

Isolated or occasional sales of tangible personal property at retail by persons who do not hold themselves out as being engaged (or who do not habitually engage) in selling such tangible personal property at retail do not constitute engaging in the business of selling such tangible personal property at retail. See 86 Ill. Adm. Code 130.110. (This is a GIL.)

May 26, 2021

Dear NAME:

This letter is in response to your letter dated April 20, 2021, 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:

Re: General Information Letter Request

To whom it may concern:

We respectfully request the issuance of guidance on behalf of our client (the "Company B") for the issues described below based on the facts contained herein. Company B is seeking to rationalize its structure by reducing the number of operating entities. As described below, Company B desires to merge Company A into Company C. Guidance is sought on the tax treatment of the assets being transferred as part of this transaction.

Facts

Company A is a subsidiary to an infrastructure industry conglomerate ("Company B"). Company A leases access and scaffolding systems in Illinois. When performing construction, restoration, or other activities within infrastructure projects, contractors may engage with Company A

to provide temporary access systems under bona fide lease arrangements.

Within the lease arrangements, Company A provides scaffolding or other access equipment, for a contractor to utilize until conclusion of the arrangement. Generally, after the lease expires under its terms, possession of the leased equipment reverts back to Company A. Company A does not habitually transfer ownership of its property to contractors. However, Company A has occasionally sold equipment and, mostly, parts for equipment (e.g., poles, boards, etc.) to third parties outright in lieu of a leasing arrangement; in YYYY and YYYY, these occasional sales represented no more than 1.5% of Company A's total revenue.

Company A does not hold itself out as a retailer. Specifically, Company A does not advertise or otherwise seek out retail customers or sales. Rather, these occasional sales arise at the lease customers request for the equipment or parts to equipment. Further, a portion of the retail sales would be related to sales of damaged leased equipment to the lessee under the lease agreement. In all respects, Company A does not act as a true retailer in Illinois as it's [sic] primary business is the leasing of equipment to customers.

Company A is registered for the Retailers' Occupation Tax to remit sales tax on these isolated sales. Company A does not collect sales tax on its rental transactions. As a lessor, Company A pays tax on its purchase of assets at the time of purchase.

As part of an effort to better organize Company B's legal entity structure, Company B will merge Company A into a related brother-sister company ("Company C"). The reorganization will be accomplished by having Company A surrender all of its assets to Company C in exchange for cash or Company C stock.

Issues

Whether Company A's transfer of assets to Company C a sale [sic] deemed taxable for the Retailer's Occupation Tax?

Analysis

Illinois Admin. Code 86 §130.2010(b) states that persons who rent tangible personal property to others are "not engaged in the business of selling tangible personal property to purchasers for use or consumption within the meaning of the Retailers' Occupation Tax Act and are not

required to remit Retailers' Occupation Tax measured by their gross receipts from such transactions." Furthermore, Illinois Admin. Code 86 §150.305(e) comments that "the Use Tax does not apply to the rental payments made by a lessee to a lessor... and the lessor is legally the user of the property and is taxable on the purchase price thereof."

In a private letter ruling, Illinois determined that the lessor of an aircraft is not a retailer when it subsequently sells the aircraft it was leasing. Specifically, Illinois Private Letter Ruling, No. ST 00-0003-PLR, dated 02/29/2000, states, "the sale of the Airplane at the end of the Lease term by the Trust to another person is an occasional sale which does not constitute engaging in a business of selling such property at retail. An occasional sale does not make the Trust a retailer, ..." A lessor is not a retailer of property that it leases under a bona fide rental agreement, even when an occasional sale is present.

According to Illinois Admin. Code §130.110(a), the Retailers' Occupation Tax is not imposed "upon persons who are not engaged in the business of selling tangible personal property, persons who make isolated or occasional sales thereof do not incur tax liability." Furthermore, Illinois Admin. Code §130.110(f) confirms that only a taxpayer with the intent to resell property at purchase "engages in conduct equivalent to holding himself out as a retailer." Illinois Admin. Code §150.305(d) mandates that the use tax does not apply for "tangible personal property purchased from an isolated or occasional seller who is not engaged in the business of selling such tangible personal property." The use tax, to complement the Retailers' Occupation Tax, does not apply to a purchase if an exemption exists for the Retailers' Occupation Tax.

Under *Valier Coal Company v The Department of Revenue*, 11 Ill 2d 402, dated 05/23/1957, the Supreme Court of Illinois found that, for purpose of the Retailers' Occupation Tax Act, "the word 'business' ... refers to a particular occupation or employment habitually engaged in for a livelihood or gain." To be considered doing business under the court's definition, a taxpayer must engage in the activity constantly or regularly.

In *Xtra, Inc. v Illinois Department of Revenue*, 95 L 50659, dated 05/07/1999, Illinois Circuit Court ruled that Xtra, Inc. was not a retailer even though less than 2% of its revenue was attributed to the sale of property that came off lease. The court noted that the Retailers' Occupation Tax Act "does not tax the sale of property, but rather the business of selling property for use or consumption." Xtra establishes a safe harbor judicial precedence [sic], that activities that both [sic]

infrequent in occurrence and represent 2% or less of gross receipts are exempt from administration of the Retailers' Occupation Tax.

Conclusion

Based on the guidance described above, Company A's one-time transfer of its assets to Company C is excepted from the Retailers' Occupation Tax because the sale is not a business activity. Illinois regulations note that an intent to resell property must be present for a taxpayer to be a retailer; however, Company A acquired its equipment with the intent to lease it, not resell it. The above stated guidance confirms that the Retailers' Occupation Tax Act does not tax the occasional sale of property, but taxes business activities, or an activity that is habitually conducted. In applying *Valier Coal Company*, Company A must be constantly or regularly engaged in the activity of making retail sales to be considered a retailer. As described in the facts, Company A does not constantly or even regularly engage in such activity. Specifically, Company A does not hold itself out as a retailer, does not seek out retail sales, and, further, does not have considerable revenue from such activity. Rather, its retail sales are a by-product of its business of leasing property to customers.

The opinion in *Xtra, Inc.* would suggest a threshold for establishing a business activity from an occasional sale for the Retailers' Occupation Tax. Specifically, the court found that retail revenue must, at minimum, exceed 2% of a taxpayer's revenue. Representing about 1.5% of Company A's total revenue from YYYY-YYYY, Company A's historical retail sales of leased equipment are both de minimus and infrequent. Moreover, the transfer of leased assets (upon which tax was paid at the time of purchase) to Company C by Company A serves no business purpose other than to complete a one-time legal reorganization of Company B's entity structure.

As such, even though Company A is registered to collect the Retailers' Occupation Tax, Company A- as a lessor of property- is not habitually engaged as a retailer in Illinois, and should not collect tax upon the occasional one-time transfer of its assets to Company C as part of the restructuring transaction.

As you review the above request for guidance, please do not hesitate to reach out to me with any questions at ##### or E-MAIL. Further, we kindly request an opportunity to have a conference call to discuss the above request.

DEPARTMENT'S RESPONSE:

Generally, when cash or stock is received in consideration of capital assets, a "sale at retail" has occurred. See 35 ILCS 120/1. Please note that in general, the transfer of capital assets pursuant to a reorganization may not be subject to sales tax liability in Illinois if the transferor of such capital assets has not ordinarily sold like-kind property at retail. See 86 Ill. Adm. Code 130.110.

Isolated or occasional sales of tangible personal property at retail by persons who do not hold themselves out as being engaged (or who do not habitually engage) in selling such tangible personal property at retail do not constitute engaging in the business of selling such tangible personal property at retail. See 86 Ill. Adm. Code 130.110. For example, if a retailer sells tangible personal property, such as machinery or other capital assets, which he has used in his business and no longer needs, and which he does not otherwise engage in selling, he does not incur Retailers' Occupation Tax liability when selling such tangible personal property even if the sales are at retail and even if he may be required to make a considerable number of such sales in order to dispose of such tangible personal property. This is because such sales are isolated or occasional and do not constitute a business of selling tangible personal property at retail. See 86 Ill. Adm. Code 130.110(b). Similarly, persons who, under bona fide agreements, lease tangible personal property to others are, to this extent, not engaged in the business of selling tangible personal property to purchasers for use or consumption within the meaning of the Retailers' Occupation Tax Act. See 86 Ill. Adm. Code 130.2010(b). Further, those engaging in this type of leasing business do not purchase inventory with the intent to resell it to purchasers for use or consumption and, therefore, are not holding themselves out as retailers. See 86 Ill. Adm. Code 130.110(f).

For instance, whether a lessor's sale of tangible personal property coming off lease that is no longer needed for the lessor's rental inventory is subject to Retailers' Occupation Tax liability depends on whether the seller is strictly a lessor, or whether the seller is otherwise engaged in the business of selling like-kind property. See 86 Ill. Adm. Code 130.2013(e). Except in the case of motor vehicles, as explained at 86 Ill. Adm. Code 130.111, a person who is strictly a lessor and whose only sales are of items no longer needed for his rental inventory does not incur Retailers' Occupation Tax liability on those sales because they constitute non-taxable isolated or occasional sales. See 86 Ill. Adm. Code 130.110. Consequently, the purchaser of that tangible personal property does not incur a corresponding Use Tax liability on that purchase. See 86 Ill. Adm. Code 150.101(d).

A one-time sale of business assets as part of a business reorganization that consist of leasing inventory would constitute isolated or occasional sales if the seller is not engaged in the business of selling like-kind tangible personal property. Sellers making such one-time sales would not incur Retailers' Occupation Tax liability on the

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gross receipts. Consequently, the purchasers of that tangible personal property do not incur a Use Tax liability on those purchases. See 86 Ill. Adm. Code 150.101.

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,

Alexis K. Overstreet
Associate Counsel

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