

When a construction contractor permanently affixes tangible personal property to real property, the contractor is deemed the end user of that tangible personal property. As the end user, the contractor incurs Use Tax on the cost price of that tangible personal property. See 86 Ill. Adm. Code 130.1940 and 86 Ill. Adm. Code 130.2075. (This is a GIL.)

August 10, 2010

Dear Xxxxx:

This letter is in response to your letter dated July 16, 2010, 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:

We are writing on behalf of our client ['CORPORATION'] to request a General Information Letter from the Department on the issues presented below. CORPORATION is seeking clarification on its Retailers' Occupation Tax collection obligations.

CORPORATION, a national retailer, is conducting a review of its sales tax collection requirements on the retail sale and installation of household appliances and home theatre equipment. Illinois Administrative Code 130.940 [sic] generally provides that construction contractors are the ultimate consumers of materials and supplies that become an integral part of real estate and that those contractors must pay use tax on the cost of those materials and supplies. In contract, contractors or retailers that sell tangible personal property must collect Retailers' Occupation Tax from customers on the sale of the property. CORPORATION is requesting clarification on whether it is acting as a real property construction contractor when it sells and installs household appliances and home theatre equipment or whether it should collect Retailers' Occupation Tax on the retail sale of these items as tangible personal property.

Household Appliances

CORPORATION operates retail locations in numerous states across the country, including Illinois. Each retail location contains a showroom where customers can view dishwashers, refrigerators, ranges, cook-top stoves, microwaves, washer and dryers, and other appliances available for purchase at retail. CORPORATION purchases these appliances directly from brand name manufacturers for sale to its customers.

When a customer purchases an appliance from CORPORATION, the customer may pick-up the appliance directly from CORPORATION's retail location or CORPORATION can deliver the appliance to the customer's home. If the customer has the appliance delivered, CORPORATION charges the customer a fixed delivery fee. (the 'Delivery Fee') For appliances such as refrigerators, laundry washers and dryers, and free-standing oven ranges, the Delivery Fee includes nominal installation services that can be performed quickly. For example, if the customer purchases a 'slide-in' electric oven range or refrigerator for delivery, CORPORATION will maneuver the appliance into place and then plug it in to an electrical outlet to confirm that the appliance is functioning properly. If a refrigerator contains an icemaker or a water dispenser, CORPORATION connects the refrigerator to the water source. For a laundry washer, CORPORATION connects the water source and the drainage hose. For a laundry dryer, the CORPORATION connects the vent pipe. These types of nominal installation services are included as part of the Delivery Fee.

If an appliance requires more significant installation services, CORPORATION sends an installer to the customer's home. If a customer purchases installation services, CORPORATION charges the customer a second fixed fee (the 'Installation Fee') in addition to the Delivery Fee. Installation services are commonly purchased for appliances that are 'built-in', or more significantly affixed, to a customer's home. CORPORATION charges an Installation Fee for the installation of the following:

- 'built-in' dishwashers that are wired-in under a kitchen countertop and attached to a washer source and drain;
- 'above range' microwaves that are affixed to cabinetry above an oven range'
- flat 'cook top' ranges that are installed directly into a pre-existing cut-out of a kitchen countertop;
- 'built-in' wall ovens that are built-in to kitchen walls;
- range hoods that are affixed to cabinetry above an oven range;
- garbage disposals that are installed and connected to the plumbing beneath a sink; and
- air conditioners that are installed either in a window or into a preexisting cut-out in an exterior wall of a customer's home

CORPORATION may outsource its delivery and installation services to third-party contractors or the services may be performed directly by CORPORATION employees. If a contractor performs the service, the contractor invoices CORPORATION directly for the service.

Both the Delivery Fee and the Installation Fee are optional and are imposed completely at the customer's discretion. The customer can avoid either fee by simply picking up the appliance and, as necessary, installing it themselves. If a customer does purchase delivery or installation services, those charges are separately stated from the retail cost

of the appliance on the customer's receipt or invoice. Both the Delivery Fee and the Installation Fee are fixed at the time of retail sale.

Although CORPORATION sells many different appliances from many different manufacturers, we have attached sample photos of a 'built-in' wall oven, an 'above range' microwave, a 'built-in' dishwasher, a 'cook-top' range, an air conditioner, and a range hood to help illustrate some of the products at issue. These photos are intended as general examples only. Please contact me if clarification is required on any of the appliances or services described above.

Home Theatre Video and Audio Installation

In addition to household appliances, CORPORATION sells home theatre audio and visual equipment such as flat panel televisions, DVD and Blu-ray players, audio receivers, and speakers. CORPORATION offers optional home theatre video and audio installation services to purchasers of home theatre equipment.

For example, CORPORATION can install a wall bracket and mount the customer's flat-panel television to a wall. If the customer would like a flat-panel television mounted to the wall, the customer must separately purchase the wall bracket. CORPORATION also provides other services such as installing in-wall speakers, attaching speakers to a wall or ceiling using brackets, and concealing audio wiring under the customer's carpet or flooring. CORPORATION only installs items that the customer has purchased at retail. CORPORATION typically does not provide any materials as part of the installation.

Pricing for home theatre video and audio installation service varies depending on which services are selected by the customer. CORPORATION offers different installation packages that include different services (e.g., Basic, Deluxe, and Premium). The more services purchased by the customer, the more expensive the package. The pricing for these installation packages is fixed prior to sale. All home theatre installation services are optional.

As with home appliance installation, CORPORATION may outsource home theatre installation to a third-party contractor or the installation may be performed directly by CORPORATION employees. All contractors bill CORPORATION directly for the services provided.

Questions Presented

Because the items discussed above are affixed to realty, CORPORATION is unclear whether it is acting as a real property construction contractor or a seller of tangible personal property on the sale and installation of household appliances and home theatre equipment. CORPORATION would like to clarify whether it should be collecting Retailers' Occupation Tax from its customers on the sale of these items or if, as a real property construction contractor, it is responsible for paying use tax on items that are installed for its customers.

- 1) Should CORPORATION collect sales tax on the sale of the following appliances when CORPORATION delivers the appliance and provides nominal installation services but does not charge the customer an Installation Fee?
 - a. Refrigerators
 - b. Laundry washer and dryers

- c. Oven ranges
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- 2) Should CORPORATION collect sales tax on the sale of the following appliances when CORPORATION delivers the appliance and provides installation services for a fee?
 - a. 'Built-in' dishwashers
 - b. 'Over the range' microwaves
 - c. Cook top ranges
 - d. 'Built-in' wall ovens
 - e. Range hoods
 - f. Garbage disposals
 - g. Air conditioners

 - 3) Should CORPORATION collect sales tax from the customer on audio or visual equipment, such as flat panel televisions and audio speakers, when CORPORATION installs the home theatre equipment for a fee as detailed above?

Thank you for assisting us with these issues. If you need additional information to reach a determination or if there is anything I can clarify for you, please contact me.

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, 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. 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.

For information regarding the Department's regulation on the treatment of transportation and delivery charges under the Retailers' Occupation Tax Act, please see 86 Ill. Adm. Code 130.415, which can be found on the Department's website. The taxation of transportation and delivery charges, also designated as shipping and handling charges, are not dependent upon the separate billing of such transportation or delivery charges or expense, but upon whether the transportation or delivery charges are included in the selling price of the property which is sold or whether the seller and the buyer contract separately for such transportation or delivery charges by not including such charges in the selling price. To the extent the transportation and delivery charges exceed the costs of shipping, the charges will be subject to tax.

As noted in subsection (d) of Section 130.415, if the seller and the buyer agree upon the transportation or delivery charges separately from the selling price of the tangible personal property which is sold, then the cost of the transportation or delivery service is not a part of the "selling price" of the tangible personal property which is sold, but instead is a service charge, separately contracted for, and need not be included in the figure upon which the seller computes his Retailers' Occupation Tax liability.

The best evidence that transportation or delivery charges were agreed to separately and apart from the selling price is a separate and distinct contract for transportation or delivery. However, documentation which demonstrates that the purchaser had the option of taking delivery of the property, at the seller's location, for the agreed purchase price, or having delivery made by the seller for the agreed purchase price, plus an ascertained or ascertainable delivery charge, will suffice.

Please note, however, in light of the recent Supreme Court of Illinois case of *Kean v. Wal-Mart Stores, Inc.*, 235 Ill.2d 351, 919 N.E.2d 926 (2009) concerning the taxation of delivery charges, the Department is considering amending Section 130.415.

If a customer purchases tangible personal property over-the counter without installation, for example an appliance or counter tops, then the retailer owes Retailers' Occupation Tax and must collect the corresponding Use Tax from the customer. If a customer purchases appliances or counter tops over-the-counter and separately contracts for installation of the appliances or cabinets, then the retailer owes Retailers' Occupation Tax and must collect the corresponding Use Tax from the customer on the sale of the appliances or cabinets. The separately contracted for installation of the appliances or cabinets is a separate service and no Retailers' Occupation Tax is incurred by the customer on the installation charges. See 86 Ill. Adm. Code 130.450.

A contract that provides for both the sale and installation of tangible personal property that is permanently affixed or incorporated into a structure is considered a construction contract (whether or not the cost of installation is separately stated in the contract). Obvious examples of the type of tangible personal property that is permanently affixed or incorporated into a structure are bathtubs, sinks, lavatories, cabinets built into the structure, water heaters and water softeners. Stoves and refrigerators that are not free standing and are built into the structure are some additional examples. The tax liabilities regarding construction contractors in Illinois may be found at 86 Ill. Adm. Code 130.1940 and 130.2075 on the Department's Internet website. The term construction contractor includes general contractors, subcontractors, and specialized contractors such as landscape contractors. In Illinois, construction contractors are deemed end users of tangible personal property purchased for incorporation into real property. As end users of such tangible personal property, these contractors incur Use Tax liability for such purchases based upon their cost price of the tangible personal property. See 86 Ill. Adm. Code 130.1940 and 86 Ill. Adm. Code 130.2075.

Therefore, any tangible personal property that a construction contractor purchases that will be permanently affixed to or incorporated into real property in this State will be subject to Use Tax. If such contractors did not pay the Use Tax liability to their suppliers, those contractors must self assess their Use Tax liability and pay it directly to the Department. If the contractors have already paid a tax in another state regarding the purchase or use of such property, they will be entitled to a credit against their Illinois Use Tax liability to the extent that they have paid tax that was properly due to another state. See 86 Ill. Adm. Code 150.310.

It is important to note that since construction contractors are the end users of the materials that they permanently affix to real estate, their customers incur no Use Tax liability and the construction contractors have no legal authority to collect the Use Tax from their customers. However, many construction contractors pass on the amount of their Use Tax liabilities to customers in the form of higher prices or by including provisions in their contracts that require customers to "reimburse" the construction contractor for his or her tax liability. Please note that this reimbursement cannot be billed to a customer as "sales tax," but can be listed on a bill as a reimbursement of tax. The choice of whether a construction contractor requires a tax reimbursement from the customer or merely raises his or her price is a business decision on the construction contractor's part.

If subcontractors are utilized and are acting as construction contractors, the transaction between the general contractors and the subcontractors is not a taxable transaction. The subcontractors incur Use Tax liability on any tangible personal property that they purchase for incorporation into real estate. If, however, general contractors make purchases and then contract to have subcontractors do the installation, the general contractors incur Use Tax liability because they are making the purchases of such tangible personal property.

Section 1 of the Retailers' Occupation Tax Act (35 ILCS 120/1) provides that construction contracts for the improvement of real estate consisting of engineering, installation, and maintenance of voice, data, video, security, and all telecommunications systems, do not constitute engaging in a business of selling tangible personal property at retail within the meaning of the Act if they are sold at one specified contract price. Rather, such contractors incur tax liability on their cost price of such systems.

The Department is reviewing its rules on construction contractors and is considering amending its rules to more fully explain the parties' tax liabilities when a construction contractor or retailer contracts with another party to manufacture and permanently affix or incorporate into a structure tangible personal property.

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,

Richard S. Wolters
Associate Counsel

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