specifically addressed the taxation of delivery charges by a transportation company that offers to sell and deliver rock to a purchaser. In the example, the transportation company purchases rock from a quarry and resells it to its customer. The regulation provides that under these circumstances, the transportation company is considered a retailer subject to Retailers' Occupation Tax. Because the rock is sold and delivered for a single price, there is an inseparable link between the sale and delivery of the rock and so the selling price includes the entire charge made to the customer. As has been previously discussed with you, delivery charges can be excluded from tax if customers have the option of picking up the rock.

In limited circumstances, we have seen instances where trucking companies not only sell and deliver rock for a customer, but establish that they have a contract to spread or otherwise permanently apply the rock to real estate (as opposed to simply dumping the rock at the customer's requested location). In these cases, they are considered construction contractors. In Illinois, construction contractors are considered the end users of the tangible personal property they affix to real estate and incur Use Tax on their cost price of that tangible personal property. As end users of the tangible personal property, they have no legal authority to collect "tax" from their customers. They can, however, incorporate their tax costs into their overall contractual charges, or can separately seek "tax reimbursement" from their customers.

It has been the Department's experience that most trucking companies that deliver rock generally are acting as retailers of rock. However, this determination must be based on the specific facts of each case. Much the same way, taxation of transportation charges must be determined based on the specific facts of each case according to the *Kean* decision.

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,

Jerilynn Troxell Gorden
Deputy General Counsel

JTG:bkl