

This letter discusses construction contractors. 86 Ill. Adm. Code 130.1940 and 86 Ill. Adm. Code 130.2075. (This is a GIL.)

October 2, 2020

Dear Xxxx:

This letter is in response to your letter dated January 18, 2019 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.

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:

I am employed with a C.P.A. accounting firm in STATE. I am assisting a STATE corporation in verifying their sales and use tax requirements for the company’s sales to Illinois.

The company is a manufacturer. The company purchases raw steel. It then manufactures the parts of a gasoline station canopy, which are then shipped to either a wholesaler or end-user. Once installed, the canopy becomes part of the real property of the gasoline station. The company sometimes will subcontract the installation of the canopy. Other times, the company will not include installation in the sale. The company will also often contract with a freight company to deliver the parts.

The company has no physical presence in Illinois.

Please advise as to whether the company should collect and remit Illinois sales tax, or pay Illinois use tax in the following scenarios where the company is shipping to a location in Illinois. Please also advise whether the installation and freight charges, as applicable, should be subject to sales or use tax.

The company sells the canopy to a wholesaler. On the invoice, the company includes a delivery charge, and installation charge (the company subcontracts the freight and installation).

1. The company sells the canopy to the end-user. On the invoice, the company includes a delivery charge, and installation charge (the company subcontracts the freight and installation).
2. The company sells the canopy to a wholesaler. On the invoice, the company includes a delivery charge. There is no charge for installation, as installation is not part of the order.
3. The company sells the canopy to an end-user. On the invoice, the company includes a delivery charge. There is no charge for installation, as installation is not part of the order.
4. The company sells repair parts to a wholesaler and delivers them on company-owned smaller 1-ton trucks.
5. The company sells repair parts to an end-user and delivers them on company-owned smaller 1-ton trucks.
6. The company sells repair parts to a wholesaler and delivers them. On the invoice, the company includes an installation charge (the company subcontracts the installation, but delivery is on one of the company-owned smaller 1-ton trucks).
7. The company sells repair parts and they are picked up by the subcontracted installation crew from the company's STATE facility.
8. The company sometimes purchases items such as lights or branded Mobil Fascia. When the company purchases them, they show the company's sales tax exemption, because the company is a wholesaler of just those items in a bigger contract. These purchased items would stay in their box/crate and would be loaded with the company's manufactured parts for shipment. Are these items subject to sales/use tax?
9. Is Illinois Excise tax required to be paid on any of the above scenarios?
10. On a general basis, in Illinois, is the freight that is charged by the company to deliver the product taxable?
11. On a general basis, in Illinois, is the installation that is charged by the company to install the product taxable?
12. Do you have any other information that would be helpful to the company in their preparation of the Illinois sales and use tax returns?

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 reduce the amount of Use Tax they must remit by the amount of Retailers' Occupation Tax liability which they are required to and do pay to the Department with respect to the same sales. See 86 Ill. Adm. Code 150.130.

NEXUS

An “Illinois Retailer” is one who makes sales of tangible personal property in Illinois. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers. Our regulations were amended in response to the Illinois Supreme Court's decision in *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130. The regulations specify the selling activities that trigger Retailers' Occupation Tax liability in Illinois. See, e.g., 86 Ill. Adm. Code 270.115.

Another type of retailer is a retailer maintaining a place of business in Illinois. The definition of a “retailer maintaining a place of business in Illinois” is found at 35 ILCS 105/2 and described further, in part, in 86 Ill. Adm. Code 150.201. This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

An out-of-State retailer (a “remote retailer”) making sales to Illinois purchasers from locations outside Illinois is required to register with the Department and collect and remit Use Tax on those sales if it falls within the definition of a “retailer maintaining a place of business in this State” in Section 2 of the Use Tax Act, 35 ILCS 105/2. The Department is authorized to require these retailers to act as tax collectors because they have established sufficient contacts, or nexus, with Illinois. There are two groups of remote retailers that must collect Use Tax on sales to Illinois purchasers:

- 1) Remote retailers with a physical presence in Illinois. Prior to October 1, 2018, remote retailers had to have a physical presence in Illinois before they could be required to collect Use Tax. The types of activities constituting a physical presence, as limited by the series of court cases described below, are found in Section 2 of the Use Tax Act's definition of a “retailer maintaining a place of business” in Illinois. See, 35 ILCS 105/2. The physical presence requirement was established in a series of United States Supreme Court decisions. See, for example, *Scripto v. Carson*, 362 U.S. 207 (1960); *National Bellas Hess v. Department of Revenue of the State of Illinois*, 386 U.S. 753 (1967); *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992). In 1996, the Illinois Supreme Court ruled that remote retailers need only “more than the slightest” physical presence to be required to collect Use Tax. See *Brown's Furniture v. Wagner*, 171 Ill.2d 410 (1996). Any remote retailer that has a physical presence in Illinois will to be required to act as a Use Tax collector. Regulations describing these types of retailers are found at 86 Ill. Adm. Code 150.801 and 150.802.

A retailer is required to collect Use Tax if it has a contract with a person located in this State under which the person, for a commission or other consideration based upon the sale of tangible personal property by the retailer, directly or indirectly refers potential customers to the retailer by providing to the potential customers a promotional code or other mechanism that allows the retailer to track purchases referred by such persons. Examples of mechanisms that allow a retailer to track purchases referred by such persons include but are not limited to the use of a link on the person's Internet website, promotional codes distributed through the person's hand-delivered or mailed material, and

promotional codes distributed by the person through radio or other broadcast media. The provisions of this paragraph apply only if the cumulative gross receipts from sales of tangible personal property by the retailer to customers who are referred to the retailer by all persons in this state under such contracts exceed \$10,000 during the preceding four quarterly calendar ending on the last day of March, June, September, and December;

A retailer required to collect Use Tax if it has a contract with a person located in this State under which:

- A) the retailer sells the same or substantially similar line of products as the person located in this state and do so using an identical or substantially similar name, trade name, or trademark as the person located in this state; and
- B) the retailer provides a commission or other consideration to the person located in this state based upon the sale of tangible personal property by the retailer.

The provisions of this paragraph apply only if the cumulative gross receipts from sales of tangible personal property by you to customers in this state under all such contracts exceed \$10,000 during the preceding four quarterly periods ending on the last day of March, June, September, and December.

- 2) Remote retailers without a physical presence in Illinois. In *South Dakota v. Wayfair, Inc.*, 585 U.S. ____ (2018), 138 S. Ct. 2080, the U.S. Supreme Court upheld a South Dakota statute that imposed tax collection obligations on remote retailers that met specific selling thresholds but had no physical presence in the state. This decision abrogated the longstanding physical presence requirement of *Quill*, deeming it “unsound and incorrect.” Illinois Public Act 100-587 enacted nexus standards, effective October 1, 2018, that are virtually identical to those upheld in *Wayfair*. This non-physical presence nexus we will call “*Wayfair* nexus.”

Public Act 100-587 implemented the U.S. Supreme Court *Wayfair* nexus standards. It requires remote retailers with no physical presence in Illinois to register and collect and remit Use Tax, as provided below:

- 1) Beginning October 1, 2018, a retailer making sales of tangible personal property to purchasers in Illinois from outside of Illinois must register with the Department and collect and remit Use Tax if:
 - a) The cumulative gross receipts from sales of tangible personal property to purchasers in Illinois are \$100,000 or more; or
 - b) The retailer enters into 200 or more separate transactions for the sale of tangible personal property to purchasers in Illinois.

- 2) A retailer shall determine on a quarterly basis, ending on the last day of March, June, September, and December, whether he or she meets either of the criteria of paragraph (1) for the preceding 12-month period. If the retailer meets either of the criteria of paragraph (1) for a 12-month period, he or she is considered a retailer maintaining a place of business in Illinois and is required to collect and remit the Use Tax and file returns for one year.
 - a) At the end of that one-year period, the retailer shall determine whether he or she met either of the criteria of paragraph (1) during the preceding 12-month period. If the retailer met either of the criteria in paragraph (1) for the preceding 12-month period, he or she is considered a retailer maintaining a place of business in Illinois and is required to collect and remit Use Tax and file returns for the subsequent year.
 - b) If at the end of a one-year period a retailer that was required to collect and remit the Use Tax determines that he or she did not meet either of the criteria in paragraph (1) during the preceding 12-month period, the retailer shall subsequently determine on a quarterly basis, ending on the last day of March, June, September, and December, whether he or she meets either of the criteria of paragraph (1) for the preceding 12-month period.

In determining whether a remote retailer meets the thresholds above, see 86 Ill. Adm. Code 150.803(c)(3)(E)(i). In addition, if a remote retailer makes exclusively nontaxable sales, he or she is not subject to the *Wayfair* nexus requirements. See 86 Ill. Adm. Code 150.803(c)(2). If, however, the remote retailer makes both taxable and nontaxable sales into Illinois, all sales are included, including the nontaxable sales (other than sales for resale and other sales specified at 86 Ill. Adm. Code 150.803(c)(3)(E)). See 86 Ill. Adm. Code 150.803(c)(3)(E)(v).

Public Acts 101-0031 and 101-0604 enacted the Leveling the Playing Field for Illinois Retail Act. The Act implements a series of structural changes to the Illinois sales tax law that are intended to “level the playing field” between Illinois-based retailers and remote retailers by imposing State and local retailers’ occupation taxes on Illinois retailers, remote retailers and marketplace facilitators alike. Public Acts 101-0031 and 101-0604 require “remote retailers” to collect and remit State and local retailers’ occupation taxes. Beginning January 1, 2021, you must remit Retailers’ Occupation Tax if you are a remote retailer and either of the following thresholds was met during the preceding four quarterly periods ending on the last day of March, June, September, and December:

- 1) The cumulative gross receipts from sales of tangible personal property by you to purchasers in Illinois was \$100,000 or more; or
- 2) you entered into 200 or more separate transactions for the sale of tangible personal property to purchasers in Illinois. [35 ILCS 120/2(b)]

You are a “remote retailer” if you do not maintain within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent or other representative operating within this State under your authority or a subsidiary of yours, irrespective of whether such place of business or agent is located here permanently or temporarily or whether you or

your subsidiary is licensed to do business in this State. 35 ILCS 120/1. Generally, persons that deliver their goods in company-owned trucks are not remote retailers because they have a physical presence in the State.

The Department has filed proposed rules implementing the new requirements for remote retailers and marketplace facilitators. The proposed rules can be found on the Department's website. 86 Ill. Adm. Code 131.

DELIVERY CHARGES

The Department's regulation regarding transportation and delivery charges can be found at 86 Ill. Adm. Code 130.415 and incorporates the decision rendered 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 in *Kean* that an "inseparable link" existed between the sale and delivery of the merchandise plaintiffs purchased from Wal-Mart's Internet store. Thus, the court 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 customer can purchase the tangible personal property without payment of transportation or delivery charges to the retailer, 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).

CONSTRUCTION CONTRACTORS

Illinois law treats construction contractors as end users for Retailers' Occupation and Use Tax purposes.

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. The tax liabilities regarding construction contractors in Illinois may be found at 86 Ill. Adm. Code 130.1940 and 130.2075 on the Department's website. 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.

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 suppliers, those contractors must register and self-assess their Use Tax liability and pay it directly to the Department. 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. If a manufacturer is also a construction contractor, the manufacturer will incur Use Tax on its cost price of the materials used in making the item incorporated into the real estate.

With respect to your sales to Illinois construction contractors, you must determine, based on the information above regarding nexus, whether your company must register with the Illinois Department of Revenue and collect Use Tax from these customers.

SALE FOR RESALE

With respect to your sales to persons other than construction contractors or other end users in Illinois, the following is a discussion of the Department's rule on sales for resale.

If a seller has nexus in Illinois, in order to document the fact that its sale to a purchaser is a sale for resale, a seller is obligated by Illinois to obtain a valid Certificate of Resale from the purchaser. See 86 Ill. Adm. Code 130.1405. A Certificate of Resale is a statement signed by the purchaser that the property purchased by him is purchased for purposes of resale. In addition to the statement that the property is being purchased for resale, a Certificate of Resale must contain:

- 1) The seller's name and address;
- 2) The purchaser's name and address;
- 3) A description of the items being purchased for resale;
- 4) Purchaser's signature, or the signature of an authorized employee or agent of the purchaser, and date of signing; and
- 5) Registration Number, Resale Number, or a statement that the purchaser is an out-of-State purchaser who will sell only to purchasers located outside the State of Illinois.

The Department provides a standard form for documenting sales for resale. This form can be obtained from the Department's website.

The obligations of a seller with respect to accepting a Certificate of Resale were addressed in *Rock Island Tobacco and Specialty Company v. Illinois Department of Revenue*, 87 Ill.App.3d 476, 409 N.E.2d 136, 42 Ill. Dec. 641 (3rd Dist. 1980). The *Rock Island* court held that when a retailer obtains a proper Certificate of Resale that contains a registration or resale number that is valid on the date it is given, the seller's liability is at an end. If the purchaser uses that item himself or herself (*i.e.*, it was not purchased for resale), the Department will proceed against the purchaser, not the seller, provided the above stated conditions are met. The purchaser's registration or reseller number can be verified at the Department's website by clicking on the "Tax registration inquiry" box.

Failure to present an active registration number or resale number and a certification to the seller that a sale is for resale creates a presumption that a sale is not for resale. This presumption may be rebutted by other evidence that all of the seller's sales are sales for resale or that a particular sale is a sale for resale. For example, other evidence that might be used to document a sale for resale, when a registration number or resale number and certification to the seller are not provided, could include an invoice from the purchaser to his customer showing that the item was actually

resold, along with a statement from the purchaser explaining why it had not obtained a resale number and certifying that the purchase was a purchase for resale in Illinois. The risk run by a seller in accepting such other documentation and the risk run by purchasers in providing such other documentation is that an Illinois auditor is more likely to require that more information be provided as evidence that the particular sale was, in fact, a sale for resale.

In sum, a valid resale certificate must contain all of the information required in 86 Ill. Adm. Code 130.1405.

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 Boggess
Associate Counsel

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