

An item becomes realty after installation if it is physically affixed to the realty and the party affixing the item intends to make it a part of the realty. See 86 Ill. Adm. Code 130.2075. (This is a GIL.)

April 24, 2024

NAME
ADDRESS

Dear NAME:

This letter is in response to your email dated March 25, 2024, 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 have some questions for a client of mine related to their sale and installation of solar panel systems.

I have only been able to find the attached general guidance on contractors. I’m hoping someone has considered its application related to solar panels before and can guide me on these questions without having to request a PLR.

1. Are solar panels, cabling, etc installed on a building by a contractor (could be a for profit school, retailer, manufacturer, etc) treated as the sale of tangible personal property, instead of a construction contract (i.e. real property)? I found a sales tax taxability matrix in our research tools (attached), which indicates that solar energy devices and systems are taxable in IL (meaning it is tangible personal property), but can’t find any IL authority on the matter.
 - 1a. Would your answer change if the solar panels are installed as a “solar car port”, with the contractor building the car port as well?

I would appreciate it if you can provide me with a contact with experience in this area (such as an audit supervisor or someone in your department) so that I can discuss this with them. I'm leaning towards it being real property with the contractor being subject to Use Tax since the system generally doesn't move after installation and therefore is more permanent in nature, and since something like Venetian blinds are considered permanently affixed to a structure. However, based on that sales tax chart I had found, and since much of the contract price is for installation services that are not separately contracted for, I thought I'd see what experience there is so far with this type of purchase.

Can you please confirm that you've received this email?

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 35 ILCS 120/2; 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 35 ILCS 105/3; 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 retain the amount of Use Tax paid to reimburse themselves for their Retailers' Occupation Tax liability incurred on those sales. If the purchases occur outside Illinois, purchasers must self-assess their Use Tax liability and remit it directly to the Department.

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.

The relevant authority regarding the tax liabilities due on purchases of materials by contractors acting as combination retailers/construction contractors may be found in the Department's regulations located at 86 Ill. Adm. Code 130.2075(b)(2). This regulation requires the retailer/contractor to self-assess the tax liability directly to the Department in the same form as the supplier would have assessed (Retailers' Occupation Tax including local occupation tax, if applicable), if the retailer/contractor provided the supplier with a certificate of resale at the time of purchase. The

Department's regulation 86 Ill. Adm. Code 130.2075(b)(3) read in conjunction with Section (b)(2) discusses the situs of the local occupation taxes to be applied.

If a customer purchases tangible personal property over the counter without installation, for example an appliance or counter tops, then the retailer/contractor owes Retailers' Occupation Tax and must collect the corresponding Use Tax from the customer. If a customer purchases appliances or counter tops over the counter and separately contracts for installation of the appliances or counter tops, then the retailer/contractor owes Retailers' Occupation Tax and must collect the corresponding Use Tax from the customer on the sale of the appliances or counter tops. The separately contracted for installation of the appliances or counter tops is a separate service and no Retailers' Occupation Tax is incurred by the customer on the installation charges. See 86 Ill. Adm. Code 130.450.

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 (whether or not the cost of installation is separately stated in the contract). Obvious examples of the type of tangible personal property that is permanently affixed or incorporated into a structure are bathtubs, sinks, lavatories, cabinets built into the structure, water heaters, and water softeners. Stoves and refrigerators that are not free standing and are built into the structure are some additional examples.

For purposes of the Illinois sales tax laws, the Department uses an intention test to determine whether items remain tangible personal property after installation or become part of realty. The Department has invoked the intention test in letter rulings concerning construction contractors.

ST 00-0156-GIL sets forth the intention test as follows:

"In determining whether an item is permanently affixed to real estate, a very fact-specific inquiry must be made regarding whether the item is intended to remain with the realty. In order to make a finding that the item is permanently affixed, at least three factors must generally be examined. First, the item must be affixed to the realty. The item must also be applied to the use or purpose to which the realty is put. Finally, the intent of the person affixing the item must be examined. Another factor often examined is whether the item is essential to the use to which the real estate has been put."

In ST 01-0093-GIL, the Department also discusses the intention test:

"If circumstances indicate that the parties obviously intended that the item remain with the realty, we give effect to that intention. If an obvious intent

is not apparent, we look to the extent to which the item has been affixed. If the item can be removed without damage to the item or to the real estate, that is an indication that the parties intended that the item remain tangible personal property. We understand that your client's material handling systems can be removed without damage to the system components or to the real estate and that the systems are often moved within the buildings in which they are installed to accommodate expansions and updates to the systems. In addition, the Department looks to externals to determine intent. So, for example, if a contract for sale indicates that the seller can repossess the item in the event of non-payment, we think that is an indication that the parties intended that the item remain tangible personal property."

Any tangible personal property that a construction contractor purchases that will be permanently affixed to or incorporated into real property in this State will be subject to Use Tax. If such contractors did not pay the Use Tax liability to their out-of-State suppliers, those contractors must self-assess their Use Tax liability and pay it directly to the Department at the rate of 6.25%. 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.

As a general rule, construction contractors should not be providing resale certificates to their suppliers in Illinois or to out-of-State suppliers registered to collect Illinois Use Tax and should be paying Use Tax and any locally imposed retailers' occupation taxes at the time of purchasing the tangible personal property to be incorporated into real estate. However, when the purchaser (the purchaser here is the retailer/contractor) of tangible personal property may use such property by converting it into real estate, but may also resell such property "over-the-counter" apart from acting as a construction contractor, and where it is impracticable, at the time of purchasing such tangible personal property, for such purchaser to determine in which way the purchaser will dispose of the property, such purchaser may certify to the supplier that the purchaser is buying all of such tangible personal property for resale and thereafter account to the Department for the tax on disposing of such property. 86 Ill. Adm. Code 130.2075(b). If the purchaser subsequently uses the tangible personal property by converting it into real estate in this State in any manner, the purchaser must include the cost price of such tangible personal property in their reported taxable receipts in their return to the Department and must pay the State Retailers' Occupation Tax (not the Use Tax, but the Retailers' Occupation Tax) thereon to the Department, and must also pay locally-imposed retailers' occupation taxes thereon, if any. 86 Ill. Adm. Code 130.2075(b)(2). The cost price of such tangible personal property should be reported as receipts on Lines 1 and 4a of the ST-1 Sales and Use Tax Return.

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It is important to note that since construction contractors are the end users of the materials that they permanently affix to real estate, their customers incur no Use Tax liability, and the construction contractors have no legal authority to collect the Use Tax from their customers. However, many construction contractors pass on the amount of their Use Tax liabilities to customers in the form of higher prices or by including provisions in their contracts that require customers to “reimburse” the construction contractor for the contractor’s tax liability. Please note that this reimbursement cannot be billed to a customer as “sales tax,” but can be listed on a bill as a reimbursement of tax. The choice of whether a construction contractor requires a tax reimbursement from the customer or merely raises the contractor’s price is a business decision on the construction contractor’s part.

I hope this information is helpful. If you require additional information, please visit our website at tax.illinois.gov or contact the Department’s Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Richard S. Wolters
Associate Counsel

RSW: sce