

This letter discusses transportation and delivery charges in light of the decision in *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 919 N.E.2d 926 (2009). (This is a PLR.)

July 16, 2015

Dear Mr. XXXX:

This letter is in response to your letter dated June 11, 2015, 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.

Review of your request disclosed that all the information described in paragraphs 1 through 8 of Section 1200.110 appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to COMPANY for the issue or issues presented in this ruling, and is subject to the provisions of subsection (e) of Section 1200.110 governing expiration of Private Letter Rulings. Issuance of this ruling is conditioned upon the understanding that neither COMPANY nor a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request. In your letter you have stated and made inquiry as follows:

On behalf of COMPANY (the “Taxpayer” or “COMPANY”), as authorized by the enclosed IL-2848 Power of Attorney executed by the Taxpayer, FIRM, respectfully requests the Department’s Private Letter Ruling that:

An out-of-state vineyard/winery that is registered as an Illinois Use Tax collector and which makes online sales of wine is not, pursuant to 86 Ill. Admin. Code § 130.415(d), required to charge Illinois Use Tax on the separately stated shipping charge on the invoice for such purchase by an Illinois purchaser when it offers its online customers (including, its Illinois customers) the delivery options to (A) have the wine shipped to the Illinois purchaser, or (B) to have the purchaser take delivery of his or her purchase at the vineyard/winery outside of Illinois, and the Illinois customer declines option (B) and chooses option (A).

We set forth below the information required by Section 1200.110 of the Illinois Administrative Code.

STATEMENT OF MATERIAL FACTS

1. Taxpayer Information: The taxpayer submitting the Private Letter Ruling request is COMPANY. COMPANY is an OUT-OF-STATE limited liability company, with its winery located at ADDRESS.

2. Description of Taxpayer's Business Operations:

COMPANY offers a tasting room and caves on their estate in which its customers from all over the world can visit, taste and purchase COMPANY's exceptional wines.

COMPANY sells and ships wine to its customers, including its Illinois customers, through several means, including its website www.COMPANY.com (the "Website").

As required by Illinois law, COMPANY is registered with the Illinois Department of Revenue (the "Department") as a Use Tax collector (a winery shipper's license) and reports and remits tax to the Department on its sales to Illinois purchasers. In order to purchase a bottle of wine from the Website, a customer must enter the Website's "shop" page. Once at the shop page, the customer can then choose what type of wine he or she would like to browse (i.e., "Cabernet Sauvignon and Cabernet Blends" or "Other Red Wines"). In order to add a bottle of wine to his or her cart, the customer must (i) choose either (a) to ship the wine to "yourself", later in the process, the customer fills out his or her shipping address, or (b) pick up the wine at the "winery tasting room." See **Exhibit A**. A customer cannot place the bottle or case of wine in his or her shopping cart, and therefore cannot purchase the wine, until he or she chooses to have either (a) the wine shipped to his or [sic] desired location or (b) to pick up the wine at the winery tasting room.

3. Audits and Litigation:

COMPANY is not presently under audit by the Department, and COMPANY has not been assessed tax by the Department. COMPANY is not a party in litigation initiated by the Department, or in which the Department is a named party.

Neither COMPANY nor its advisors have previously requested, or requested and withdrawn, a ruling request on this issue.

RULING REQUESTED

Taxpayer requests from the Department a Private Letter Ruling that:

An out-of-state vineyard/winery that is registered as an Illinois Use Tax collector and which makes online sales of wine is not, pursuant to 86 Ill. Admin. Code § 130.415(d), required to charge Illinois Use Tax on the separately stated shipping charge on the invoice for such purchase by an Illinois purchaser when it offers its online customers (including, its Illinois customers) the delivery options to (A) have the wine shipped to the Illinois purchaser, or (B) to have the purchaser take delivery of his or her purchase at the vineyard/winery outside of Illinois, and the Illinois purchaser declines option (B) and chooses option (A).

STATEMENT OF LAW AND ANALYSIS

Ruling Request.

Illinois Department of Revenue Regulation Section 130.415, in pertinent part, provides as follows:

(b) The answer to the question of whether or not a seller, in computing his Retailers' Occupation Tax liability, may deduct, from his gross receipts from sales of tangible personal property at retail, amounts charged by him to his customers on account of his payment of transportation or delivery charges in order to secure delivery of the property to such customers, or on account of his incurrence of expense in making such delivery himself, depends not upon the separate billing of such transportation or delivery charges or expense, but upon whether the transportation or delivery charges are included in the selling price of the property which is sold or whether the seller and the buyer contract separately for such transportation or delivery charges by not including such charges in such selling price. In addition, charges for transportation and delivery must not exceed the costs of transportation or delivery. If those charges do exceed the cost of delivery or transportation, the excess amount is subject to tax.

* * *

(d) If the seller and the buyer agree upon the transportation and 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. Delivery charges are deemed to be agreed upon separately from the selling price of the tangible personal property being sold so long as the seller requires a separate charge for delivery and so long as the charges designated as transportation or delivery or shipping and handling are actually reflective of the costs of such shipping, transportation or delivery. . . . 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 the delivery made by the seller for the agreed purchase price, plus an ascertained or ascertainable delivery charge, will suffice.

86 Ill. Admin. Code § 130.415(b) and (d).

Section 12 of the Use Tax Act (the "UTA") incorporates by reference as though fully set forth in the UTA the sections of the Retailers Occupation Tax Act that are being explained in the above Department of Revenue Regulation.

Exhibit A consists of documentation that demonstrates that a customer of COMPANY always has the option of taking delivery of his or her purchase at the seller's location. As a result, COMPANY is not required to collect Use Tax on its sales to its Illinois customers, whether those sales are made by phone, email or the Website.

Illinois Department of Revenue Regulation Section 130.415 is applicable to all retailers and holds no provision applicable only to a particular industry or transaction, nor does it limit its application by the amount of the purchase or the physical dimensions or properties of the item purchased. Although COMPANY is not requesting a ruling on the constitutional implications of denying the requested ruling, we note that making such distinctions in the application of Section 130.415 without expressly providing for them in Section 130.415 would raise concerns under the Illinois Administrative Procedure Act and under the due process clauses of the Illinois and Federal constitutions.

Lastly, Regulation Section 130.415 does not limit the delivery option of taking delivery at seller's location to locations within Illinois. Although COMPANY is not requesting a ruling on the constitutional implications of denying the requested ruling, we note that a reading of Regulation Section 130.415 which would restrict the delivery option to only seller locations within Illinois would impermissibly discriminate against interstate commerce.

DEPARTMENT'S RESPONSE:

The Department's regulation regarding transportation and delivery charges, 86 Ill. Adm. Code 130.415, is under review in light of the decision in *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 919 N.E.2d 926 (2009). At issue in *Kean* was whether shipping charges for certain Internet purchases of tangible personal property were subject to Illinois sales tax. The court found that an "inseparable link" existed between the sale and delivery of the merchandise plaintiffs purchased from Wal-Mart's Internet store. Thus, the court in *Kean* concluded that the outgoing transportation and delivery charges were part of the gross receipts subject to the Retailers' Occupation Tax.

An inseparable link exists when (a) the transportation and delivery charges are not separately identified to the purchaser on the contract or invoice or (b) the transportation and delivery charges are separately identified to the purchaser on the contract or invoice, but the seller does not offer the purchaser the option to receive the property in any manner except by delivery from the seller (i.e., no pick-up option). In contrast, if the tangible personal property that the customer agreed to buy can be sold to the customer without the retailer rendering the delivery service, then an inseparable link does not exist and the delivery charges should not be included in the selling price of the sale of tangible personal property. *Kean*, 235 Ill. 2d at 375.

Thus, when charges for outgoing transportation and delivery are separately identified and the purchaser has the option to pick up the tangible personal property, outgoing transportation and delivery is considered a service separate and distinct from the sale of tangible personal property that

is being transported or delivered and charges for such services should be excluded from the gross receipts subject to the Retailers' Occupation Tax (or Use Tax in the case of out-of-state wineries who sell directly to Illinois residents). When a seller offers the purchaser the option to pick up the property at the seller's location, the seller must maintain documentation which demonstrates that the purchaser had that option.

In your letter, you stated that your customers have the option to come to your winery and pick up any wine they purchase from you or they can have the wine delivered to them. In addition, you provided documentation to support your assertion that your customers have this pick-up option. Based on all the information you have provided in your letter, it is the Department's opinion that the transportation or delivery charges associated with your sales of wine are not subject to tax.

I hope this information is helpful. If you have further questions concerning this Private Letter Ruling, you may contact me at (217) 782-2844. 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
Chairman, Private Letter Ruling Committee

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