

In general, the downloading of data represents the transfer of an intangible and is thus not subject to Retailers' Occupation and Use Tax. See 86 Ill. Adm. Code 130.2105. (This is a GIL.)

December 8, 2008

Dear Xxxxx:

This letter is in response to your letter dated April 18, 2007, in which you request 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:

My client ('Taxpayer') is in the electronic jukebox and music service business. Simply, Taxpayer sells digital jukeboxes to its customers ('Operators') that contain a hard drive pre-loaded with thousands of songs available for play by customers upon inserting a coin into the jukebox. Additional songs can be downloaded via the Internet onto the hard drive. Charges by Taxpayer for the music on each jukebox, whether on the hard drive at the time of the sale of the jukebox, or downloaded at the request of the Operator or customer, are based on a variety of music service packages as noted below. Technical support service is included with the purchase of each jukebox at no charge to Operators.

Music Service Packages:

- A. Fixed Rate, New Fixed Rate, Fixed Rate 2006 - Operators are charged a weekly base fee of \$12.95 plus \$ 0.04 each time a song is played ('per play'). Operators are entitled to a fixed number of free music downloads annually.
- B. Ultra 16 - Operators are charged a weekly base fee of \$12.95 plus 16% of revenue from the total coinage (intake). Operators are entitled to a fixed number of free music downloads annually.
- C. Elite, New Elite, Fixed Percentage Program - There is no base fee on these plans. Operators are charged between 20% and 23% revenue on total coinage (intake), depending on the plan. Operators are entitled to a fixed number of free music downloads annually.

Separately Stated and Charged For Additional Services:

- D. Additional Song Downloads - In each of the music service packages noted above, existing Operators are entitled to a fixed number of free music downloads annually. Should Operators exceed their free annual download allotment, they will incur a separately stated charge of \$1.50 for each additional song downloaded onto the hard drive.
- E. Per Play Fee (Tune Central) - Operators electing the Fixed Rate, Elite, Ultra16, and/or Fixed Percentage music packages may incur a separately stated charge for each 'per play fee.' A per play fee is a charge incurred each time a song, accessed from Taxpayer's 'Tune Central' database, is chosen and played by a customer. The fees differ whether Tune Central is leased or purchased. This charge is never passed on to the customer, but absorbed by the Operator.
- F. Tune Central - Taxpayer's music access database allows a customer to access said database to search thousands of music titles by name, artist, or album. Customers perform the search, make their selection, and insert coins to have their song played. While the song is accessed from the database (entity within the jukebox body) it is never downloaded to the Operators [sic] hard drive. No copies (either hard or digital) are maintained by the Operator after the play has been completed. This is a one time play option and a separate charge or credit is used by the customer each time the customer searches, and chooses to play a song.
- G. Tune Central (Gen III) - Taxpayer's on-line music access database allows a customer to access the main frame database (by the Internet) to search for music titles by name, artist, album, or genre. A selection is made, coins are inserted and a song is played. It is not downloaded onto the Operators [sic] hard drive, and no copies are maintained after the play has been completed. This is a one time play option and a separate charge or credit is used by the customer each time the customer searches, and chooses to play a song.
- H. Background Music - Background music is a separately charged for service available with the Ultra 16, Elite, New Elite and Fixed Percentage Plan music packages. The charge is calculated on a graduated rate based on the percentage of total jukebox plays. This charge is never passed on to the customer, but absorbed by the Operator.
- I. Telephone Support - Telephone support services provide Operators twenty-four hour technical telephone support, an exchange of damaged or defective parts and or any applicable software upgrades (in both tangible and intangible format), and on-site field service technicians.

Question:

We understand that the sale and lease of the jukebox is subject to Illinois sales tax. Our question is, will Illinois require Taxpayer to collect and remit sales tax, or self-assess use tax on the following music service packages and/or separately stated and charged for additional services, as described above:

- A. Fixed Rate, New Fixed Rate, Fixed Rate 2006
- B. Ultra 16
- C. Elite, New Elite, Fixed Percentage Program
- D. Additional Song Downloads
- E. Per Play Fee
- F. Tune Central
- G. Tune Central Gen III
- H. Background Music
- I. Telephone Support

Thank you for your assistance with this issue. Because Taxpayer wishes to correctly comply with its Illinois sales tax collection and remittance obligation, your attention to this matter is greatly appreciated.

If you have any questions or require further information, please contact me.

DEPARTMENT'S RESPONSE:

We regret that, in the context of a GIL, we cannot respond to your questions in the requested form and that our response was not issued sooner. We are, however, providing the following general information for your consideration.

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 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 86 Ill. Adm. Code 150.101. These taxes comprise what is commonly known as "sales" tax in Illinois. Illinois also has a Service Occupation Tax and a Service Use Tax. The Service Occupation Tax Act and Service Use Tax impose a tax on the transfer of tangible personal property incident to sales of service. See 86 Ill. Adm. Code 140.101 and 160.101. If no tangible personal property is being transferred to customers, however, then no Illinois Retailers' Occupation Tax and Use Tax would apply. Likewise, if no tangible personal property is being transferred to customers, then no Illinois Service Occupation Tax Act and Service Use Tax would apply.

In Illinois, lessors of tangible personal property under a true lease, except for automobiles leased for terms of one year or less, are considered to be the end users of the property to be leased. See 86 Ill. Adm. Code 130.220 and 130.2010. As the end users of tangible personal property located in Illinois, lessors incur Use Tax on the lessors' cost price of the property. Since lessors are considered the end users of the property and have paid the Use Tax, no Retailers' Occupation Tax is imposed upon the rental receipts, and the lessees incur no Use Tax liability for the rental charges. In Illinois, a true lease generally has no buy out provision at the close of the lease. If a buy out provision does exist, it must be a fair market value buy out option in order to maintain the character of the true lease.

As mentioned, in the case of a true lease, the lessors of the property being used in Illinois would be the parties with Use Tax obligations. The lessors would either pay their suppliers, if their suppliers were registered to collect Use Tax, or would self-assess and remit the tax to the Department. If the lessors already paid taxes in another state with respect to the acquisition of the tangible personal property, they would be exempt from Use Tax to the extent of the amount of such tax properly due and paid in such other state. See 86 Ill. Adm. Code 150.310(a)(3).

Even though lessees do not incur any tax liability in a true lease situation, it is typical of true leases to contain contractual provisions stating that the lessees will reimburse the lessors for their tax costs. This is not a matter of Illinois tax law but of private agreement between lessors and lessees. If the lessees agreed to such provisions, they are bound to satisfy that duty because of a contractual agreement, not because of Illinois tax law.

As mentioned above, the Use Tax is a tax imposed on the privilege of using, in this State, any kind of tangible personal property that is purchased anywhere at retail from a retailer. The Use Tax is paid to Illinois retailers registered to collect Use Tax. If the Use Tax is not paid to an Illinois registered retailer, the purchaser must self-assess the Use Tax at the rate of 6.25% and remit it to the Department. "Use" means the exercise by any person of any right or power over tangible personal property incident to the ownership of that property. Therefore, Use Tax liability would be incurred on equipment and materials used in Illinois in the performance of the service transaction.

Be mindful that in Illinois, canned 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. The sale at retail or transfer of canned software intended for general or repeated use is taxable, including the transfer by a retailer of software which is subject to manufacturer licenses restricting the use or reproduction of the software. Charges for updates of canned software are also considered to be sales of software. See 86 Ill. Adm. Code 130.1935. of the Department's regulations which can be accessed on our website.

Generally, information that is downloaded is not taxable because it is considered an intangible. Likewise, the sale of electronic downloads of music or video from the Internet is not considered the sale of tangible personal property for purposes of liability under the Retailers' Occupation Tax Act and Use Tax Act. See 86 Ill. Adm. Code 130.2105. However, please note that this is not the case for downloading canned software. The Department's regulation, 86 Ill. Adm. Code 130.2105 states in part: "Information or data that is downloaded electronically, such as downloading books, musical recordings, videos, newspapers or magazines, does not constitute the transfer of tangible personal property. These types of transactions represent the transfer of intangibles and are thus not subject to Retailers' Occupation and Use Tax. However, downloads of canned software, as defined more fully in Section 130.1935 of this Part, are subject to Retailers' Occupation and Use Tax."

The tax applies to the entire charge made to the customer, including charges for all associated documentation and materials. Charges for training, telephone assistance, installation and consultation are exempt if they are separately stated from the selling price of the canned software. Maintenance agreements for software will be treated in the same manner as other maintenance agreements. Sellers of maintenance agreements must pay tax on their cost price of the materials transferred incident to the completion of a maintenance agreement. See Section 130.1935(b). However, if the agreement provides for updates of canned software and the updates are not separately stated and taxed, the entire maintenance agreement constitutes a sale of canned software and is 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,

Debra M. Boggess
Associate Counsel

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