

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.)

April 5, 2011

Dear Xxxxx:

This letter is in response to your letter dated February 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.

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:

A client of ours underwent a Sales/Use tax audit last year. They are a [sic] considered a construction contractor and are subject to Use Tax on the cost of tangible personal property incorporated into real estate.

The auditor instructed us to report the cost of tangible personal property purchased from an out of state [sic] vendor on Line 12a subject to the 6.25% tax rate. All other tangible personal property purchases from IL vendors are to be reported on Line 14a subject to the full ROT rate for their location which is 7.5%. Since it is difficult to separate the out-of-state purchases from in-state purchases we have been reporting all purchases on Line 14a and self assessing the 7.5% rate.

We have searched endlessly for specific instructions to confirm this information. The instructions for Form ST-1 state that **Line 12a amounts should include:**

- your cost of the general merchandise you purchased to use from an out-of-state retailer who did not collect Illinois tax from you, plus
- your cost of general merchandise you purchased tax free to sell at retail, but instead used or consumed yourself, plus

- your cost of general merchandise you purchased tax free to sell in performing your service, but instead used or consumed yourself, or transferred subject to use tax, plus
- your cost of general merchandise an out-of-state serviceperson used in performing a service for you, if Illinois tax was not paid.

Line 14a instructions: Write the total of all purchases you made at rates different from the rates printed in Lines 12a and 13a. This includes

- your cost of the general merchandise you purchased prior to 1/1/90 from an out-of-state retailer on which you continue to make payments, plus
- your cost of the general merchandise and qualifying food, drugs, and medical appliances on which you paid tax to another state at a rate lower than Illinois tax rates, plus
- your cost of the general merchandise and qualifying food, drugs, and medical appliances an out-of-state serviceperson used in performing a service for you, if Illinois tax was not paid.

The difference between our clients [sic] ROT rate of 7.5% and the USE Tax rate of 6.25% on purchases reported on Line 12a is significant considering the amount [sic] tangible personal property purchases they incorporate into real estate each month. We have tried to find a decisive cite that will clarify what rate these purchases should be taxed at. We've contacted the Department via the On-line support center and were told to contact the auditor or the Legal Department. We've contacted the auditor by email on 2/09/11 and have not received a response.

Any guidance you can offer will be greatly appreciated.

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.

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 out-of-State suppliers, those contractors must self assess their Use Tax liability and pay it directly to the Department at the rate of 6.25%. 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.

As a general rule, construction contractors should not be providing resale certificates to their suppliers in Illinois and to out-of-State suppliers registered to collect Illinois Use Tax and should be paying Use Tax and any locally-imposed retailers' occupation taxes at the time of purchase of tangible personal property to be incorporated into real estate. However, when the purchaser of tangible personal property may use such property by converting it into real estate, but may also resell such property "over-the-counter" apart from acting as a construction contractor, and where it is impracticable, at the time of purchasing such tangible personal property, for such purchaser to determine in which way he or she will dispose of the property, such purchaser may certify to his or her supplier that he or she is buying all of such tangible personal property for resale and thereafter account to the Department for the tax on disposing of such property. 86 Ill. Adm. Code 130.2075(b). If the purchaser subsequently uses the tangible personal property by converting it into real estate in this State in any manner, he or she must include the cost price of such tangible personal property in his or her reported taxable receipts in his or her return to the Department and must pay the State Retailers' Occupation Tax (not the Use Tax, but the Retailers' Occupation Tax) thereon to the Department, and must also pay locally-imposed retailers' occupation taxes thereon, if any. 86 Ill. Adm. Code 130.2075(b)(2). The cost price of such tangible personal property should be reported as receipts on Lines 1 and 4a of the ST-1 Sales and Use Tax Return.

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.

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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