

ST 17-0009-PLR 09/14/2017 ENTERPRISE ZONES

Under the Enterprise Zone building materials exemption, a deduction from Illinois Retailers' Occupation Tax liability exists for gross receipts from retail sales of materials that will be incorporated, by remodeling, rehabilitation, or new construction, into real estate located in an enterprise zone established by a county or municipality under the Illinois Enterprise Zone Act. (See 35 ILCS 120/5k and 86 Ill. Adm. Code 130.1951(e).) (This is a PLR.)

September 14, 2017

Re: Private Letter Ruling Request
Retailers' Occupation Tax and Use Tax
COMPANY

Dear Xxxxx:

This letter is in response to your letter dated June 5, 2017 in which you requested 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 our client, COMPANY ("Company"), we respectfully request the Illinois Department of Revenue issue a Private Letter Ruling pursuant to 2 Ill. Adm. Code Sec. 1200.110 with respect to the following factual situation and ruling requested below.

General Information

1. Enclosed please find an original Form II-2848 Power of Attorney, authorizing FIRM("FIRM") to represent Company before the Illinois Department of Revenue (the 'Department') and obtain a Private Letter Ruling.
2. This Private Letter Ruling ('PLR') is not requested with regard to hypothetical or alternative proposed transactions. The PLR is requested to determine the state and local Retailer's Occupation Tax and Use Tax consequences of the actual business practices of the Company.
3. Company is not currently engaged in litigation with the Department in regard to this or any other tax matter.
4. Company is not currently under audit by the Department in regard to any tax matter.
5. The Company has not previously requested the Department to issue a Private Letter Ruling on this matter.
6. The Company requests that certain information be deleted from the PLR prior to dissemination to others. The Company requests that its name, address, location of its plant, enterprise zone name and the name of its representative be deleted. If, and to the extent, permissible, Company also requests the exclusion/deletion of the detailed Materials Exhibit and plant facility diagrams from any published ruling document.
7. The Company knows of no authority contrary to the authorities referred to and cited below.

Statement of Facts

1. Company is the owner of a parcel of land located in CITY, Illinois (COUNTY).
2. Company is proceeding with the development of the land to build and operate a 1,000 megawatt, natural gas-fired, combined-cycle, power generation facility (the "Facility") for supply of electricity to the utility power grid.
3. The generation of electricity is the sole purpose for which Facility and land is dedicated.
4. Each of the listed materials (see #8 below) is critical to the Facility's design and process and is integral and dedicated to Facility.
5. Company is entering into contracts to purchase and permanently incorporate materials into the power generation facility.
6. Company will contract with suppliers to directly procure certain materials.
7. Company will contract with a construction contractor to engineer, procure and construct the Facility, including installation and construction of all materials directly procured by Company.

8. A complete listing of the materials that are the subject of this request is included in the enclosed Materials Exhibit, which includes explanations of the description and or function of the materials and the manner of affixation to real estate. Also enclosed, is a diagram of the plant design overlaid upon the land with some Materials Categories labeled for additional context.
- 9 Each material and/or component is intended to be permanently affixed to the real estate, and is being specifically designed, fabricated and constructed for exclusive, permanent, physical incorporation into the facility for purposes of generating electricity.
- 10 Company has been working with officials from COUNTY to provide for the expansion of the NAME Enterprise Zone currently located in COUNTY to include Company's Facility.
11. Upon the expansion of the enterprise zone noted in #10 above, Company will submit the information required by 86 Ill. Adm. Code 130.1951(c)(2)(A) to the Enterprise Zone Administrator and request that the Administrator seek Exemption Certificates from the Department for Company and its Contractors as provided in 86 Ill. Adm. Code 130.1951(c)(2).
12. The negotiation of procurement and construction contracts is on-going.

Ruling Requested

The materials, including all listed components (as represented in summary by the Materials Categories that follow and in detail in the enclosed Materials Exhibit) and considering the manner of affixation to realty as indicated in the Materials Exhibit, are "building materials to be incorporated into real estate" for purposes of the exemption provided in 35 ILCS 120/5k (the "EZ Exemption").

Materials Categories

- A. Power Generation Equipment (natural gas and steam turbines, electric generator)
- B. Heat Recovery Steam Generator
- C. Air Cooled Condenser
- D. Fire Protection System
- E. Water Pumps – Various Systems
- F. Closed Cooling Water System
- G. Auxiliary Boiler
- H. Large Field Erected Tanks
- I. Building (Power Generation Equipment)
- J. Control/Admin/Warehouse Building
- K. Chemical Feed & Electrical Equipment Building
- L. Piping Materials
- M. Valves and Specialties
- N. Major Electrical – Generated Power & Facility Source Power
- O. Electrical – Balance of Plant
- P. Instrumentation and Controls

- Q. Air Compressors and Dryers
- R. Structural Steel Materials
- S. Pollution Control Facilities – Other
- T. Repair and Replacement Materials (for all of the above Materials Categories)

We note and understand that, for the EZ Exemption to apply, “building materials to be incorporated into real estate” must be, at the time of purchase, purchased in a “qualifying sale” and, therefore, part of a building project for which an Enterprise Zone Building Materials Exemption Certificate has been issued to the purchaser by the Department (see 35 ILCS 120/5k(a)-(b)).

Statement of Authorities Supporting Taxpayer’s Views

The Illinois Retailers’ Occupation Tax (“ROT”) Act imposes a tax on persons engaged in the business of making retail sales of tangible personal property. 35ILCS 120/2. The ROT is measured by the retailer’s gross receipts. 35ILCS 120/2-10. Pursuant to Section 5k of the ROT Act, “[e]ach retailer who makes a qualified sale of building materials to be incorporated into real estate in an enterprise zone established by a county or municipality under the Illinois Enterprise Zone Act by remodeling, rehabilitation or new construction, may deduct receipts from such sales when calculating the tax imposed by the [ROT Act].” 35 ILCS 120/5K(a) [sic]. “[O]n and after July 1, 2013, ‘qualified sale’ means a sale of building materials that will be incorporated into real estate as part of a building project for which an Enterprise Zone Building Materials Exemption Certificate has been issued to the purchaser by the Department.” 35 ILCS 120/5K [sic].

The Illinois Regulations provide, in order to qualify for the Enterprise Zone exemption the materials being purchased must be “building materials,” i.e., the materials must be purchased for physical incorporation into real estate. 86 Ill. Adm. Code 130.1951(e). The Regulation also provides several examples, including common building materials, plumbing heating, electrical, central air conditioning systems and related components (see 86 Ill. Adm. Code 130.1951(e)(1)-(5)).

In Private Letter Ruling ST 08-0003-PLR, involving a request similar to Company’s request, the Department outlined the inquiry that must be made in order to determine whether materials are permanently affixed to real estate:

The Department has invoked the intention test in the context of letter rulings concerning construction contractors (see Private Letter Ruling ST 05-0016 (October 7, 2005) and General Information Letters ST-04-0105 (July 1, 2004), ST-01-0141 (July 27, 2001), ST-00-0156 (July 27, 2000) and ST-96-0138 (March 13, 1996)). General Information Letter ST 00-0156 sets forth the intention test as follows: “In determining whether an item is permanently affixed to real estate, a very fact-specific inquiry must be made regarding whether the item is intended to remain with the realty. In order to make a finding that the item is permanently affixed, at least three factors must generally be examined. First, the item must be affixed to the realty. The item must also be applied to the use or purpose to

which the realty is put. Finally, the intent of the person affixing the item must be examined. Another factor often examined is whether the item is essential to the use to which the real estate has been put.”

The Department also advised:

Generally, the determination of whether an item qualifies for the exemption must be made on an item-by-item basis. ST 08-0003-PLR.

Available authority does not specifically define what qualifies as “affixed to realty”. Department rulings have focused on the permanency and immovable nature of materials upon affixation and incorporation into real estate. ST 08-0003-PLR, ST01-0040-PLR. Examples of “affixed” materials include embedding materials in concrete, anchor bolting materials directly to concrete, and bolting or welding materials to components or steel, building or other structures that are embedded in or bolted to concrete. See ST 08-0003-PLR, ST-01-0040-PLR. Integrating materials and/or components into facilities, structures or systems through hardwired electrical or hardpiped plumbing (for chemicals, gas, steam, water) are other examples affixing materials to realty. See ST 08-0003-PLR, ST-01-0040-PLR.

Analysis

Materials Group 1

The following “Group 1” Materials Categories consist of the primary power generation facility systems that are essential to plant operations:

- A. Power Generation Equipment (natural gas and steam turbines, electric generator)
- B. Heat Recovery Steam Generator
- C. Air Cooled Condenser
- D. Fire Protection System
- E. Water Pumps – Various Systems
- F. Closed Cooling Water System
- G. Auxiliary Boiler
- H. Large Field Erected Tanks
- N. Major Electrical – Generated Power & Facility Source Power
- P. Instrumentation and Controls
- Q. Air Compressors and Dryers
- S. Pollution Control Facilities – Other

Company intends Group 1 materials (as represented by the preceding Materials Categories) to be permanently dedicated and affixed to the facility and physically incorporated into the real estate. As noted above, the generation of electricity is the sole purpose for which the land and Facility is dedicated. Each of the above systems are essential and integral to the operations of Facility.

Company’s contractors will permanently affix each component material to the real estate. Each material component, as explained in detail in the Materials Exhibit, will be

either (i) directly anchor bolted to a concrete foundation, or (ii) will be permanently bolted or welded to another component, steel framing, or a housing or building structure that is anchor bolted to a concrete foundation. All piping interconnecting the various systems for water, steam, gas, and chemicals, will be hardpiped to each applicable system component (welded or flanged as required). All electrical connections are hardwired and permanently fastened. As a result of the manner of affixing the materials to the real estate, and aligned with Company's intentions and the dedicated use of the real estate, the Group 1 materials will be permanently incorporated into real estate and immovable.

Materials Group II

The following "Group II" Materials Categories consist of buildings, which house major facility components and personnel and storage operations, and are essential to plant operations:

- I. Building (Power Generation Equipment)
- J. Control/Admin/Warehouse Building
- K. Chemical Feed & Electrical Equipment Building

Company intends to permanently incorporate the Group II buildings and related infrastructure materials into the real estate and dedicate the buildings to Facility's power generation operations. As noted above, the generation of electricity is the sole purpose for which the land and Facility is dedicated. The buildings provide shelter and support structure to key systems components and operations and are, therefore, essential and integral to the power generation operations. Building and related infrastructure materials are clear examples of "building materials to be incorporated into real estate" as indicated in the Department's Regulation, 86 Ill Adm. Code Sec. 130.1951(e)(1)-(5).

Company's contractors will construct the buildings, including installation of pre-fabricated components, and permanently affix materials to the real estate or to other permanently affixed materials (as detailed in the Materials Exhibit). Within the power generation building (and dedicated to the operations herein), a 100-ton Bridge Crane (see Materials Exhibit, Component 112 for additional detail) is permanently mounted to steel support columns and beams (anchor bolted to the building's concrete foundation), affixed to the building structure for additional support and hardwired to electrical power sources. As a result of the manner of affixing the materials to the real estate, and aligned with Company's intentions and the dedicated use of the real estate, the Group II materials (buildings and related infrastructure, including the Bridge Crane) are permanently incorporated into real estate and are immovable.

Materials Group III

The following "Group III" Materials Categories consist of various materials (e.g., communications cable, electric cable, electric panelboards, conduit, pipe, hangers, valves, structural steel, anchor bolts, component materials repair or replacement parts (See Materials Exhibit for complete listing and details)) used throughout Facility in

conjunction with various materials components and processes and are essential to plant operations:

- L. Piping Materials
- M. Valves and Specialties
- O. Electrical – Balance of Plant
- R. Structural Steel Materials
- T. Repair and Replacement Materials (for all Materials Categories)

Company intends Group III Materials Categories to be permanently dedicated and affixed to the power generation facility and physically incorporated into the real estate. As noted above, the generation of electricity is the sole purpose for which the land and Facility is dedicated. Each of the above materials are essential and integral to the operations of Facility.

Company's contractors will permanently affix each component to the real estate as indicated in the following examples (see Materials Exhibit for full listing and manner of affixation). Pipe materials and valves, for example, are hardpiped (welded or flanged) to various permanently affixed materials components throughout Facility and installed underground or hanger-mounted above ground to building, steel frames or systems component structures. Electric and communication cable is run through conduit or trays above and below ground (above-ground conduit is also permanently fastened to such support structures). Structural steel is needed throughout the plant to create support framing and infrastructure and is welded or bolted to structures or material components or anchor-bolted to concrete throughout the plant as needed. Repair and replacement materials (excluding any consumable maintenance items) are ordered and or inventoried as necessary to keep the plant operational. Such repair and replacement materials shall be affixed and incorporated into the facility in the same manner as the original installation. As a result of the manner of affixing the materials to the real estate, and aligned with Company's intentions and the dedicated use of the real estate, the Group III materials are permanently incorporated into real estate and are immovable.

Conclusion

Company's Materials Categories and components thereof (as detailed in the Materials Exhibit and as analyzed above in Materials Groups I – III) are intended to be permanently affixed and incorporated into real estate and fully dedicated to the use for which the real estate is put, i.e., generation of electricity. Company's contractors will permanently affix the materials and material components to real estate hereby rendering the materials immovable and further showing Company's intent for the materials to remain with the real estate. Therefore, the Materials Categories and components thereof qualify as "building materials to be incorporated into real estate" for purposes of the EZ Exemption. Accordingly, we respectfully request the Department issue the Ruling Requested above.

If the Department is unable to issue the Requested Ruling based upon the information provided in this request, we request that the Department contact me at (XXX)XXX-XXXX to determine what additional information is required or allow the taxpayer to

rescind this ruling request. Thank you, in advance, for your consideration of this request.

DEPARTMENT'S RESPONSE:

The Retailers' Occupation Tax Act imposes a tax upon persons engaged in this State in the business of selling tangible personal property at retail to purchasers for use or consumption. See 86 Ill. Adm. Code 130.101. 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.

Under the Enterprise Zone building materials exemption, a deduction from Illinois Retailers' Occupation Tax liability exists for gross receipts from retail sales of building materials that will be incorporated into real estate located in an enterprise zone established by a county or municipality under the Illinois Enterprise Zone Act by remodeling, rehabilitation or new construction. 35 ILCS 120/5k. All "qualified sales" of building materials sold for incorporation into any Illinois enterprise zone are eligible for the deduction. 86 Ill. Adm. Code 130.1951(d)(1). A "qualified sale" means a sale of building materials: a) for incorporation into real estate in an Illinois enterprise zone, b) as part of a building project, c) for which a Certificate of Eligibility for sales tax exemption has been issued, d) by the administrator of the enterprise zone in which the project is located. 86 Ill. Adm. Code 130.1951(d)(2). In order to qualify for the deduction, the materials being purchased must be building materials. 86 Ill. Adm. Code 130.1951(e).

The Department's regulation at 86 Ill. Adm. Code 130.1951(e) provides examples of qualifying building materials. The enterprise zone exemption includes component parts of building materials that are permanently affixed to realty. While the examples in the Department's regulation reflect more conventional buildings, the fundamental concept of the building materials exemption is that, to qualify, provided that the other requirements of the regulation are met, the materials at issue must also be physically incorporated into real estate.

The Department has invoked the intention test in the context of letter rulings concerning construction contractors. ST 08-0003-PLR (April 1, 2008) identifies a number of letters invoking the test. ST 00-0156 sets forth the intention test as follows:

"In determining whether an item is permanently affixed to real estate, a very fact-specific inquiry must be made regarding whether the item is intended to remain with the realty. In order to make a finding that the item is permanently affixed, at least three factors must generally be examined. First, the item must be affixed to the realty. The item must also be applied to the use or purpose to which the realty is put. Finally, the intent of the person affixing the item must be examined. Another factor often examined is whether the item is essential to the use to which the real estate has been put."

In your written request and the attachments, you have described each item of tangible personal property, explained the functions of the items, and described how each item is permanently affixed to the real estate.

The specific question of whether the materials used in constructing an electric generating facility qualify for the building materials exemption under 35 ILCS 120/5k of the Retailers' Occupation Tax has been addressed in numerous private letter rulings issued by the Department in recent years. In Private Letter Ruling ST 99-0009 (March 9, 1999) the Department ruled that pipe racks, pipe, supports, and piping tie-ins installed at a natural gas fired power plant qualified for the exemption because they were permanently affixed to real estate. In Private Letter Ruling ST 00-0013 (July 7, 2000) the Department found that certain materials incorporated into realty within an electricity generating facility qualified for the exemption. The Department found that turbine generators, electrical transformers, electrical cabling, piping and other materials that are permanently affixed to real estate qualified for the exemption in 35 ILCS 120/5k and 86 Ill. Adm. Code Sec. 1951(a)(1). Thereafter, the Department has consistently ruled that these materials qualified for the exemption if it was demonstrated that they were permanently affixed to the real estate (see, for example, Private Letter Rulings ST 00-0025 (October 19, 2000), ST 00-0026 (November 3, 2000), ST 00-0033 (December 11, 2000), ST 00-0034 (December 11, 2000), ST 01-0001 (January 9, 2001), ST 01-0012 (April 5, 2001), ST 01-0014 (April 9, 2001), ST 01-0040 (September 24, 2001), ST 01-0045 (October 26, 2001), ST 02-0012 (June 10, 2002), ST 05-0020 (November 18, 2005) and ST 08-0003 (April 1, 2008).

Generally, the determination of whether an item qualifies for the exemption must be made on an item-by-item basis. The Department has reviewed each of the items identified in the request, 86 Ill. Adm. Code 130.1951, and its prior letters issued within the last 10 years. Based on its review it is the Department's determination that the items would qualify for the building materials in Section 5k of the Retailers' Occupation Tax Act.

To qualify for the exemption the property must be located within an enterprise zone and the Company must possess an Exemption Certificate at the time the building materials are purchased.

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

RSW:bkl