

A repossession of equipment and inventory by a lender upon a default by a borrower does not constitute a transfer within the meaning of the Bulk Sales provision of the Retailers Occupation Tax Act. See 86 Ill. Adm. Code 130.1701(g)(3). (This is a GIL.)

December 7, 2011

Dear Xxxxx:

This letter is in response to your letter dated September 27, 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:

On behalf of our client, the ‘Company’, we respectfully request that the Illinois Department of Revenue (the ‘Department’) issue a private letter ruling pursuant to 2 Ill. Adm. Code 1200.110 with respect to the following factual situation.

GENERAL INFORMATION.

Enclosed please find an original Form IL-2848 Power of Attorney, authorizing the Firm to represent the Company before the Department.

This Private Letter Ruling (‘PLR’) is not requested with regard to alternative proposed transactions. The PLR is requested to determine how to proceed with respect to Bulk Sales Stop Orders issued in connection with the sale of property pursuant to a foreclosure.

The Company is not currently engaged in litigation with the Department with regard to this or any other tax matter.

To the best knowledge of the Company’s personnel, and to the best of the Firm’s knowledge, the Department has not previously ruled regarding this matter for the Company. Neither the Company nor the Firm have, at any time prior to this request,

submitted requests for any rulings or determinations regarding the same or similar issue to the Department.

The Company requests that its name and identification numbers, the location of its offices, and the name of its representative be deleted from the Private Letter Ruling prior to dissemination to others.

STATEMENT OF MATERIAL FACTS.

1. The Company has a mortgage on property located at ADDRESS, CITY, Illinois (the 'Property'), in connection with a commercial loan made by the Company to ABC, an Illinois limited liability company ('ABC'). ABC operated a service station located on the Property (the 'Business'). ABC defaulted on the loan and the Company foreclosed on the Property in COUNTY in January of 2009. INDIVIDUAL of XYZ was appointed as receiver (the 'Receiver') in an order entered DATE1, 2009. Judgment for foreclosure was entered on DATE2, at which time the Company deeded the property to ADDRESS. COMPANY, an Illinois limited liability company and single purpose entity (the 'SPE'). The Receiver operated the Property and service station located thereon through one of his affiliated entities, BUSINESS, an Illinois corporation ('BUSINESS'). In his capacity as the court appointed receiver, the Receiver decided to sell the Property and the Business in order to satisfy the loan with BUSINESS to act as seller. On DATE3, 2010 a Notice of Sale was submitted to the Illinois Department of Revenue incorrectly identifying ABC as the seller of the Property and the Business. On DATE4, 2010 a replacement Notice of Sale was submitted to the Illinois Department of Revenue correctly identifying BUSINESS as the seller of the property and the Business. The Illinois Department of Revenue issued Bulk Sales Stop Orders on both the incorrect and correct Notice of Sale. The Company paid to the Illinois Department of Revenue the amount indicated on the BUSINESS Bulk Sales Stop Order and the Department issued a release on that Order. The Company notified the Department of the error in filing the ABC Notice of Sale and requested that such Notice be cancelled and the resulting Stop Order be released. However, the Department indicated that it would not do so without a signed letter from the buyer identifying BUSINESS as the sole seller. The buyer in the transaction refused to provide the Company with an executed letter.

Opinions Requested.

1. The sale of the Property and the Business by the Receiver and BUSINESS does not warrant a Stop Order under the Department's policy regarding the sale of assets as part of a foreclosure.

2. ABC is not the seller for purposes of the proposed sale of the Business and the Property. The Notice of Sale identifying BUSINESS as seller of the Property and the Business effectively replaces and cancels the Notice of Sale incorrectly identifying ABC as seller. The Department's Stop Order issued with respect to ABC is not binding on the purchaser.

Relevant Authorities

The State of Illinois imposes notification requirements on any taxpayer, who 'outside the usual course of his business, sells or transfers the major part of any one or more of (A) the stock of goods, which he is engaged in the business of selling, (B) the furniture or fixtures, or (C) the machinery and equipment, or (D) the real property, of any business

that is the subject of the provisions of [the Illinois Income Tax Act and the Illinois Retailer's [sic] Occupation Tax Act].¹ 35 ILCS 120/5j; 35 ILCS 5/902(d).

The statutes do not specifically address whether these requirements apply in the case of a sale of assets by a court appointed receiver in connection with a foreclosure. However, some guidance can be found in private letter rulings issued by the Department.

The IDOR has explained in PLRs and General Information Letters ("GILs") that there is no need for a stop order when purchasing assets out of bankruptcy or as part of a foreclosure action.

In addition, the Department has issued several rulings on this matter involved [sic] taxpayers with order acceptance procedures similar to those of the Company. These rulings indicate that the receipt of the customer's acceptance of the Company's complete and unconditional offer to sell by its Sales Department personnel to be based in the Village will conclusively establish the situs of the sale in the Village and, consequently, the tax rates applicable to sales in the Village should apply to such sales by the Company.

In GIL 01-0036 and GIL 01-0066 the Department ruled that bulk sales notification requirements do not apply to transfers under federal bankruptcy court proceedings. These decisions reference a 1986 letter ruling addressing judicial and non-judicial foreclosure sales. The Firm was unable to locate the full copy of PLR 86-0090. However, an abbreviated version confirms that the Department declined to enforce Section 902(d) in the case of judicial and non-judicial foreclosure sales.¹ A 1987 letter ruling confirms that "[t]he Department has a standing policy of not enforcing either statute in judicial and non-judicial foreclosure actions."² The Department has also declined to enforce bulk sales withholding in connection with transfers of property made in connection with the repossession of collateral under UCC Article 9 security agreements.³

Although the letter rulings dealing referenced herein with foreclosure actions are old enough to constitute non-binding authority, the Company knows of no authority contrary to the above cited authorities.

Conclusions

1. The facts indicate that the Company effectively repossessed the Business and the Property after BUSINESS's default under the loan. At the point of transfer to the SPE, ABC ceased to hold title to the Property and the Business and could not qualify as the seller. The Stop Order issued by the Department with respect to the outstanding tax liability of ABC should be released and the Notice of Sale cancelled.

2. The proposed sale by BUSINESS at the direction of the Receiver qualifies as a sale pursuant to a foreclosure action. In accordance with the Department's policy regarding judicial and non-judicial foreclosure actions, the notification requirements under the bulk sales statutes do not apply to the sale of the Business and the Property and the Stop Orders issued by the Department relative to the sale should be released.

We respectfully request that the Department issue rulings that conclude that the Company is correct in its understanding of the application of the Illinois bulk sales

statutes to the sale of the Business and the Property, as reflected in the above conclusions set forth in this private letter ruling request.

If the Department has additional questions, needs additional information, or anticipates a response to this request that is not in accordance with the conclusions expressed in this ruling request, please contact the undersigned before a written response is delivered.

DEPARTMENT'S RESPONSE:

The Department's regulation "Public Information, Rulemaking and Organization" provides that "[w]hether to issue a private letter ruling in response to a letter ruling request is within the discretion of the Department. The Department will respond to all requests for private letter rulings either by issuance of a ruling or by a letter explaining that the request for ruling will not be honored." 2 Ill. Adm. Code 1200.110(a)(4). Further, the Department's regulations regarding Private Letter Rulings provide that "[i]f there is case law or there are regulations dispositive of the subject to the request, the Department will decline to issue a letter ruling on the subject." 86 Ill. Adm. Code 1200.110(a)(3)(D). The Department declines to issue a Private Letter Ruling since its regulations are dispositive of the subject of your request. We hope the following information is helpful.

If any taxpayer, outside the usual course of his business, sells or transfers the major part of any one or more of

- (1) the stock of goods which he is engaged in the business of selling, or
- (2) the furniture or fixtures, or
- (3) the machinery and equipment,
- (4) the real property of any business that is subject to the provisions of the Act,

the purchaser or transferee of such assets shall, no later than 10 days after the sale or transfer, file a notice of sale or transfer of business assets with the Chicago office of the Department. 86 Ill. Adm. Code 130.1701. These are the circumstances under which notice of the sale must be given to the Department pursuant to the Retailers' Occupation Tax Act. To the extent that the taxpayer is a retailer, he or she will have to comply with requirements under the Retailers' Occupation Tax Act.

Special procedures exist for the successor to minimize exposure from the predecessor. These procedures are described at subparts (a)(4) and (b) of 86 Ill. Adm. Code 130.1701. The notice of sale/purchase of business assets must be reported to the Department on Form CBS-1 no later than 10 days after the sale or transfer. This form can be obtained on the Department's website under registration forms. This form must be filed at our Chicago office at the address provided on the form. If we determine that tax is owed by the seller, an order to withhold a portion of the purchase price is issued within 10 days after receipt of the notice.

However, if the successor does no more than repossess or foreclose on property that is the subject of a note and mortgage or security interest, we do not believe that the situation is subject to the bulk sales reporting requirements because no "sale or transfer" within the statutory meaning has occurred. Please refer to 86 Ill. Adm. Code 130.1701(g)(3). Please be advised that to the extent that the successor has property transferred to him that was not subject to the note and mortgage or security interest, there would be a "transfer" subject to bulk sales reporting if the property is a major part of one of the asset types listed above.

A successor that is not subject to the notice requirements of Section 130.1701 does not have to obtain the Department's permission prior to taking possession of secured property. However, the Department recommends that such a successor provide the Department with documentation that identifies the secured property, provides the basis of the successor's claim and right to take possession of the secured property.

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

¹ 1986 WL 24257.

² Letter No. 87-215, 1987 WL 53678.

³ See Letter No. IT 92-208, 1992 WL 489017.