

A transaction for sale of business assets made entirely through a private broker qualified for the occasional sale exemption. See 86 Ill. Adm. Code 130.110.
(This is a PLR.)

February 7, 2023

NAME/COMPANY1/ADDRESS

Dear Mr. XXX,

This letter is in response to your letter dated September 17, 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.

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, COMPANY2, ("COMPANY2") 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 COMPANY2 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:

We are requesting a Private Letter Ruling on behalf of our client, COMPANY2, pursuant to 86 Ill. Admin Code 1200.110. Pursuant to the regulation, we attest on behalf of our client the following:

1. The taxpayer is not under audit for any tax, nor is the taxpayer the subject of any pending litigation related to the request.
2. The requested ruling relates to Service Occupation Tax for periods open under the statute of limitation and going forward.
3. To the best of our knowledge, the Taxpayer and Representative

are not aware of any contradictory authorities nor are we aware of any rulings covering the specific facts and questions addressed below.

4. Neither the taxpayer nor its Representative have previously requested a ruling from the Department of Revenue on this issue.
5. The Taxpayer is not aware of any relevant authorities not disclosed which contradict the ruling request.

Statement of Facts

COMPANY2 ("The Taxpayer") is a construction company located in CITY1, Illinois.

In DATE1, Taxpayer was privately notified by COMPANY3 ("Broker") of an opportunity to negotiate for either the purchase of COMPANY4 ("Seller") as a going concern or to purchase the equipment of that company in a private sale. Broker is based in CITY2 and is primarily engaged in the business of auctioning farm, construction and other commercial equipment. For online auctions, equipment is listed in a uniform presentation format set by the Broker. (See ADDRESS2).

As the opportunity was not yet publicly known, the negotiations were conducted directly between Taxpayer and the Seller. Negotiations took place directly between the Taxpayer and the Seller in the fall of YEAR1. The Seller had initially been interested in continuing with the business through a transitional agreement, but in early YEAR2, the Seller decided just to sell the assets. Preliminary lists of assets and pricing were exchanged that ultimately culminated in the purchase of assets. An offer for equipment was presented by Taxpayer to the Seller at this time.

In DATE2, Broker listed all of the assets of the Seller on its website as available. Shortly thereafter, Taxpayer completed its direct negotiations with the Seller to purchase selected equipment from the Seller. At this time, the purchased assets were removed from the listing on the Broker's website. Note that the assets purchased by the Taxpayer were not purchased through the internet auction but were invoiced by the Broker based on instructions by the Seller and Taxpayer.

Broker invoiced Taxpayer for the equipment including ROT. To our knowledge, the Broker did not take title to the property. Taxpayer, through its representative, inquired as to applicability of the law changes described in Information Bulletin FY2021-05 applied to this transaction and spoke to Debra Boggess, who advised that we submit a private letter ruling request. Taxpayer paid the ROT and now seeks to clarify whether it is entitled to a

refund. We discussed the matter with Debra Boggess from your office and she recommended that we request a ruling.

Ruling Requested

The Taxpayer requests a ruling that its purchase of equipment from Broker Auctions is not subject to Illinois Retailers Occupation Tax as the purchase was made from a disclosed principal not engaged in the business of selling the type of equipment purchased and the auction company was not required to collect ROT as an auctioneer.

Discussion and Relevant Authorities

Prior to January 1, 2021, Illinois regulations provided that when a retailer sells tangible personal property such as machinery and 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 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, because such sales are isolated and occasional and do not constitute the business of selling tangible personal property at retail. 86 Admin. Code 130.110(b).

In the rules relating to auctions in effect prior to January 1, 2021, when auctioneers making sales on behalf of disclosed principals provided the principal is engaged in the business of making sales of such tangible personal property at retail. 86 Ill. Admin. Code 130.1915(b).

"Auction" means the sale or lease of property, real or personal, by means of exchanges between an auctioneer and prospective purchasers or lessees, which consists of a series of invitations for offers made by the auctioneer and offers by prospective purchasers or lessees for the purpose of obtaining an acceptable offer for the sale or lease of the property, including the sale or lease of property via mail, telecommunications, or the Internet. 225 ILCS 407/5-10.

Effective January 1, 2021, P.A. 101-0031 and 101-0604 became effective and changed the rules for auctioneers as announced in Information Bulletin 2021-05:

If an auctioneer makes a sale on behalf of an identified marketplace Seller (e.g., a marketplace Seller that is disclosed), the auctioneer will incur Retailers' Occupation Tax at the rate in effect at the location where the tangible personal property is shipped or

delivered or at which possession is taken by the purchaser (destination rate).

Subsequently, in an apparent acknowledgement that this law change needed further clarification, the Illinois Generally Assembly passed SB 2066 and the Governor signed the bill into law on August 27, 2021 as PA 102-0634. This bill provides that the term "marketplace facilitator" does not include any person licensed under the Auction License Act, other than a person who is an Internet auction listing service.

Internet auction listing service is defined under 225 ILCS 407/5-10 as: "Internet auction listing service" means a website on the Internet, or other interactive computer service, that is designed to allow or advertise as a means of allowing users to offer personal property or services for sale or lease to a prospective buyer or lessee through an online bid submission process using that website or interactive computer service and that does not examine, set the price, prepare the description of the personal property or service to be offered, or in any way utilize the services of a natural person as an auctioneer.

Here, we have a sale brokered by a third party where the buyer and Seller extensively negotiated directly with each other and which culminated in the sale.

We submit that the law change announced in Information Bulletin 2021-5 was not applicable to this sale for the following reasons:

- At the time the negotiations began, the marketplace facilitator law relating to auctioneers was not in effect
- The transaction should not be considered an auction because, once the parties were introduced by the Broker, negotiations were conducted directly between the Taxpayer and the Seller.
- The transaction should not be considered an auction because the assets were purchased through a brokered sale rather than through the Broker's auction channel.
- The General Assembly, through the passage of SB 2066/ PA 102-0634, recognized that the application of marketplace facilitator rules to auction situations in PA 101-0031 and 101-0604, as described in Information Bulletin FY2021-05, was overly broad.
- To the extent that the Department finds that the date of the invoice rather than the date of the commencement of negotiations applies in determining the rules for characterizing the transaction, the Broker should not be considered an "internet auction listing service" under 225 ILCS 407/5-10.

- Under the revised law, marketplace facilitator rules only apply to internet auction listing services.
- Therefore, the transaction should not be subject to the marketplace facilitator rules whether the Department looks at the date of commencement of negotiations or the date of the invoice, and the transaction should qualify for occasional sale treatment as the Seller was not engaged in the business of selling construction equipment, and the Taxpayer should be entitled to a refund of sales tax paid to and remitted by the Broker.

We respectfully submit that the Illinois Department of Revenue issue the requested ruling with the taxpayer information redacted. We further request that if the Department concludes contrary to the request that the Taxpayer be allowed to withdraw the ruling request. We are happy to provide any additional information or answer any questions the Department has.

Please contact me at (###)###-#### if there are any questions. A Power of Attorney has been submitted to the POA unit.

After the submission of this ruling request, at the Department's request, additional information was submitted. The information included copies of the following documents: a nondisclosure agreement, numerous emails and written correspondence, an appraisal of business assets, schedules of business assets, and various proposals relating to the purchase of the business or its assets.

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.

For consistency, we will refer to the various parties as named in the PLR request, i.e. COMPANY2 ("Taxpayer"), COMPANY3 ("Broker"), and COMPANY4 ("Seller").

The Broker was retained by the Seller to assist with the sale of its business either as an ongoing business or, failing that, the sale of its business assets. The Broker offers several different business services to its clients depending on their needs. Of the

services offered, the two business services which are relevant in this matter are auction services and private sale services. As discussed below, the tax consequences are different depending on the nature of the services performed.

Auctioneers as marketplace facilitators

Beginning January 1, 2021, an internet auction listing service which meets a tax remittance threshold set out in 86 Ill. Adm. Code 131.135(a), is considered a marketplace facilitator subject to State and local retailers' occupation taxes on all sales made on its marketplace. See 35 ILCS 120/1. On and after August 27, 2021, a marketplace facilitator does not include any person licensed under the Auction License Act, 225 ILCS 407. However, this exemption does not apply to any person who is an Internet auction listing service, as defined by the Auction License Act. 35 ILCS 120/1.

An internet auction listing service is defined under 225 ILCS 407/5-10 as: "[a] website on the Internet, or other interactive computer service, that is designed to allow or advertise as a means of allowing users to offer personal property or services for sale or lease to a prospective buyer or lessee through an online bid submission process using that website or interactive computer service and that does not examine, set the price, prepare the description of the personal property or service to be offered, or in any way utilize the services of a natural person as an auctioneer."

An internet auction listing service is subject to the marketplace facilitator sourcing rules for sales tax, if 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 internet auction listing service had cumulative gross receipts from sales of tangible personal property to purchasers in Illinois of \$100,000 or more; or
- 2) the internet auction listing service entered into 200 or more separate transactions for the sale of tangible personal property to purchasers in Illinois. 35 ILCS 120/2(b).

Under the sourcing rules, an internet auction listing service is deemed to be engaged in the business of selling on behalf of its disclosed marketplace sellers at the Illinois location to which the tangible personal property is shipped or delivered or at which possession is taken by the purchaser. See 35 ILCS 120/2-12(7). However, if an internet auction listing service makes a sale on behalf of a marketplace seller not disclosed on the marketplace, then, the internet auction listing service is considered the seller and is required to file its own return, separate from the return it files for sales it makes on behalf of marketplace sellers. The internet auction listing service would incur State and local retailers' occupation tax at either the rate in effect at the Illinois location where the selling occurs or if the sale is fulfilled from inventory located outside Illinois and selling activities otherwise occur at a location outside of Illinois, the rate in effect at

the location to which the tangible personal property is shipped or delivered or at which possession is taken by the purchaser. See 86 Ill. Adm. Code 131.155 and 86 Ill. Adm. Code 270.115.

In this case, the Broker's auction services meet the definition of an internet auction listing service as defined under 225 ILCS 407/5-10. As such, the Broker would be considered a marketplace facilitator for all sales made through its internet auction listing service. Additionally, because a marketplace is a location held out to the public as being habitually engaged in the selling of tangible personal property, no sales made on a marketplace are considered occasional sales. See 86 Ill. Adm. Code 131.145(k).

Accordingly, if the sale of the Seller's business assets was made through the Broker's auction services, the transaction would be taxable as a retail sale under the provisions of the Retailers' Occupation Tax, 35 ILCS 120/1, *et seq.*

Occasional sales

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 business sells tangible personal property, such as machinery or other capital assets, which has been used in the business and is no longer needed, and which such business does not otherwise engage in selling, it does not incur Retailers' Occupation Tax liability when selling such tangible personal property. This exemption applies even if the sales are at retail and even if the business 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).

The occasional sale exemption would apply in this case if the sale of the Seller's business assets was conducted through the Broker's private sales services. See 86 Ill. Adm. Code 130.110.

A fundamental principal of tax law is that tax exemption provisions are strictly construed in favor of taxation and the party claiming the exemption has the burden of clearly proving that it is entitled to the exemption; with all doubts resolved in favor of taxation. *Heller v. Fergus Ford, Inc.*, 59 Ill. 2d 576, 579 (1975).

It is the Department's opinion, after reviewing the information in the private letter ruling request as well as the additional materials submitted, that the sale of the Seller's business assets to the Taxpayer was exempt from sales tax as an occasional sale. From the facts presented, the entire transaction was conducted independent of the Broker's internet auction listing service. The Broker approached the Taxpayer to

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ascertain its potential interest in purchasing the Seller's on-going business. Only after the Taxpayer expressed an interest in doing so, was a nondisclosure agreement executed identifying the Seller. Thereafter, a series of negotiations took place regarding the sale of the business. The confidential nature of the negotiations precluded the use of the internet auction listing service as it involved such matters as employment contracts, equipment, and asset purchases, as well as the assuming of building rental and existing contracts. The final negotiated agreement for the purchase of certain business assets rather than the Seller's on-going business, was accomplished, as was the entire negotiation process, separate and independent from the Broker's internet auction listing service. Consequently, the fact that some of the purchased assets were eventually listed on the Broker's internet auction listing service during the negotiations, and payment for the Seller's business assets was made to the Broker, does not change this result. The Broker's involvement in this matter was pursuant to its private sales services, rather than as an auctioneer, and as such, the Taxpayer's purchase of the Seller's business assets was exempt from sales tax as an occasional sale.

Please note that since the Broker paid the sales tax, directly to the Department, the Broker is the only party with standing to file a claim regarding an overpayment of the tax. See 86 Ill. Adm. Code 130.1501. A retailer's determination as to whether it will make a refund of the amount of the tax to a customer and file a claim for credit with the Department is a matter between the retailer and its customer. The Department has no authority to compel a retailer to refund taxes to a customer and file a claim for credit.

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 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.

Very truly yours,

Samuel J. Moore
Private Letter Ruling Committee Chairman

SJM:TG:rkn