

ST 15-0014 (PLR) October 23, 2015 DELIVERY CHARGES

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.)

October 23, 2015

Dear Xxxxx:

This letter is in response to your letter dated May 15, 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 ABC 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 ABC 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:

As counsel for and on behalf of ABC we hereby formally request from the Illinois Department of Revenue (“Department”) a Private Letter Ruling, pursuant to 2 Ill. Admin. Code §1200.110, confirming that ABC’s Internet retail sales of wine shipped from its Illinois inventories to points outside the State not to be returned to a point within the State are not subject to Retailers’ Occupation Tax (“ROT”) or Use Tax (“UT”) when title passes to the out-of-state purchaser in Illinois at the time of the purchase and ABC serves as the purchaser’s agent or representative in arranging for shipment of the purchased wine to points outside the State. Moreover, this request also seeks to confirm that ABC need not charge, collect, or remit ROT/UT on its shipping charges because shipping is optional

under its sales agreements with its purchasers. ABC is not currently under audit by the Department regarding this issue. In addition, ABC is unaware of any authority contrary to its views expressed in this request. Furthermore, we ask that our client's name, address, and any contract or exhibits attached be kept confidential and deleted from the publicly disseminated version of the private letter ruling. A Power of Attorney authorizing us to represent ABC before the Department in connection with this request is attached as Exhibit A.

FACTS

ABC is engaged in the retail sales of wine from an inventory maintained at its state-of-the-art location in CITY, Illinois and over the Internet to purchasers in Illinois and a number of other states. ABC holds liquor licenses and is registered to collect sales taxes in some but not all other states. Wines may be purchased at ABC's CITY, Illinois location or over the Internet. Orders for wine purchased over the Internet or purchased at ABC's CITY location for shipment to a location outside Illinois are filled from inventories maintained in CITY, Illinois and are shipped to customers in the various states, including Illinois, via common carrier. ABC also provides every customer with an option to pick-up their purchases at its CITY, Illinois location and, in fact, urges customers to do so. ABC collects and remits tax on sales which are picked-up at its City, Illinois location or are shipped to points within Illinois. ABC does not collect Illinois tax on sales of wine shipped to points outside the State, nor does ABC collect tax on any shipping and handling charges on shipments to customers located in Illinois.¹ ABC Internet sales are shipped to points outside the State and the taxability of ABC's shipping and handling charges are the subject of the PLR request.

ABC's Web Site Retail Conditions of Sale ("RCS"), a copy of which is attached as Exhibit B provide that any wine sold by ABC is sold in Illinois. ABC's RCS further provides that title to purchased wine passes to the purchaser in Illinois at the time of the sale. Finally, ABC's RCS provide that buyers, not ABC, are the owners and shippers of all ABC wine purchased in Illinois. ABC will, as buyer's agent or representative, choose a licensed common carrier at purchaser's cost and arrange for shipment of the purchased wine. ABC does provide a pick-up option at its CITY, Illinois location and recommends that all customers pick-up their purchases. ABC is listed as the shipper to its out of state customers on the bills of lading.

ABC's Shipping FAQ's, a copy of which is attach as Exhibit C, provides for the "pick-up option" at ABC's CITY, Illinois location and advises customers

¹ When a customer makes a purchase online, the customer is always advised as to the shipping and handling charges to be paid for delivery of the order and is advised of the option to pick up the order at ABC's CITY location. If the delivery option is selected, the order confirmation and invoice to the customer again separately specifies the amount of the delivery charge. The charges for delivery whether shipped to customers located within the state of Illinois or outside the State do not exceed the costs of delivery paid/incurred by ABC to the carrier on behalf of ABC's customers.

that they are responsible for complying with the tax laws of their respective states regarding any excise, use taxes, and sales taxes related to their purchases.

ILLINOIS LAW & ANALYSIS

The Illinois Retailers' Occupation Tax ("ROT") imposes a tax on persons engaged in the business of making retail sales of tangible personal property. 35 ILCS 120/2. The term "sale at retail" is defined to mean any transfer of ownership of or title to tangible personal property to a purchaser for the purpose of use or consumption, and not for the purpose of resale. 35 ILCS 120/1. However, no tax is imposed upon the privilege of engaging in a business in interstate commerce or otherwise when the business may not, under the U.S. Constitution and statutes of the United States, be made the subject of taxation by the State. 35 ILCS 120/2/-60.

The Illinois Use Tax ("UT") is imposed on the purchaser of tangible personal property for the privilege of using the property in this State when purchased at retail from a retailer. 35 ILCS 105/3. The UT is collected from the purchaser by the retailer maintaining a place of business in this State. Retailers are required to collect the UT from purchasers by adding the UT to the selling price of the tangible personal property when sold for use or consumption. 35 ILCS 105/3-45. Any retailer required to collect the UT is liable to the Department for the tax whether or not the UT has been collected from the purchaser. The retailer is relieved to [sic] the duty of remitting UT to the Department, and may retain the UT charged and collected, if the retailer has remitted ROT to the Department on the same transaction. 35 ILCS 105/8.

Where tangible personal property is located in Illinois at the time of its sale and then delivered in Illinois to the purchaser or his or her representative², the seller is taxable if the sale is a retail sale. 86 Ill. Admin. Code. 130.605(a). The sale is not deemed to be an exempt sale in interstate commerce if the purchaser or his representative receives physical possession of the property in Illinois. 86 Ill. Admin. Code 130.605(a)(1). In determining whether a sale is made in interstate commerce, the place at which the contract of sale or contract to sell is negotiated and executed and where title to the property passes to the purchaser is immaterial. 86 Ill. Admin. Code 130.605(a)(3). Instead, the location of delivery is the critical factor in determining whether Illinois tax applies.

Tax does not apply to gross receipts from which the seller is obligated, under the terms of his or her agreement with the purchaser, to make physical delivery of the goods from a point in Illinois to a point outside Illinois, not to be

² The term "representative" is not defined in the Department's regulations but at least one court has held that where a representative is a person or entity that does not do anything other than facilitate shipment to a location outside the state, tax liability does not attach. See *Union Electric Company v. Illinois Department of Rev.* 136 Ill. 2d 385, 556 N.E. 2d 236 (Ill. 1990).

returned to a point within Illinois, so long as delivery is actually made. 86 Ill. Admin. Code 130.605(c). Nor does the tax apply to gross receipts from sales in which the seller, by carrier, under the terms of his or her agreement with the purchaser, delivers goods from a point in Illinois to a point outside Illinois not to be returned to a point within Illinois. The fact that the purchaser may actually arrange for a common carrier or pays the carrier that effects delivery does not destroy the interstate commerce exemption. It is critical, however, that the seller be shown as the shipper on the bill of lading. If the purchaser is shown as the shipper, delivery will be deemed to have occurred in Illinois and the interstate commerce exemption will not apply. 86 Ill. Admin. Code 130.605(d).

Moreover, shipping and handling charges may or may not be subject to ROT depending on whether the charges are optional or mandatory. To the extent shipping and handling charges are optional, they are deemed a non-taxable service. However, in instances where a purchaser is required to buy the delivery service as part of the purchase of a product, tax does apply. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351 (Ill. 2009). 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. 86 Ill. Admin. Code 130.415(b).

Here, the transactions that form the basis of this request involve ABC's sale and shipping to its customers for delivery to locations outside Illinois as well as the deduction of shipping and handling charges from gross receipts for purposes of sale and delivery to customers located within Illinois. Although title passes to its customers in Illinois, ABC ships the property to the customers outside the State. Because passage of title is irrelevant to the analysis regarding whether Illinois tax applies, ABC is listed as the shipper, and the products at issue are delivered to locations outside Illinois, we are confident that the transactions at issue are not subject to Illinois ROT/UT pursuant to 86 Ill. Admin. Code 130.605. Moreover, because the shipping and handling charges at issue are optional, as customers may pick up their purchases from ABC's physical location, the shipping and handling charges ABC charges its customers should also not be subject to Illinois ROT/UT pursuant to the Illinois Supreme Court's ruling in *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351 (Ill. 2009). Moreover, the shipping and handling charges do not exceed the costs incurred by ABC in shipping and handling merchandise for its customers.

REQUEST FOR RULING

Pursuant to 2 Ill. Admin. Code Section 1200.110, ABC respectfully requests that the Department of Revenue issue a private letter ruling declaring that ABC's sales to customers that are delivered outside this State, notwithstanding passage of title in Illinois, are not subject to Illinois tax. Moreover, ABC respectfully requests that the Department of Revenue issue a ruling declaring that

ABC's shipping and handling charges charged to customers located within Illinois are not subject to tax because such charges are optional.

If you concur, please issue your favorable ruling to the undersigned. If you do not concur, please advise so that we may discuss your reasoning before an adverse ruling is issued.

DEPARTMENT'S RESPONSE:

Interstate Commerce

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 35 ILCS 120/2; 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 35 ILCS 105/3; 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 the purchases occur outside Illinois and the seller is not registered to collect Illinois Use Tax, purchasers must self assess their Use Tax liability and remit it directly to the Department.

Sales of property originating in Illinois are specifically addressed at 86 Ill. Adm. Code 130.605. Subpart (d) of this regulation states that the gross receipts from such sales are not subject to tax when a sale is conducted in which the seller is obligated, under the terms of an agreement with the purchaser, to make delivery of the property from a point in this State to a point outside this State, not to be returned to this State, provided that such delivery is actually made. See 86 Ill. Adm. Code 130.605(d). Such sales are considered to be sales in interstate commerce and are exempt from Illinois and local Retailers' Occupation Tax.

In your letter, you stated that you make Internet retail sales of wine that are shipped from your Illinois inventory to your customers who are located outside of Illinois. Because the structure of your Internet sales falls within this exemption, you do not incur sales tax on the gross receipts from your Internet sales that are shipped to locations outside Illinois, not to be returned to Illinois.

Transportation and Delivery Charges

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 business located in CITY, Illinois and pick up any wine they purchase from you. In addition, you provided documentation to support your assertion that your customers have this 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.

The factual representations upon which this ruling is based are subject to review by the Department during the course of any audit, investigation, or hearing and this ruling shall bind the Department only if the factual representations recited in this ruling are correct and complete. This Private Letter Ruling is revoked and will cease to bind the Department 10 years after the date of this letter under the provisions of 2 Ill. Adm. Code 1200.110(e) or earlier if there is a pertinent change in statutory law, case law, rules or in the factual representations recited in this ruling.

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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