

This letter discusses the requirement in Section 130.1935(a)(1) regarding a written “signed” agreement. See 86 Ill. Adm. Code 130.1945(a)(1). (This is a PLR.)

September 26, 2018

Re: Request for Private Letter Ruling

Dear Xxxx:

This letter is in response to your letter dated June 14, 2018, 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”), and at the request of the Illinois Department of Revenue (“Department”), we are re-submitting this request for a letter ruling from the Department. This submission is revised to provide additional detail regarding the process by which the Company and its customers sign contracts.

I. Statement Relating to Request

Pursuant to Ill. Admin. Code 2 §1200.110(b), the Company makes the following representations:

- To the best of the Company’s or its representative’s knowledge, the Department has not previously ruled on the same or similar issue for the taxpayer or a

predecessor or the same or similar issue was requested but withdrawn before a letter ruling was issued.

- A signature of the taxpayer's representative, and a duly executed power of attorney in favor of the representative is enclosed.
- Taxpayer's identifying information is set out as follows:

COMPANY NAME
STREET ADDRESS
CITY, STATE ZIP CODE
FEIN: #####

II. Statement of Relevant Facts

- The Company is a Delaware C-corporation, headquartered in CITY, STATE.
- The Company is in the business of providing digital enterprise security solutions by constantly monitoring, securing, authenticating and verifying as trusted all users and their various devices. To accomplish this, the Company secures access by employing adaptive and dynamic software that can instantly respond to changes in user behavior and context. The Company achieves this using both hosted (software-as-a-service) and on- premise software products. It also provides implementation services and conducts customer training (a majority of which are done remotely).
- The Company does not provide any of its software products and services through a tangible medium. All software products and services are delivered electronically.
- The Company has customers located in the State of Illinois ("Customer").
- To enter into a contract with the Company for the Company's products/services, the Customer must sign a Subscription Order Form ("Order Form").
- The process of signing the Order Form is as follows:
 - Once prepared, the Company and the Customer must sign the Order Form.
 - The Company predominantly uses DocuSign software to electronically sign various contracts, including Order Forms.
 - DocuSign software is a 3rd party electronic signature and digital transaction management tool that can be used to replace manual, paper-based transactions and processes.¹

¹ See: <https://www.WEBSITE>

- An electronic signature, or eSignature, as defined by the Federal ESIGN Act, is an “electronic sound, symbol or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record” (ESIGN). All 50 states have laws that define electronic signatures in substantially the same way.²
- Customers have several options to sign the Order Form. They may either:
 - Physically sign the Order Form (i.e., wet signature). This rarely occurs.
 - Physically sign the order Form (i.e., wet signature), and then digitize the entire Order Form, including signature, by scanning and converting it to a Portable Document Format (“PDF”) file.
 - Use DocuSign to sign the Order Form,
 - Use a competing software product to electronically sign the Order Form,
or
 - Digitally sign the Order Form by pasting a digital image of the signature of an authorized representative of the Customer onto the PDF Order Form file, then saving said file with the image of the signature embedded into the Order Form.
- Under no circumstances is a “click-through” signature used by the Company or its Customers. Digital or electronic signature are always obtained on the Order Form.
- The Order Form contains the following information (two Order Form examples are enclosed as Attachment A):
 - Information identifying both the Company and the Customer.
 - Detailed description of the products/licenses, subscription terms, quantities, and associated/itemized costs.
 - Limited terms and conditions, including a hyperlink to the complete Subscription Agreement (“T&C’s Agreement”).
 - The Order Form is signed by both Company and Customer representatives, either in ink or electronically (actual signatures, as contrasted to check-box signatures).
- The Order Form does not contain the full and complete terms of the software licensing Agreement. The full terms and conditions are contained in the T&C

² <https://www.WEBSITE>

Agreement that are accessible by clicking on a hyperlink contained on the Order Form.

- The hyperlinked T&C Agreement (redacted T&C Agreement enclosed as Attachment B) contains the full licensing subscription agreement between the contracting parties, including:
 - A comprehensive definition section;
 - General terms and conditions, such as provision of service, license grant, developer licenses, delivery, installation and acceptance of software, order forms, resellers, supplemental terms;
 - Responsibilities for service, such as customer responsibilities and Company responsibilities;
 - Fees and payment terms;
 - Confidentiality terms;
 - Proprietary right terms;
 - Warranties and disclaimers terms;
 - Indemnification terms;
 - Limitations of Liability terms;
 - Termination terms; and
 - Other general provisions.

III. Question Presented

Does the Company's signed Order Form and accompanying licensing T&C Agreement satisfy the first prong of the Illinois five-part test as prescribed by Ill. Admin. Code 86 § 130.1935(a)(1)(A)? The Company is not requesting the Departments ruling on prongs two through five of the Ill. Admin. Code 86 §130.1935(a)(1).

Additionally, the Company is not requesting the Department to examine the ramifications of sales of SaaS.

IV. Company's Position

The Company's position is that the executed Order Form creates the written contract, a binding agreement between the contracting parties. The T&C Agreement is, 1) not required to be signed because a contract is formed when the Order Form is executed,

and 2) the T&C Agreement is incorporated by reference into the contract as a whole. Therefore, an unsigned T&C Agreement does not control the validity of the contract created by the Order Form.

V. Illinois Law

a. *Sale of License of Computer Software*

“Computer software” means all types of software including operational, applicational, utilities, compilers, templates, shells and all other forms.³ Generally, sales of “canned” computer software are taxable retail sales in Illinois. Sales of canned software are taxable regardless of the means of delivery. For instance, the transfer or sale of canned computer software downloaded electronically would be taxable. However, a license of software is not a taxable retail sale if all of the following conditions are met:

- The license is evidenced by a written agreement signed by the licensor and the customer;⁴
- The license restricts the customer’s duplication and use of the software;⁵
- The license bars the customer from licensing, sublicensing, or transferring the software to a third party (except a related party) without the permission and continued control of the licensor;⁶
- 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;⁷ and
- The customer must destroy or return all copies of the software to the vendor at the end of the license period.⁸

It is very common for software to be licensed over the Internet and for a customer to “check a box” that states that he or she accepts the license terms. The Department has repeatedly held that acceptance in this manner does not constitute a written agreement signed by the licensor and the customer for purposes of Ill. Admin. Code 86 § 130.1935(a)(1)(A). According to the Department, to meet the signature requirement for an exempt software license, the agreement must contain the written signature of the licensor and customer.⁹ The written signature can be made in either ink or electronically.¹⁰

³ Ill. Admin. Code 86 § 130.1935(a).

⁴ Ill. Admin. Code 86 § 130.1935(a)(1)(A).

⁵ Ill. Admin. Code 86 § 130.1935(a)(1)(B).

⁶ Ill. Admin. Code 86 § 130.1935(a)(1)(C).

⁷ Ill. Admin. Code 86 § 130.1935(a)(1)(D).

⁸ Ill. Admin. Code 86 § 130.1935(a)(1)(E).

⁹ Illinois Dept. of Rev. General Information Letter No. ST 12-0011-GIL, 02/29/2012.

¹⁰ See: Ill. General Information Letter ST 13-0049 GIL (09/11/2013)

b. The Doctrine of Incorporation by Reference

The legal doctrine of “incorporation by reference” is a method of making a secondary document part of a primary document by including in the primary document a statement that the secondary document should be treated as if it were contained within the primary one.¹¹ Most attorneys are familiar with the incorporation by reference doctrine, and there is case law from virtually every state upholding its application. It is often used, and in many different legal contexts, such as in creating laws, in drafting contracts, and in trust and estate law.

Historically, the State of Illinois has recognized the doctrine of incorporation by reference in several contexts, including wills, trusts, estates, contract law and even in its own legislation.¹²

VI. Authorities in Support of Requested Ruling

We have reviewed all relevant Illinois tax statutes, regulations and administrative opinions issued by the Department but were unable to locate authority directly on point. However, the following cited authority supports the position advocated by the Company.

VII. Authorities Contrary to Requested Ruling

We have reviewed all relevant Illinois tax statutes, regulations, and administrative opinions issued by the Department but were unable to locate authority directly challenging the validity of a signed software licensing agreement.

VIII. Discussion/Analysis

The Department has stated on numerous occasions that software licensed over the Internet requiring the customer to check a box that states he or she accepts the license terms or a “shrink wrap” licensing agreement does not constitute a written agreement signed by the licensor and the customer for purposes of 86 Ill. Admin. Code 130.1935(a)(1)(A).¹³ To meet the signature requirement for an exempt software license, the agreement must contain the written signature of the licensor and customer.¹⁴ To satisfy the “written signature” requirement the signature must be with an ink signature or an electronic signature.¹⁵

As discussed above, the Company and its Customers use electronic or digital signatures to execute the Order Forms. ‘Shrink-wrap’ or ‘click-through’ agreements are not used in any circumstance. For purposes of this analysis, the Company and

¹¹ Black’s Law Dictionary 126 (9th ed. 2009)

¹² See: In Re Estate of Meskimen, 39 Ill. 2d 415 (1968); 5 ILCS 100/5-75 of the Illinois Administrative Procedure Act.

¹³ Illinois Dept. of Rev. General Information Letter ST 16-0038-GIL, 08/18/2016.

¹⁴ See Ill. Gen. Info. Letter No. ST 12-0011-GIL (2/29/12).

¹⁵ Ill. General Information Letter ST 13-0049 GIL (09/11/2013).

Customer's use of either DocuSign, software or any of the other above-mentioned methods of electronically/digitally signing the Order Form are consistent with the Department's ruling in Il. General Information Letter ST 13-0049 GIL (09/11/2013), and should fall squarely within the requirements of 86 Ill. Admin. Code 130.1935(a)(1)(A).

However, neither the Department nor Illinois courts have examined the issue at hand – if multiple documents encompassing the entire licensing agreement are used, which one of those documents must contain the written signature in order for § 130.1935(a)(1)(A) to be satisfied?

As discussed in the facts above, the Company uses two documents which, in combination, encompass the full software licensing contract. The signed Order Form incorporates by reference the T&C Agreement. Without a signature by both parties on the Order Form, there is no valid contract and therefore no licensing agreement. Specifically, the Order Form states that,

“Customer's use of such products is subject to the subscription agreement located at: www.WEBSITE”

The T&C Agreement contains the following clause, found at Section 2.8:

“Order Forms. Customer and its Affiliates may place orders under this Agreement by executing Order Form(s). *When an Affiliate of Customer signs an Order Form under this Agreement, the Affiliate shall be considered the Customer for purposes of such Order Form and shall be bound by the terms and conditions of this Agreement.*” [emphasis added].

Therefore, the Order Form creates the contract, not the T&C Agreement. But, both forms taken together encompass the entirety of the contract.

a. The signed Order Form is a “written agreement” because it imposes the terms and conditions of the Agreement on the Customer.

The Order Form should be deemed the “written agreement” for purposes of the first requirement of 86 Ill. Admin. Code § 130.1935(a)(1)(A), and when signed by both the Company and Customer, it creates a binding software licensing agreement.

In ST 95-0222-GIL, the Department wrote that,

“To the extent that the licensor and licensee enter into a bonafide agreement that is in writing and signed by both parties, the requirement of § 130.1935(a)(1)(A) is met.”¹⁶ [emphasis added]

¹⁶ Illinois Dept. of Rev. General Information Letter ST 95-0222-GIL, 05/25/1995.

The signed Order Form is, in the words of the Department, a “bonafide agreement” between the Company as licensor and Customer as licensee, and it therefore meets the requirements of §130.1935(a)(1)(A)

In ST 07-0035-GIL, the Department focused on the enforceability of the licensing agreement and wrote the following,

“If the agreement for the licensing is enforceable without the written signature of the licensor and the customer, then we believe that the signing of the Agreement Profile or Purchase Order attached to your letter would not meet the requirements of 86 Ill. Adm. Code §130.1935(a)(1)(A).¹⁷”

Here, the Department states that if the licensing agreement is enforceable without a signature, then obtaining written signatures on the supplementary/secondary forms, such as an agreement profile, or a purchase order, will not meet the Departments criteria for a “written signature.” Presumably, this is because the enforceable licensing agreement itself was not signed by the licensor and licensee. However, the Company’s facts are the reverse of the facts in GIL ST 07-0035-GIL. In the case of the Company, the Order Form is the licensing agreement, and is enforceable only if signed by both parties. The additional T&C Agreement is the supplementary document. Therefore, the written signatures on the Order Form are sufficient to meet the requirements of § 130.1935(a)(1)(A) even though the T&C Agreement itself is not signed.

b. The Doctrine of incorporation by reference necessitates that we treat the Order Form and the Agreement as a single document.

As discussed above, Illinois has long accepted and employed the doctrine of incorporation by reference. Specifically, in 2006, the court in the Northern District of Illinois examined the sufficiency of a signed paper contract, which incorporated by reference a document containing terms and conditions.¹⁸ The case, *International Star Registry*, concerned a disputed paper contract, which stated:

“...by my signature below, I certify that I have read and agree to the provisions set forth in this invoice and to the terms and conditions posted at www.WEBSITE.”

The court found a choice of venue clause in the website’s terms of sale to be enforceable. The clause was contained in a page displaying three hyperlinks, all of which were found by the court to be incorporated by reference. The court found these to be enforceable because the external documents were described with the requisite specificity, and the parties’ intent to be bound by the terms and clearly expressed.

Just as the Illinois District Court found the hyperlinked terms and conditions enforceable due to their incorporation by reference in *International Star Registry*, it would likely find the hyperlinked T&C Agreement used by the Company to be incorporated by reference

¹⁷ Illinois Dept. of Rev. General Information Letter ST 07-0035-GIL, 05/21/2007.

¹⁸ *International Star Registry of Illinois v. Omnipoint Marketing, LLC*, 2006 WL 2598056 (N. D. Ill. 2006).

as well. The Order Form, as the primary/external document, describing with the requisite specificity the parties intent to be bound by the T&C Agreement, as the secondary document.

Therefore, because the T&C Agreement should be deemed incorporated by reference into the Order Form, which is signed by both parties, the two documents, in combination, should meet the requirements of § 130.1935(a)(1)(A).

IX. Conclusion

In conclusion, the Company's contract, represented by the Order Form and the T&C Agreement, should satisfy §130.1935(a)(1)(A) and be deemed a valid written agreement because of the operation of the doctrine of incorporation by reference and because the signed Order Form creates the contract, no [sic] the supplementary T&C Agreement.

DEPARTMENT'S RESPONSE:

“Computer software’ means a set of statements, data, or instructions to be used directly or indirectly in a computer in order to bring about a certain result in any form in which those statements, data, or instructions may be embodied, transmitted, or fixed, by any method now known or hereafter developed, regardless of whether the statements, data, or instructions are capable of being perceived by or communicated to humans, and includes prewritten or canned software.” 35 ILCS 120/2-25. Generally, sales of “canned” computer software are taxable retail sales in Illinois. Canned computer software is considered to be tangible personal property regardless of the form in which it is transferred or transmitted, including tape, disc, card, electronic means, or other media. 86 Ill. Adm. Code 130.1935. However, if the computer software consists of custom computer programs, then the sales of such software may not be taxable retail sales. Custom computer programs or software are prepared to the special order of the customer. The selection of pre-written or canned programs assembled by vendors into software packages does not constitute custom software unless real and substantial changes are made to the programs or creation of program interfacing logic. See 86 Ill. Adm. Code 130.1935(c)(3). Computer software that is not custom software is considered to be canned computer software.

If transactions for the licensing of computer software meet all of the criteria provided in Section 130.1935(a)(1), 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.

If a license of canned computer software does not meet all the criteria the software is taxable.

In order to comply with the requirements as set out in Section 130.1935(a)(1), there must be a written "signed" agreement. A license agreement in which the customer electronically accepts the terms by clicking "I agree" does not comply with the requirement of a written agreement signed by the licensor and customer. The Department previously held that an electronic signature did not comply with the requirement of Section 130.1935(a)(1)(A) that the license be evidenced by a written agreement signed by the licensor and the customer. ST 06-0005-PLR (December 16, 2006). In ST 18-0003-PLR (February 8, 2018), the Department decided that an electronic license agreement in which the customer accepts the license by means of a signature in electronic form that is attached to or is part of the license, is verifiable, and can be authenticated will comply with the requirement of a written agreement signed by the licensor and customer. A license agreement in which the customer electronically accepts the terms by clicking "I agree" remains unacceptable.

The Department also stated in ST 18-0003-PLR that whenever an order form incorporates terms and conditions from another document, the Department will review the order form and the document that is incorporated by the order form to determine if all the requirements of Section 130.1935(a)(1) have been met. The Department found, however, that the information provided in the request describing the nature of the electronic signature was insufficient for the Department to determine whether the order form along with the subscription agreement met the requirements of Section 130.1935(a)(1) that there be a written "signed" agreement.

In your letter you describe 5 methods of executing the order form.

1. Physically sign the Order Form (i.e., wet signature).
2. Physically sign the order Form (i.e., wet signature), and then digitize the entire Order Form, including signature, by scanning and converting it to a Portable Document Format ("PDF") file.
3. Use DocuSign to sign the Order Form,
4. Use a competing software product to electronically sign the Order Form, or
5. Digitally sign the Order Form by pasting a digital image of the signature of an authorized representative of the Customer onto the PDF Order Form file, then saving said file with the image of the signature embedded into the Order Form.

The Department finds that methods 1, 2, 3 and 5 meet the requirement for a written signed agreement for purposes of Section 130.1935(a)(1)(A). The Department has insufficient information

on the software products that compete with DocuSign to determine whether method 4 meets the requirement of Section 130.1915(a)(1)(A).

The Department finds that the Order Form signed using one of the four acceptable methods will meet the requirements of Section 130.1935(a)(1)(A). In addition, the Department finds that the signed Order Form and the T & C's Agreement that is incorporated into the Order Form constitute a written agreement under Section 130.1935 for the purpose of determining if all the requirements of Section 130.1935(a)(1) have been met.

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:bkf