ST-24-0005-GIL 01/29/2024 COMPUTER SOFTWARE

If a transaction for the licensing of computer software meets all of the criteria provided in 86 Ill. Adm. Code 130.1935(a)(1), neither the transfer of the software nor the subsequent software updates will be subject to retailers' occupation tax. An end user license agreement which does not contain the signature of both the licensor and licensee would not meet the requirements of Section 130.1935(a)(1). See 86 Ill. Adm. Code 130.1935. (This is a GIL)

January 29, 2024

NAME
TAXPAYER REPRESENTATIVE
ADDRESS

Dear NAME:

This letter is in response to your letter dated November 16, 2023, 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:

> I have a question about something being taxable in IL. I reached out on line to your sales tax department and they recommended I send this in to the Legal Department.
>
> We use COMPANY for our sales tax calculation, and we code our items with their tax codes. We are collecting sales tax on tech support, our support items code with COMPANY's tax codes:
> **CODE** Computer software technical services (prewritten software)-optional (electronically downloaded) downloaded updates, etc. & services (Technical support that is optional to the customer that includes both software updates and support services, and associated with electronically downloaded prewritten computer software)
>
> However, we have a client stating that they should be exempt from tax based on the following:
>
> "If transactions for the licensing of computer software meet all of the criteria provided in Section 130.1935(a)(1), neither the transfer of the software nor the subsequent software

updates will be subject to Retailers' Occupation Tax." (see ST 18-0010-PLR, 09/26/2018 for reference)

1. It is evidenced by a written agreement signed by the licensor and the customer;
2. It restricts the customer's duplication and use of the software;
3. 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*;*
4. The licensor has a policy of providing another copy at minimal or no charge if the customer loses or damages the software, or of 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
5. 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."

I reached out to COMPANY, the software we sell and support to see if all 5 apply and this is their response:

Just to clarify, I understand the situation to be that they do not want to pay sales tax on their COMPANY software licenses or Software Assurance. If I'm off on that let me know.

We do have a End User License Agreement with the customer, and yes the 5 points they mention are mostly consistent with our EULA terms and conditions from my perspective.

1. It is evidenced by a written agreement signed by the licensor and the customer; - *yes we have a EULA signed with them*.
2. It restricts the customer's duplication and use of the software; - *the word "duplication" may or may not be stated in the EULA but it's fairly implied by the EULA stating that they have a "limited non-transferable software license". So yes*.
3. 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; - *our EULA clarifies that the customer has a "limited non-transferable software license". So yes I would say this statement is true*.
4. The licensor has a policy of providing another copy at minimal or no charge if the customer loses or damages the software, or of 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. - *This may not be stated exactly in our EULA. but the way our software installed and licenses work, we do provide active customers their access to installers and licenses and minimal to no charge*.
5. 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." -- *This may not be*

stated exactly in our EULA, but I think the reference in our EULA to the customer having a "limited non-transferable software license" covers this.

We are not in a legal position to advise if sales tax should be charged or not but yes those 5 points are consistent with our EULA terms and conditions. And... no the language they use isn't exactly match the language we use in our EULA, but it's fairly consistent. I think all those 5 points to be true. But that's not COMPANY*'s legal determination and we aren't going to formally agree or disagree with those 5 points. It's simply that we just have a EULA signed with the customer and that is our legal/formal agreement with them to be interpreted by them and their accountant as they wish*.

I am unsure if support should be taxed in IL based on the above. I don't see any special tax codes for IL in COMPANY tax codes.

COMPANY will not help me with this, could you please help me as to whether tech support should be taxed in Illinois or not?

Thank you,

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. See 86 Ill. Adm. Code 130.101. In Illinois, the Use Tax Act imposes a tax on the privilege of using, in this State, any kind of tangible personal property that is purchased anywhere at retail from a retailer. See 86 Ill. Adm. Code 150.101. These taxes comprise what is commonly known as "sales tax" in Illinois.

Generally, sales of "canned" computer software are taxable retail sales in Illinois. Canned computer software is considered tangible personal property regardless of the form in which it is transferred or transmitted, "…including tape, disc, card, electronic means, or other media." See 86 Ill. Adm. Code 130.1935. Charges for updates of canned software are considered to be sales of software. 86 Ill. Adm. Code 130.1935(b). However, charges for training, telephone assistance, installation, and consultation are not subject to tax if they are separately stated from the selling price of canned software. *Id.*

If the computer software consists of custom computer programs, then the sales of such software may not be taxable retail sales. Custom computer programs or software are prepared to the special order of the customer. See 86 Ill. Adm. Code 130.1935(c). If computer software training or other support services are provided in conjunction with a sale of exempt custom computer software or a license of computer software, the charges for that training are not subject to tax. 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 86 Ill. Adm. Code 130.1935(c)(3).

If transactions for the licensing of computer software meet all of 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.

Assuming a license of software meets the requirements of subsection (a)(1) of 86 Ill. Adm. Code 130.1935, any charges for support, maintenance or updates of the licensed software provided pursuant to the qualified license agreement would not be subject to Retailers' Occupation Tax, whether or not the charges for support, maintenance, or updates of the licensed software are billed pursuant to the terms of the license agreement or the terms of a separate agreement.

If a license of canned computer software does not meet all the criteria of subsection (a)(1) of 86 Ill. Adm. Code 130.1935, the software is taxable. To comply with the requirements as set out in Section 130.1935(a)(1), there must be a written agreement signed by the licensor and the customer. An end user license agreement which does not contain the signature of both the licensor and licensee would not meet the requirements of Section 130.1935(a)(1).

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,

Thomas Grudichak
Associate Counsel

TG:sc