

ST 11-0110-GIL 12/29/2011 DELIVERY CHARGES

Charges designated as delivery or transportation charges are not taxable if it can be shown that they are both agreed to separately from the selling price of the tangible personal property which is sold and that such charges are actually reflective of the costs of shipping. See 86 Ill. Adm. Code 130.415. (This is a GIL.)

December 29, 2011

Dear Xxxxx:

This letter is in response to your letter dated July 12, 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:

We have questions concerning sales tax law that we are asking for further clarification. An agent with the Illinois Department of Revenue said that we could request an answer from your department since they were unable to give us an answer and support the decision with information from the Department's website. Our question relates to an ophthalmology office.

When applying ST10-0118-GIL 12/20/2010 Medical Appliances, we understand the following:

When health care professionals such as optometrists render service, they are not subject to Retailers' Occupation Tax liability. They are, however, subject to liability under the Service Occupation Tax Act to the extent they transfer tangible personal property incident to their rendering service.

When applying ST08-00036-GIL 03/21/2008 Medical Appliances, we understand the following:

Sales made to Medicaid and Medicare are exempt from tax as sales to a government body so long as the exemption is properly documented

through provision of an active exemption identification number. While no tax may be due on payments made directly to vendors by Medicare, Medicaid, or the Illinois Department of Healthcare and Family Services, tax is due upon any portions of bills paid by individuals or private insurance companies not covered by Medicare, Medicaid, or the Illinois Department of Healthcare and Family Services. This means, for example, when Medicare directly pays 80% of the medical bill and the remaining 20% is billed to the patient or his insurance company, assuming proper documentation of the exemption, the 80% is tax exempt as a governmental payment while the 20% is taxable. It is important to note that payments will only be exempt from tax when they are paid directly by the government agency. It is not enough that a payment to the vendor is made by a patient or insurance and reimbursed by the government agency.

Our questions are as follows:

1. Are qualifying taxable sales, which are provided to patients covered by COMPANY State of Illinois, treated for sales tax; the same way sales to Medicaid and Medicare patients are?
2. In addition, are the excess shipping and handling charges the over actual cost taxable for Medicaid and Medicare patients?
3. If the excess shipping and handling is taxable, which sales tax rate is applied when the sales are related to qualifying medical appliances that are taxed at the lower qualifying rate?
4. When the patient's taxable co-pay is a set exact fee, are the amounts received assumed to have sales tax already included in that set amount or is the full amount received subjected to sales tax? For example: If the patient's co-pay \$20.00, is it assumed that the \$20 represents sales and sales tax? Or is the sale accounted for at \$20 and the seller responsible to remit sales tax in addition to the \$20? Please keep in mind that the seller, by contact [sic], cannot receive additional receipts and will not be paid the sales tax that should then be assessed.

Enclosed are copies of the referenced Department responses.

Thank you for your clarification and assistance

DEPARTMENT'S RESPONSE:

Retailers' Occupation Tax and Use Tax do not apply to receipts from sales of personal services. Under the Service Occupation Tax Act, servicemen are taxed on tangible personal property transferred incident to sales of service. For your general information, please see the Department's Regulation at 86 Ill. Adm. Code 140.101 regarding sales of service and Service Occupation Tax which can be found on the Department's website. Sales of services by optometrists are subject to Service Occupation Tax, unless an exemption exists.

Sales to a governmental body are subject to tax unless the governmental body has an active exemption identification "E" number. If an organization or governmental body does not have an "E" number, then its purchases are subject to tax. Only sales to the organization or governmental body holding the "E" number are exempt, not sales to individual members of the organization.

Accordingly, sales made to Medicare and Medicaid are exempt from tax as sales to a governmental body so long as the exemption is properly documented through the use of an active exemption identification number ("E" number). See 86 Ill. Adm. Code 130.2080(a). While no tax may be due on payments made directly to vendors by Medicare or Medicaid, tax is due upon any portion of the sale that is paid by individuals or private insurance companies not covered by Medicare and Medicaid. For example, when Medicare directly pays 80% of the total sale and the remaining 20% of the sale is paid by the patient or his insurance company, assuming proper documentation of the exemption, the 80% is tax exempt as a sale to a governmental body while the 20% is taxable.

The purchase of tangible personal property that is transferred to service customers may result in either Service Occupation Tax liability or Use Tax liability for the servicemen, depending upon which tax base the servicemen choose to calculate their liability. Servicemen may calculate their tax base in one of four ways: (1) separately stated selling price; (2) 50% of the entire bill; (3) Service Occupation Tax on cost price if they are registered de minimis servicemen; or, (4) Use Tax on cost price if the servicemen are de minimis and are not otherwise required to be registered under the Retailers' Occupation Tax Act.

Using the first method, servicemen may separately state the selling price of each item transferred as a result of sales of service. The tax is based on the separately stated selling price of the tangible personal property transferred. If servicemen do not wish to separately state the selling price of the tangible personal property transferred, those servicemen must use 50% of the entire bill to their service customers as the tax base. Both of the above methods provide that in no event may the tax base be less than the cost price of the tangible personal property transferred. Under these methods, servicemen may provide their suppliers with Certificates of Resale when purchasing the tangible personal property to be transferred as a part of the sales of service. In any event, persons making purchases from servicemen incur a corresponding Service Use Tax.

The third way servicemen may account for their tax liability only applies to de minimis servicemen who have either chosen to be registered or are required to be registered because they incur Retailers' Occupation Tax liability with respect to a portion of their business. Servicemen may qualify as de minimis if they determine that their annual aggregate cost price of tangible personal property transferred incident to sales of service is less than 35% of their annual gross receipts from service transactions (75% in the case of pharmacists and persons engaged in graphic arts production). See, 86 Ill. Adm. Code 140.101(f). This class of registered de minimis servicemen is authorized to pay Service Occupation Tax (which includes local taxes) based upon the cost price of tangible personal property transferred incident to sales of service. Persons making purchases from this class of registered de minimis servicemen incur the corresponding Service Use Tax on their purchases absent exemptions. The servicemen remit the tax to the Department by filing returns and do not pay tax to suppliers. They provide suppliers with Certificates of Resale for the tangible personal property transferred to service customers.

The final method of determining tax liability may be used by de minimis servicemen that are not otherwise required to be registered under the Retailers' Occupation Tax Act. Servicemen may qualify as de minimis if they determine that their annual aggregate cost price of tangible personal property transferred incident to sales of service is less than 35% of their annual gross receipts from service transactions (75% in the case of pharmacists and persons engaged in graphic arts production). Such de minimis servicemen may pay Use Tax to their suppliers or may self-assess and

remit Use Tax to the Department when making purchases from unregistered out-of-State suppliers. Those servicemen are not authorized to collect "tax" from their service customers, nor are they liable for Service Occupation Tax. It should be noted that servicemen no longer have the option of determining whether they are de minimis using a transaction by transaction basis.

Most optometrists are registered de minimis servicemen because they are generally registered under the Retailers' Occupation Tax Act because they sell other kinds of tangible personal property. (See the third method payment above.) These servicemen pay Service Occupation Tax to the Department based upon the cost price of tangible personal property transferred incident to their sales of service. If a portion of a sale of service by a registered de minimis serviceman is to an exempt organization, such as a governmental entity with an E-number, that portion of the transaction is not taxable. As a technical matter, that portion of the transaction that is not taxable represents the portion of the cost price of the tangible personal property transferred incident to the sale of service that is not subject to the Service Occupation Tax. Likewise, the remaining portion of the transaction that is taxable represents the portion of the cost price of the tangible personal property transferred incident to the sale of service that is subject to the Service Occupation Tax. However, unlike the Retailers' Occupation Tax, servicemen are not required to separately state the tax and many do not. For this reason, it may appear that they are not collecting the tax when, in fact, they may be indirectly collecting it from the individual or third party.

The Department's regulation "Cost of Doing Business Not Deductible" 86 Ill. Adm. Code 130.410, provides, in part, that in computing Retailers' Occupation Tax liability, no deductions shall be made by a taxpayer from gross receipts or selling prices on account of the cost of property sold, the cost of incoming freight or transportation costs, or any other expenses whatsoever. Costs of doing business are an element of the retailer's gross receipts subject to tax even if separately stated on the bill to the customer.

Note, if a seller delivers the tangible personal property to the buyer, and the seller and the buyer agree upon the transportation or delivery charges separately from the selling price of the tangible personal property which is sold, then the cost of the transportation or delivery service is not a part of the "selling price" of the tangible personal property which is sold, but instead is a service charge, separately contracted for, and need not be included in the figure upon which the seller computes his or her tax liability. See the Department's regulation at 86 Ill. Adm. Code 130.415(d).

As noted in subsection (d) of Section 130.415, if the seller and the buyer agree upon the transportation or delivery charges separately from the selling price of the tangible personal property which is sold, then the cost of the transportation or delivery service is not a part of the "selling price" of the tangible personal property which is sold, but instead is a service charge, separately contracted for, and need not be included in the figure upon which the seller computes his Retailers' Occupation Tax liability.

A separate listing on an invoice of such charges is not sufficient to demonstrate a separate agreement. The best evidence that transportation or delivery charges were agreed to separately and apart from the selling price is a separate and distinct contract for transportation or delivery. However, documentation which demonstrates that the purchaser had the option of taking delivery of the property, at the seller's location, for the agreed purchase price, or having delivery made by the seller for the agreed purchase price, plus an ascertained or ascertainable delivery charge, will suffice. As stated in Section 130.415 of the Department's regulations, if the charges for transportation or delivery exceed the cost of delivery or transportation, the excess amount is subject to tax.

Please be aware, however, in light of a Supreme Court of Illinois case of *Kean v. Wal-Mart Stores, Inc.*, 235 Ill.2d 351, 919 N.E.2d 926 (2009) concerning the taxation of delivery charges, the Department is considering amending Section 130.415.

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,

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