

ST 24-0032-GIL 10/09/2024 COMPUTER SOFTWARE:

Computer software provided through a cloud-based delivery system is not subject to tax. A cloud-based delivery system is one in which computer software is never downloaded onto a client's computer and only accessed remotely. 86 Ill. Adm. Code 130.1935. (This is a GIL.)

October 9, 2024

NAME
ADDRESS

Dear NAME:

This letter is in response to your letter dated September 24, 2024, 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 <https://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:

Thank you for taking the time to call me back this afternoon in response to my inquiry on a sales tax charge for a yearly membership to APP fitness app.

Attached are the following documents:

1. COMPANY invoice showing assessment of a \$10 sales tax charge in connection with my yearly subscription to this app. The invoice clearly identifies the \$99.99 app fee as an "annual membership" renewable one year from now.
2. Email thread from customer service department of APP.
3. An Illinois Department of Revenue Private Letter Ruling, ST 17-0008-PLR issued on September 14, 2017 that states (highlighted text)

NAME

Page 2

October 9, 2024

membership fees are exempt from Illinois sales tax because it is an intangible. Under my membership to APP app, I have no right to download anything for offline use or otherwise receive any tangible personal property. I realize that the private letter ruling is not binding on any taxpayer other than the one who requested it, but I am confident that the Illinois Department of Revenue would want to follow this private letter ruling when similar facts as here are present.

4. A response to an AI inquiry on this issue made by AI PLATFORM that suggests that an Illinois sales tax should not be imposed for my purchase of a membership subscription to this app.

I thank you for looking into this matter, and look forward to receiving your response. COMPANY has already refused to refund the sales tax and referred me to the Illinois Department of Revenue for relief. If you agree with my position, I ask your assistance when I reach out to COMPANY again so that I can get a credit card refund on the sales tax. You may also want to issue some written guidance on this matter for me as well as other Illinois residents who are currently being charged a sales tax on app membership fees. Thank you.

NAME

My residence address is:
ADDRESS.

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. 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. 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 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.

Donors of Tangible Personal Property

If the arrangement between a business and a customer is such that the business provides tangible personal property to the customer free-of-charge, then a donor/donee situation may exist. A donor who purchases tangible personal property and gives the tangible personal property to a donee makes a taxable use of the property when making the gift. 86 Ill. Adm. Code 150.305(c). A donor owes Use Tax on the donor's cost price of the tangible personal property that is transferred. Although the donor/user is not taxable on the value of the finished product which he produces himself, such donor/user is taxable on the purchase price of the tangible personal property that he purchases and incorporates into such finished product which he uses in this State, such purchase being a purchase at retail or a purchase for use. 86 Ill. Adm. Code 150.305(b).

Computer Software

“Computer software’ means a set of statements, data, or instructions to be used directly or indirectly in a computer in order to bring about a certain result in any form in which those statements, data, or instructions may be embodied, transmitted, or fixed, by any method now known or hereafter developed, regardless of whether the statements, data, or instructions are capable of being perceived by or communicated to humans, and includes prewritten or canned software.” 35 ILCS 120/2-25. Generally, sales of “canned” computer software are taxable retail sales in Illinois. Canned computer software is considered to be tangible personal property regardless of the form in which it is transferred or transmitted, including tape, disc, card, electronic means, or other media. 86 Ill. Adm. Code 130.1935. However, 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. 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). Computer software that is not custom software is considered to be canned computer software.

Software as a service is generally defined as a cloud computing service model where the provider licenses the use of computer software to a client and manages all needed physical and software resources. The possession and ownership of software remains with the provider, and the client accesses the software on web-enabled devices over the internet. The software is often provided on a subscription basis. A provider of software as a service is acting as a serviceman. As a serviceman, the seller does not incur Retailers’ Occupation Tax. Service Occupation Tax is imposed upon all persons engaged in the business of making sales of service on all tangible personal property transferred incident to a sale of service, including computer software (35 ILCS 115/3).

Computer software is defined broadly in the Retailers’ Occupation Tax Act. However, computer software accessed through a cloud-based delivery system – a system

NAME

Page 4

October 9, 2024

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 such 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. A serviceman may provide such software along with a subscription for software as a service in a single transaction. 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.

If an Illinois customer downloads computer software for free from an out-of-State retailer's or serviceman's web site or server that is also located out of State, the retailer or serviceman, even though it is donating tangible personal property to the customer, has exercised no power or control over the property in Illinois. In this instance, the donor would not have made any taxable use of the property in Illinois. The customer, the donee, would incur no Use Tax liability for the retailer or Service Use Tax liability for the serviceman to collect and remit to Illinois.

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 under the Service Occupation Tax Act.

If a transaction does not involve the transfer of any tangible personal property to the customer, then it generally would not be subject to Retailers' Occupation Tax, Use Tax, Service Occupation Tax, or Service Use Tax. Information or data that is electronically transferred or downloaded is not considered the transfer of tangible personal property in this State. See 86 Ill. Adm. Code 130.2105(a)(3). Illinois does not tax subscriptions of software as a service.

Claim for Credit

The Department's regulation at 86 Ill. Adm. Code 130.1501 describes the procedures used to obtain a credit for sales tax that is erroneously paid. Please note that only persons who have actually paid tax to the Department can file a claim for credit. Since retailers usually pay the tax to the Department, usually only retailers can file a claim for credit.

To file this claim, however, if a seller has collected tax from a purchaser, it must first prove to the Department that it has unconditionally repaid the taxes to the purchaser. The taxpayers must apply for the credit in the manner described in the rule. Under Illinois sales tax laws, retailers are not required to file claims for credit. Please note that the Department has no authority to compel the seller to file a claim for credit. As this regulation explains, this procedure is a matter of business between the purchaser and the retailer – the retailer is not required by the tax laws to file a claim for credit.

NAME
Page 5
October 9, 2024

If a retailer does not agree to file a claim for credit on a given transaction, the purchaser must enforce his right to any refund of taxes collected as he would any other debt owed to him.

Please note that the form ST-6, Claim for Prior Overpayment/Request for Action on a Credit Memorandum, is not the form to use in the situations you have described. If the retailer has paid the amount that was shown due on an original Form ST-1, Sales and Use Tax Return, the retailer must file a corresponding ST-1-X, Amended Sales and Use Tax Return for that same period if it later determines that all or part of the tax shown on the original return was paid in error.

I hope this information is helpful. If you require additional information, please visit our website at <https://tax.illinois.gov/> or contact the Department's Taxpayer Information Division at 800-732-8866.

Very truly yours,

Alexis K. Overstreet
Deputy General Counsel
Sales and Excise Tax Policy

AKO:slc