

Servicemen do not incur Service Occupation Tax liability on property that they resell as an incident to a sale of service under an agreement by which the servicemen are obligated to make physical delivery of the goods from a point in Illinois to a point outside Illinois, not to be returned to a point within Illinois, provided that such delivery is actually made. See, 86 Ill. Adm. Code 140.501. (This is a PLR.)

December 9, 2011

Dear Xxxxx:

This letter is in response to your letter dated August 24, 2011 in which you requested a Private Letter Ruling. 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 TAXPAYER 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 TAXPAYER 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:

Our client, the TAXPAYER, has requested that FIRM represent it in obtaining a private letter ruling on issues surrounding the application of the Illinois interstate commerce exemption to specific transactions. Enclosed please find an executed Power of Attorney Form IL 2848. We are requesting a ruling for the issues and transactions described herein as it applies to the period January 1, 2010 to date, as well as, to current transactions.

Prior to submitting this private letter ruling request, the issue on which we are requesting a ruling upon was presented to the Illinois Informal Conference Board ('ICB') during a prior audit of the taxpayer. The ICB ruled in favor of the taxpayer on this issue, however, since the ICB rulings are not binding on future audits, TAXPAYER is requesting a private letter ruling.

We also have had subsequent discussions with the Illinois State auditor regarding the interstate commerce exemption issue that was addressed during the ICB hearing. It was conveyed to us that the auditor is not going to abide by the decision of the ICB on future audits and she will seek to continue to tax the direct mail transactions as described below at 100% taxable in Illinois. The auditor strongly advised that TAXPAYER obtain a private letter ruling from the State before the next audit, otherwise, TAXPAYER would be forced to take their argument to ICB yet again. In order to bring closure to this issue for future audit periods, we respectfully request that the State issue a Private Letter Ruling on the specific issue presented herein. Our request is made pursuant to the auditor's remarks that a General Information Letter would not provide the specific guidance that would allow her to characterize the taxpayer's interstate commerce transactions any differently than she has in past audits.

In accordance with Illinois Administration [sic] Code 1200.110, we affirm that there is neither an audit ongoing nor litigation pending with the Illinois Department of Revenue. To the best of our knowledge and to the knowledge of the taxpayer, the Department has not previously ruled on the same or a similar issue for the taxpayer or a predecessor, nor has the taxpayer or any representatives previously submitted the same or a similar issue to the Department but withdrew it before a letter ruling was issued.

In the event the State issues a ruling that is published or otherwise made known to the public, we request that the State remove or modify any identifying characteristics of facts about the taxpayer or any of the other parties mentioned in our request.

Company Background:

TAXPAYER is a print broker headquartered in the STATE. TAXPAYER has established a physical presence in Illinois through the existence of offices, a warehouse and various company personnel. The taxpayer is currently registered as a de minimis serviceman for Illinois sales tax purposes. Therefore, TAXPAYER is subject to the service occupation tax and its complement the service use tax.

Illinois Activity and Facts:

TAXPAYER has customers with whom it contracts for the custom manufacture and mailing of direct mail pieces. The customers are not located in Illinois and are therefore not registered for sales tax purposes in Illinois. These contracts are executed at TAXPAYER's headquarters in CITY/STATE. Pursuant to these types of contracts, TAXPAYER coordinates the custom manufacture of these direct mail pieces which are personalized to include the customer's name and logo. TAXPAYER will also coordinate the fulfillment function which includes personalizing, bursting, trimming, bagging, tagging, sorting and mailing.

While these contracts are executed in STATE, their fulfillment takes place in Illinois. In Illinois TAXPAYER engages the services of third party Illinois printers and third party Illinois fulfillment houses. The mailers are mailed throughout the United States with only a small percentage of them being mailed to Illinois addresses, if any. TAXPAYER's customer relies upon them to contract with all third parties and coordinate the entire process. At no time is TAXPAYER's customer contracting either directly or indirectly with any of the third parties. Additionally, TAXPAYER's customer exercises no direct control over the selection of the subcontractors or the work the subcontractors will perform.

Ruling Requested:

TAXPAYER respectfully requests that the State of Illinois provide a ruling regarding the proper application of the Illinois interstate commerce exemption as described in Illinois Regulation Section 130.605 to the direct mail transactions described in the above section entitled *'Illinois Activity and Facts'*.

Discussion

TAXPAYER asserts that the Illinois interstate commerce exemption properly applies to the transactions described herein. The discussion below further explains and supports the Taxpayer's position.

Interstate Commerce

To determine the applicability of Illinois' interstate commerce exemption, the relationship between TAXPAYER, its third party subcontractors and its customers should be examined.

Pursuant to an Illinois Private Letter Ruling [*ST-91-0928, November 25, 1991,*] when an out-of-state purchaser contracts with an Illinois serviceman to manufacture and mail mailers to out-of-state locations, a transaction subject to the Service Occupation Tax exists. The letter ruling references Illinois Administration [sic] Code 130.605(b) – (f), stating that if a registered serviceman performs this service, it can claim the interstate commerce exemption because it mails the items out-of-state.

We note that the fact pattern described in Illinois Private Letter Ruling ST-91-0928 is analogous to the facts at hand in that TAXPAYER, rather than its customer, contracts with the fulfillment house to mail the items. The fulfillment house then mails the mailers through the U.S. mail or through common carrier. Therefore, there is no Illinois delivery of the items made except for those mailed to Illinois addresses.

An Illinois case involving Deere & Company ('Deere') [*Deere & Company v. State of Illinois, 49 Ill App 3d 164 7 Ill Dec 130 364 NE2d 117, 06/14/77*] specifically addressed the taxability of advertising brochures. The brochures were purchased from a commercial printer in Illinois and then at Deere's request sent to a fulfillment company in Illinois to ready the materials for mailing and subsequently mail. The brochures were mailed to Deere's customers residing both within and without the State of Illinois. The main focus of the case was to determine if Deere exercised right of ownership of the property while it is in Illinois thereby generating a use tax liability. The Illinois court referenced a Supreme Court ruling where that court determined that goods do not enter interstate commerce until they have been shipped or otherwise begun to move from one state to another. Deere exercised a right to the goods prior to the goods entering into the stream of interstate commerce because they directed the printer to send the brochures to the fulfillment company. Based on these facts a use tax obligation for Deere was established.

We believe that the Deere case is not controlling in relation to the facts as presented herein because TAXPAYER's customers do not have control over the property, the selection of the subcontractors or the work the subcontractors will perform. TAXPAYER retains control of the property throughout the transactions.

Because TAXPAYER is registered and subcontracts with a fulfillment house to mail the items, it can still claim the interstate commerce exemption because its subcontractor mails the items out of state.

Due to the fact that TAXPAYER is a registered serviceman it is eligible for all exemptions that are afforded to other registered servicemen. Pursuant to Illinois Private Letter Ruling ST 93-0103-PLR, March 22, 1993, TAXPAYER has elected to issue resale certificates to its servicemen and takes advantage of the interstate commerce exemption. As noted in Illinois Private Letter Ruling ST 93-0103, 'Such servicemen, since they are registered, can claim all the exemptions any other registered serviceman can claim.'

Because there is no guidance in the form of published rulings, regulations or court cases on this issue the Taxpayer respectfully requests a ruling on the above issues and desires that the State looks favorably upon its contentions. If additional information is required or you have additional questions please do not hesitate to contact me.

DEPARTMENT'S RULING:

Illinois Service Occupation and Use Taxes do not apply to sales of service that do not involve the transfer of tangible personal property to customers. However, if tangible personal property is transferred incident to sales of service, this will result in either Service Occupation Tax liability or Use Tax liability for the servicemen depending upon his activities. See 86 Ill. Adm. Code 140.101. The purchase of tangible personal property that is transferred to the service customer may result in either Service Occupation Tax liability or Use Tax liability for the servicemen depending upon his activities.

A serviceman who incurs SOT on his or her selling price is authorized to claim any exemption provided for in the Service Occupation Tax Act. For example, he or she may claim the interstate commerce exemption or accept various exemption certificates from his or her customers (e.g., Certificates of Resale, exemption identification numbers). 86 Ill. Adm. Code 140.106(d). A de minimis serviceman incurring Service Occupation Tax liability on his or her cost price also is authorized to claim any of the various exemptions provided for in the Service Occupation Tax Act. For example, he may claim the interstate commerce exemption or accept various exemption certificates from his customers (e.g., he can accept Certificates of Resale). 86 Ill. Adm. Code 140.109 (a)(3). The Department has also determined that a de minimis serviceman incurring a Use Tax liability may claim any of the exemptions, except as provided in subsection (a)(2)(C), authorized under the Service Occupation Tax Act. De minimis servicemen incurring Use Tax liability may likewise claim the interstate commerce exemption, which is more fully explained at 86 Ill. Adm. Code 130.605. 86 Ill. Adm. Code 140.108(a)(2)(B).

The Department's regulation at 86 Ill. Adm. Code 140.501(b) provides that "[t]he serviceman does not incur Service Occupation Tax liability on property which he resells as an incident to a sale of service under an agreement by which the serviceman is obligated to make physical delivery of the goods from a point in this State to a point outside this State, not to be returned to a point within this State, provided that such delivery is actually made. Nor does the tax apply to property which the serviceman resells as an incident to a sale of service under an agreement by which the serviceman, by carrier (when the carrier is not also the purchaser) or by mail, delivers the property from a point in this State to a point outside this State, not to be returned to a point within this State. The place at which title to the property passes to the purchaser is immaterial. The place at which the contract of sale of the service or contract to sell the service is negotiated and executed and the place at which

the purchaser resides are also immaterial. Sales of service of the type described in this paragraph are deemed to be within the protection of the Commerce Clause of the Constitution of the United States.”

However, 86 Ill. Adm. Code 140.501(a) provides that “[w]here tangible personal property is located in this State at the time of its transfer (or is subsequently produced in Illinois) as an incident to a sale of service, and is then delivered in Illinois, the serviceman incurs Service Occupation Tax liability on the selling price of the property. The sale is not deemed to be in interstate commerce if the purchaser or his representative receives the physical possession of such property in this State. This is so notwithstanding the fact that the purchaser may, after receiving physical possession of the property in this State, transport or send the property out of the State for use outside the State or for use in the conduct of interstate commerce.”

Based on the facts contained in your letter; based on the understanding that the customers send the mailing lists to TAXPAYER; and based on the understanding that TAXPAYER, not the customers, controls and directs the Illinois fulfillment houses on how and where to deliver or mail the tangible personal property, then the tangible personal property delivered or mailed throughout the United States by the fulfillment houses is exempt from tax under the interstate commerce exemption. Tangible personal property delivered or mailed to locations in Illinois is subject to tax. TAXPAYER must retain documentation to support the exemption for each delivery of tangible personal property made in interstate commerce. If sufficient documentation is not retained for a delivery, the exemption will be denied.

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.

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

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