

Persons who permanently affix tangible personal property to real estate act as construction contractors and incur Use Tax liability on their cost price of tangible personal property they physically incorporate into realty. See 86 Ill. Adm. Code 130.1940. (This is a GIL.)

November 3, 2009

Dear Xxxxx:

This letter is in response to your letter dated July 16, 2009, 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:

This is a request for a general information letter on the application of the Illinois Retailers' Occupation ('ROT') and Use Tax ('UT') on the purchase and installation of built-in appliances by sellers/construction contractors. Because of two fairly recent general information letters issued on August 14, 2004, ST-04-0142-GIL (8/19/04) and May 15, 2005, ST 06-0115-GIL (5/15/2005) ('GILs'), there has been confusion among both sellers and consumers as to the taxability of built-in appliances and other home improvements in Illinois.

These GILs suggest that the when a seller/contractor separately agrees to and states an installation charge for a built-in appliance or other home improvement (that is installed by the seller as a permanent improvement to realty), the existence of this separate charge transforms the sale of this permanent improvement into a taxable retail sale to the customer/homeowner. It appears that these GILs are in conflict with Illinois case law and Department regulations on this issue, as well as inconsistent with ST 02-0264-GIL (12/11/2002) and other letter rulings of the Department.

Under Illinois law, permanent improvements to realty made by the seller/contractor of the tangible personal property which is incorporated by that seller into such realty are not taxable sales subject to the ROT or UT. See *e.g. Klein Town Builders, Inc. v. Dept. of Rev.*, 36 Ill. 2d 301 (1967); *Craftmaster, Inc. v. Ill. Dept. of Revenue*, 269 Ill. App. 3d

934 (4th Dist. 1995); *Spurgeon v. Department of Revenue*, 52 Ill. App. 3d 29 (3rd Dist. 1977).

Similarly, Regulation Section 130.1940(c) addresses retailers who are also contractors, and expressly states that 'a construction contractor liability does not incur Retailers' Occupation Tax liability as to receipts from 'labor furnished' and 'tangible personal property (materials and fixtures)' incorporated into a structure.' (Emphasis added.) Examples given include the sale and installation of screen and storm doors, blinds, sinks, water heaters, water softeners and furnaces. *Id.* This Regulation does not suggest that a separately stated price (separately agreed to or otherwise) for such installation would transfer the sale into a taxable retail sale. Actually, the opposite is suggested. But, this does not seem unusual since it is common practice that (except in new home construction) many of these items are generally sold with a separately agreed to installation charge by the seller/construction contractor. Notably, this Regulation does treat the separately stated installation charge as being relevant when 'portable' appliances are sold or when other improvements retain their character as personal property after installation (i.e. not build in). A situation not addressed in this request.

Likewise, Regulation Sections 130.1952 and 130.1953 specifically recognizes that built-in home appliances, such as garbage disposals, air conditioning units, furnaces, trash compactors, ovens, and other appliances, qualify as building materials incorporated into real estate when installed by the seller/contractor. Again, these Regulations do not suggest that if the seller/contractor and purchaser agrees to a separate installation charge that this will now change the nature of the transaction to a retail sale. On the contrary, in *Craftmaster*, the Illinois Appellate Court specifically agreed with the Illinois Department of Revenue that the existence of a separately stated installation charge by a seller does not convert the sale of personal property permanently installed into realty into a retail sale. See 269 Ill. App. 3d at 940-941; See also *Spurgeon supra*. (the Court again agreed with the Department that cabinets sold with a separately stated installation price were not retail sales but improvements to realty, but those sold without installation, i.e. no installation charge, were retail sales.)

In addition, ST 02-0264 GIL (12/11/2002) explains that when a retailer acts as a construction contractor and installs appliances as build in improvements to realty, the sale is not a retail sale, Moreover, it follows the long standing past position of the Department by providing that when the sale is of property that is not permanently affixed to real property, then the separately stated installation price is relevant. See also ST 04-0151 GIL (9/9/2004).

As to the GILs at issue, these GILs appear to confuse the requirements of Regulation Section 130.940(b)(4) (installation of personal property that remains personal property after installation) with Section 130.940(c) (installation of permanent improvements). As a result, these GILs state that the taxability of the purchase and installation of a built-in appliance and other improvements depends not only on who is installing the equipment and how it is installed, but additionally on how the price of installation is agreed to and stated. However, as the Department has previously reasoned and was upheld in *Craftmaster* as well as in other cases and as suggested in various Department regulations), the existence of a separately stated/agreed to installation charge is not determinative of such sales taxability under the ROT and UT when sales of permanent improvements are involved.

The suggestion by these GILs that how the seller now prices the transaction is determinative of its taxability has thus resulted in confusion as to what is exactly taxable. Consequently, assuming these GILs are the current position of the Department, certain questions need to be answered to clarify their scope.

1. Will the Regulations be amended to reflect the new requirements of these GILs?
2. If the separate charge for installation is on the same invoice as the price of the item, does that determine the items taxability (i.e. does the entire price have to be stated as one single installed price for the sale to qualify as a sale of a permanent improvement?).
3. For exemption purposes, will separately stating the agreed to installation charge on the invoice or contract make the sale a retail sale that could now qualify it for an available exemptions (e.g. reverses *Craftmaster*).

Based on the above, a general information letter is respectfully requested on these issues.

If you have any questions, please call.

DEPARTMENT'S RESPONSE:

The Department has not changed the requirements of its regulation on construction contractors, and the general information letters issued by the Department referred to in your letter are consistent with the regulation. 86 Ill. Adm. Code 130.1940. Accordingly, there is no need to amend Section 130.1940.

Section 130.1940(b)(1) addresses situations when a construction contractor sells tangible personal property without installation. Section 130.1940(b)(2) addresses situations when a construction contractor sells tangible personal property that is not permanently affixed or incorporated into a structure and remains tangible personal property, even if the construction contractor installs the property as part of a construction contract. Obvious examples of the type of tangible personal property that remains tangible personal property after installation are refrigerators, gas and electric stoves, washing machines and clothes dryers.

Section 130.1940(c) addresses situations where tangible personal property is permanently affixed or incorporated into a structure incident to a construction contract. Obvious examples of the type of tangible personal property that is permanently affixed or incorporated into a structure are bathtubs, sinks, lavatories, cabinets built into the structure, water heaters and water softeners. Stoves and refrigerators that are not free standing and are built into the structure are some additional examples. A construction contract that provides for both the sale and installation of tangible personal property that is permanently affixed or incorporated into a structure may separately state the cost of installation and the cost of the tangible personal property and remain a construction contract for sales tax purposes. The fact that the installation costs and the tangible personal property costs are separately stated in the contract or on the billing does not change the tax consequences of the transaction. If a construction contractor sells tangible personal property without installation Section 130.1940(b)(1) applies.

ST 06-0115 is consistent with subsections (b) and (c) of Section 130.1940 and the above statements. "[I]f a customer purchases an appliance over-the-counter and separately contracts for

installation of the appliance, then the retailer owes Retailers' Occupation Tax and must collect the corresponding Use Tax from the customer on the sale of the appliance. The separately contracted for installation of the appliance is a separate service and no tax is incurred by the customer on the installation charges. See 86 Ill. Adm. Code 130.450 and 130.1940. Similarly, if a purchaser makes a purchase of cabinetry under a purchase agreement, and enters into a separate installation agreement for the cabinetry, then the retailer owes Retailers' Occupation Tax and must collect the corresponding Use Tax from the customer on the sale of the cabinetry. The separately contracted for installation of the cabinetry is a separate service and no tax is incurred by the customer on the installation agreement.” “Separately contracted for installation” and “a separate installation agreement” are different than separately stating the cost of installation and the cost of the tangible personal property on a single construction contract.

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,

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RSW:mzk