

This letter provides a brief summary of when the high rate of tax for food and the low rate of tax for food apply. See 86 Ill. Adm. Code 130.310. (This is a GIL.)

August 27, 2010

Dear Xxxxx:

This letter is in response to your letter dated August 3, 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:

I need some clarification as to which rate I should be using when reporting my monthly sales tax. I have been told I qualify for the lower food rate, but have also been told I could possibly fall into a higher rate of general merchandise.

I operate an ice cream truck and sell pre-packaged ice cream purchased from an ice cream distributor.

I am not sure what other information you need. Please review and advise so I know whether or not the returns I have filed can stay as is, or if I need to amend them.

DEPARTMENT'S RESPONSE:

Food sold at retail in Illinois is subject to Retailers' Occupation Tax and Use Tax. Items that qualify as food, drugs and medical appliances are taxed at the low State rate of 1%. The Department's regulation regarding the appropriate tax rates for food can be found at 86 Ill. Adm. Code 130.310.

Food that is to be consumed off the premises where it is sold (other than alcoholic beverages, candy, soft drinks, and food that has been prepared for immediate consumption) is taxed at the rate of 1% plus applicable local taxes. Food is defined as any solid, liquid, powder or item intended by the

seller primarily for human internal consumption, whether simple, compound or mixed, including foods such as condiments, spices, seasonings, vitamins, bottled water and ice. Candy is defined as a preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts or other ingredients or flavorings in the form of bars, drops, or pieces. Candy does not include any preparation that contains flour or requires refrigeration.

The manner in which food is taxed depends upon the nature of the establishment that is selling the food. Retailers who provide seating or facilities for on-premises consumption of food generally incur tax at the high rate (6.25% State rate) on all food sales (including bulk or grocery type items). However, if establishments sell both food that has been prepared for immediate consumption and bulk or grocery type items and also provide facilities for on-premises consumption, the lower rate of tax (1%) may be charged on the bulk or grocery type items (other than alcoholic beverages, candy, soft drinks, and food that has been prepared for immediate consumption) if the dining facilities are physically partitioned from the area where food not for immediate consumption is sold and these facilities utilize a separate means of collection of receipts. See 86 Ill. Adm. Code 130.310(b)(3).

The Department generally relies on the plain meaning of the term “physically partitioned” as in separated or divided by a tangible barrier. An eat-in-area that is partially isolated from the generally sales area of a store by the arrangement of display cases, service counters, or stub walls would qualify as “physically partitioned.” If establishments have no seating or facilities for on-premises consumption of food, the tax rate incurred on food sales is determined by whether the majority (over 50%) are bulk or grocery type sales or are sales for immediate consumption. If more than 50% of all food sales are for immediate consumption, the retailer must charge the high rate on all food sales. If more than 50% of all food sales are bulk or grocery type items, all food sales are taxed at the low rate with the exception of hot foods, food that has been prepared for immediate consumption, alcoholic beverages, candy and soft drinks. See Section 130.310(a). Food for immediate consumption is defined in the regulation as hot food and food made ready by the retailer to be eaten without substantial delay after the final stage of preparation by the retailer. See 86 Ill. Adm. Code 130.310(b)(6).

Based on the forgoing, generally a retailer that sells ice cream from a truck is selling the ice cream for immediate consumption and would incur tax at the high rate (6.25% State rate) plus applicable local taxes.

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

RSW:msk