

A person who purchases tangible personal property for the purpose of giving it away makes a taxable use of the property and incurs Use Tax upon such purchase. See 86 Ill. Adm. Code 150.305(c). (This is a GIL.)

March 12, 2010

Dear Xxxxx:

This letter is in response to your letter dated September 15, 2009, in which you request 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:

Pursuant to 2 Ill. Admin. Code § 1200.110, we request the Department's guidance on the retailers' occupation tax and use tax consequences of the transactions described below. The transactions in question are not currently being audited or involved in litigation and to the best of the knowledge of both ABC and XYZ there has not been a ruling on the same or similar issue. We do not believe there is any authority contrary to our view. The tax period at issue is July 1, 2006 through current.

ABC markets and sells orthopaedic implants (e.g., hip, knee, and elbow joint replacements) directly to hospitals and other surgical facilities nationwide. When ABC sells a joint replacement system, it also provides the customer with a kit of specialized instruments required for use in implanting the orthopaedic devices. ABC purchases the instruments from third-party suppliers and an affiliated industrial processor. The instrument kits are almost always provided to customers at no extra charge.

Some of ABC's customers in Illinois are not-for-profit healthcare institutions. We request confirmation that ABC is not liable for tax on the instruments provided to these customers. The retailers' occupation tax is imposed on persons engaged in Illinois in selling goods to purchasers for use or consumption. 35 ILCS 120/2. The tax does not apply to sales made to entities organized and operated exclusively for charitable purposes, including not-for-profit hospitals. 35 ILCS 120/2-5(11); 86 Ill. Admin. Code §§ 130.120(h), 130.201(a)(3), 130.2005(m).

The complementary use tax is imposed on the use in Illinois of tangible personal property purchased at retail from a retailer. 35 ICLS [sic] 105/3. As we have noted, virtually all of the instruments are provided to customers at no extra charge, with the result that ABC may be considered the donor—*i.e.*, user of the instruments in question. See 86 Ill. Admin. Code § 150.305(c) (providing that a person who purchases an item and gives it away makes a taxable use 'when making such gift').

However, if the seller of an item would not be subject to retailers' occupation tax despite all elements of the sale occurring in Illinois, then the use in the State of that same item is not subject to the use tax. ; [sic] 86 Ill. Admin. Code §§ 150.101(c), 150.310(b) Thus, insofar as ABC would not be subject to retailers' occupation tax if it *sold* the instruments to nonprofit hospitals in Illinois, ABC's *donation* of the instruments (*i.e.* its 'use') to these same institutions is likewise not subject to the complementary use tax.

We look forward to your confirmation of this conclusion. We respectfully request that if you do not rule in favor of ABC that you contact us and allow us to withdraw our request. If you have any questions regarding this request, please contact the undersigned.

DEPARTMENT'S RESPONSE:

The Department's regulation "Public Information, Rulemaking and Organization" provides that "[w]hether to issue a private letter ruling in response to a letter ruling request is within the discretion of the Department. The Department will respond to all requests for private letter rulings either by issuance of a ruling or by a letter explaining that the request for ruling will not be honored." 2 Ill. Adm. Code 1200.110(a)(4). Based on the information you provided, the Department cannot determine with any certainty whether or not your client is selling the instruments, loaning them and, thus retaining ownership, or donating them to its customers. In one of the documents you provided it states that if the user damages the instruments, the user must buy them. Further, the information in the contracts you provided is similarly unclear. As a result, the Department declines to issue a private letter ruling and issues this general information letter instead.

Sales Tax

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, 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 86 Ill. Adm. Code 150.101. These taxes comprise what is commonly known as "sales" tax in Illinois.

Unless there is an exemption, 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 retailer does not collect the Use Tax from the purchaser for remittance to the Department, the purchaser is responsible for remitting the Use Tax directly to the Department. See 86 Ill. Adm. Code 150.130.

Sales To Exempt Organizations

Organizations that are recognized as non-profit under Internal Revenue Code Section 501(c)(3), are not necessarily exempt organizations pursuant to Illinois tax law. Such organizations

must obtain an exemption identification number (an "E number") to qualify. See 86 Ill. Adm. Code 130.2007.

Organizations that make application to the Department of Revenue and are determined to be exclusively religious, educational, or charitable, receive an E number. The E number evidences that the Department recognizes the organizations as exempt from incurring Use Tax when purchasing tangible personal property in furtherance of their organizational purposes. If an organization does not have an E number, then its purchases are subject to tax. Please be aware that currently only sales to organizations holding the E number are exempt, not sales to individual members of the organization.

As noted above, it is unclear from the information that you provided whether your client is selling the instruments to its clients that have an E number. If your client is selling the instruments, please beware that all sales to an exempt entity holding an E number must be documented. For general information, please see the Department's regulation at 86 Ill. Adm. Code 130.810(b).

Sale For Resale

It is unclear from the information that you provided whether or not these instruments are part of the sale of the orthopedic implants. If so, for general information regarding resale certificates, please see the Department's regulation for resale certificates, "Seller's Responsibility to Obtain Certificates of Resale and Requirements for Certificates of Resale," at 86 Ill. Adm. Code 130.1405 which can be found on the Department's website.

Donor/Donee

Again, the Department cannot determine with certainty whether your client may be donating the instruments to its customers holding an E number. If it is truly donating the instruments to customers holding an E number, please note that when property is purchased and then given away, the donor has made a taxable use of the property by making such gift. Therefore, it is the donor of the gift who is deemed the end user of the property and who is subject to the Use Tax, rather than the donee regardless of the type of entity to whom it was donated (e.g., an exempt organization). See 86 Ill. Adm. Code 150.305(c); see also 86 Ill. Adm. Code 130.2125(c) concerning "Gift Situations." The donor may satisfy this Use Tax obligation either by paying tax to his supplier or by self-assessing Use Tax and paying directly to the Department as discussed above.

Use Tax

The Use Tax is a tax imposed on the privilege of using, in this State, any kind of tangible personal property that is purchased anywhere at retail from a retailer. The Use Tax is paid to Illinois retailers registered to collect Use Tax. If the Use Tax is not paid to an Illinois registered retailer, the purchaser must self-assess the Use Tax at the rate of 6.25% and remit it to the Department. "Use" means the exercise by any person of any right or power over tangible personal property incident to the ownership of that property. It is not clear from the information that you provided whether your client transfers ownership of the instruments or, rather, retains ownership of the instruments. As pointed out earlier, in one of the documents you provided, there was a provision that stated "The hospital will be responsible for the care and maintenance of these instruments. Any lost or damaged instruments will be invoiced at list price at the time of replacement." See ABC Medical Center, "Implant & Instrument Delivery" section, pg. 5.

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,

Debra M. Boggess
Associate Counsel

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