

This letter discusses the Rental Purchase Agreement Occupation and Use Tax (35 ILCS 180/1 et seq.); the demonstration use exemption from the Use Tax Act (86 Ill. Adm. Code 150.306); and sourcing of State and local Retailers' Occupation Tax (86 Ill. Adm. Code 270.115). (This is a GIL.)

July 27, 2021

Dear NAME:

This letter is in response to your letter 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:

Our firm, on behalf of our client ("Company"), and pursuant to Illinois Administrative Code title 2, section 1200.120, respectfully requests guidance on the application of Illinois sales/use tax laws to the facts presented below. Please direct any questions regarding this request to NAME at PHONE# of E-MAIL.

A. Statement of Facts

The Company is a non-domiciliary corporation that maintains its headquarters outside of Illinois. The Company operates e-commerce websites that showcase items of non-titled tangible personal property ("Merchandise") that the Company purchases for resale and markets to individuals located throughout the United States ("Customers"). All of the Company's Customers are individuals as the Company's Merchandise is used for personal purposes only. Customers can try the Merchandise as part of a subscription program before making a decision whether to purchase or return the Merchandise.

The Company's websites are online platforms whereby Customers enter into a month-to-month subscription (cancelable at any time) that allows

them to receive different items of Merchandise in order to ascertain whether the Merchandise suits their particular needs. The Company's subscription-based business model helps induce Customers to purchase the Merchandise. If the Customer determines that the Merchandise does not suit their needs, the Customer can return the Merchandise to receive a different item of Merchandise for an initial demonstration use, which the Customer can again either purchase or return for another item of Merchandise. The Merchandise showcased on the Company's online platform has a normal shelf-life of less than 24 months for various reasons, including routine damage.

The Company ships all Merchandise from locations outside of Illinois. Any returns are accepted only at locations outside of Illinois. The Company has no store location or other place of business in Illinois. No inventory is stored at any Illinois warehouse. The Company purchases all Merchandise for resale free of sales/use taxes.

Merchandise that is shipped to an Illinois Customer pursuant to a subscription may have already been used by a Customer in another state, and Merchandise that is returned by an Illinois Customer pursuant to a subscription may then be subsequently reused by other Customers located anywhere in the United States.

All Merchandise purchased by the Company that is made available on its online platform is classified as "inventory" for book and tax purposes.

The Company's cumulative gross receipts from sales of Merchandise to purchasers in Illinois exceeds \$ 100,000 annually, and/or it enters into 200 or more separate transactions for the sale of Merchandise to Customers in Illinois. The Company and its Customers do not enter into any conditional sales agreements (*i.e.*, leases with a dollar or nominal option to purchase).

B. Issue

The Company is seeking guidance on how it should account for Illinois sales/use taxes, including its monthly subscription receipts and sales proceeds.

C. Discussion & Analysis

As relevant here, Illinois law imposes a Retailers' Occupation Tax ("State Sales Tax"), a Use Tax, and a Rental Purchase Agreement Occupation and Use Tax. Illinois law also provides for various Retailers' Occupation

Taxes that are imposed by counties, municipalities, and special districts (collectively, “Local Sales Taxes”). All of these taxes are discussed in the context of the facts discussed above.

1. The Company’s subscription receipts are not subject to State Tax or Local Sales Tax

Illinois imposes a State Sales Tax upon “persons engaged in the business of selling at retail tangible personal property...”¹ As a general rule, this tax is imposed “at the rate of 6.25% of gross receipts from sales of tangible personal property made in the course of business.”²

Various counties, municipalities, and special districts impose Local Sales Taxes that are imposed on “all persons engaged in the business of selling tangible personal property at retail [in the locality].”³ All of these Local Sales Taxes are administered by the state.

The phrase “sale at retail” is defined in the State Sales Tax law, and that same definition is incorporated by reference in the various Local Sales Tax laws. As relevant here, the phrase “sale at retail” is defined to mean “any transfer of the ownership of or title to tangible personal property to a purchaser....”⁴

The Company’s subscription receipts are not derived from ‘any transfer of the ownership of ... tangible personal property to a purchaser.’ As such, the Company’s subscription receipts are not subject to State Sales Tax or Local Sales Tax.

2. The Company’s subscription receipts are subject to Illinois’ new Rental Purchase Agreement Occupation and Use Tax

Illinois law now has a Rental Purchase Agreement Occupation and Use Tax Act, which became effective January 1, 2018.⁵ This tax is imposed “upon persons engaged in this State in the business of renting merchandise under a rental-purchase agreement in Illinois at the rate of 6.25% of the gross receipts received from the business.”⁶

¹ 35 ILCS 120/2.

² 35 ILCS 120/2-10.

³ See, e.g., 55 ILCS 5/5-1006 (home rule county ROT); 65 ILCS 5/8-11-1 (home rule municipal ROT); 70 ILCS 3615/4.03(e) (regional transportation authority ROT).

⁴ 35 ILCS 120/1 (emphasis added).

⁵ 35 ILCS 180/1 *et. Seq.*

⁶ 35 ILCS 180/10.

The term “rental purchase agreement” is defined as “an agreement for the use of merchandise by a consumer for personal, family, or household purposes for an initial period of 4 months or less that is automatically renewable with each payment after the initial period and that permits the consumer to become the owner of the merchandise.”⁷

The Company’s online subscription platform provides for month-to-month subscriptions, cancelable at any time, but is automatically renewable with each payment. The subscription is always for an initial period of 4 months or less. Further, the terms between the Company and the Customer permit the Customer to own the Merchandise if the Customer decides to purchase the Merchandise after an initial demonstration use.

Based on the foregoing, the Company’s monthly subscription receipts are subject to Illinois’ new Rental Purchase Agreement Occupation and Use Tax because the Company’s receipts are pursuant to an agreement with an individual Customer to use the Merchandise for personal purposes for an initial period of 4 months or less, the agreement is automatically renewable with each payment after the initial period, and the Customer is permitted to purchase the Merchandise.

3. The Company does not owe Illinois use tax on the Merchandise purchased for resale and made available to its subscription-based Customers

Illinois imposes a use tax on the “privilege of using in the State tangible personal property purchased at retail from a retailer....”⁸ As a general rule, the use tax is imposed “at the rate of 6.25% of either the selling price or the fair market value, if any, of the tangible personal property.”⁹

Illinois’ use tax provides for various exemptions, including: (1) “merchandise that is subject to the Rental Purchase Agreement Occupation and Use Tax,”¹⁰ and (2) a demonstration use exemption.¹¹

With respect to the first exemption noted, if the Department agrees that the Company’s subscription receipts are subject to Illinois’ Rental

⁷ 35 ILCS 180/5.

⁸ 35 ILCS 105/3.

⁹ 35 ILCS 105/3-10.

¹⁰ 35 ILCS 105/3-5(38).

¹¹ 35 ILCS 105/2 (“‘use’ does not mean the demonstration use ... of tangible personal property by a retailer before he sells that tangible personal property.”)

Purchase Agreement Occupation Tax, the Company's Merchandise purchases are exempt from Illinois use tax.

Alternatively, if it is determined that the Rental Purchase Agreement Occupation and Use Tax does not apply here, the Company's Merchandise is exempt from use tax pursuant to Illinois' demonstration use exemption.¹² Illinois' Use Tax Act defines the term "use" to exclude the "demonstration use ... of tangible personal property by a retailer before he sells that tangible personal property." A Department regulation clarifies that property may qualify for the demonstration use exemption even if the property is leased. Specifically, the Department's regulation states: "the leasing of tangible personal property by a retailer to prospective buyers for the purpose of allowing them to ascertain whether the property suits their particular need and for the purpose of trying to induce them to buy the property is a use for demonstration purposes, [except as provided otherwise for aircraft and watercraft]."¹³ The Company's Merchandise does not include aircraft or watercraft.

Based on the foregoing, no Illinois Use Tax is due on the Merchandise that is used in Illinois pursuant to the subscription-based online platform because the Merchandise is subject to the Rental Purchase Agreement Occupation and Use Tax or, alternatively, the demonstration use exemption applies.¹⁴

4. The Company is required to collect and remit Illinois use tax (not sales tax) on its Merchandise sales

Illinois' Sales Tax is an "occupation tax."¹⁵ The Tax is imposed upon "persons engaged in the business of selling at retail tangible personal property."¹⁶ If the state sales tax applies, then the retailer is also responsible for collecting and remitting the applicable local sales tax,

¹² 35 ILCS 105/3; Ill. Admin. Code tit. 86, § 150.306.

¹³ Ill. Admin Code tit. 86, § 150.306(b)(2).

¹⁴ We note that should the Department determine that the Company is required to remit use tax on Merchandise that it transfers to its subscribers via its subscription platform, the Company should be allowed a credit or a refund for use tax paid on those Merchandise when it subsequently sells Merchandise to Customers via either of its two platforms. The credit or refund is limited to the lesser of the use tax paid by the Company or the tax collected from the Company's customer upon sale of the item. See Illinois Department of Revenue Information Bulletin FY86-54.

¹⁵ 35ILCS 120/2; see also *Automatic Voting Machine Corp v. Daley*, 100 N.E. 2d 591 (Ill. 1951)

¹⁶ *Id.*

which is imposed on “all persons engaged in the business of selling tangible personal property at retail [in the locality].”¹⁷

To complement the sales tax, Illinois imposes a use tax. Use tax is imposed on the “privilege of using in this State tangible personal property purchased at retail from a retailer...”¹⁸ If the retailer “maintains a place of business in Illinois,” the retailer is required to collect and remit the applicable use tax from the purchaser.¹⁹ A “retailer maintaining a place of business in this State” is a defined phrase, which now includes remote sellers:

beginning October 1, 2018, a retailer making sales of tangible personal property to purchasers in Illinois from outside of Illinois if:

(A) the cumulative gross receipts from sales of tangible personal property to purchasers in Illinois are \$100,000 or more; or

(B) the retailer enters into 200 or more separate transactions for the sale of tangible personal property to purchasers in Illinois.²⁰

As a general rule, if the retailer is not engaged in the business of selling in any Illinois jurisdiction, then no local sales/use tax is due and, as such, only the state use tax is due.²¹

Turning back to the sales tax, an Illinois statute enacted in 2014 addresses the location where a retailer is deemed to be engaged in the business of selling.²² That law applies “only with respect to the particular selling activities described in the following paragraphs.”²³ The paragraphs include situations where (1) the purchaser is present at the retailer’s place of business to make the purchase; (2) the purchaser takes possession of the tangible personal property at the retailer’s place of business; and (3) the sourcing of a conditional sale (i.e., a lease with a dollar or other

¹⁷ See, e.g., 55 ILCS 5/5-1006 (home rule county ROT); 65 ILCS 5/8-11-1 (home rule municipal ROT); 70 ILCS 3615/4.03(e) (regional transportation authority ROT); see also Ill. Admin. Code tit. 86, secs. 220.115 (county), 270.115 (municipal), 320.115 (regional transit authority).

¹⁸ 35 ILCS 105/3.

¹⁹ 35 ILCS 105/3-45.

²⁰ 35 ILCS 105/2.

²¹ See, e.g., 55 ILCS 5/5-1006 (home rule county ROT); 65 ILCS 5/8-11-1 (home rule municipal ROT); 70 ILCS 3615/4.03(e) (regional transportation authority ROT).

²² 35 ILCS 120/2-12.

²³ *Id.*

nominal option to purchase).²⁴ Additional guidance is set forth in the Department's regulations.²⁵

In 2014, the Department issued revised local sales tax sourcing regulations after the Illinois Supreme Court invalidated those regulations in its 2013 *Hartney* decision.²⁶ Pursuant to the revised regulations, a retailer is generally required to remit use tax (not sales tax) if (1) the retailer's headquarters is located outside of Illinois; (2) invoices are issued and payment is received outside of Illinois; and (3) the seller takes action to find [sic] the sale from a location outside Illinois.²⁷ However, special sourcing rules apply in other instances, such as with conditional sales, as well as when the tangible personal property that is sold is in an inventory "in the possession of the retailer located within a jurisdiction in Illinois at the time of its sale."²⁸

The Company acknowledges that it is a "retailer maintaining a place of business in this State," particularly given Illinois' adoption of the *Wayfair* economic nexus rules and the Company's Illinois sales volume.²⁹ Yet, the Company's selling activities occur outside of Illinois for the following reasons:

- i. the Company maintains its headquarters in a state other than Illinois;
- ii. the Company has no store location or other place of business in Illinois;
- iii. the Company has no personnel in Illinois;
- iv. the Company takes no action in Illinois to bind it to any sales;
- v. all shipments and deliveries are made from a location outside of Illinois, and any returns are accepted only at a location outside of Illinois;
- vi. the Company and its Customers do not enter into conditional sales contacts; and
- vii. none of the Merchandise that is sold in an inventory in the possession of the Company is located within Illinois at the time of sale.

²⁴ 35 ILCS 120/2-12(5).

²⁵ See Ill. Admin. Code tit. 86, §§ 220.115 (county), 270.115 (municipal), 320.115 (regional transit authority); see also *Hartney Fuel Oil Co. v. Hamer*, 998 N.E.2d 1227 (2013) ("The local ROT Acts ... with the exception of coal and other mineral extraction—they do not offer substantial guidance on the proper situs of taxation. For guidance on the proper situs of retail occupation tax under the local ROT Acts, one must turn to the regulations.")

²⁶ See *id.*

²⁷ See, e.g., Ill. Admin. Code tit. 86, § 220.115(b)(c)(1)-(2).

²⁸ See, e.g., Ill. Admin. Code tit. 86, § 220.115(b)(2), (4).

²⁹ See 35 ILCS 105/2(9).

Upon applying Illinois law to the Company's activities, the Company is engaged in the business of selling outside of Illinois. As such, the Company is required to collect Illinois use tax (not local sales tax).

We appreciate the Department's review of this matter and await a response. Please direct all questions or correspondence to NAME at PHONE# of E-MAIL.

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 at retail to purchasers for use or consumption. See 86 Ill. Adm. Code 130.101. In Illinois, a Use Tax is also 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.

Subscriptions

The Illinois Retailers' Occupation Tax and Use Tax are conditioned upon the sale at retail of tangible personal property. The Retailers' Occupation Tax Act defines "sale at retail" as "any transfer of the ownership of or title to tangible personal property to a purchaser, for the purpose of use or consumption, and not for the purpose of resale . . . for a valuable consideration . . ." See 86 Ill. Adm. Code 130.201(a). Subscription receipts are generally not subject to Retailers' Occupation Tax or Use Tax, unless the receipts are derived from a sale at retail as defined in the Retailers' Occupation Tax Act.

Rental Purchase Agreement Occupation and Use Tax

Persons who are engaged in the business of renting merchandise in Illinois under a rental purchase agreement are subject to the Rental Purchase Agreement Occupation and Use Tax. 35 ILCS 180/1 et seq. A "rental purchase agreement" is an agreement for the use of merchandise by a consumer for personal, family, or household purposes for an initial period of 4 months or less that is automatically renewable with each payment after the initial period and that permits the consumer to become the owner of the merchandise. The Rental Purchase Agreement Occupation and Use Tax is imposed at the rate of 6.25% of the gross receipts from the business of renting merchandise in Illinois under a rental purchase agreement. The Rental Purchase Agreement Occupation and Use Tax does not apply to tangible personal property that is required to be titled and registered by a State agency.

Generally, a transaction is subject to the Rental Purchase Agreement Occupation and Use Tax only if the transaction is governed by the Rental Purchase Agreement Act (815 ILCS 655/0.01 et seq.). The Rental Purchase Agreement Act provides, in

subsection (c) of Section 2 that “(c) [a] rental-purchase agreement may not contain a provision: . . . (6) requiring a payment at the end of the scheduled rental-purchase term in excess of or in addition to a regular periodic payment in order to acquire ownership of the merchandise. In no event shall the consumer be required to pay a sum greater than the total amount to be paid to acquire ownership, as disclosed in item (3) of subsection (g) of this Section. See 815 ILCS 655/2(c). Subsection (g) of Section 2 of the Rental Purchase Agreement Act provides that “(g) [a] rental-purchase agreement must disclose: . . . (2) the amount and timing of payments; (3) the total number of payments necessary and the total amount to be paid to acquire ownership of the merchandise; . . .” See 815 ILCS 655/2(g).

Transactions in which a customer can try merchandise as part of a subscription program before making a decision whether to purchase or return the merchandise are generally not intended to be covered by the Rental Purchase Agreement Occupation and Use Tax. As further indication of this, the sponsor of this legislation in the Illinois House of Representatives referred in debate to “rent-to-own dealer[s]” when discussing taxpayers subject to the Act. See State of Illinois, 100th General Assembly, House, Transcription of Debate, May 30, 2017, page 17. A subscription model with a separate option to purchase generally would not fit that category. It is important to note, however, that each arrangement must be evaluated in light of the specific contract and the other aspects of the transaction to determine whether the Rental Purchase Agreement Occupation and Use Tax applies.

Demonstration Use

Generally, when a company ships items of tangible personal property that it owns to customers in Illinois pursuant to a subscription so that the customers may try the property before making a decision whether to purchase or return the property, the company is making a taxable use of the property under the Use Tax Act. The Use Tax Act defines “use” as the exercise by any person of any right or power over tangible personal property incident to the ownership of that property” See 86 Ill. Adm. Code 150.201. However, the Act goes on to provide that “ “[u]se’ does not mean the demonstration use or interim use of tangible personal property by a retailer before he sells that tangible personal property.” See 35 ILCS 105/2 and 86 Ill. Adm. Code 150.201. See also the Department’s regulation at 86 Ill. Adm. Code 150.306 that describes the Interim Use and Demonstration Exemption. Specifically, subsection (b)(1) provides guidance regarding when tangible personal property qualifies for the demonstration exemption, including a provision that, except for certain restrictions on watercraft and aircraft, “[t]he leasing of tangible personal property by a retailer to prospective buyers for the purpose of allowing them to ascertain whether the property suits their particular needs and for the purpose of trying to induce them to buy the property is a use for demonstration purposes” See 86 Ill. Adm. 150.306(b)(2). We note that a month-to-month subscription that allows customers to receive different items of merchandise is not the same as a lease of an item as discussed in the rule.

Sourcing of sales

When an out-of-state seller (other than, after January 1, 2021, a marketplace seller) makes sales to Illinois customers from inventory located in Illinois, the sale is subject to State and local Retailers' Occupation Tax, sourced to the location of the inventory. The Department's administrative rules governing the sourcing of sales provides as follows: "[i]f a retailer's selling activities take place in taxing jurisdictions outside the State, except that the tangible personal property that is sold is in an inventory in the possession of the retailer located within a jurisdiction in Illinois at the time of its sale (or is subsequently produced by the retailer in the jurisdiction), then delivered in Illinois to the purchaser, the jurisdiction where the property is located at the time of the sale or when it is subsequently produced by the retailer will determine where the retailer is engaged in business with respect to the sale." See, for example, 86 Ill. Adm. Code 270.115(d)(2).

Generally, if tangible personal property is maintained as inventory in Illinois, whether eligible for the demonstration use exemption or not, the sale of the property will result in State and local Retailers' Occupation Tax liability due to the maintenance of inventory at an Illinois location, subject to credit for use tax properly due and paid, if any. For example, if a company ships items of tangible personal property that it owns to a customer in Illinois pursuant to a subscription so that the customer may try the property before making a decision whether to purchase or return the property, and the customer decides to purchase the item, then the sale is subject to both State and local Retailers' Occupation Tax at the customer's location, because the company's inventory is at that location at the time of the sale.

We note that Public Acts 101-0031 and 101-0604 enacted the Leveling the Playing Field for Illinois Retail Act. The Act implements a series of structural changes to the Illinois sales tax law that are intended to "level the playing field" between Illinois-based retailers and remote retailers by imposing State and local retailers' occupation taxes on Illinois retailers, remote retailers, marketplace sellers, and marketplace facilitators alike. Public Acts 101-0031 and 101-0604 require "remote retailers" to collect and remit State and local retailers' occupation taxes. Beginning January 1, 2021, you must remit Retailers' Occupation Tax if you are a remote retailer and either of the following thresholds was met during the preceding four quarterly periods ending on the last day of March, June, September, and December:

- 1) The cumulative gross receipts from sales of tangible personal property by you to purchasers in Illinois was \$100,000 or more; or
- 2) you entered into 200 or more separate transactions for the sale of tangible personal property to purchasers in Illinois. [35 ILCS 120/2(b)]

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You are a “remote retailer” if you do not maintain within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent or other representative operating within this State under your authority or a subsidiary of yours, irrespective of whether such place of business or agent is located here permanently or temporarily or whether you or your subsidiary is licensed to do business in this State. 35 ILCS 120/1. If you have inventory in Illinois, you are not a remote retailer. The Department has adopted rules implementing the new requirements for remote retailers and marketplace facilitators. The rules can be found on the Department’s website. 86 Ill. Adm. Code 131. The new requirements for remote retailers and marketplace facilitators took effect on January 1, 2021.

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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,

Samuel J Moore
Associate Counsel

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