

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.)

December 9, 2011

Dear Xxxxx:

This letter is in response to your letter dated November 15, 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 a client, hereafter referred to as AAA (an alias), we are respectfully requesting a general information letter concerning nexus for sales tax purposes for the State of Illinois. Specifically we are inquiring if based on the business activities of AAA as described below, would nexus exist for purposes of sales or use tax to AAA including for registration and remitting purposes. Further, if nexus does exist, are the activities of AAA subject to sales or use tax.

AAA is organized as a limited liability company under the laws of the STATE. All of the members of AAA are residents of STATE. AAA has only one physical location and it is in STATE. All employees work solely in STATE. AAA has agreements with national companies (AAA's customers) to arrange repairs and maintenance to their customer's [sic] commercial buildings that are located in various states. For example if a customer's commercial building that is located in Illinois has a water leak, the corporate national office will call directly to AAA to get the services of a plumber. The customer's corporate national office may be located in another state or possibly in Illinois. AAA then will locate local contractors (e.g. plumbers in Illinois for this example), and then usually issue a repair order on a not-to-exceed basis to a local contractor (e.g. plumber). A not-to-exceed order is a work order where the price is set by AAA at a limit that the contractor cannot exceed. The contractor (e.g. plumber) can choose whether to accept such an

order or counter with different amount. As an alternative to a not-to-exceed order, on occasion AAA will get bids and then issue a repair order to the contractor (e.g. plumber). The repair order will direct the contractor (e.g. plumber) to contact the building manager to schedule and make the repairs. Upon completion of the repairs AAA will pay the contractor's (e.g. plumber) bill. AAA will then bill their commercial building customer for the cost of the contractor (e.g. plumber) and add on AAA's management fee. Management fees usually run from 14% to 23% of the contractor's bill. AAA's has no pre-existing arrangement with the contractors and no continuing one after the job is completed. Repair and maintenance work could include such items as plumbing, electrical, painting and other general building repairs.

Based [sic] our review of federal law and Illinois statutes and rules it does not appear AAA's activities would create nexus for purposes of reporting and remitting sales or use taxes to Illinois. Further, if nexus does exist, does it not appear AAA's activities would be subject to reporting and remitting sales or use tax to Illinois. Nonetheless, we are seeking a general information letter on these matters.

We would appreciate your prompt assistance on this matter. If you have any questions please do not hesitate to contact us. Our address and telephone number are noted on this letter. Thank you very much.

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.

Construction Contractors

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. 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 suppliers, those contractors must self assess their Use Tax liability and pay it directly to the Department. 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.

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.

If subcontractors are utilized and are acting as construction contractors, the transaction between the general contractors and the subcontractors is not a taxable transaction. The subcontractors incur Use Tax liability on any tangible personal property that they purchase for incorporation into real estate. If, however, general contractors make purchases of tangible personal property and then contract to have subcontractors install that tangible personal property, the general contractors incur Use Tax liability on that tangible personal property.

Service Occupation Tax

Illinois Retailers' 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. For your general information see of 86 Ill. Adm. Code 140.101 through 140.109 regarding sales of service and Service Occupation Tax.

Under the Service Occupation Tax Act, businesses providing services (*i.e.* servicemen) are taxed on tangible personal property transferred as an incident to sales of service. 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. The serviceman's liability may be calculated in one of four ways: (1) separately stated selling price of tangible personal property transferred incident to service; (2) 50% of the serviceman's entire bill; (3) Service Occupation Tax on the serviceman's cost price if the serviceman is a registered *de minimis* serviceman; or (4) Use Tax on the serviceman's cost price if the serviceman is a *de minimis* serviceman and is not otherwise required to be registered under Section 2a of the Retailers' Occupation Tax Act.

When a serviceman contracts out all or a portion of the service that he will provide, he is acting as a primary serviceman in a multi-service situation. As a primary serviceman, he engages the services of a secondary serviceman in order to obtain all or part of the product and services desired by the service customer. See 86 Ill. Adm. Code 140.145 to determine the tax incurred in these situations.

Nexus

The definition of a "serviceman maintaining a place of business in Illinois" is set forth at 86 Ill. Adm. Code 160.105(f). An out-of-state "serviceman maintaining a place of business in this State" is required to register with the State as an Illinois Service Use Tax collector. The serviceman must collect and remit Service Use Tax to the State of Illinois on behalf of its Illinois customers. Under Section 160.105(f), an Illinois agent or representative operating in this State under the company's

authority would give the State nexus over the out-of-state serviceman. As an out-of-state serviceman maintaining a place of business in Illinois, a company is required to register in Illinois as a Service Use Tax collector and remit tax to the Department on behalf of its Illinois customers.

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 tax laws. The Supreme Court has set out a 2-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 itself or himself of the benefits of an economic market in a forum state. *Quill* 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 is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis, will trigger Use Tax collection responsibilities. Please refer to *Brown's Furniture, Inc. v. Wagner*, 171 Ill.2d 410, (1996).

The final type of serviceman is the out-of-State serviceman that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A serviceman in this situation does not incur Service Occupation Tax on sales of service into Illinois and is not required to collect Service Use Tax on behalf of its Illinois customers. However, the serviceman's Illinois customers will still incur Service Use Tax liability on the purchase of the goods and have a duty to self-assess and remit their Service Use Tax liability directly to the State.

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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