

This letter discusses computer software. See 86 Ill. Adm. Code 130.1935. (This is a GIL.)

May 8, 2023

NAME
COMPANY
ADDRESS

Dear NAME:

This letter is in response to your letter dated December 19, 2022, in which you requested information. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.tax.illinois.gov to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

I work within COMPANY finance department. We are a STATE-based media software company with clients in Illinois. We don't sell through a marketplace, are an out of state seller with no presence in Illinois.

Regarding the sales and use tax, I would like to confirm if the following items sold by COMPANY and delivered to our customers in Illinois are taxable. Each item is separately stated on our invoices.

- *Pre-written Software - canned software that may or may not be customized to the client's needs.
- *Hardware -such as PRODUCT and miscellaneous hardware
- *Services (Remote or Onsite) - including installation, project management, solution architecture, etc for the software or/and hardware
- *Training (Remote or Onsite) - training and coaching of the customers on how to use COMPANY products.

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*Hardware Support (Remote or Onsite) - PRODUCT and miscellaneous hardware support

*Non-hardware support (Remote or Onsite) - COMPANY or Third-Party software support

*Hosting

In addition, I would like to confirm what the threshold is to start charging tax? What is the tax rate for taxable sales and use items? When is local tax applicable? Is the threshold for charging tax and local tax based on \$100,000 gross receipts on *tangible items* or \$100,000 gross receipts for *all items* sold (including services, training, support, hosting, etc.)?

Please let me know if you need further information. Thank you in advance.

DEPARTMENT'S RESPONSE:

The 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. 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 86 Ill. Adm. Code 150.101. These taxes comprise what is commonly known as "sales tax" in Illinois.

Although, the general description of COMPANY's products and services provided in your letter does not allow for a more specific response, an explanation regarding the taxation of these types of products and services should provide the information you seek.

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 tangible personal property regardless of the form in which it is transferred or transmitted, "...including tape, disc, card, electronic means, or other media." See 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 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 continued 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, supported 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 does not meet all the criteria the software is taxable.

Please note that a license agreement in which the customer electronically accepts the terms by clicking "I agree" does not comply with the requirement of a written agreement signed by the licensor and the customer. However, an electronic agreement in which the customer accepts the license by means of a signature in electronic form that is attached to or is part of the license, is verifiable, and can be authenticated will comply with the requirement in Section 130.1935(a)(1)(A).

Public Acts 101-31 and 101-604 amended the Retailers' Occupation Tax Act and Use Tax Act, as well as enacted the Leveling the Playing Field for Illinois Retail Act. These changes are intended to "level the playing field" between Illinois-based retailers and remote retailers. As a result, beginning January 1, 2021, a remote retailer as defined in [35 ILCS 120/1], is liable for all applicable State retailers' and locally imposed retailers' occupation taxes, 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:

- A) The cumulative gross receipts from sales of tangible personal property to purchasers in Illinois are \$100,000 or more; or
- B) The remote retailer enters into 200 or more separate transactions for the sale of tangible personal property to purchasers in Illinois. 86 Ill. Adm. Code 131.115(a).

A remote retailer meeting either of these thresholds is liable for all applicable State and local retailers' occupation taxes administered by the Department on all retail sales shipped or delivered to Illinois purchasers. See 86 Ill. Adm. Code 131.110(a). See also Sections 131.110(c), 131.115 and 131.120, which discuss how to determine whether a retailer meets either of these thresholds.

An Out-of-State Seller is defined as: "A seller located outside Illinois but that has or maintains within Illinois, 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 the authority of the seller or its subsidiary, irrespective of whether such place of business or agent or other representative is located here permanently or temporarily...". See 86 Ill. Adm. Code 131.105.

In your statement of facts, you state that COMPANY has no presence in Illinois, but does perform various on-site services for its Illinois customers. The listed services include hardware and software support as well as training and coaching. Although your letter does not provide any details as to the frequency or duration of these activities in Illinois, for purposes of this letter, it will be assumed that COMPANY has established physical nexus with Illinois. In 1996, the Illinois Supreme Court ruled a vendor's delivery and installation of its product on a repetitive basis, will trigger Use Tax collection responsibilities. See *Brown's Furniture v. Wagner*, 171 Ill. 2d 410 (1996).

An out-of-state seller incurs a Use Tax (6.25%) collection obligation for sales made to Illinois purchasers when both its selling activities occur outside Illinois and the inventory used to fill purchases for Illinois purchasers is located outside Illinois. However, for a sale made to an Illinois purchaser, if either the selling activities occur in Illinois or the inventory is located in Illinois, the out-of-state seller is considered an Illinois retailer for that transaction and is subject to State and local retailers' occupation taxes at the rate at the location at which the selling activities occur or at which the inventory is located. See 86 Ill. Adm. Code 270.115(b);(c) and (d) for factors used to make this determination as well as the applicable local rate. These provisions would apply to the retail sales of computer hardware and canned software which are taxable as tangible personal property.

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Charges for training, telephone assistance, installation and consultation are not subject to tax if they are separately stated from the selling price of canned software. See 86 Ill. Adm. Code 130.1935(b). Likewise, if computer software training or other support services are provided in conjunction with a sale of exempt custom computer software or a license of computer software, the charges for that training are not subject to tax.

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,

Thomas Grudichak
Associate Counsel

TG:bf