

If all the criteria listed in subsection (a)(1)(A)-(E) of Section 130.1935 are met, then neither a transaction involving the licensing of software nor the subsequent software updates will be considered a taxable retail sale subject to Retailers' Occupation and Use Tax. See 86 Ill. Adm. Code 130.1935. (This is a GIL.)

December 10, 2008

Dear Xxxxx:

We apologize for the delay in responding to your letter dated October 24, 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](http://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:

COMPANY is an STATE corporation with no physical location in the state of Illinois. Our company is the sole owner and distributor of our computer programs used to measure and evaluate Electronic Media and Print Media Market Research Data. We license the use of our computer programs to the television station industry. We are registered with the State of Illinois to collect and remit taxes under IBT #, and we are not under audit or any pending litigation with the Illinois Department of Revenue.

Attached is a copy of our License and Service Agreement. We believe that our License Agreement and Maintenance and Support Services are exempt from the Illinois Retailer's [sic] Occupation and Use Tax based on Regulation §130.1935 to wit:

(a)(1)(A) it is evidenced by a written agreement signed by the licensor and the customer

**See Pages 6, 7 & 9 - Signature Pages**

(a)(1)(B) it restricts the customer's duplication and use of the software

**See Page 1, Item 1 - 'COMPANY hereby grants CLIENT a personal, nonexclusive and nontransferable license to use the Systems...'**

(a)(1)(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

**See Page 2, Item 5 - 'The Systems, data and all materials provided are not to be sold, licensed, leased or transferred by any means...'**

(a)(1)(D) the licensor has a policy of providing another copy at minimal or no charge if the customer loses or damages the product..

**See Page 2, Item 4.3 - 'Making all unreasonable efforts to correct, bypass or replace any reported Systems malfunction to maintain the intended functionality of the Systems...'**

(a)(1)(E) the customer must destroy or return all copies of the software to the licensor at the end of the license period.

**While our License Agreement does not explicitly state that the customer must destroy or return all copies of the software, we must point out that their only access to our Systems Program is via electronic connection. They do not receive any tangible personal product to destroy or return at the end of the License Agreement. As evidenced on Page 1, Item 2, TERM, the license is restricted to a specified period of months as described on Page 8, Exhibit 1, 'The Initial Term is for \_\_\_\_ months commencing \_\_\_\_\_.'. On Page 3, Item 7 states that the customer 'acknowledges all materials provided...are the sole and exclusive property of COMPANY...'. Our software security continually checks for valid contract dates. Therefore, when a contract expires at the end of the license period, if the customer does not renew the License Agreement, access to our Systems Programs is immediately denied and the system is of no value to the customer.**

The Department has not previously ruled on the same or a similar issue for COMPANY, nor have we previously submitted the same or a similar issue to the Department but withdrew it before a letter ruling was issued.

We have not found any authorities contrary to our views of Regulation §130.1935. Therefore, based on the provisions of our License Agreement and the facts provided within this letter, COMPANY respectfully requests that the Department of Revenue rule on the application of the Retailer's [sic] Occupation and Use tax to our software License Agreement and Support Services. We also request that the PLR apply to all periods not barred by the statute of limitations.

COMPANY respectfully requests that the Illinois Department of Revenue omit any reference to our company name, address, and/or telephone numbers as a part of any public PLR issued, as well as all verbiage in our License Agreement and all product names and prices shown on Schedule A and Exhibit 1 of our License Agreement.

Should you have any questions regarding this request please contact our Sales Tax Manager or our Chief Financial Officer.

**DEPARTMENT'S RESPONSE:**

The Department's regulation "Public Information, Rulemaking and Organization" provides that "[w]hether to issue a private letter ruling in response to a letter ruling request is within the discretion of the Department. The Department will respond to all requests for private letter rulings either by issuance of a ruling or by a letter explaining that the request for ruling will not be honored." 2 Ill. Adm. Code 1200.110(a)(4). Further, the Department's regulations regarding Private Letter Rulings provide that "[i]f there is case law or there are regulations dispositive of the subject to the request, the Department will decline to issue a letter ruling on the subject." 86 Ill. Adm. Code 1200.110(a)(3)(D).

The Private Letter Ruling Committee recently determined that it will no longer issue Private Letter Rulings regarding whether a specific license of prewritten (canned) computer software meets the requirements of subsection (a)(1) of 86 Ill. Adm. Code 130.1935. It is the Private Letter Ruling Committee's position that its regulation at 86 Ill. Adm. Code 130.1935 is dispositive of the subject of your request, as are several PLRs and GILs that the Department has issued which can be found on the Department's website. Therefore, we are responding with a General Information Letter, the information contained therein we hope you find helpful.

Generally, sales of "canned" computer software are taxable retail sales in Illinois. Sales of canned software are taxable regardless of the means of delivery. For instance, the transfer or sale of canned computer software downloaded electronically would be taxable. However, if the computer software consists of custom computer programs, then the sales of such software may not be taxable retail sales. See 86 Ill. Adm. Code 130.1935(c). Custom computer programs or software must be prepared to the special order of the customer.

Charges for updates of canned software are fully taxable pursuant to Section 130.1935. If the updates qualify as custom software under Section 130.1935(c), they may not be taxable. But, if maintenance agreements provide for updates of canned software, and the charges for those updates are not separately stated and taxed, then the whole agreements would be taxable as sales of canned 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.

A license of canned software is subject to Retailers' Occupation Tax liability if all of the criteria set out in 86 Ill. Adm. Code 130.1935(a)(1) are not met.

I hope this information is helpful. If you require additional information, please visit our website at [www.tax.illinois.gov](http://www.tax.illinois.gov) or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Terry Charlton  
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