

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 130.2075. (This is a GIL.)

October 29, 2015

Dear Xxxxx:

This letter is in response to your letter dated, January 7, 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.

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 would appreciate your guidance in confirming the proper sales and use tax treatment of the facts presented below.

BACKGROUND

ABC (“TAXPAYER”) is a national retailer of home organizational products. TAXPAYER operates 67 retail locations in 24 states and an internet business. Examples of products sold by TAXPAYER include shelving, shoe and clothing boxes, trash cans, kitchen containers and other home organizational products.

TAXPAYER operates in Illinois under taxpayer number ##### and is classified under Standard Industrial Classification Code 5719 Miscellaneous Homefurnishings Stores. The issue addressed in this request is based upon a prospective product offering and is not the subject of review with the Illinois Department of Revenue.

FACTS

TAXPAYER is introducing a new product (“PRODUCT”) to help organize closets of our customers (“CUSTOMER”). PRODUCT is a floor-based solution,

resting on the floor but not connected or attached in any manner to the floor, that can be placed against walls or freestanding in the center of a closet. PRODUCT can be enhanced to include drawers, hanging rods, retractable dressing mirrors, tie and belt racks, jewelry trays, hampers and other organizational amenities the customer desires.

PRODUCT is designed to CUSTOMER's specifications using actual closet measurements from CUSTOMER. Depending on CUSTOMER's preference, PRODUCT can be placed freestanding in the center of a room, against a single wall or configured against multiple walls to give the appearance of wall-to-wall built in cabinetry.

After PRODUCT has been designed to CUSTOMER's specifications, CUSTOMER is billed for 50% of the total cost of PRODUCT and related installation charges. After receipt of the initial payment, TAXPAYER orders PRODUCT from the supplier ("SUPPLIER"). SUPPLIER custom builds the components of PRODUCT to the design specifications as laid out by TAXPAYER. PRODUCT components are shipped on a pallet from SUPPLIER to CUSTOMER's location. Given the size and weight of PRODUCT, PRODUCT is shipped in component pieces to be assembled onsite by TAXPAYER. PRODUCT is not pre-assembled and taken apart for shipment by SUPPLIER.

PRODUCT is assembled onsite at CUSTOMER's location by subcontractor's [sic] working on behalf of TAXPAYER. After assembly, PRODUCT is placed free-standing in the center of a room or against a wall according to design specifications. Wall-to-wall appearance is achieved by placing PRODUCT components adjacent to each other against each wall of the room. Decorative trim may be added across PRODUCT components to further give the appearance of built-in cabinetry.

When PRODUCT is placed against walls, it utilizes anti-tip brackets (resembling an L-bracket) to prevent damage and injury from tipping. The anti-tip bracket connects PRODUCT to the wall with two screws and generally consists of one anti-tip bracket per wall. Freestanding PRODUCT requires no anti-tip brackets connected to walls or additional safety features.

PRODUCT placed against a wall can be augmented with rear paneling of the same color and material as PRODUCT to give the appearance of an enclosed cabinet. If rear paneling is not chosen by CUSTOMER, the wall against which PRODUCT is placed is visible between shelves.

Rear paneling is placed similar to PRODUCT in that it rests on the floor against the wall. Rather than an anti-tip bracket, it is secured using finishing nails to prevent shifting and tipping. After the paneling is placed against the wall,

PRODUCT is placed on the floor adjacent to the paneling to give the appearance of a complete cabinet. PRODUCT's anti-tip bracket is secured after placement against the rear panel.

Upon completion of PRODUCT installation, the remaining balance is collected from CUSTOMER. TAXPAYER presents CUSTOMER with a final receipt that separately states charges for TAXPAYER's assembly and placement costs (*i.e.*, "Installation") and TAXPAYER's material costs for PRODUCT purchased from SUPPLIER. Both installation and product costs include a profit markup.

Disassembly and removal of PRODUCT is performed by reversing the steps used in the original installation. Should CUSTOMER desire to remove PRODUCT from its placement in the future, damage to the realty would be limited to two screw holes for each anti-tipping bracket installed and any small holes from finishing nails used to secure rear paneling.

AUTHORITY

Receipts from the retail sale of tangible personal property are generally subject to sales tax.

A retailer of tangible personal property who installs it for a buyer is liable for sales tax on the gross receipts of the installation regardless of whether the installation charges were separately stated unless the seller and buyer agree on an installation charge separately from the price of the property sold.¹

Sellers who permanently affix tangible personal property to real estate are considered construction contractors and incur use tax.²

Sales of furniture and furnishings, drapes, floor coverings, trade fixtures, and machinery by a contractor to buyers for use or consumption, with or without installation, and whether or not the seller furnishes and installs the items as part of a construction contract are taxable.³

ISSUE

TAXPAYER is in the business of selling home organizational products, including shelving and closet organization systems, at retail which is taxable.

¹ Ill. Admin. Code 86 § 130.450

² Ill. Admin. Code 86 § 130.2140.

³ Ill. Admin. Code 86 § 130.1940(b)(2).

PRODUCT, although custom designed, is not affixed to the realty in any way that causes substantial damage to the realty or PRODUCT upon removal. In any given PRODUCT installation, certain freestanding components may not be connected to walls with anti-tip brackets at all. As previously mentioned, when connected to walls, generally one anti-tip bracket per wall is installed using two screws. Any rear paneling placed between PRODUCT and wall is secured using either two or four finishing nails. Additionally, PRODUCT rests unattached to the floor.

Taxpayer has determined based upon relevant authority that the sale of PRODUCT should be treated as the sale and installation of tangible personal property for Illinois sales and use tax purposes. The sale and installation of PRODUCT does not constitute an improvement to realty or a real property contract performed by TAXPAYER. This treatment applies to the sale and installation of PRODUCT in both existing structures and installation during new construction since the minimal connection to walls and the ease of removal without substantial damage is the same in both instances.

TAXPAYER hereby requests technical assistance in confirming that the treatment of PRODUCT will be considered taxable as the sale of tangible personal property and the separately stated installation of PRODUCT will be excluded from the sales price in both existing and newly constructed structures. We respectfully request a phone conference to discuss the relevant facts and issues contained herein prior to the issuance of a final determination.

Should you have any questions regarding this request, please contact me.

DEPARTMENT'S RESPONSE:

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.

Construction Contractors:

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.

See 86 Ill. Adm. Code 130.1940 and 130.2075. 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 will be permanently affixed to or incorporated into real property in this State will be subject to Use Tax. If such contractors did not pay the Use Tax liability to their suppliers, those contractors must self assess their Use Tax liability and pay it directly to the Department. 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. The Illinois Use Tax rate incurred by an out-of-State construction contractor on purchases of materials from an unregistered supplier located outside of this State is generally 6.25% as described in subsection (c) of Section 130.2075.

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.

For purposes of the Illinois sales tax laws, the Department uses an intention test to determine whether items remain tangible personal property after installation or become part of realty. If circumstances indicate that the parties obviously intended that the item remain with the realty, we give effect to that intention. If an obvious intent is not apparent, we look to the extent to which the item has been affixed. If the item cannot be removed without damage to the item or to the real estate, that is an indication that the parties intended that the item become part of the realty. In general, if an item is attached to a wall using only an anti-tip bracket attached with two screws, it seems likely that that item could be removed without damaging the item or the real estate. This is likely also the case for rear paneling that rests on the floor and is secured to the walls using finishing nails.

Stock or Standard items

When a person sells items that are produced on special order and that serve the same function as stock or standard items sold at retail, the sale is subject to Retailers' Occupation Tax. No deduction can be taken for the cost of labor involved in producing the finished item for sale. This principle is explained in the Department's rules at 86 Ill. Adm. Code 130.2140. Generally (assuming that the transaction does not involve a construction contract as discussed above), the custom floor-based closet products described in this letter, although produced on special order for customers, serve substantially the same function as stock or standard floor-based closet products that can be purchased from other retailers. As a result, custom produced floor-based closet products as described in this letter are generally subject to Retailers' Occupation Tax. Design and labor costs for producing these custom floor-based closet products would also be subject to tax, even if stated separately from the cost of materials.

Installation Charges:

In Illinois, when a seller engages in the business of selling tangible personal property at retail, and such tangible personal property is installed by the retailer, the receipts from such installation charges must be included in the gross receipts upon which his Retailers' Occupation Tax liability is measured if such installation charges are included in the selling price of the property being sold. If, however, the seller and buyer agree upon the installation charges separately from the selling price of the tangible personal property which is sold, then the receipts from the installation charges are not a part of the "selling price" of the tangible personal property which is sold. Instead such charges constitute a service charge, separately contracted for, which need not be included in the figure upon which the seller computes his Retailers' Occupation Tax liability. See 86 Ill. Adm. Code 130.450. If, for instance, the purchaser cannot get the items without agreeing to installation as well, this is considered to be included in the price and, therefore, taxable.

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,

Samuel J. Moore
Associate Counsel

SJM:elh