

On-bill financing charges are not subject to Gas Revenue Tax liability. See 86 Ill. Adm. Code 470.101. (This is a PLR.)

March 2, 2011

Dear Xxxxx:

This letter is in response to your letter dated January 19, 2011, 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.

Review of your request disclosed that all the information described in paragraphs 1 through 8 of Section 1200.110 appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to GAS COMPANIES for the issue or issues presented in this ruling, and is subject to the provisions of subsection (e) of Section 1200.110 governing expiration of Private Letter Rulings. Issuance of this ruling is conditioned upon the understanding that neither GAS COMPANIES, nor a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request. In your letter you have stated and made inquiry as follows:

I am writing to you on behalf of my clients, collectively, the 'Gas Companies', to request a Private Letter Ruling from the Illinois Department of Revenue (the 'Department') with respect to the question whether the Gas Companies must remit Gas Revenue Tax to the Department on the charges they collect from customers pursuant to the on-bill financing program set forth in Section 19-140 of the Illinois Public Utilities Act (220 ILCS 5/19-140).

The Gas Companies believe that this request for private letter ruling meets the exception set forth in Ill. Admin. Code tit. 2, § 1200.110(a)(3)(A)(i) for private letter ruling requests on behalf of multiple taxpayers because the request is made by a designated agent of the Gas Companies and the Gas Companies file a composite return under the Illinois Income Tax Act. If the Department disagrees with this conclusion and wishes the Gas Companies to file separate requests for private letter rulings on this issue, the Gas Companies would be happy to comply. Completed Power of Attorney forms for the Gas Companies are enclosed with this correspondence.

Statement of Relevant Material Facts

1. The Gas Revenue Tax

As entities engaged in the ‘business of distributing, supplying, furnishing or selling gas for use or consumption and not for resale,’ the Gas Companies are subject to the Illinois Gas Revenue Tax (‘GRT’). 35 ILCS 615/1, *et seq.* The GRT is imposed ‘at the rate of 2.4 cents per therm of all gas which is so distributed, supplied, furnished, sold or transported to or for each customer in the course of such business, or 5% of the gross receipts received from each customer from such business, whichever is the lower rate as applied to each customer for that customer’s billing period.’ 35 ILCS 615/2. Gross receipts are defined by the GRT Act as:

‘Gross receipts’ means the consideration received for gas distributed, supplied, furnished or sold to persons for use or consumption and not for resale, and for all services (including the transportation or storage of gas for an end-user) rendered in connection therewith, and shall include cash, services and property of every kind or nature, and shall be determined without any deduction on account of the cost of the service, product or commodity supplied, the cost of materials used, labor or service costs, or any other expense whatsoever.

35 ILCS 615/1. The GRT is administered by the Department.

Although the legal incidence of the GRT falls on the Gas Companies, as public utilities they are authorized by statute to include a separately stated charge on their customer bills in an amount equal to the GRT they pay to the Department. 220 ILCS 5/9.222. By this mechanism, the economic burden of the GRT may be passed on by the Gas Companies to their customers.

2. The Electricity Excise Tax

The Electricity Excise Tax (‘EET’) is a tax on the privilege of using in this State electricity purchased for use or consumption in Illinois and not for resale. 35 ILCS 640/2-4(a). Unlike the GRT, the legal incidence of the EET is on the customer. The EET also differs from the GRT in that it is measured solely by a volumetric measure (kilowatt hours used or consumed). In contrast, the GRT is measured by the lesser of a volumetric or dollar measure. The EET is collected and remitted to the Department by delivering suppliers of electricity.

3. The On-Bill Financing Program

Effective July 10, 2009, two new sections were added to the Public Utilities Act creating what is known as the ‘On-Bill Financing Program.’ 220 ILCS 5/19-140; 5/16-111.7 (copies attached as Exhibit A) (the ‘On-Bill Financing Law’). The Program requires electric and gas utilities serving more than 100,000 customers to offer an Illinois Commerce Commission (‘Commission’)-approved program that allows residential retail customers to borrow funds from a third-party lender to purchase electric or gas energy efficiency equipment without any required upfront payment and to pay back such funds over time through their electric or gas utility bills. A utility also may extend the Program to certain small commercial customers.

Customers wishing to participate in the On-Bill Financing Program must first secure a lender's approval of their financing. 220 ILCS 5/19-140(c)(4), 5/16-111.7(c)(4). Once financing has been secured and equipment purchased, the lender forwards payment information to the appropriate utility and the utility is required to become the payment agent by adding a separate line item to the participant's utility bill showing the amount due under the loan, collecting each monthly payment and forwarding it to the appropriate lender. *Id.*

In the event a participant fails to pay his electric or gas utility bill, the electric or gas utility must continue to remit all payments due under the program to the lender. 220 ILCS 5/19-140(c)(6); 5/16-111.7(c)(6). Public utilities participating in the Program are permitted to recover all costs related to a participant's nonpayment through an automatic adjustment clause tariff established pursuant to the Public Utilities Act. *Id.* In addition, participating electric or gas utilities retain a security interest in equipment purchased under the Program, and retain all rights to disconnect a participant who defaults on the payment of his utility bill. *Id.* The On-Bill Financing Law provides that amounts due to gas or electric utilities under the Program 'shall be deemed amounts owed for residential and, as appropriate, small commercial gas [electric] service.' 220 ILCS 5/19-140(c)(5); 5/16-111.7(c)(5).

This is not the first time that the Illinois General Assembly has required public utilities to include charges on their customer bills that are characterized by statute as amounts owed 'for gas or electric service.' In 1997, the General Assembly enacted the Renewable Energy, Energy Efficiency, and Coal Resources Development Law ('Renewable Energy Law'), which requires public utilities, electric cooperatives and municipal utilities to assess their customers a monthly charge ('Renewable Energy Charge') to fund efforts to develop renewable energy resources and clean coal technologies. 20 ILCS 687/6-1, *et seq.* The Renewable Energy Law provides that the Renewable Energy Charge 'shall be considered a charge for public utility service.' 20 ILCS 687/6-6-5(b). Similarly, in 2002, the General Assembly enacted the Energy Assistance Act, which created an energy assistance program for low income citizens funded in part by an 'Energy Assistance Charge' that public utilities, electric cooperatives and municipal utilities are required to assess on each customer account. 305 ILCS 20/1, *et seq.* The Energy Assistance Act provides that the Energy Assistance Charge is considered to be 'a charge for public utility service.' 305 ILCS 20/13(e).

In 2002, the Department was asked to consider whether the Renewable Energy and Energy Assistance Charges were 'gross receipts' within the meaning of the GRT, such that gas utilities were required to remit GRT on those charges. By a General Information Letter issued on September 13, 2002 (ST 02-0201-GIL, copy attached as Exhibit B), the Department concluded that because the charges were defined by the statutes in question as a 'charge for public utility service,' they were 'gross receipts' subject to the GRT when the GRT was computed at the 5% rate. (Ex. B, p. 2)

4. Proceedings Before the Illinois Commerce Commission

On February 2, 2010, the Gas Companies filed a Petition asking the Commission to issue an order approving the Gas Companies' On-Bill Financing Program and a Rider to implement the Program. In the course of proceedings before the Commission on this topic, the Gas Companies questioned whether their customer on-bill charges should be treated as 'gross receipts' subject to GRT, particularly in light of the Department's prior

ruling with respect to the Renewable Energy and Energy Assistance Charges (ST 02-0201-GIL).¹ Like the Renewable Energy Law and the Energy Assistance Act, the On-Bill Financing Law provides that on-bill charges are ‘amounts owed for gas service.’ (See, e.g., Additional Comments of GAS COMPANIES on Tax Issues, Commission Docket No. 10-0090, copy attached as Exhibit C.) The Commission’s Staff also questioned this issue. (See, e.g., Verified Reply Comments of the Staff of the Illinois Commerce Commission (‘Reply’), ICC Docket No. 10-0090, at pp. 5-6 (attached as Exhibit D)).

As Staff explained in its Reply, because it was unclear whether the Commission had jurisdiction to decide if state taxes not administered by the Commission should be applied to the On-Bill Financing Program, Staff sought guidance from the Department, the State agency responsible for administering the GRT. In response to Staff’s request for guidance, on March 11, 2010, the Department issued an advisory memorandum regarding the Program (‘Memorandum’) (copy attached as Exhibit E) in which it concluded that although the issue was a ‘close call,’ in the Department’s opinion constitutional issues and issues of statutory construction weighted in favor of a conclusion that the loan payments should not be treated as ‘gross receipts’ for purposes of the GRT. (Ex. E, Mem. pp. 1, 7).

The Department concluded that if GRT were required to be paid on gas-related on-bill financing payments, gas utility consumers and electric utility consumers likely would not be taxed uniformly, which would raise serious constitutional uniformity issues and put the on-bill financing program at risk. (Ex. E., Mem. at pp. 4-6). In reaching this conclusion, the Department also relied upon rules of statutory construction, including those which provide that where a statute is capable of more than one interpretation, legislative intent may be ascertained by considering ‘the entire act, its nature, its object, and the consequences resulting from different constructions,’ and that statutes should be interpreted in a way that leads to a logical, common sense result. (Ex. D, Mem. at p. 7) (quoting *Taddeo v. Bd. of Trustees of the Illinois Mun. Retirement Fund*, 216 Ill. 2d 590, 595 (2005) and *People v. Mullinex*, 125 Ill. App. 3d 87, 89 (2nd Dist. 1984)). The Department concluded that it would be unreasonable to find that the Illinois General Assembly intended to discriminate against gas utilities, gas utility consumers and companies that manufacture and sell gas-using energy equipment by subjecting gas utility consumers to the economic burden of a tax that would not be imposed on electric consumers participating in the same program. (Ex. E, Mem. at 7).

Reason for Requesting a PLR

The Gas Companies’ On-Bill Financing Program will become effective in June 2011. The Gas Companies cannot rely upon the opinion expressed by the Department in the Memorandum regarding the taxability of on-bill charges related to the Program because the Memorandum is an advisory memorandum to the Commission, not a formal response to a taxpayer inquiry. Moreover, the Gas Companies cannot rely upon any ruling by the Commission on this subject, as the Commission has concluded that it does not have jurisdiction to determine the applicability of the GRT to the On-Bill Financing Program. 2010 WL 2375843 at p. 41 (Commission’s June 2, 2010 Order approving the Gas Companies’ On-Bill Financing Program (Docket 10-0090), copy attached as Exhibit

¹ No similar concerns arose under the EET because the measure of the tax is solely volumetric, and thus by definition does not cover customers’ on-bill financing payments to their electric utilities.

F).² The Gas Companies therefore request a binding private letter ruling from the Department on this subject.

Documents Relevant to the Request

Copies of the relevant documents are attached as Exhibits A-F to this request.

Business Tax Period at Issue

The tax period at issue will commence on June 1, 2011, which is the effective date of the Gas Companies' On-Bill Financing Program.

No Pending Audit; No Dispositive Case Law or Regulations

The issue raised by this request is not being examined as a part of a Department audit or pending in litigation in a case involving the Gas Companies or any related taxpayer. To the best of the Gas Companies' and their counsel's knowledge and belief, the Department has not previously ruled on this issue for the Gas Companies or any predecessor of the Gas Companies.

Statement of Authorities Supporting Taxpayer's Views

In this request, the Gas Companies seek a private letter ruling answering the question whether customer on-bill charges related to their On-Bill Financing Program are 'gross receipts' subject to the GRT. The Department should conclude that the on-bill charges are not subject to the GRT based on the plain language of sub-section [sic] (h) of the On-Bill Financing Law.

As noted above, the On-Bill Financing Law is like the Renewable Energy Law and the Energy Assistance Act in its characterization of on-bill charges as 'charges for public utility service.' Unlike the other statutes, however, the On-Bill Financing Law contains language which precludes the triggering of GRT liability. Sub-section [sic] (h) of the On-Bill Financing Law provides:

(h) a gas [electric] utility offering a Commission-approved program pursuant to this Section *shall not be required to comply with any other statute, order, rule, or regulation of this State that may relate to the offering of such program*, provided that nothing in this Section is intended to limit the gas [electric] utility's obligation to comply with this Act and the Commission's orders, rules, and regulations, including Part 280 of Title 83 of the Illinois Administrative Code.

220 ILCS 5/19-140(h); 5/16-111.7(h) (emphasis added).

Sub-section [sic] (h) protects the on-bill charges from GRT liability. Because the Gas Companies have a Commission-approved program (see Exhibit F), they are not required to comply with any statute that relates to the offering of the program. This

² In proceedings before the Commission, it was contemplated that the Gas Companies would seek a binding ruling from the Department on the GRT tax issue. In its order approving the On-Bill Financing Program, the Commission agreed that the Gas Companies could petition for recovery of any prudently incurred expenses related to the pursuit of such a ruling. (*Id.*)

includes the Gas Revenue Tax Act, which could otherwise be construed to require the Companies to collect GRT on their on-bill financing charges.

The only exception to the sub-section [sic] (h) exemption is with respect to the Public Utilities Act and orders, rules and regulations of the Commission. The exception does not apply here because the GRT is neither imposed by the Public Utilities Act nor administered by the Commission.

At the time the Department was asked to provide its Memorandum to the Commission's Staff, the Gas Companies' program had not yet been approved by the Commission. As a result, sub-section [sic] (h) did not then present a basis upon which the Department could have concluded that the Gas Companies' on-bill charges were not subject to the GRT.

For these reasons, the Gas Companies ask the Department to conclude that the plain language of sub-section [sic] (h) of the On-Bill Financing Law establishes that they have no duty to collect GRT on their commission-approved on-bill financing charges. Illinois case law supports this conclusion. *People v. Roberts*, 214 Ill.2d 106, 116, 824 N.E.2d 250, 256 (2005) ('If we can determine the legislative intent from the plain language of the statute, we will give that intent effect without resorting to other interpretive aids.' (citing *Metzger v. DaRosa*, 209 Ill.2d 30, 34 (2004))). See also *Mulay v. Mulay*, 225 Ill.2d 601, 607 (2007) (constitutional questions should be addressed 'only as a last resort,' and decision-makers should rely 'whenever possible on non-constitutional grounds to decide cases.') (citing *In re E.H.*, 224 Ill. 2d 172, 178 (2006)).

Statement of Authorities Contrary to the Taxpayer's Views

As noted above, the On-Bill Financing Law provides that on-bill charges are amounts paid for gas or electric service. 220 ILCS 5/19-140(c)(5) 5/16-111.7(c)(5). This suggests that GRT should be collected on the Gas Companies' on-bill charges, because the GRT defines all gas-related services as 'gross receipts' subject to tax. 35 ILCS 615/1. The Department reached a similar conclusion in ST 02-0201-GIL, in which the Department concluded that the Renewable Energy and Energy Assistance Charges were 'gross receipts' subject to GRT. Moreover, in *Illinois Power Co. v. Mahin*, 72 Ill.2d 189, 381 N.E.2d (1978) the Illinois Supreme Court held that contributions made by a utility's customers in aid of construction, advances received by the utility for construction and sums collected by the utility for rental of equipment and appliances were 'gas services' and thus 'gross receipts' subject to the GRT. While these authorities might be cited as contrary to the conclusion urged by the Gas Companies in this request for letter ruling, they are tempered by the arguments set forth in the Department's Memorandum, and may be factually distinguished because the underlying statutes in those matters did not contain the exemption language set forth in sub-section [sic] (h) of the On-Bill Financing Law. 220 ILCS 5/19-140(h), 5/16-111.7(h).

Conclusion

For all the foregoing reasons, the Gas Companies respectfully request that the Department issue a private letter ruling confirming that they have no obligation to remit GRT with respect to on-bill charges collected from customers pursuant to their Commission-approved On-Bill Financing Program. No trade secret information need be deleted from the publicly-disseminated version of any PLR issued in response to this request.

DEPARTMENT'S RULING:

On-Bill Financing Program

P.A. 96-0033 implements an on-bill financing program for gas and electric utility customers. One section relates to electric utilities (220 ILCS 5/16-111.7), and one section relates to gas utilities (220 ILCS 5/19-140). The two sections are essentially the same.

Electric and gas utilities serving more than 100,000 customers on January 1, 2009, must offer an Illinois Commerce Commission-approved, on-bill financing program that allows specified retail customers (i) to borrow funds from a third-party lender in order to purchase electric or gas energy efficiency equipment approved under the program without any required upfront payment and (ii) to pay back such funds over time through the electric or gas utility bills.

Following the lender's approval of financing and the participant's purchase of the equipment, the lender will forward payment information to the electric or gas utility, and the utility will add as a separate line item on the participant's utility bill a charge showing the amount due under the program each month. A loan issued to a participant pursuant to the program is the sole responsibility of the participant, and any dispute that may arise concerning the loan's terms, conditions, or charges must be resolved between the participant and lender. Upon transfer of the property title for the premises at which the participant receives electric or gas service from the utility or the participant's request to terminate service at such premises, the participant must pay in full its electric or gas utility bill, including all amounts due under the program.

Section 5/19-140 of the Public Utilities Act provides that amounts due under the program "shall be deemed amounts owed for residential and, as appropriate, small commercial gas service." 220 ILCS 5/19-140. Section 16-111.7 of the Public Utilities Act contains similar language for electric service. The electric or gas utility must remit payment in full to the lender each month on behalf of the participant. In the event a participant fails to pay its electric or gas utility bill, the electric or gas utility must continue to remit all payments due under the program to the lender, and the utility will be entitled to recover all costs related to a participant's nonpayment through an automatic adjustment clause tariff established pursuant to the Act. In addition, the electric or gas utility will retain a security interest in the measure or measures purchased under the program, and the utility retains its right to disconnect a participant that defaults on the payment of its utility bill.

The Gas Revenue Tax Act

Section 2 of the Gas Revenue Tax Act (35 ILCS 615/) imposes a tax "upon persons engaged in the business of distributing, supplying, furnishing or selling gas to persons for use or consumption and not for resale at the rate of 2.4 cents per therm of all gas which is so distributed, supplied, furnished, sold or transported to or for each customer in the course of such business, or 5% of the gross receipts received from each customer from such business, whichever is the lower rate as applied to each customer for that customer's billing period" Pursuant to Section 9-222 of the Public Utilities Act (220 ILCS 5/9-222), the utility may pass through the tax to the user or consumer.

Section 1 of the Gas Revenue Tax Act states:

"Gross receipts' means the consideration received for gas distributed, supplied, furnished or sold to persons for use or consumption and not for resale, and for all services (including the transportation or storage of gas for an end-user) rendered in

connection therewith, and shall include cash, services and property of every kind or nature, and shall be determined without any deduction on account of the cost of the service, product or commodity supplied, the cost of materials used, labor or service costs, or any other expense whatsoever....”

Section 1 also enumerates a number of specific exclusions from “gross receipts”.

The Electricity Excise Tax Law

Section 2-4(a) of the Electricity Excise Tax Law (35 ILCS 640/) imposes a tax on the privilege of using in this State electricity purchased for use or consumption and not for resale, other than by municipal corporations owning and operating a local transportation system for public service. Unlike the Gas Revenue Tax, the Electricity Excise Tax is imposed upon the user and is collected by delivering suppliers and remitted to the Department. The tax is based upon the number of kilowatt-hours delivered to the purchaser.

In ST 02-0201-GIL, the Department stated that Energy Assistance Charges and Renewable Energy Resources and Coal Technology Development Assistance Charges are statutorily considered charges for public utility services and are subject to Gas Revenue Tax liability when that tax is computed at the 5% rate on gross receipts. The residential Energy Assistance Charge is \$0.48 per month for each account for electric service and \$0.48 per month for each account for gas service. The residential Renewable Energy Resources and Coal Technology Development Assistance Charge is \$0.05 per month for each account for electric service and \$0.05 per month for each account of gas service. The revenues received from the charges are remitted to the State to fund programs for low-income households administered by the State under the Energy Assistance Act and to fund renewable energy programs administered by the State under the Renewable Energy, Energy Efficiency, and Coal Resources Development Law of 1997.

Unlike the energy assistance program and the renewable energy program administered by the State, the on-bill financing program allows qualified retail customers to borrow funds from third-party lenders in order to purchase electric or gas energy efficiency equipment approved under the program from private vendors without any required upfront payment and to pay back such funds to the third-party lenders over time by making payments to their gas or electric utilities, which payments are subsequently remitted to the lenders by the utilities on behalf of the customers. The services provided by the utilities under the on-bill financing program are not rendered in connection with the distribution, furnishing, supplying or selling of natural gas. Section Accordingly, on-bill financing payments made by customers to utilities and forwarded to third-party lenders under the on-bill financing program are not part of “gross receipts” subject to the Gas Revenue Tax. This conclusion is supported by the language contained in subsection (h) of Sections 19-140 and 16-111.7 of the Public Utilities Act. 220 ILCS 5/19-140(h); 220 ILCS 5/16-111.7(h). (“A gas [electric] utility offering a Commission-approved program pursuant to this Section shall not be required to comply with any other statute, order, rule, or regulation of this State that may relate to the offering of such program... .”)

The factual representations upon which this ruling is based are subject to review by the Department during the course of any audit, investigation, or hearing and this ruling shall bind the Department only if the factual representations recited in this ruling are correct and complete. This Private Letter Ruling is revoked and will cease to bind the Department 10 years after the date of this letter under the provisions of 2 Ill. Adm. Code 1200.110(e) or earlier if there is a pertinent change in statutory law, case law, rules or in the factual representations recited in this ruling.

I hope this information is helpful. If you have questions concerning this Private Letter Ruling, you may contact me at (217) 782-2844. If you have further questions related to the Illinois sales tax laws, please visit our website at www.tax.illinois.gov or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Terry D. Charlton
Chairman, Private Letter Ruling Committee

TDC/RW:msk