

If no tangible personal property is transferred to the customer, then no Illinois Retailers' Occupation Tax, Use Tax, Service Occupation Tax, or Service Use Tax would apply. See 86 Ill. Adm. Code Parts 130, 140, 150, and 160. (This is a GIL.)

March 11, 2021

Dear NAME:

This letter is in response to your letter dated December 23, 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](http://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 submitting this petition seeking a Letter Ruling for our client COMPANY, hereafter ("Petitioner") with an office in CITY, Illinois. Petitioner offers various services to clients domiciled in the state of Illinois. Please find below the Company description and technical questions regarding the appropriate application of Illinois sales tax law.

Petitioner requests an opinion as to the applicability of Illinois sales and compensating use taxes to various services it offers to its clients whom have physical locations in the State of Illinois.

**Petitioner's Representations:**

To the best of the knowledge of both the Petitioner and the Petitioner's representative the Department has not previously ruled on the same or a similar issue for the Petitioner or a predecessor, or that the Petitioner or any representatives previously submitted the same or a similar issue to the Department but withdrew it before a letter ruling was issued.

**Company Description/Background/Facts:**

1. The Company is a leading national provider of lifecycle records and information management solutions. The Company provides document storage, data protection, digital/electronic document management and storage as well as certified destruction. The Company offers digital document management solutions with the integration of traditional or legacy hard copy storage, supplying its customers with an integrated platform of services and information management solutions. The Company does not engage in the self-storage business.
2. The Petitioner's contracts with its clients clearly specify that storage will take place in Illinois.

Below is a list of revenue categories with descriptions for which Petitioner is requesting a Letter Ruling as to the revenue category's taxability. All revenue categories are separately stated on customer invoices.

- a) **Boxes, Cases, & Packaging Materials:** These are storage container boxes, plastic bins and cases as well as packaging materials sold to customers for the storage of their documents or other data storage items. These items are delivered to a customer's location in Illinois. (Materials may include; folders containers, tapes, CD, encrypted hard drives, etc.
- b) **Document Storage (Physical Storage):** This is the monthly recurring charge for the physical storage in the State of Illinois of customer materials which include; Documents, Books, Manuscripts, and Electronic Data stored on CD, within a controlled environment with limited to no direct access by the customer.
- c) **Vault Storage (Physical Storage):** This is the monthly recurring charge for the physical storage in the State of Illinois of customer materials which include: Art, Antiques, Artifacts, Sports or Entertainment Memorabilia, Tapes, Tape Cases, all other Magnetic Media, within a climate-controlled facility with limited to no direct access by the customer.
- d) **Document/Vault Storage Perm-Out:** This is the one-time labor and administrative fee that is charged to its customers when a customer has decided to end its storage contract in the State of Illinois and desires to have their stored items removed and transferred to another facility. This fee includes the cost of inventorying and verifying the completeness of the items to be removed and reassigning the locations within the system.

- e) **Account Maintenance Fees for Document & Vault Storage:** This is a monthly administrative fee which varies based upon the specific customer's account size. This fee is charged for the monthly administration and inventory management of the client's documents and other items in the State of Illinois.
- f) **Access and Refiling Fees:** This is the charge to retrieve or place the customer's materials or to access or refile the storage containers which is separately stated on the invoice. There is no charge for the initial placement of storage items. This charge represents subsequent requests from the customer to access or refile their items.
- g) **Pick-up and Delivery Services:** This is the charge for the pick-up and delivery of storage items to and from the customer's physical location in the State of Illinois and is stated separately on the invoice.
- h) **Fuel Surcharges:** This is the charge for occasions when the cost of fuel has increased significantly and is required to be included on invoices which contain pick-up and delivery charges from the State of Illinois.
- i) **Access Viewing Room:** This is the charge for a customer to come to the Petitioner's location and use an office to review their stored documents.
- j) **Release of Information Services (Physical Delivery):** This is a charge for the retrieval, duplication, and delivery of certain medical information to a third-party other than the client in the State of Illinois. This is confidential medical information and is handled and delivered in a secure manner. The Petitioner delivers these records to the third party via Physical Delivery in the State of Illinois or Secure Mail to a third-party with an Illinois address.
- k) **Release of Information Services (Electronic Delivery Method):** This is a charge for the retrieval, duplication, and delivery of certain medical information to a third-party other than the client, who has a State of Illinois address. This is confidential medical information and is handled and delivered in a secure manner. The Petitioner delivers these records to the third party via Electronic or Digital Delivery via the internet.

- l) **Certified Shredding & Destruction:** This is the charge for the certified destruction of documents, tapes or other materials. The Petitioner is requested to pick-up a sealed container, bin, or console containing documents to be destroyed from the customer's location. The Petitioner picks up the sealed containers then brings them back to the Illinois office location. The materials are contained in Petitioner's bins and consoles and are locked and sealed for security purposes during this entire process. The entire bin or console is transported to the Petitioner's Illinois location where they are transferred to a third-party who picks up the materials and brings them to their facility in Illinois for destruction.
- m) **Scanning & Digital Imaging:** This is the charge for the conversion of a customer's materials to digital images by means of digital scanning for customers with a State of Illinois address.
- n) **Hosting Services:** This is a monthly license fee calculated on a per user basis to access digital images stored in the customer's online virtual warehouse for customers with a State of Illinois Address.
- o) **Workflow Automation Software:** This is a monthly license fee charged on a per user basis to customers with an Illinois address access workflow automation software which permits a customer to scan a document and track its movement through various departments within their company. For example, in the case of an invoice in a customer's accounts payable department: (1) customer received a vendor invoice and the invoice is scanned and uploaded to the cloud platform, (2) the invoice is then electronically routed to the applicable department(s) for approval, (3) once approved the invoice is electronically routed back to accounts payable to be approved for payment. This software also includes a separate charge for the component related to the virtual warehouse for data storage in the cloud.
- p) **Online Research Tool:** This is the monthly charge to customers with an Illinois address for the ability to access the online document retention guidelines by State and by discipline.
- q) **Electronic Digital Cloud Back-Up:** This is a monthly charge to customers with an Illinois address for the 24/7 electronic back-up service. A customer's data is backed up via the internet and is

stored on a remote server for emergency data recovery needs. Petitioner uses a third-party vendor to perform this service.

- r) **Help Desk Support:** This is the monthly charge to customers with an Illinois address for access to the telephone help desk to address issues that the customer may have with the online services.
  
- s) **Data Entry/Indexing:** This is the charge to customers with an Illinois address for services related to data entry and indexing of such data previously scanned electronically to allow for future search or query abilities.

We appreciate your assistance with these technical questions.

## **DEPARTMENT'S RESPONSE:**

### Tangible Personal Property vs. Services

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. If the purchases occur outside Illinois, purchasers must self-assess their Use Tax liability and remit it directly to the Department.

In computing Retailers' Occupation Tax liability, no deductions shall be made by a taxpayer from gross receipts or selling prices on account of the cost of property sold, the cost of materials used, labor or service costs, idle time charges, incoming freight or transportation costs, overhead costs, processing charges, clerk hire or salesmen's commissions, interest paid by the seller, or any other expenses whatsoever. Costs of doing business are an element of the retailer's gross receipts subject to tax even if separately stated on the bill to the customer. 86 Ill. Adm. Code 410. Fuel charges represent costs of doing business and are included when determining Retailers' Occupation Tax liability.

Retailers' Occupation Tax and Use Tax 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.

If the transactions you are inquiring about do not involve the transfer of any tangible personal property to the customer, then they generally would not be subject to Retailers' Occupation Tax, Use Tax, Service Occupation Tax, or Service Use Tax.

#### Maintenance Agreements

The taxation of maintenance agreements is discussed in subsection (b)(3) of Section 140.301 of the Department's administrative rules under the Service Occupation Tax Act. See 86 Ill. Adm. Code Sec. 140.301(b)(3). The taxability of agreements for the repair or maintenance of tangible personal property depends upon whether charges for the agreements are included in the selling price of the tangible personal property. If the charges for the agreements are included in the selling price of the tangible personal property, those charges are part of the gross receipts of the retail transaction and are subject to tax. In those instances, no tax is incurred on the maintenance services or parts when the repair or servicing is performed. A manufacturer's warranty that is provided without additional cost to a purchaser of a new item is an example of an agreement that is included in the selling price of the tangible personal property.

If agreements for the repair or maintenance of tangible personal property are sold separately from tangible personal property, sales of those agreements are not taxable transactions. However, when maintenance or repair services or parts are provided under those agreements, the service or repair companies will be acting as service providers under provisions of the Service Occupation Tax Act that provide that when service providers enter into agreements to provide maintenance services for particular pieces of equipment for stated periods of time at predetermined fees, the service providers incur Use Tax based on their cost price of tangible personal property transferred to customers incident to the completion of the maintenance service. See 86 Ill. Adm. Code

140.301(b)(3). The sale of an optional maintenance agreement or extended warranty is an example of an agreement that is not generally a taxable transaction.

### Delivery Charges

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).

As noted above, if the transactions you are inquiring about do not involve the transfer of any tangible personal property to the customer, then delivery charges would not be subject to Retailers' Occupation Tax, Use Tax, Service Occupation Tax, or Service Use Tax.

### Physical Storage, Shredding, and Destruction

The tax liabilities of warehousemen who hold themselves out to the public as being engaged in the business of moving, storing, packing, and shipping tangible personal property belonging to other persons are generally engaged in a service transaction. See 86 Ill. Adm. Code 130.2170. The business of providing security, shredding, and storage services would generally fall under this category. Again, if no tangible personal property is transferred to the service customer, then no Retailers' Occupation Tax, Use Tax, Service Occupation Tax, or Service Use Tax, is incurred. Retailers' Occupation Tax liability may be incurred on any shredded material that is sold to a third party. Such a transaction may be exempt from tax if the purchaser is making a purchase of the shredded material for resale. See 86 Ill. Adm. Code 130.1405. However, in cases in which

warehousemen are engaged in the business of selling, to purchasers for use or consumption, tangible personal property such as cartons, boxes, and packing tape, they incur Retailers' Occupation Tax liability.

### Computer Software

Generally, sales of "canned" computer software are taxable retail sales in Illinois. Canned computer software is tangible personal property regardless of the form in which it is transferred or transmitted, including tape, disc, card, electronic means, or other media. However, if the computer software consists of custom computer programs, then the sales of such software may not be taxable retail sales. See 86 Ill. Adm. Code 130.1935. Computer software that is not custom software is canned computer software, whether it is "stand-alone" or not. Custom computer programs or software are prepared to the special order of the customer. The selection of pre-written or canned programs assembled by vendors into software packages does not constitute custom software unless real and substantial changes are made to the programs or creation of program interfacing logic. See Section 130.1935(c)(3).

If transactions for the licensing of computer software meet all the criteria provided in subsection (a)(1) of Section 130.1935, neither the transfer of the software nor the subsequent software updates will be subject to Retailers' Occupation Tax. A license of software is not a taxable retail sale if:

- A) It is evidenced by a written agreement signed by the licensor and the customer;
- B) It restricts the customer's duplication and use of the software;
- C) It prohibits the customer from licensing, sublicensing or transferring the software to a third party (except to a related party) without the permission and continued control of the licensor;
- D) The licensor has a policy of providing another copy at minimal or no charge if the customer loses or damages the software, or permitting the licensee to make and keep an archival copy, and such policy is either stated in the license agreement, supported by the licensor's books and records, or supported by a notarized statement made under penalties of perjury by the licensor; and
- E) The customer must destroy or return all copies of the software to the licensor at the end of the license period. This provision is deemed to be met, in the case of a perpetual license, without being set forth in the license agreement.

If a license of canned computer software does not meet all the criteria the software is taxable.



In order to comply with the requirements as set out in Section 130.1935(a)(1), there must be a written “signed” agreement. A license agreement in which the customer electronically accepts the terms by clicking “I agree” does not comply with the requirement of a written agreement signed by the licensor and customer. The Department recently decided an electronic license agreement in which the customer accepts the license by means of a signature in electronic form that is attached to or is part of the license, is verifiable, and can be authenticated will comply with the requirement of a written agreement signed by the licensor and customer. See ST-18-0010-PLR (Sept. 26, 2018) for examples of acceptable electronic signatures. A license agreement in which the customer electronically accepts the terms by clicking “I agree” remains unacceptable.

In general, maintenance agreements that cover computer software are treated the same as maintenance agreements for other types of tangible personal property. See 86 Ill. Adm. Code

130.1935(b). The taxation of maintenance agreements is discussed in the Service Occupation Tax Act as well as above. See 86 Ill. Adm. Code Sec. 140.301(b)(3). If the charges for the maintenance agreements are included in the selling price of canned software, those charges are part of the gross receipts of the retail transaction and are subject to tax. In those instances, no tax is incurred on the maintenance services or parts when the repair or servicing is performed.

If the maintenance agreements are sold separately of the computer software, sales of those agreements are not taxable transactions. However, when maintenance or repair services or parts are provided under those agreements, the service or repair companies will be acting as service providers under provisions of the Service Occupation Tax Act that provide that when service providers enter into agreements to provide maintenance services for particular pieces of equipment for stated periods of time at predetermined fees, the service providers incur Use Tax based on their cost price of tangible personal property transferred to customers incident to the completion of the maintenance service. See 86 Ill. Adm. Code 140.301(b)(3). Charges for training, telephone assistance, installation, and consultation are non-taxable services if separately stated from the selling price of canned software. See 86 Ill. Admin. Code 130.1935(b); 86 Ill. Admin. Code 140.301(b)(3).

If, under the terms of a maintenance agreement involving computer software, a software provider provides a piece of object code (“patch” or “bug fix”) to be inserted into an executable program that is a current or prior release or version of its software product to correct an error or defect in software or hardware that causes the program to malfunction, the tangible personal property transferred incident to providing the patch or bug fix is taxed in accordance with the provisions discussed above.

In contrast to a patch or bug fix, if the sale of a maintenance agreement by a software provider includes charges for updates of canned software, which consist of new releases or new versions of the computer software designed to replace an older version

of the same product and which include product enhancements and improvements, the general rules governing taxability of maintenance agreements do not apply. This is because charges for updates of canned software are fully taxable as sales of software under Section 130.1935(b). (Please note that if the updates qualify as custom software under Section 130.1935(c) they may not be taxable). Therefore, if a maintenance agreement provides for updates of canned software, and the charges for those updates are not separately stated and taxed from the charges for training, telephone assistance, installation, consultation, or other maintenance agreement charges, then the whole agreement is taxable as a sale of canned software.

The Department does not consider the viewing, downloading, or electronically transmitting of video, text, and other data over the internet to be the transfer of tangible personal property. However, if a company provides services that are accompanied with the transfer of tangible personal property, including computer software, such service transactions are generally subject to tax liability.

Computer software is defined broadly in the Retailers' Occupation Tax Act. However, computer software provided through a cloud-based delivery system – a system in which computer software is never downloaded onto a client's computer and is only accessed remotely – is not subject to tax. If a provider of a service provides to the subscriber an API, applet, desktop agent, or a remote access agent to enable the subscriber to access the provider's network and services, the subscriber is receiving computer software. Although there may not be a separate charge to the subscriber for the computer software, it is nonetheless subject to tax, unless the transfer qualifies as a non-taxable license of computer software. Illinois generally does not tax subscriptions.

### Telecommunications

The Telecommunications Excise Tax is imposed upon the act or privilege of originating or receiving intrastate or interstate telecommunications in Illinois at the rate of 7% of the gross charges for such telecommunications purchased at retail from retailers. 35 ILCS 630/3 and 630/4.

"Gross charge" means the amount paid for the act or privilege of originating or receiving telecommunications in this State and for all services and equipment provided in connection therewith by a retailer, valued in money whether paid in money or otherwise, including cash, credits, services and property of every kind or nature, and shall be determined without any deduction on account of the cost of such telecommunications, the cost of materials used, labor or service costs or any other expense whatsoever. In case credit is extended, the amount thereof shall be included only as and when paid.

"Telecommunications," in addition to the meaning ordinarily and popularly ascribed to it, includes, without limitation, messages or information transmitted through use of local, toll and wide area telephone service; private line services; channel services; telegraph

services; teletypewriter; computer exchange services; cellular mobile telecommunications service; specialized mobile radio; stationary two-way radio; paging service; or any other form of mobile and portable one-way or two-way communications; or any other transmission of messages or information by electronic or similar means, between or among points by wire, cable, fiber-optics, laser, microwave, radio, satellite or similar facilities.

The Act defines gross charges as including the amount paid for the act or privilege of originating or receiving telecommunications in this State and for all services and equipment provided in connection therewith by a retailer. 35 ILCS 630/2(a). The Act does exclude charges for customer equipment, including equipment that is leased or rented by the customer from any source, when those charges are disaggregated and separately identified from other charges. 35 ILCS 630/2(a)(4).

Generally, persons that provide services and who do not, as part of that service, charge customers for the line or other transmission charges that are used to obtain these services are not considered to be telecommunications retailers from these activities. Consequently, a company that provides audio conference services, for example, may pay its telecommunications provider the tax for telecommunications services it uses to provide the services. See ST 13-0048-GIL. If, however, the company separately charges customers for the line or other transmission charges, they should provide their telecommunications providers with Certificates of Resale and should themselves collect and remit tax. Some services may also be classified as value-added services and not subject to tax. See ST 15-0001-PLR.

### Cancellation Charges

A cancellation fee typically does not involve retail sales or the sale or transfer of tangible personal property incident to a sale of service. Such charges are not subject to tax.

I hope this information is helpful. If you require additional information, please visit our website at [www.tax.illinois.gov](http://www.tax.illinois.gov) or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Alexis K. Overstreet  
Associate Counsel

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