

Food items for immediate consumption are subject to the higher tax rate. See 86 Ill. Adm. Code 130.310. (This is a PLR.)

March 23, 2021

Dear NAME:

This letter is in response to your letter dated November 16, 2020, 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 COMPANY1, 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 COMPANY1, 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:

Re: Sales Tax Ruling Request for COMPANY1.
To Whom It May Concern:

I am writing on behalf of the above referenced entity to request a taxability ruling pertaining to the appropriate use of the high rate of tax versus the low rate of tax for sales of certain cold prepared food items and sales of individual servings of rolls and cookies.

COMPANY1 ("COMPANY1") previously received a taxability ruling regarding individual servings of rolls and cookies in 2011 (ST-11-0008-PLR) and they have relied on the guidance in the PLR to determine the correct rate of tax to charge their customers on these items. COMPANY1 believes that any changes to the taxability of these items would create frustration for their customers. A copy of the PLR is attached for ease of reference. During a recently completed audit by the Illinois Department of

Revenue, the auditor started to question the taxability of these type items, giving the impression the auditor ' s position would be contrary to the guidance issued in the PLR. Such questions ceased once the auditor was provided a copy of the PLR and such items were not a part of the audit workpapers. As Regulation 1200.110e states that private letters rulings are revoked 10 years after their date of issuance, we would like to request a new letter ruling on these same issues.

Facts:

COMPANY1 sells groceries, hot and cold prepared foods, and general merchandise at retail through twenty-seven store fronts throughout Illinois. All the stores sell grocery items for off premise consumption as well as prepared foods and bakery items that are ready for immediate consumption.

The tax flag for each item purchased in any store is preprogrammed and consistently applied to all stores located in the State of Illinois. The team member operating a particular register in any particular store in Illinois has the ability to change the low rate of tax designation to the high rate of tax designation on certain items purchased if for immediate on-premise consumption. The areas designated for on-premise consumption can vary from store to store. Some stores continue to have the same area layout as described in the prior ruling request:

The area designated for on-premise consumption is typically in the left front comer of the store as the customer enters. Several long, high curving bar tables form a divider that separates the dining area from the rest of the store. These high bar tables also serve as an enclosure that surrounds a number of smaller tables and chairs within the dining area.

As the customer moves past the dining area into the rest of the store, he first passes a series of checkout lanes situated across the middle of the store which further separates the dining area from the area where food is stocked for sale.

Other stores have the exact same layout as described above, except on the right front comer of the store as the customer enters.

Other stores have indoor and/or outdoor seating available at the middle front of the store. Such indoor seating is typically separated by a low wall immediately following a series of checkout lanes situated across the middle of the store, which further separates the dining area from the area where food is stocked for sale.

In all cases, no food is stocked for sale in, or near, these front areas.

Each store has several different sections which can include a bakery section, a juice bar, a pizza bar, a sandwich bar, a stir fry bar, a self-serve salad bar, a self-serve hot soup bar, and areas where pre-packaged hot and cold prepared food can be picked up. The juice bar, pizza bar, sandwich bar, stir fry bar usually have store personnel available who assist customers.

Within their prepared foods department, they sell a variety of prepackaged cold prepared food products that are sold either by weight or by each. Such products are sold in various sized packages. Daily, the products are either made in house and packaged for sale, or the products are received from a third party in bulk and subsequently packaged for sale by the store. Although the cold prepared food products are ready for immediate consumption, most of the cold prepared food products are not typically eaten on the premises of the retailer.

Within their bakery departments, they sell fresh baked rolls and cookies that are sold by the piece as individual servings. The rolls and cookies are baked in the store daily. They do not maintain the temperature of the rolls and cookies after they are baked. The rolls and cookies are placed out in self-service bins for the customers. Customers are free to purchase as many, or as few, of these items as they wish. Although the bakery products are ready for immediate consumption, most of the bakery products are not typically eaten on the premises of the retailer. Generally, there are no separate cash registers in these sections but while the layout is generally consistent throughout the various stores, there may be slight differences in a particular store (i.e., a cash register may be situated in the stir fry bar in one store but not in any other store). That being said, a large portion of food sold in the grocery stores is paid for at the regular grocery store check-out counters.

Current Treatment:

Based upon the guidance in the previous letter ruling issued to COMPANY1 the stores are charging the high rate of tax on food prepared for immediate on-premise consumption, candy, alcohol and general merchandise. In the case of baked goods, such as rolls or cookies that can be bought in any quantity, including a single item, the store is charging the low rate of tax on these items.

The store is charging the low rate of tax on cold prepared food purchases other than sandwiches and salad bar transactions.

Applicable Regulations and Letter Rulings:

86 Ill. Adm. Code 130.310(b) states "The manner in which food is taxed depends upon 2 distinct factors that must both be considered in determining if food is taxed at the high rate as "food prepared for immediate consumption" or the low rate as "food prepared for consumption off the premises where sold:

- 1) The first factor is whether the retailer selling the food provides premises for consumption of food. If so, a rebuttable presumption is created that all sales of food by that retailer are considered to be prepared for immediate consumption and subject to tax at the high rate. As a result of this presumption, even bulk food could potentially be taxable at the high rate. However, this presumption is rebutted if a retailer demonstrates that:
 - A) the area for on-premises consumption is physically separated or otherwise distinguishable from the area where food not for immediate consumption is sold; and
 - B) the retailer has a separate means of recording and accounting for collection of receipts from sales of both high and low rate foods. For purposes of this subsection (b)(1)(B), the phrase "separate means of recording and accounting for collection of receipts" includes cash registers that separately identify high rate and low rate sales, separate cash registers, and any other methods by which the tax on high and low rate sales are recorded at the time of collection; and
- 2) The second factor is the nature of the food item being sold. As provided in subsection (c), some foods, such as hot foods, are always considered to be "food prepared for immediate consumption", and thus subject to the high rate of tax.

86 Ill. Adm. Code 130.310(c)(2) states "...Food prepared for immediate consumption means food that is prepared or made ready by a retailer to be eaten without substantial delay after the final stage of preparation by the retailer. Food prepared for immediate consumption includes, but is not limited to, the following... (A)(v) all food sold for consumption on the premises wheresold.

86 Ill. Adm. Code 130.310(c)(2)(B) states " Food prepared for immediate consumption" does not include: (i) doughnuts, cookies, bagels or other bakery items prepared by a retailer and sold either individually or in another quantity selected by the customer, provided they are for consumption off the premises where sold... "

86 Ill. Adm. Code 130.310(c)(2)(C) states "... the items listed in subsection (c)(2)(B) are taxable at the low rate only if the retailer had a separate means of recording and accounting for high and low rate sales, and the retailer provides no on-premises facilities for consumption of the food or, if the retailer does provide such facilities, they are physically separated or otherwise distinguishable from the area where food not for immediate consumption is sold."

86 Ill. Adm. Code 130.310(d)(1) states "If retailers provide seating or facilities for on- premises consumption of food , all food sales are presumed to be taxable at the high rate as "food prepared for immediate consumption". However, this presumption can be rebutted by evidence that: A) the area for on-premises consumption is physically separated or otherwise distinguishable from the area where food not for immediate consumption is sold; and B) the retailer utilizes a means of recording and accounting for collection of receipts from the sales of food prepared for immediate consumption (high rate) and the sales of food that are not prepared for immediate consumption (low rate).

86 Ill. Adm. Code 130.310(d)(4)(A) gives the following example "... Provided that the requirements of subsection (d)(1) are met ... Low rate items would include, but are not limited to, doughnuts (regardless of quantity), bagels, rolls and whole breads or bakery items prepared by the retailer ... "

In Private Letter Ruling No. ST 11-0008-PLR, the state determined that COMPANY1 had:

- 1) sufficiently distinguishable areas designated for on-premise consumption of food from the rest of the store to meet the requirements of 86 Ill. Adm. Code 130.310(d)(1)(A) and
- 2) the requirements of 86 Ill. Adm. Code 130.310(d)(1)(B) had also been met since the registers at the store can account for both low and high rate items, each item sold in the store is "tax flagged" with a specific tax rate and store personnel inquire whether individually baked good items are for consumption on the premises.

The method of accounting has not significantly changed since the issuance of ST-11-008- PLR in 2011. While the layout of the stores used by COMPANY1 has changed since the issuance of ST-11-008-PLR in 2011, primarily as it relates to where such areas designated for on-premise consumption are located within the store, such areas appear sufficiently distinguishable.

Ruling Request:

COMPANY1 is not currently under audit by the Illinois Department of Revenue.

Please confirm that the low rate of tax should be charged on all sales of individual servings of rolls or cookies and cold prepared food (other than sandwiches and salad bar purchases) sold by COMPANY1 in its Illinois grocery stores for off premise consumption.

An affiliated company (COMPANY2) has one store in Illinois that is set up the same way and we would also like any ruling issued by the Illinois Department of Revenue to apply to that entity as well. COMPANY2 is also not currently under audit by the Illinois Department of Revenue.

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. 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.

The Department's regulation governing food is found at Section 130.310 ("Food, Soft Drinks and Candy"). Food can be taxed at either the State general merchandise, or "high" rate (6.25%), or a preferential low rate of 1% (plus any applicable local taxes). As Section 130.310 explains, the applicable tax rate depends upon several factors.

The manner in which food is taxed depends upon two distinct factors that must both be considered in determining if food is prepared for immediate consumption or if food is prepared for consumption off the premises where sold:

1. The first factor is whether the retailer selling the food provides premises for consumption of food.
2. The second factor is the nature of the food item being sold.

86 Ill. Adm. Code 130.310(b).

As to the first factor, if retailers provide facilities for the on-premises consumption of food, a presumption is created that all sales of food are taxable at the higher rate. However, this presumption can be rebutted if the following two criteria are demonstrated:

1. The area for on-premises consumption is physically separated or otherwise distinguishable from the area where food not for immediate consumption is sold; and
2. The retailer utilizes a means of recording and accounting for collection of receipts from the sales of food prepared for immediate consumption (high rate) and the sales of food that are not prepared for immediate consumption (low rate).

86 Ill. Adm. Code 130.310(b) and (d).

As to the second factor, the nature of the food item being sold, certain items are always taxable at the high rate, such as candy, soft drinks and “food prepared for immediate consumption.” The latter term is explained in greater detail at subsection (c)(2)(A)(i) through (iv) of the regulation. Many of the items sold by COMPANY1, Inc. clearly constitute “food prepared for immediate consumption.” Examples include, but are not limited to, all hot foods, sandwiches prepared to the individual order of a customer, and salad bars where a customer can prepare his or her own salad (both hot and cold). Food that is not considered “food prepared for immediate consumption” is explained in greater detail at subsection (c)(2)(B)(i) through (iv) of the regulation. Examples include, but are not limited to, doughnuts, cookies, bagels or other bakery items prepared by a retailer and sold either individually or in another quantity selected by the customer, provided they are for consumption off the premises where sold, and cold salads, jellos, stuffed vegetables or fruits sold by weight or by quart, pint or other quantity by a retailer.

It is our opinion, after reviewing the information in your letter and the additional materials you submitted, that the store should charge the high rate of tax only on food prepared for immediate consumption (as explained in the regulation), candy, alcohol and general merchandise. In the case of baked goods, such as rolls or cookies that can be bought in any quantity, including a single item, the store should only charge high rate on these items if they are sold for consumption on the premises. Similarly, with regard to cold prepared food products that are prepackaged and sold either by weight or individually in various sized packages, the store should only charge high rate on these items if they are sold for consumption on the premises. As a practical matter, the store will need to make this determination at the time of sale by asking the customer if he or she plans on eating these items in the dining area. If the store determines that these items will not be consumed in the on-premises facilities, the low rate of tax would apply.

The Department finds that the two criteria are met to rebut the presumption that all food sold in an establishment that provides an area for on-premises consumption of food are taxed at the high rate. First, the area designated for on-premises consumption of food is sufficiently distinguishable from the rest of the store. It generally occupies the left front corner of the store as you enter; although, in some stores it may be located in the right front corner. No food is stocked for sale in, or near, this front area. Several long, high curving bar tables form a divider that separates the dining area from the rest of the store. These high bar tables also serve as an enclosure that surrounds a number of smaller tables and chairs within the dining area. As one moves past the dining area into the rest of the store, he or she first passes a series of checkout lanes situated across the middle of the store. These checkout lanes further separate the dining area from the area where food is stocked for sale.

Second, the information you have submitted also indicates that the requirements of the second factor have been met because the registers at the store can record and account for both low and high rate items. Each item sold in the store has a “tax flag” preprogrammed with a specific tax rate that is applied consistently to all stores located in Illinois. Each employee operating a register has the ability to change the low rate of tax designation to the high rate of tax designation on certain items purchased if for immediate on-premises consumption. The stores therefore utilizes a means of recording and accounting for collection of receipts from high rate and low rate sales and so meet the requirements of the second criteria. If the baked good or cold prepared food is for consumption on the premises, it should be taxed at the high rate; otherwise, it should be taxed at the lower rate. This will require the store to make inquiry of the customer at the time of sale.

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