ST 14-0029-GIL 05/05/2014 CONSTRUCTION CONTRACTORS
As end users of such tangible personal property, construction contractors incur Use Tax liability for such purchases based upon the cost price of the tangible personal property. See 86 Ill. Adm. Code 130.1940 and 86 Ill. Adm. Code 130.2075 (This is a GIL.)

May 5, 2014

Dear Xxxx:

This letter is in response to your letter dated April 24, 2014, 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 company, COMPANY, I am inquiring as to the taxable status of the services we will be invoicing to the railroads. We will be providing these services at various locations within the state and need to verify exactly what is taxable and non-taxable to them.
> Our services include the following:
> - Lubricating grease
> - Parts to fix railroad existing and new lubricators owned by the railroad
> - Travel time-per diem invoiced for our travel expense
> - Other labor- a per hour rate charged for all labor
> - Freight-charges that may be incurred for special parts ordered and shipped to location
> - Mileage- a per mile charge for travel to and from location.
>
> Our services include the installation and maintenance on lubricators and pumps that are attached to the rail track. From the lubricator there are hoses that run over to the rail of which there are bars that are attached to the rail of which lubricant comes out to go on the track. For this we will charge either labor or a delivery fee. We also charge travel time and per diem.
>
> There is a separate charge for any lubricant and parts used for installation or repair of a lubricator. We also provide equipment and an operator for which we have a charge. An example of this would be a skidster which is used in the installation of a wayside lubricator and an operator for the skidster.

(See attached pictures)

We are also inquiring as to what is considered to be the “end user location”- as our work is done within a general area consisting of many miles/mileposts. Is there an easy way to determine this? Due to the numerous county and city tax rates in most states, please advise as to what needs to be used as our final taxable location within the state for billing our customer. On behalf of your state, our customers, and COMPANY’s sales tax compliance, we want to make sure that we are collecting the sales tax appropriately.

Thank you for your assistance-

DEPARTMENT’S RESPONSE:

Retailers’ Occupation Tax

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. 86 Ill. Adm. Code 130.101. The Use Tax Act imposes a tax upon the privilege of using in this State tangible personal property purchased at retail from a retailer. 86 Ill. Adm. Code 150.101. If no tangible personal property is being transferred to the customers, then neither Illinois Retailers’ Occupation Tax nor Use Tax would apply. Likewise, the Service Occupation Tax Act and Service Use Tax are imposed on the transfer of tangible personal property incident to sales of service. 86 Ill. Adm. Code 140.101 and 160.101. If no tangible personal property is being transferred to customers incident to the services being provided, then neither Illinois Service Occupation Tax nor Service Use Tax would apply. You mention several charges in your letter. It is difficult to determine what information to provide you regarding the taxability of those charges because different tax liabilities apply depending on factors like how the transactions are invoiced and what provisions are covered by contracts.

The Retailers’ Occupation Tax is based upon the “selling price” of the tangible personal property sold. Section 1 of the Retailers’ Occupation Tax Act defines the term, “selling price,” as the “consideration for a sale valued in money … and shall be determined without any deduction on account of the cost of the property sold, the cost of materials used, labor or service cost or any other expense whatsoever….” See 35 ILCS 120/1. As indicated by this definition, a retailer’s cost of doing business is not deductible from his or her gross receipts. This principle is articulated in Section 130.410 of the Department’s rules. (86 Ill. Adm. Code 130.410) This rule states that in calculating Retailers’ Occupation Tax liability, “labor or service costs” . . . “overhead costs” . . . “or any other expenses whatsoever” are not deductible from gross receipts. The rule provides that these 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.

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).

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. Note, 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. For further information, see *Nancy Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 919 N.E.2d 926 (2009).

When you sell tangible personal property and perform labor associated with that property, the taxability hinges on whether the labor was separately contracted for. Section 130.450 (86 Ill. Adm. Code 130.450) states that "[w]here the seller engages in the business of selling tangible personal property at retail, and such tangible personal property is installed or altered for the purchaser by the seller (or some other special service is performed for the purchaser by the seller with respect to such property), the gross receipts of the seller on account of his charges for such installation, alteration or other special service must be included in the receipts by which his Retailers' Occupation Tax liability is measured, if such installation, alteration or other special service charges are included in the selling price of the tangible personal property which is sold." This rule goes on to say that the fact that the special services are billed separately from the charge for the property sold does not change this result.

Section 130.450 goes on to say that if the seller and the buyer agree on the special service charges separately from the selling price of the property, then those charges are excluded from Retailers' Occupation Tax. Simply stating the fees separately does not change the facts of the sale. In sum, in accordance with Sections 130.415 and 130.450, delivery and installation fees are generally subject to Retailers' Occupation Tax as part of gross receipts unless it can be shown that they were contracted for separately.

Service Occupation Tax

Please be aware that if you are not selling tangible personal property at retail, but instead you are transferring tangible personal property incident to providing a service, 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.

Using the first method, servicemen may separately state the selling price of each item transferred as a result of the sale of service. The tax is then calculated on the separately-stated selling price of the tangible personal property transferred. If the servicemen do not separately state the selling price of the tangible personal property transferred, they must use 50% of the entire bill to the service customer as the tax base. Both of the above methods provide that in no event may the tax

base be less than the servicemen's cost price of the tangible personal property transferred. *See* 86 Ill. Adm. Code 140.106.

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. *See* 86 Ill. Adm. Code 140.109. Servicemen may qualify as de minimis if they determine that the annual aggregate cost price of tangible personal property transferred as an incident of the sale of service is less than 35% of the total annual gross receipts from service transactions (75% in the case of pharmacists and persons engaged in graphics arts production). Servicemen cannot determine whether they are de minimis on a transaction-by-transaction basis. Registered de minimis servicemen are authorized to pay Service Occupation Tax (which includes local taxes) based upon their cost price of tangible personal property transferred incident to the sale of service. Such servicemen should give suppliers resale certificates and remit Service Occupation Tax using the Service Occupation Tax rates for their locations. Such servicemen also collect a corresponding amount of Service Use Tax from their customers, absent an exemption.

The final method of determining tax liability may be used by de minimis servicemen that are not otherwise required to be registered under Section 2a of the Retailers' Occupation Tax Act. Servicemen may qualify as de minimis if they determine that the annual aggregate cost price of tangible personal property transferred as an incident of sales of service is less than 35% of the servicemen's annual gross receipts from service transactions (75% in the case of pharmacists and persons engaged in graphic arts production). Such de minimis servicemen handle their tax liability by paying Use Tax to their suppliers. If their suppliers are not registered to collect and remit tax, the servicemen must register, self-assess and remit Use Tax to the Department. The servicemen are considered to be the end-users of the tangible personal property transferred incident to service. Consequently, they are not authorized to collect a "tax" from the service customers. *See* 86 Ill. Adm. Code 140.108.

Construction Contracts

If you are permanently affixing items to real estate, different rules may apply. If a person or business enters into a contract to permanently incorporate tangible personal property into real estate, then it would be acting as a construction contractor. 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, contractors incur Use Tax liability for such purchases based upon the cost price of the tangible personal property. See 86 Ill. Adm. Code 130.1940 and 86 Ill. Adm. Code 130.2075. Because there is no local Use Tax, municipal tax rates would not apply. Persons from other states who act as construction contractors in Illinois by permanently affixing tangible personal property to real estate owe Illinois Use Tax on the cost price of the tangible personal property affixed to that real estate.

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.

Local Taxes

You also inquired about which local tax rate to use when billing customers. Please be advised of the Department's proposed regulations regarding the local Retailers' Occupation Tax Acts. These proposed regulations are in response to the Illinois Supreme Court's recent decision in *Hartney Fuel Oil Company v. Hamer*, 2013 IL 115130 (November 21, 2013). If you have questions regarding local tax rates, we encourage you to look at these proposed regulations on the Department's website at http://tax.illinois.gov/News/HartneyDecision.htm.

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,

Cara Bishop
Associate Counsel

CB:lkm