

This letter addresses sales for resale. See 86 Ill. Adm. Code 130.1405. (This is a GIL.)

May 26, 2011

Dear Xxxxx:

This letter is in response to your letter dated March 28, 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:

I am writing about the laws and regulations regarding sales tax and shipping TPP into your state.

We are registered in the state of Illinois and collect and remit sales tax.

Please answer the following questions and provide the regulation or law where the answer is derived from.

1. We ship TPP to a client that is not a reseller in the state of Illinois, is the TPP taxable or exempt?
2. We ship TPP to a client that is registered in the state of Illinois and holds a resale permit or license, what do we need to exempt the client from sales tax?
3. An out of state dealer who holds a resale permit in their home state asks us to ship TPP into Illinois. Is the sale exempt from Illinois sales tax? Does the out of state dealer who holds a resale permit in their home state need to be registered for sales tax in the state of Illinois to be exempt from sales tax? What documentation does ABC need to exempt the out of state dealer who holds a resale permit in their home state from sales tax?

4. A foreign dealer who resells TPP from their home country asks us to ship TPP into Illinois. Can we exempt the sale from sales tax? Does the foreign dealer who resells TPP from their home country need to be registered for sales tax in the state of Illinois to be exempt from sales tax? What documentation does ABC need to exempt foreign dealer who resells TPP from their home country from sales tax?
5. We hold an auction in the state of Illinois and a client that is not a reseller that resides in the state of Illinois takes possession of the TPP, are the items taxable?
6. We hold an auction in the state of Illinois and a client that is registered in the state and holds a resale permit or license takes possession of the TPP, what do we need to exempt the client from sales tax?
7. We hold an auction in the state of Illinois and an out of state dealer who holds a resale permit in their home state takes possession of the TPP in the state of Illinois, can we exempt the transaction from sales tax? Does the out of state dealer who holds a resale permit in their home state be [sic] exempt from sales tax? What documentation does ABC need to exempt the out of state dealer who holds a resale permit in their home state from sales tax?
8. We hold an auction in the state of Illinois and a foreign dealer who resells TPP from their home country takes possession of the TPP in the state of Illinois, can we exempt the sale from sales tax? Does the foreign dealer who resells TPP from their home country need to be registered for sales tax in the state of Illinois to be exempt from sales tax? What documentation does ABC need to exempt the foreign dealer who resells TPP from their home country from sales tax?
9. What is a drop shipment?

We would like written answers to our questions so we may rely on this for any future audits and to properly apply the laws in our course of business.

DEPARTMENT'S RESPONSE:

Retailers' Occupation Tax and Use Tax

The Retailers' Occupation Tax is what is commonly referred to in other locales as "sales" tax. However, the Retailers' Occupation Tax is not a sales tax, but rather an occupation tax. The Retailers' Occupation Tax is imposed on persons engaged in the business of selling tangible personal property at retail. The complement of the Retailers' Occupation Tax is the Use Tax, which is essentially a privilege tax imposed upon the privilege of using, in Illinois, tangible personal property purchased anywhere at retail. The current tax rate is 6.25% plus any local taxes if applicable.

Sale for Resale

When a person purchases items of tangible personal property with the intention of reselling them to purchasers for use or consumption, that person engages in making retail sales of tangible personal property. This makes the initial purchase a purchase for resale, and the subsequent sale is a taxable sale at retail subject to Illinois Retailers' Occupation and Use Tax liabilities. See 86 Ill. Adm. Code 130.201 and 130.210.

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. The tax is measured by the seller's gross receipts from retail sales made in the course of such business. "Gross receipts" means the total selling price or the amount of such sales.

The retailer must pay Retailers' Occupation Tax to the Department based upon its gross receipts, or actual amount received, from the sale of the tangible personal property. 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 35 ILCS 105/3; 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 the retailer does not collect the Use Tax from the purchaser for remittance to the Department, the purchaser is responsible for remitting the Use Tax directly to the Department. See 86 Ill. Adm. Code 150.130.

The resale exemption is applicable when making sales to a purchaser who will in turn sell the tangible personal property. For general information regarding resale certificates, the Department's regulation for resale certificates, "Seller's Responsibility to Obtain Certificates of Resale and Requirements for Certificates of Resale," is found at 86 Ill. Adm. Code 130.1405. A Certificate of Resale is a statement signed by the purchaser that the property purchased by him is purchased for purposes of resale. Provided that this statement is correct, the Department will accept Certificates of Resale as prima facie proof that sales covered thereby were made for resale.

In addition to the statement, a Certificate of Resale must contain:

- 1) the seller's name and address;
- 2) the purchaser's name and address;
- 3) a description of the items being purchased for resale;
- 4) purchaser's signature, or the signature of an authorized employee or agent of the purchaser, and date of signing;
- 5) Registration Number, Resale Number, or Certification of Resale to out-of-State purchaser.

The obligations of a seller with respect to accepting a Certificate of Resale were addressed in *Rock Island Tobacco and Specialty Company v. Illinois Department of Revenue*, 87 Ill.App.3d 476, 409 N.E.2d 136, 42 Ill. Dec. 641 (3rd Dist. 1980). The *Rock Island* court held that when a retailer obtains a proper Certificate of Resale that contains a registration or resale number that is valid on the date it is given, the retailer's liability is at an end. If the purchaser uses that item himself or herself (*i.e.*, it was not purchased for resale), the Department will proceed against the purchaser, not the retailer, provided the above stated conditions are met. The purchaser's registration or reseller number can be verified at the Department's website by clicking on the "Tax registration inquiry" box.

Failure to present an active registration number or resale number and a certification to the seller that a sale is for resale creates a presumption that a sale is not for resale. This presumption may be rebutted by other evidence that all of the seller's sales are sales for resale, or that a particular sale is a sale for resale. For example, other evidence that might be used to document a sale for resale, when a registration number or resale number and certification to the seller are not provided, could include an invoice from the purchaser to his customer showing that the item was actually resold, along with a statement from the purchaser explaining why it had not obtained a resale number and certifying that the purchase was a purchase for resale in Illinois. The risk run by companies in

accepting such a certification and the risk run by purchasers in providing such a certification is that an Illinois auditor is more likely to require that more information be provided as evidence that the particular sale was, in fact, a sale for resale.

Registration

Out-of-State sellers who fall under the definition of a “retailer maintaining a place of business in this State” (see 86 Ill. Adm. Code 150.201(i)) must register to collect Illinois Use Tax from Illinois customers and remit that tax to the Department. See 86 Ill. Adm. Code 150.801(c). Please note that out-of-State sellers with any kind of agent in Illinois (not just sales or lease agents) are required to register as out-of-State Use Tax collectors. If an out-of-state dealer has no contact with Illinois, it does not fall within the definition of a “retailer maintaining a place of business in this State,” and it need not register as an out-of-State Use Tax collector.

The United States Supreme Court in *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state’s sales tax laws. The Supreme Court has set out a two-prong test for nexus. The first prong is whether the Due Process Clause is satisfied. Due Process will be satisfied if the person or entity purposely avails himself or itself of the benefits of an economic market in a forum state. *Id.* at 1910. The second prong of the Supreme Court’s nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause.

A physical presence does not mean simply an office or other physical building. Under Illinois tax law, it also includes the presence of any representative or other agent of the seller. The representative need not be a sales representative and it is immaterial for tax purposes that the representative’s presence is temporary.

Resale numbers are issued to persons who make no taxable sales in Illinois but who need the wherewithal to provide suppliers with Certificates of Resale when purchasing items that will be resold. So long as Purchasers do not act as Illinois retailers and, so long as they do not fall under the definition of a “retailer maintaining a place of business in this State”, their sales to Illinois customers are not subject to Illinois Retailers’ Occupation Tax liability, and they cannot be required to act as Use Tax collectors. So long as this is true, Purchasers qualify for resale numbers that do not require the filing of tax returns with the Illinois Department of Revenue. See 86 Ill. Adm. Code 130.1415.

Please note that the fact that Purchasers may not be required to act as Use Tax collectors for Illinois does not relieve their Customers of Use Tax liability. Therefore, if Purchasers do not collect Illinois Use Tax from their Customers, the Customers would have to pay their tax liability directly to the Illinois Department of Revenue.

Lastly, note, if a person or entity makes sales that are exclusively (*i.e.*, 100%) for resale, that person or entity is not required to register under the Illinois Retailers’ Occupation Tax Act when making such sales. See *Dearborn Wholesale Grocers, Inc. v. Whitler*, 82 Ill.2d 471 (1980). However, if a person or entity engages in making both wholesale and retail sales, they are required to register under the Retailers’ Occupation Tax Act and file monthly sales tax returns and document the exempt status of their wholesale transactions. See *Tri-America Oil Company v. Department of Revenue*, 102 Ill.2d 234 (1984).

Auctions

For general information regarding auctioneers and agents, see the Department's Regulation entitled "Auctioneers and Agents" which can be found on the Department's website at 86 Ill. Adm. Code 130.1915. When auctioneers or agents are involved in selling activities, the person who is liable for Retailers' Occupation Tax will depend on whether the auctioneer or agent is working on behalf of a disclosed or undisclosed principal. This rule applies to consignment transactions, as well. An auctioneer or agent acting on behalf of an unknown or undisclosed principal is considered to be the owner of the tangible personal property that will be sold and is responsible for paying Retailers' Occupation Tax on the gross receipts from the sale, as well as filing a sales tax return.

However, if the auctioneer or agent is acting on behalf of a known or disclosed principal, the sale of the tangible personal property is taxable to the principal and not the auctioneer or agent. A principal is deemed to be disclosed to a purchaser for use or consumption only when the name and address of such principal is made known to such purchaser at or before the time of the sale and when the name and address of the principal appears upon the books and records of the auctioneer or agent. See subsection (b) of Section 130.1915. Please be advised, however, that if the tangible personal property sold would constitute an occasional sale by the disclosed principal, then the sale is not taxable. See 86 Ill. Adm. Code 130.110 ("Occasional Sales"). If tax is due, it is based upon the total selling price, including any commission.

Drop Shipments

A drop-shipment situation is normally one in which an out-of-State purchaser makes a purchase for resale from a company which is registered with Illinois and has that company drop-ship the property to the purchaser's customer located in Illinois. For general information regarding drop shipments, you may wish to review the Department's drop shipment rules at 86 Ill. Adm. Code 130.225, which can be viewed on the Department's website. These rules provide guidance in general drop shipment situations.

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,

Debra M. Boggess
Associate Counsel

DMB:msk