

Fresh culinary herb plants sold for the purpose of human consumption are subject to the low rate of Retailers' Occupation Tax. See 86 Ill. Adm. Code 130.310. (This is a PLR.)

April 7, 2021

Dear NAME:

This letter is in response to your letter dated December 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 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:

COMPANY is a STATE based corporation and does business as a food retailer in Illinois. We would like to request a private letter ruling as to whether or not culinary herb plants sold for the purpose of human consumption are subject to the low rate of the Retailer's Occupation Tax.

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

Per the requirements of Title 2 Part 1200 Section 1200.110(b):

1) Statement of Facts

Our company sells assorted fresh culinary herb plants in our produce departments either in a small pot containing dirt or bare root in a plastic bag containing a few ounces of water.

Illinois Administrative Code Section 130.310(a) defines food as:

“With respect to food for human consumption that is to be consumed off the premises where it is sold (other than alcoholic beverages, food consisting of or infused with adult use cannabis, soft drinks, candy and food that has been prepared for immediate consumption), the tax is imposed at the rate of 1%. Food for human consumption that is to be consumed off the premises where it is sold includes all food sold through a vending machine, except soft drinks, candy, and food products that are dispensed hot from a vending machine, regardless of the location of the vending machine.”

In previous audits, the Illinois Department of Revenue has indicated that packaged fresh cut herbs (no roots) were subject to the low rate of tax, and plants such as decorative indoor plants, hanging baskets and plants intended to be planted in gardens were subject to the high rate of tax.

A package of PRODUCT Basil is shown in exhibits 1 & 2. The package directions specifically say “Do not plant in soil...”

A package of potted Organic Italian Parsley is shown in exhibits 3 – 5. This particular line of products includes other varieties of culinary herbs, such as rosemary, mint, basil, cilantro, etc. Exhibit 3 shows the plant as sold in a plastic bag. Exhibit 4 shows the front of the plastic bag with the plant removed. Exhibit 5 shows the back of the plastic bag with the plant removed.

- 2) We submit Exhibits 1-5, product pictures, as the only other documents relevant to this request.
- 3) The tax period at issue is all time periods on and after the date of the Department’s private letter ruling.
- 4) To the best of our knowledge, the Department has not previously ruled on this or a similar issue for COMPANY. We have not previously requested and subsequently withdrawn a ruling request on this issue.
- 5 & 6) To the best of our knowledge, no State of Illinois authority has issued an opinion as to whether or not the products in question meet the

legal definition of food for human consumption for the purpose of the Retailers' Occupation Tax.

7) This request contains no trade secrets

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 is defined as any solid, liquid, powder or item intended by the seller primarily for human internal consumption, whether simple, compound or mixed, including foods such as condiments, spices, seasonings, vitamins, bottled water and ice. See 86 Ill. Adm. Code 130.310(c)(1). 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. However, 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. Food for human consumption that is to be consumed off the premises where it is sold is taxed at the rate of 1%. See 86 Ill. Adm. Code 130.310(a).

The manner in which food is taxed depends upon two 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." See 86 Ill. Adm. Code 130.310(b). The first factor is whether the retailer selling the food provides premises for consumption of food. The second factor is the nature of the food item being sold. See *id.* With regard to grocery stores, 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).

If a retailer does not provide seating or facilities for on-premises consumption of food, then the low rate of tax will be applied to all food items except for "food prepared for immediate consumption by the retailer" as provided in section 130.310(b) and soft drinks, candy and alcoholic beverages. However, for the low rate of tax to apply, retailers that sell both food prepared for immediate consumption and food for consumption off the premises where sold must utilize 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). If these receipts are not maintained, all sales will be presumed to be at the high rate of tax. See 86 Ill. Adm. Code 130.310(d)(2).

In your letter, you have requested a ruling as to whether fresh culinary herb plants sold for the purpose of human consumption are subject to the low rate of Retailers' Occupation Tax. The ruling on this issue is especially specific to the facts as stated in your letter. The fresh culinary herb plants at issue are sold either in a small pot containing dirt or with bare roots in a plastic bag containing a few ounces of water. These plants are displayed in the produce section of your grocery stores. Additionally, the plants' packaging states, "Do not plant in soil," "up to 2 cups" next to a picture of a measuring cup commonly used in cooking, "That's Tasty," "Indoor grown," and includes a picture of the herb being added to a plate of food for human consumption. Our understanding is that these plants are not intended for planting outdoors.

It is the Department's opinion, after reviewing the information in your letter and the additional materials submitted, that the seller clearly intends these plants to be used for human internal consumption. Therefore, these culinary herb plants meet the definition of food pursuant to Section 130.310(c)(1). Moreover, the plants are not prepared for immediate consumption and are intended for consumption off the premises where sold. Assuming the other criteria in Section 130.310(b) and (c) are met, the store should charge the low rate of tax on sales of these culinary herb plants.

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.

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Very truly yours,

Richard S. Wolters
Chairman, Private Letter Ruling Committee

RSW:rkn