

ST 17-0011 PLR 12/27/2017 DELIVERY CHARGES

This letter discusses transportation and delivery charges. 86 Ill. Adm. Code 130.415. (This is a PLR.)

December 27, 2017

Re: COMPANY

Dear Xxxxx:

This letter is in response to your letter dated September 8, 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:

This is a request for a private letter ruling regarding the collection of the Retailers’ Occupation Tax on delivery charges for the delivery of sandwiches and other food items pursuant to Illinois Department of Revenue Regulations Title 86 Part 130 Section 415 Transportation and Delivery Charges. (86 Ill. Adm. Code 130.415).

Taxpayer:

COMPANY

ADDRESS

EIN: XX-XXXXXXX

IBT: ####-####

Form ST-1, Sales and Use Tax Return

Contact: NAME, TITLE

Phone No. ###-###-####

Statement of Facts:

1. Taxpayer operates approximately 50 stores under the FRANCHISE NAME as an independent operator. Sandwiches, chips and drinks are sold in the store and also available via delivery for a nominal charge. The store itemizes its sales receipt and list the delivery charge as a separate line item on the receipt. See the attached sample receipt. The Taxpayer has collected Illinois sales tax based on each store location and has remitted the tax on a regular basis on its monthly returns. The Taxpayer has included the delivery charge as being subject to the state sales tax when calculating and filing Form ST-1 Sales and Use Tax Return.
2. The periods at issue for this request will be those beginning the month after response to this Private Letter Ruling is issued. Should the Taxpayer continue to assess tax on the delivery charge or should the delivery charge continue to be itemized separately but not subject to the Retailers' Occupation Tax? Any periods prior to this request will not be modified. Taxpayer is not currently under audit and is not aware of any pending litigation as to itself and this particular issue. The reason for the request at this time is that there appears to be inconsistency in the food delivery industry on the issue and all cases cited in prior rulings on the Illinois Department of Revenue relate to the typical big box retailer and not to the typical fast food delivery store. Taxpayer is requesting a ruling to ensure that it is correctly reporting on delivery charges.

Statement of Law/Authority:

The state statute [sic] governing this transaction is 86 Ill. Adm. Code 130.415 Transportation and Delivery Charges. This states that delivery charges are part of the gross receipts and subject to the Retailers' Occupation Tax when there is an inseparable link between the sale of tangible personal property and the outgoing delivery of the property. **Section 130.415 (b)(1)(B) Taxability of Outgoing Transportation and Delivery.**

This section states further in subsection (b)(1)(B)(ii) there is an inseparable link meaning the seller does not separately identify the delivery charge or if separately identified the seller does not offer the purchaser the option to receive the property in any manner other than via the delivery charge. This inseparable link subjects the delivery charge to the Retailers' Occupation Tax. This is not the case with a retail sandwich store that allows for pick up in the store. However, the Taxpayer will not deliver without the additional delivery charge.

Subsection (iii) state as follows:

"Except for cases in which an inseparable link exists as provided in Section (b)(1)(B)(ii), 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 is excluded from the gross receipts subject to the Retailers' Occupation Tax.

Ruling Requested:

The taxpayer respectfully requests the Illinois Department of Revenue to rule on whether the delivery charges as separately stated on the Taxpayer's receipts should continue to be subject to the Retailers' Occupation Tax or are exempt from such tax as a delivery charge as the consumer is able to up their order in store for no added delivery charge. In such a ruling no inseparable link exists or Taxpayer falls under the Safe Harbor in subsection C.

If you need further information or clarification of any facts and circumstances please contact the undersigned. I have enclosed a copy of the Power of Attorney that has my contact information.

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.

The Department's regulation regarding transportation and delivery charges, 86 Ill. Adm. Code 130.415, was amended 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. 86 Ill. Adm. Code 130.415(b)(1)(B)(i). 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 the payment of transportation and delivery charges added to the selling price of an item (e.g., the seller does not offer the purchaser the option to pick up the tangible personal property or the seller does not offer, or the purchaser does not qualify for, a free transportation and delivery option). 86 Ill. Adm. Code 130.415(b)(1)(B)(ii). In contrast, if the tangible personal property that the customer agreed to buy can be sold to the customer without adding a transportation or delivery charge to the selling price of the item, then an inseparable link does not exist and the delivery charges should not be included in the selling price of the tangible personal property. 86 Ill. Adm. Code 130.415(b)(1)(B)(ii)-(iii).

If a seller of tangible personal property offers the purchaser free transportation and delivery of the property, qualified transportation and delivery of the property for which the purchaser qualifies (e.g., purchases over \$25 qualify for free shipping, and the purchaser spends more than \$25), or the option to pick up the property, any separately identified transportation and delivery charges chosen by the purchaser (e.g., amounts paid for expedited transportation and delivery) will be nontaxable, as long as the selling price of the tangible personal property neither increases nor decreases depending

on the method chosen by the purchaser to obtain the merchandise. If the selling price of the tangible personal property increases or decreases depending on the method chosen by the purchaser to obtain the merchandise, any transportation and delivery charges imposed will be subject to Retailers' Occupation Tax to the extent those charges exceed the actual cost of outgoing transportation and delivery. 86 Ill. Adm. Code 130.415(b)(1)(C).

In your letter you state that sandwiches, chips and drinks sold in your stores are also available via delivery for a nominal charge. The stores list the items purchased on the sales receipt and list the delivery charge as a separate line item on the receipt. It is our understanding the purchaser always has the option to pick up these items at the stores without incurring delivery charges and without any increase or decrease in the prices of the items purchased. It is the Department's opinion that the delivery charges are not included in gross receipts and are not subject to Retailers' Occupation Tax liability.

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 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:bkI