

ST 24-0044-GIL 12/16/2024 COMPUTER SOFTWARE

The sale of computer software, including online video games, game extras, and in-game currency, downloaded onto a customer's computer in Illinois constitutes the sale of tangible personal property subject to Retailers' Occupation Tax. Illinois does not tax subscriptions of software as a service. See 86 Ill. Adm. Code 130.1935. (This is a GIL.)

December 16, 2024

COMPANY1  
NAME  
EMAIL

Dear NAME:

This letter is in response to your letter dated November 1, 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 <https://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:

**Private and Confidential**

To Whom It May Concern:

COMPANY1 ("COMPANY1" or "we") respectfully requests written guidance on behalf of its client ("the Company"), which wishes to remain anonymous at this time. The Company requests guidance from the Illinois Department of Revenue ("the Department") confirming the analysis and conclusions established in this letter. The relevant facts are set forth below.

### **Statement of Facts**

The Company is an out-of-state video game publisher. The Company, through a related entity, sells the video game in electronic format through third-party vendors such as COMPANY2, COMPANY3, and other vendors, and directly to customers. Note that the Company itself does not sell the video game. Also, the Company's related party and/or its wholesalers collect applicable sales tax on the sale of the video game to the purchaser.

Although the Company does not sell the video game, the Company offers purchasers of the video game the option to enhance their gaming experience through the purchase of three additional items. Each of these items is offered after the sale of the video game and are optional. These additional purchase offerings include: 1) monthly online subscription that allows the player to play the game in an online, multi-player setting; 2) in-game items, such as costumes or weapons, or time saving enhancements; and 3) virtual currency that allows the purchaser to acquire in-game items or pay for the monthly online subscription within the game. Note that although the game is sold separate from the online subscription the game cannot be played without monthly online subscription. If the subscription is canceled, the player may continue playing until the subscription period ends. Periodically the Company may offer free trials of the game and/or monthly online subscription to new users. These free trials are limited in duration and playability. Below is a detailed description of each offering.

#### **Offering #1 – Monthly Online Subscription**

To play the game, players must first purchase the video game from either the Company's related party or a third-party wholesaler. Then, at the player's option, the player can enter into a monthly subscription plan offered by the Company. The subscription plan may be terminated at any time by the player. Upon termination the player will still retain access until the subscription term ends. The player at all times maintains ownership rights to the previously purchased video game.

The monthly subscription plan is required to access the online functionality of the video game, including playing the video game in a multiplayer setting. Without the monthly subscription plan, the video game cannot be played online.

Players may purchase the monthly online subscription using any of the following four methods:

1. Players may pay the monthly online subscription fee with a credit or debit card directly with the Company.
2. Players may pay by redeeming virtual currency (see Offering#3).
3. Players may purchase a timecard from third party retailers (e.g., COMPANY4, COMPANY5, etc.).
4. Players may purchase the monthly online subscription through an online third-party seller, and then redeem the subscription with the Company.

### **Offering #2 – In-Game Items**

The Company offers players the option to purchase in-game items to enhance their playing experience. Each of these items are optional and are separately stated on sales receipts to the player. Examples of these in-game items are bucketed into the following categories:

1. Cosmetic Items:
  - Players can acquire cosmetic items such as costumes, armor, outfits, and weapons that customize the appearance of their characters and surroundings.
2. Gameplay / Time Savings Boosts:
  - Certain in-game items may offer advantages or shortcuts during gameplay, such as boosts to experience points or temporary items that enhance character attributes.
3. Digital Services:
  - Players may desire to change the name of their character.
4. Expansions:
  - Players can purchase expansion packs, granting them access to new content beyond the originally purchased video game. Players may purchase expansion packs from the Company or approved third-party retailers (COMPANY2, COMPANY3, COMPANY4, etc.).

### **Offering #3 – Virtual Currency**

The Company offers virtual currency that may be redeemed for transactions within the online game store. The virtual currency cannot be exchanged for real world money. The virtual currency is intended to provide players with an alternative payment method for transactions (monthly subscriptions/in-game

items) allowing them to make purchases without directly using a credit or debit card.

Players may purchase virtual currency using any of following two methods:

1. Players may purchase the currency directly with a credit or debit card, or via Amazon Pay or PayPal.
2. Players may in the future purchase the currency through an online third-party seller.

Players who purchase virtual currency may redeem it using two methods:

1. Players may redeem the currency in the online game store for in-game items (see Offering#2); or,
2. Players may redeem the currency in the online game store to pay for the monthly online subscription (see Offering #1).

### **Issue**

Whether the Company's offerings: 1) Monthly Online Subscription, 2) In-Game Items, and 3) Virtual Currency, are subject to sales tax.

### **Position**

The charges for Offering#1 - Monthly Online Subscription, Offering#2 - In-Game Items, and Offering#3 - Virtual Currency, are not subject to Illinois sales tax.

### **Discussion**

#### **Offering #1 – Monthly Online Subscription**

#### **Pertinent Authority:**

The Illinois Retailers' Occupation Tax Act imposes a tax upon persons engaged in the business of selling tangible personal property to purchasers for use or consumption.<sup>1</sup> In Illinois, Use Tax is imposed on the privilege of using, any kind of tangible personal property that is purchased at retail from a retailer.<sup>2</sup>

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<sup>1</sup> 35 ILCS § 120/2; 86 Ill. Adm. Code 130.101.

<sup>2</sup> 35 ILCS § 105/3; 86 Ill. Adm. Code 150.101.

Illinois does not have a statutory definition of “Tangible Personal Property” however it is generally known to mean “existing physically and can be used or consumed.”<sup>3</sup> County courts in Illinois have defined tangible personal property<sup>4</sup> to mean “that which may be seen, weighed, measured and estimated by the physical senses and which is capable of being possessed.”<sup>5</sup> Taken together, these definitions can be taken to mean that Retailers’ Occupation and Use taxes apply when tangible personal property is sold at retail to be used or consumed in Illinois. “Sale at retail” includes any transfer of the ownership of or title to tangible personal property to a purchaser, for use or consumption by any other person to whom such purchaser may transfer the tangible personal property without a valuable consideration.”<sup>6</sup>

In General Information Letter NO. ST-22-0027-GIL, the Department determined that a provider of software as a service is acting as a serviceman.<sup>7</sup> As a serviceman, the seller does not incur Retailers’ Occupation Tax. Service Occupation Tax is imposed upon all persons engaged in the business of making sales of service on all tangible personal property transferred incident to a sale of service, including computer software.<sup>8</sup> If the provider transfers to the customer an API, applet, desktop agent, or a remote access agent to enable the customer to access the provider’s network and services, it appears the subscriber is receiving computer software that is subject to tax.<sup>9</sup>

“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.<sup>10</sup>

Computer software provided through a cloud-based delivery system is not subject to tax. A cloud-based delivery system is one in which computer

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<sup>3</sup> Illinois Department of Revenue says “Tangible Personal Property” exists physically (i.e., you can touch it) and can be used or consumed. <https://tax.illinois.gov/questionsandanswers/answer.164.html>

<sup>4</sup> *In re Application of the County Collector*, 2011 Ill. App. 3d 100181, 952 N.E.2d 57 (Ill. App. Ct. 2011)

<sup>5</sup> *Archer Daniels Midland Co. v. City of Chicago*, 294 Ill. App. 3d 186, 190 (1997), quoting *In re Estate of Berman*, 39 Ill. App. 2d 175, 178 (1963).

<sup>6</sup> 35 ILCS § 120/1.

<sup>7</sup> ST-22-0027-GIL 12/02/2022 COMPUTER SOFTWARE.

<sup>8</sup> (35 ILCS 115/3); see also 86 Ill. Adm. Code Parts 130 and 140. ST-22-0027-GIL 12/02/2022.

<sup>9</sup> See 86 Ill. Adm. Code Parts 130 and 140.

<sup>10</sup> 35 ILCS 120/2-25.

software is never downloaded onto a client's computer and only accessed remotely.<sup>11</sup>

Information or data that is electronically transferred or downloaded is not considered the transfer of tangible personal property in Illinois.<sup>12</sup> However, canned computer software is considered taxable tangible personal property regardless of the form in which it is transferred or transmitted, including tape, disc, card, electronic means or other media.<sup>13</sup>

Canned software is generally subject to Illinois sales tax, however licensed software is not taxable if: (i) the license is evidenced by signed, written agreement; (ii) the license restricts the customer from duplicating the software; (iii) the customer cannot sublicense the software without the licensor's permission and continued control; (iv) for little or no charge the customer can secure a new copy of the software if lost or damaged; and (v) the customer must return or destroy their copy of the software at the end of the license term (this last requirement is deemed satisfied for perpetual licenses, even if not laid out in the written agreement).<sup>14</sup>

### Analysis

In Illinois, taxes apply when tangible personal property is sold at retail to be used or consumed in Illinois. "Sale at retail" includes any transfer of the ownership of or title to tangible personal property to a purchaser, for use or consumption by any other person to whom such purchaser may transfer the tangible personal property without a valuable consideration."<sup>15</sup>

The Company's offering does not qualify as tangible personal property, as no tangible personal property is transferred as part of the transaction.

Computer software provided through a cloud-based delivery system is not subject to tax. A cloud-based delivery system is one in which computer software is never downloaded onto a client's computer and only accessed remotely.<sup>16</sup>

The Company's offering meets the definition of cloud-based delivery of computer software. No computer software, as defined above, is downloaded onto the player's computer. The player may only remotely access the

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<sup>11</sup> 86 Ill. Adm. Code 130.1935(a)(3).

<sup>12</sup> See 86 Ill. Adm. Code 130.2105(a)(3).

<sup>13</sup> See 86 Ill. Adm. Code 130.1935.

<sup>14</sup> Ill. Admin. Code tit. 86 § 130.1935(a)(1).

<sup>15</sup> 35 ILCS § 120/1.

<sup>16</sup> 86 Ill. Adm. Code 130.1935(a)(3).

Company's content through their online account on the Company's remote server.

Further, in General Information Letter NO. ST-22-0027-GIL, the Department determined that a provider of software as a service is acting as a serviceman.<sup>17</sup> As a serviceman, the seller does not incur Retailers' Occupation Tax. Service Occupation Tax is imposed upon all persons engaged in the business of making sales of service on all tangible personal property transferred incident to a sale of service, including computer software.<sup>18</sup> If the provider transfers to the customer an API, applet, desktop agent, or a remote access agent to enable the customer to access the provider's network and services, it appears the subscriber is receiving computer software that is subject to tax.<sup>19</sup>

Here, the Company provides remote access only to individual Players who have purchased a subscription. Only these Players can access the content on the Company's server remotely. Players cannot download, copy or otherwise modify the software on the Company's server. Nor can Players download any digital content from the Company's servers. The Company does not provide software to Players, and only provides remote access contingent on Players purchasing a monthly subscription. If a subscription is cancelled the Player may only continue accessing the digital content on the Company's servers until the end of the prepaid subscription term. After this date, Players will need to repurchase a monthly subscription.

Additionally, Illinois statutes state that computer software provided through a cloud-based delivery system is not subject to tax. Further, if the information is not electronically transferred or downloaded it is not a transfer of tangible personal property, and therefore not taxable.

Here, as discussed above, no property is transferred or electronically downloaded by the Player. The video games offered by the Company are only accessible after paying a subscription fee, and only then may Players access content on their servers.

While canned software is generally subject to Illinois sales tax, licensed software is not taxable if: (i) the license is evidenced by signed, written agreement; (ii) the license restricts the customer from duplicating the software; (iii) the customer cannot sublicense the software without the licensor's permission and continued control; (iv) for little or no charge the

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<sup>17</sup> ST-22-0027-GIL 12/02/2022 COMPUTER SOFTWARE.

<sup>18</sup> (35 ILCS 115/3); see also 86 Ill. Adm. Code Parts 130 and 140. ST-22-0027-GIL 12/02/2022.

<sup>19</sup> See 86 Ill. Adm. Code Parts 130 and 140.

customer can secure a new copy of the software if lost or damaged; and (v) the customer must return or destroy their copy of the software at the end of the license term (this last requirement is deemed satisfied for perpetual licenses, even if not laid out in the written agreement).<sup>20</sup>

The Company's offering does not need to be evaluated under the five-part test for the taxability of licensed software in Illinois because it is not canned licensed software. The service provided is a monthly subscription that grants players remote access to video games they have already purchased from a third-party retailer, rather than involving the sale or licensing of software. Therefore, the conditions outlined in the five-part test—such as the need for a signed, written agreement; restrictions on duplication; sublicensing controls; provisions for replacement copies; and requirements to return or destroy the software—are not relevant in this context. The Company is not involved in the distribution or control of the software; instead, it simply offers a service to provide access to games that users already own. Consequently, the tax implications associated with software licensing do not pertain to this subscription service.

Given that the Company's offering, Monthly Subscription Fees, does not meet the definitions of tangible personal property, does not need to be evaluated under the five-part software licensing test, and instead qualifies as a cloud-based delivery system, this offering should not be subject to Illinois' Retailers' Occupation Tax and Use Tax.

### **Offering #2 – In-Game Items**

The Illinois Department of Revenue decided in General Information Letter No. ST 10-0113-GIL that persons who are engaged in the business of selling cards or coupons, which entitle purchasers to the right to redeem those cards for tangible personal property, are not engaged in selling tangible personal property. Rather, they are making sales of intangibles. Such sales are not subject to the Retailer's Occupation Tax. However, when those cards or coupons are used to purchase tangible personal property, the retailers transferring that tangible personal property incur Retailer's Occupation Tax liability based on their gross receipts from those sales.

Similar to the facts above, the Company's second offering is not taxable. In-game items used within the Company's video games are not transferred to the Player's computers and are not downloadable for access outside of the game

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<sup>20</sup> Ill. Admin. Code tit. 86 § 130.1935(a)(1).



played online. Thus, the Company's offering does not meet the definition of a retail transaction of tangible personal property.

For the same reasons specified above in Offering #1, the Company's second offering does not meet the definition of computer software that is delivered electronically. In-game items are distinct from these categories because there is no electronic delivery to the Player. Similar to the SaaS analysis mentioned above, Players may only access the video games and relevant in-game items via the internet and with a subscription.

Therefore, the sale of in-game items is not subject to Retailers' Occupation Tax and Use Tax in Illinois.

### **Offering #3– Virtual Currency**

#### Pertinent Authority

The Illinois Retailers' Occupation Tax Act imposes a tax upon persons engaged in the business of selling tangible personal property to purchasers for use or consumption.<sup>21</sup> In Illinois, Use Tax is imposed on the privilege of using, any kind of tangible personal property that is purchased at retail from a retailer.<sup>22</sup>

Illinois does not have a statutory definition of "Tangible Personal Property" however it is generally known to mean "existing physically and can be used or consumed."<sup>23</sup> County courts in Illinois have defined tangible personal property<sup>24</sup> to mean "that which may be seen, weighed, measured and estimated by the physical senses and which is capable of being possessed."<sup>25</sup> Taken together, these definitions can be taken to mean that Retailers' Occupation and Use taxes apply when tangible personal property is sold at retail to be used or consumed in Illinois. "Sale at retail" includes any transfer of the ownership of or title to tangible personal property to a purchaser, for use or consumption by any other person to whom such purchaser may transfer the tangible personal property without a valuable consideration."<sup>26</sup>

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<sup>21</sup> 35 ILCS § 120/2; 86 Ill. Adm. Code 130.101.

<sup>22</sup> 35 ILCS § 105/3; 86 Ill. Adm. Code 150.101.

<sup>23</sup> Illinois Department of Revenue says "Tangible Personal Property" exists physically (i.e., you can touch it) and can be used or consumed. <https://tax.illinois.gov/questionsandanswers/answer.164.html>.

<sup>24</sup> In re Application of the County Collector, 2011 Ill. App. 3d 100181, 952 N.E.2d 57 (Ill. App. Ct. 2011).

<sup>25</sup> Archer Daniels Midland Co. v. City of Chicago, 294 Ill. App. 3d 186, 190 (1997), quoting In re Estate of Berman, 39 Ill. App. 2d 175, 178 (1963).

<sup>26</sup> 35 ILCS § 120/1.

“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.<sup>27</sup>

Computer software provided through a cloud-based delivery system is not subject to tax. A cloud-based delivery system is one in which computer software is never downloaded onto a client's computer and only accessed remotely.<sup>28</sup>

The Illinois Department of Revenue decided in General Information Letter No. ST 10-0113-GIL that persons who are engaged in the business of selling cards or coupons, which entitle purchasers to the right to redeem those cards for tangible personal property, are not engaged in selling tangible personal property. Rather, they are making sales of intangibles. Such sales are not subject to the Retailer's Occupation Tax. However, when those cards or coupons are used to purchase tangible personal property, the retailers transferring that tangible personal property incur Retailer's Occupation Tax liability based on their gross receipts from those sales.

#### Analysis

In Illinois, taxes apply when tangible personal property is sold at retail to be used or consumed in Illinois. “Sale at retail” includes any transfer of the ownership of or title to tangible personal property to a purchaser, for use or consumption by any other person to whom such purchaser may transfer the tangible personal property without a valuable consideration.”<sup>29</sup>

The Company's offering does not qualify as tangible personal property, as no tangible personal property is transferred as part of the transaction.

Computer software provided through a cloud-based delivery system is not subject to tax. A cloud-based delivery system is one in which computer software is never downloaded onto a client's computer and only accessed remotely.<sup>30</sup>

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<sup>27</sup> 35 ILCS 120/2-25.

<sup>28</sup> 86 Ill. Adm. Code 130.1935(a)(3).

<sup>29</sup> 35 ILCS § 120/1.

<sup>30</sup> 86 Ill. Adm. Code 130.1935(a)(3).

The Company's offering meets the definition of cloud-based delivery of computer software. No computer software, as defined above, is downloaded onto the player's computer. The player may only remotely access the Company's content through their online account on the Company's remote server.

Per, General Information Letter NO. ST-10-0113-GIL, Companies engaged in the business of selling cards or coupons, which entitle purchasers to the right to redeem those cards for tangible personal property, are not engaged in selling tangible personal property. Rather, they are making sales of intangibles. Such sales are not subject to the Retailers' Occupation Tax.

Here, Company does not offer physical cards that entitle players the right to redemption in the online account. Instead, the Company offers players the ability to purchase virtual currency in their online account on the Company's servers. This virtual currency can be used to purchase in-game items, as well as to pay for monthly subscription fees. The virtual currency once purchased does not have real world value nor can it be exchanged for real-world money. If the player uses virtual currency to purchase in-game items, these can only be viewed or accessed while playing the game on the Company's server. Purchased in-game items cannot be downloaded to player's computers. The items immediately after purchase are directly added into the video game content. As such, there is no transfer of tangible personal property, and the transaction should not be taxed.

Therefore, the sale of virtual currency is not subject to Retailers' Occupation and Use Tax in Illinois.

**DEPARTMENT'S RESPONSE:**

The Department's regulation "Public Information, Rulemaking and Organization" provides that "[w]hether to issue a private letter ruling in response to a letter ruling request is within the discretion of the Department. The Department will respond to all requests for private letter rulings either by issuance of a ruling or by a letter explaining that the request for ruling will not be honored." 2 Ill. Adm. Code 1200.110(a)(4). The Department has declined to issue a Private Letter Ruling in response to your request. We hope, however, the following General Information Letter will be helpful in addressing your question.

Retailers' Occupation Tax and Use Tax

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.

If a transaction does not involve the transfer of any tangible personal property to the customer, then it generally would not be subject to Retailers' Occupation Tax, Use Tax, Service Occupation Tax, or Service Use Tax. Information or data that is electronically transferred or downloaded is not considered the transfer of tangible personal property in this State. The Department does not consider the viewing, downloading, or electronically transmitting of video, text, and other data over the internet to be the transfer of tangible personal property. See 86 Ill. Adm. Code 130.2105(a)(3).

#### Service Occupation Tax

Retailers' Occupation Tax and Use Tax do not apply to sales of service. Under the Service Occupation Tax Act, businesses providing services (*i.e.*, servicemen) are taxed on tangible personal property transferred as an incident to sales of service. See 86 Ill. Adm. Code 140.101. The transfer of tangible personal property to service customers may result in either Service Occupation Tax liability or Use Tax liability for servicemen, depending upon which tax base they choose to calculate their liability.

Servicemen may calculate their tax base in one of four ways: (1) separately-stated selling price of tangible personal property transferred incident to service; (2) 50% of the serviceman's entire bill; (3) Service Occupation Tax on the serviceman's cost price if the serviceman is a registered *de minimis* serviceman; or (4) Use Tax on the serviceman's cost price if the serviceman is *de minimis* and is not otherwise required to be registered under Section 2a of the Retailers' Occupation Tax Act.

Using the first method, servicemen may separately state the selling price of each item transferred incident to sales of service. The tax is based on the separately stated selling price of the tangible personal property transferred. If servicemen do not wish to separately state the selling price of the tangible personal property transferred, those servicemen must use the second method where they will use 50% of the entire bill to their service customers as the tax base. Both methods provide that in no event may the tax base be less than the

cost price of the tangible personal property transferred. Under these methods, servicemen may provide their suppliers with Certificates of Resale when purchasing the tangible personal property to be transferred as a part of sales of service. They are required to collect the corresponding Service Use Tax from their customers to remit to the Department.

The third way servicemen may account for their tax liability only applies to de minimis servicemen who have either chosen to be registered or are required to be registered because they incur Retailers' Occupation Tax liability with respect to a portion of their business. Servicemen may qualify as de minimis if they determine that their annual aggregate cost price of tangible personal property transferred incident to sales of service is less than 35% of their annual gross receipts from service transactions (75% in the case of pharmacists and persons engaged in graphic arts production). See 86 Ill. Adm. Code 140.101(f). This class of registered de minimis servicemen is authorized to pay Service Occupation Tax (which includes local taxes) based upon the cost price of tangible personal property transferred incident to sales of service. Servicemen that incur Service Occupation Tax collect the Service Use Tax from their customers. They remit tax to the Department by filing returns and do not pay tax to their suppliers. They provide suppliers with Certificates of Resale for the tangible personal property transferred to service customers.

The final method of determining tax liability may be used by de minimis servicemen that are not otherwise required to be registered under Section 2a of the Retailers' Occupation Tax Act. Such de minimis servicemen handle their tax liability by paying Use Tax to their suppliers. If their suppliers are not registered to collect and remit tax, the servicemen must register, self-assess, and remit Use Tax to the Department. The servicemen are considered to be the end-users of the tangible personal property transferred incident to service. Consequently, they are not authorized to collect a "tax" from the service customers. See 86 Ill. Adm. Code 140.108.

If a company provides services that are accompanied with the transfer of tangible personal property, including computer software, such service transactions are generally subject to tax liability under one of the four methods set forth above. If a transaction does not involve the transfer of any tangible personal property to the customer, then it generally would not be subject to Retailers' Occupation Tax, Use Tax, Service Occupation Tax, or Service Use Tax. Video, text, information, or data that is electronically transferred, viewed, or downloaded is not considered the transfer of tangible personal property in this State. See 86 Ill. Adm. Code 130.2105(a)(3).

#### Computer Software

“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, including video games, 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 subsection (a)(1) of Section 130.1935, 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 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, support 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 or video game does not meet all of the criteria, the software is taxable.

### Software as a Service

Software as a service is generally defined as a cloud computing service model where the provider licenses the use of computer software to a client and manages all needed physical and software resources. The possession and ownership of software remains with the provider, and the client accesses the software on web-enabled devices over the internet. The software is often provided on a subscription basis.

A provider of software as a service is acting as a serviceman. As a serviceman, the seller does not incur Retailers' Occupation Tax. Service Occupation Tax is imposed upon all persons engaged in the business of making sales of service on all tangible personal property transferred incident to a sale of service, including computer software (35 ILCS 115/3), and is calculated as explained above. Illinois does not tax subscriptions of software as a service.

Computer software is defined broadly in the Retailers' Occupation Tax Act. However, computer software provided through a cloud-based delivery system – a system in which computer software is never downloaded onto a client's computer and is only accessed remotely – is not subject to tax. If a provider of such a service provides to the subscriber an API, applet, desktop agent, or a remote access agent to enable the subscriber to access the provider's network and services, the subscriber is receiving computer software. 86 Ill. Adm. Code 130.1935(a)(3) and (4). Although there may not be a separate charge to the subscriber for the computer software, it is nonetheless subject to tax, unless the transfer qualifies as a non-taxable license of computer software.

The Department has previously stated that the sale of extras and in-game currency could constitute a sale of tangible personal property in Illinois subject to State and local retailers' occupation tax. ST 24-0036-GIL. Depending on the nature of the extras and how they are used by the purchaser will determine whether they are taxable. If the sale of extras merely "unlocks" content that was preloaded on the initial download or purchase of the game, then that would constitute a sale of tangible personal property. Similarly, a purchaser buying an extra item that is downloaded to the game would also be a sale of tangible personal property (canned computer software). ST 24-0036-GIL.

COMPANY1/NAME

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However, if the purchase merely allows the player to access the item on the Company's server through online play and nothing is ever downloaded or unlocked in the original, downloaded game then such transaction would not be a sale of tangible personal property.

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

Very truly yours,

Kimberly Rossini  
Associate Counsel

KAR:slc