

ST 16-0050-GIL 09/30/2016 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.)

September 30, 2016

Dear Xxxxx:

This letter is in response to your letter dated April 25, 2016, 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 accept this letter as our request for a General Information Letter pursuant to Illinois Administrative Code 1200.120.

COMPANY is sole owner of ABC (Taxpayer ID #####). ABC fabricates and installs glass and glazing related products into commercial and residential structures. A small percentage of its business does, however, result from “over the counter” sales. For purposes of the sales tax rules, it would be considered a construction contractor. ABC quotes and sells the majority of its business on a lump sum basis whereby the labor and material portion of the contract are not separately stated.

ABC makes material purchases from both in state and out of state suppliers. For in state purchases, ABC provides the CTR-61 Certificate of Resale to its suppliers. ABC self-assesses its Use Tax on materials at the 6.25% rate, but the business is located in CITY 1, Illinois, where the rate is 8.75%.

We have the following questions with respect to the situation above:

- (1) What is the tax basis for tangible personal property purchased under a certificate of resale that is subsequently incorporated into real estate pursuant to a lump-sum (materials and labor are not separately stated) construction contract? Specifically, is the tax basis the entire amount as set forth in the lump-sum construction contract (materials and labor) or the cost paid to the supplier for the materials only?
- (2) What tax rate should the ABC be paying - the Use Tax rate of 6.25% or the 8.75% assessed by CITY 1?
- (3) Since ABC issued a certificate of resale to its supplier for tangible personal property incorporated into real estate, should it instead be paying the Retailer's [sic] Occupation Tax, including any applicable Home Rule Retailer's [sic] Occupation Tax, as opposed to the Use Tax?
- (4) If ABC is required to pay the Retailer's [sic] Occupation Tax, is the tax basis for tangible personal property incorporated into real property pursuant to a lump-sum construction contract the cost of the materials at the time of purchase from the supplier or the entire amount as set forth in the lump-sum contract?
- (5) If ABC is required to pay the Home Rule Retailer's [sic] Occupational Tax, is the tax rate based upon the ABC's home rule municipality or county or the supplier's home rule municipality or county?
- (7) For purposes of tangible personal property purchased under a Certificate of Resale and later sold "over the counter", is ABC required to pay the Retailer's [sic] Occupation Tax and the Home Rule Retailer's [sic] Occupation Tax on the selling price of such property with the Home Rule rate being set by ABC's home rule municipality or county?
- (8) If the ABC purchases tangible personal property out of state pursuant to a certificate of resale and later incorporates such property into real estate, does the Retailer's[sic] Occupational[sic] Tax apply or the Use Tax?

I would appreciate it [sic] you could provide answers to the questions above. If you have any questions, please feel free to give me a call or send me an email. My contact information is listed above.

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.

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 windows, 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. 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. Furthermore, since construction contractors are deemed end users of tangible personal property purchased for incorporation into real property and incur Use Tax on the cost price for such purchases, it generally does not matter whether the construction contractor charges for his or her work as a lump-sum contract.

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. See also CA-2015-14 entitled Construction Contracts and Retailers' Occupation Tax.

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.

As a general rule, construction contractors should not provide resale certificates to their suppliers and should instead pay Use Tax and any reimbursement for locally-imposed occupation taxes at the time of purchase of tangible personal property to be incorporated into real estate. However, when the contractor 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 to determine in which way he will dispose of the property, such contractor 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 contractor 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) to the Department, and must also pay any locally-imposed taxes. The local Retailers' Occupation Tax to be paid by the contractor in this situation shall be paid for the benefit of the entity in which the place of business at or from which the contractor handles the transaction is located, if such entity has adopted the local Retailers' Occupation Tax at the time when the contractor converts the tangible personal property in question into real estate. For example, a contractor who is registered at a location in CITY 2, Illinois, and who also sells "over-the-counter" gives its supplier a resale certificate when he buys dry wall from a supplier located in CITY 3, Illinois. Subsequent to the purchase, the contractor incorporates some of the dry wall into real estate on a job. The contractor must account for the tax by paying the State Retailers' Occupation Tax and the Springfield Home Rule Municipal Retailers' Occupation Tax (the location where the contractor is registered) on his return by including the cost price of the dry wall converted to real estate in his taxable receipts. However, if the contractor subsequently sells the tangible personal property "over-the-counter" he will owe the State Retailers' Occupation Tax and the Springfield Home Rule Municipal Retailers' Occupation Tax on the selling price. See 86 Ill. Adm. Code 130.2075.

If a contractor purchases tangible personal property out of state pursuant to a certificate of resale and later incorporates such property into real estate in Illinois, the contractor must self-assess its Use Tax liability and pay it directly to the Department at the rate of 6.25%. If the contractor has already paid tax in another state on the purchase or use of such property, it will be entitled to a credit against their Illinois Use Tax liability to the extent that it paid tax that was properly due to state. See 86 Ill. Adm. Code 150.310.

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,

Debra M. Boggess
Associate Counsel

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