

This letter discusses the taxability of computer software licenses. See 86 Ill. Adm. Code 130.1935. (This is a GIL.)

October 15, 2015

Dear Xxxxx:

This letter is in response to your letter dated August 18, 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:

Please find enclosed a copy of an invoice from ABC. We were charged a sales tax on the XXXX support fee. We have been purchasing equipment since 2012, along with an annual license support fee. The support fee gives us the ability to only access their software and for our management. We do not believe this support fee is subject to the Illinois Sales Tax based on our understanding of your regulations. I would like to be notified whether or not we should be paying sales tax on support services. The vendor ABC indicated that they needed your department to indicate that this isn’t subject to tax. Until we get information from your department they will continue to charge XYZ Sales Tax on support.

We would appreciate your department to notify us if this should not be exempt. Should you agree, we would like to know how to be refunded on previous invoices?

Thank you very much for your assistance in this matter.

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. 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. 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, purchasers must self assess their Use Tax liability and remit it directly to the Department.

Information or data that is electronically transferred or downloaded is not considered the transfer of tangible personal property in this State. See 86 Ill. Adm. Code 130.2105(a)(3). However, canned computer software is considered taxable tangible personal property regardless of the form in which it is transferred or transmitted, including tape, disc, card, electronic means or other media. See 86 Ill. Adm. Code 130.1935. If the computer software consists of custom computer programs, then the sales of such software may not be taxable retail sales. See Section 130.1935(c). Custom computer programs or software must be prepared to the special order of the customer.

Charges for updates of canned software are fully taxable pursuant to Section 130.1935. If the updates qualify as custom software under Section 130.1935(c), they may not be taxable. If transactions for the licensing of computer software meet all of the criteria provided in subsection (a)(1) of Section 130.1935, neither the transfer of the software nor the subsequent software updates will be subject to Retailers' Occupation Tax. A license of software is not a taxable retail sale if:

- A) It is evidenced by a written agreement signed by the licensor and the customer;
- B) It restricts the customer's duplication and use of the software;
- C) It prohibits the customer from licensing, sublicensing or transferring the software to a third party (except to a related party) without the permission and continued control of the licensor;
- D) The licensor has a policy of providing another copy at minimal or no charge if the customer loses or damages the software, or permitting the licensee to make and keep an archival copy, and such policy is either stated in the license agreement, supported by the licensor's books and records, or supported by a notarized statement made under penalties of perjury by the licensor; and

- E) The customer must destroy or return all copies of the software to the licensor at the end of the license period. This provision is deemed to be met, in the case of a perpetual license, without being set forth in the license agreement.

Please note that it is very common for software to be licensed over the internet and the customer to check a box that states that he or she accepts the license terms. Acceptance in this manner does not constitute a written agreement signed by the licensor and the customer for purposes of subsection (a)(1)(A) of Section 130.1935. To meet the signature requirement for an exempt software license, the agreement must contain the written signature of the licensor and customer.

We cannot provide you with a specific answer based on the limited information provided in your letter. The charge that you reference is labeled on the invoice as a license. Though the invoice shows that this price includes telephone support, if it is a license of canned software it is subject to Retailers' Occupation Tax unless it meets all of the criteria set out in 86 Ill. Adm. Code 130.1935(a)(1). The question as to whether this software license fee is subject to Illinois sales tax liability depends upon the content of the license between you and the seller. If the license contains all of the elements set out in Section 130.1935(a)(1), then receipts from this license are not taxable. If the license does not contain all of those elements, then receipts from the license fee are subject to Illinois sales tax liability. The charge for customer support is taxable if it is not broken out as a separate item. In sum, we cannot make a determination about whether the software license is taxable without reviewing the terms of the license. However, if the license is taxable, the support charges are also taxable as they are not separately stated.

Claims for credit and refunds are available when a person shows that he paid tax to the Department as a result of a mistake of fact or law. Only the remitter of the tax erroneously paid to the Department is authorized to obtain a refund. In order to obtain a credit, one must first demonstrate that he or she has borne the burden of the tax erroneously paid. Claims for credit shall state the requirements that are contained in subpart (b) of the regulation. See 86 Ill. Adm. Code 130.1501(b).

Please note that the Department has no authority to compel sellers to file a claim for credit. Whether or not companies file a claim for credit with the Department is a private business matter.

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

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