

ST 15-0007-GIL 01/12/2015 CONSTRUCTION CONTRACTORS: 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.)

January 12, 2015

Dear XXXX:

This letter is in response to your letter dated September 3, 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:

Statement of Facts and Information:

COMPANY is engaged in custom millwork fabrication and installation, mainly, for commercial purposes. All cabinets, countertops, wall fixtures, etc are made on site at the production facility in STATE and delivered to various construction job sites inside of IL by COMPANY employees. Any complex solid surface pieces require a COMPANY employee to install them on the job site. The majority of all jobs require these complex pieces. All pieces are custom and made to customer specifications; no stock of finished product is maintained for sale to the public. In addition, most large jobs are bid based and progress billed.

Typical Job:

Most jobs are part of a bid process where COMPANY submits a bid based upon architect drawings to either a general contractor or the final customer.

Once the bid is accepted and construction is started on the job site, a COMPANY employee will go to the job site to field measure prior to fabrication on all jobs. In addition, COMPANY employees are required to attend architect and construction meetings, generally, on the job site, both prior to and during construction when related to its portion of the job. All large and complex pieces are installed on the job site with the help of COMPANY employees. A typical job will also require the installation of locks into cabinets and drawers, installation of all field seams for solid surface materials, adjusting of drawers and/or doors, and various other finishing items. COMPANY employees also buff out scratches in solid surface, fix any chips, dents and dings in laminate that occurred during shipping and/or installation on the job site, do a final fitting and squaring of all cabinets and drawers, and provide a final inspection of all COMPANY related work areas. Finally, if necessary, COMPANY receives a punch list for any remaining items that must be signed off by the customer to ensure that work is complete. Since COMPANY is involved in the bidding process and provides substantial on job site installation and other services, COMPANY considers itself a construction contractor and self-assesses use tax on materials.

Extra Work Orders:

At certain times, either the general contractor or customer will request extra work orders (EWO) generally related to a much larger job as the construction moves forward. Sometimes, these EWOs involve non-complex millwork that is affixed into real property by either the general contractor or a customer's contractor without a COMPANY employee being present. Generally, a phone call is placed to COMPANY to have one of its employees come to the job site and field measure and potentially mock up, using cardboard or other appropriate material, the required product. COMPANY makes a drawing which is sent to the customer, the customer signs off on the drawing for work to begin, and the product is delivered. A COMPANY employee is still responsible for all finishing work at the job site; including lock installation, solid surface seams if necessary, and final fitting.

Questions:

When another contractor installs finished product without the help of COMPANY employee, is COMPANY still considered a construction contractor, and hence subject to use tax on material costs due to the other nature of their work on the job site (measure, drawings, job meetings, installation of other products, field seams, lock installation, and other finishing work) and the custom nature of all pieces?

Is the installation of locks and other finish items from EWO considered installation into real property if a COMPANY employee did not directly affix the larger item into real property?

Is there a de minimis amount for an EWO compared to the larger job that would still require the charging of use tax? Or is there a threshold amount from an EWO that would require the charging of sales tax on the entire EWO amount?

Since all items produced by COMPANY are custom and only have value to the purchaser, is COMPANY a "serviceman" if it meets the cost of materials/goods test?

Prior Issues:

To the best of our knowledge, COMPANY or its representatives have never submitted a Private Letter Ruling request to IL for this or any similar or other issue.

Support for Current Tax Treatment:

Title 86 Part 130 Section 130.1940 Construction Contractors & Real Estate Developers.

Title 86 Part 130 Section 130 2075 [sic] Sales to Construction Contractors
ST 07-0057-GIL

Contrary Views for Current Tax Treatment:

Title 86 Part 130 Section 130.1940 Construction Contractors & Real Estate Developers. Title 86 Part 130 Section 130 2075 [sic] Sales to Construction Contractors

COMPANY did not directly affix all finished product to real property.

Trade Secrets:

There are no trade secrets involved in this matter; the record can be public.

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). The Department recently met and determined that it would decline to issue a Private Letter Ruling in response to your request. We hope however, the following General Information Letter will be helpful in addressing your questions.

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.

If a customer purchases tangible personal property over-the-counter without installation, for example an appliance or counter tops, then the retailer owes Retailers' Occupation Tax and must collect the corresponding Use Tax from the customer. If a customer purchases appliances or counter tops over-the-counter and separately contracts for installation of the appliances or cabinets, then the retailer owes Retailers' Occupation Tax and must collect the corresponding Use Tax from the customer on the sale of the appliances or cabinets. The separately contracted for installation of the appliances or cabinets is a separate service and no Retailers' Occupation Tax is incurred by the customer on the installation charges. See 86 Ill. Adm. Code 130.450.

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 (whether or not the cost of installation is separately stated in the contract). Obvious examples of the type of tangible personal property that is permanently affixed or incorporated into a structure are bathtubs, sinks, lavatories, cabinets built into the structure, water heaters and water softeners. Stoves and refrigerators that are not free standing and are built into the structure are some additional examples. Regulations governing the tax liabilities of construction contractors in Illinois may be found at 86 Ill. Adm. Code 130.1940 and 130.2075 on the Department's 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 he or she will permanently affix to or incorporate into real property in this State will be subject to Use Tax. If such contractors did not pay the Use Tax liability to their out-of-State suppliers, those contractors must self assess their Use Tax liability and pay it directly to the Department at the rate of 6.25%. 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.

As a general rule, construction contractors should not provide resale certificates to their suppliers in Illinois and to out-of-State suppliers registered to collect Illinois Use Tax and should instead pay Use Tax and any locally-imposed retailers' occupation taxes at the time of purchase of tangible personal property to be incorporated into real estate. However, when the purchaser of tangible personal property may use such property by converting it into real estate, but may also resell such property "over-the-counter" apart from acting as a construction contractor, and where it is impracticable, at the time of purchasing such tangible personal property, for such purchaser to determine in which way he will dispose of the property, such

purchaser may certify to his supplier that he is buying all of such tangible personal property for resale and thereafter account to the Department for the tax on disposing of such property. 86 Ill. Adm. Code 130.2075(b). If the purchaser subsequently uses the tangible personal property by converting it into real estate in this State in any manner, he must include the cost price of such tangible personal property in his reported taxable receipts in his return to the Department and must pay the State Retailers' Occupation Tax (not the Use Tax, but the Retailers' Occupation Tax) thereon to the Department, and must also pay locally-imposed retailers' occupation taxes thereon, if any. 86 Ill. Adm. Code 130.2075(b)(2). The cost price of such tangible personal property should be reported as receipts on Lines 1 and 4a of the ST-1 Sales and Use Tax Return. If the purchaser subsequently sells the tangible personal property "over-the-counter" he will owe Retailers' Occupation Tax and any locally-imposed retailers' occupation taxes on the selling price.

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 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 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 do the installation of that tangible personal property, the general contractors incur Use Tax liability on that tangible personal property.

I hope this information is helpful. If you have further questions related to the Illinois sales tax laws, 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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