

Under the Service Occupation Tax, servicemen are taxed on tangible personal property transferred incident to a sale of service. See 86 Ill. Adm. Code Part 140. (This is a GIL.)

January 12, 2009

Dear Xxxxx:

This letter is in response to your letter received in this office on December 24, 2008, 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:

I am writing to receive a written response to the below questions, to ensure we are in compliance with the Illinois Department of Revenue Sales Tax Regulations.

We are opening a private fitness club, and therefore charge membership dues and joining fees. We have Personal Training Services, as well as Tanning available. Please confirm that these services are not taxable.

We charge a one-time processing fee, usually \$39, that helps us pay our processing fees of the member, and the member receives an electronic key fob that gives them access to the club. The actual key costs us \$4. Once the member cancels membership, the key is deactivated, and they are not required to return the key, nor are they refunded if the key is returned. Should we be charging any tax on this fee?

We sell basic retail like tanning lotions, t-shirts, and protein powder, along with vending machine drinks and bars. Please confirm that the rate is 7.5%.

Thank you in advance for your quick response.

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 at retail 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 Retailers' Occupation and Use Taxes do not apply to sales of service. If tangible personal property is transferred incident to sales of service, this will result in either Service Occupation Tax liability or Service Use Tax liability for the servicemen depending upon his activities. However, if no tangible personal property is transferred incident to the sales of service, the Service Occupation Tax and Service Use Tax do not apply. For your general information see of 86 Ill. Adm. Code 140.101 through 140.109 regarding sales of service. The registration requirements for servicemen may be found at 86 Ill. Adm. Code 140.601.

Under the Service Occupation Tax Act, businesses providing services (*i.e.* servicemen) are taxed on tangible personal property transferred as an incident to sales of service. See 86 Ill. Adm. Code 140.101. The purchase of tangible personal property that is transferred to the service customer may result in either Service Occupation Tax liability or Use Tax liability for the servicemen depending upon his activities. The serviceman's liability may be calculated in one of four ways: (1) separately-stated selling price of tangible personal property transferred incident to service; (2) 50% of the servicemen's entire bill; (3) Service Occupation Tax on the servicemen's cost price if the servicemen are registered de minimis servicemen; or (4) Use Tax on the servicemen's cost price if the servicemen are de minimis and are not otherwise required to be registered under Section 2a of the Retailers' Occupation Tax Act.

Using the first method, servicemen may separately state the selling price of each item transferred as a result of the sale of service. The tax is then calculated on the separately-stated selling price of the tangible personal property transferred. If the servicemen do not separately state the selling price of the tangible personal property transferred, they must use 50% of the entire bill to the service customer as the tax base. Both of the above methods provide that in no event may the tax base be less than the servicemen's cost price of the tangible personal property transferred. See 86 Ill. Adm. Code 140.106.

The third way servicemen may account for their tax liability only applies to de minimis servicemen who have either chosen to be registered or are required to be registered because they incur Retailers' Occupation Tax liability with respect to a portion of their business. See 86 Ill. Adm. Code 140.109. Servicemen may qualify as de minimis if they determine that the annual aggregate cost price of tangible personal property transferred as an incident of the sale of service is less than 35% of the total annual gross receipts from service transactions (75% in the case of pharmacists and persons engaged in graphics arts production). Servicemen no longer have the option of determining whether they are de minimis using a transaction by transaction basis. Registered de minimis servicemen are authorized to pay Service Occupation Tax (which includes local taxes) based upon their cost price of tangible personal property transferred incident to the sale of service. Such servicemen should give suppliers resale certificates and remit Service Occupation Tax using the Service Occupation Tax rates for their locations. Such servicemen also collect a corresponding amount of Service Use Tax from their customers, absent an exemption.

The final method of determining tax liability may be used by de minimis servicemen that are not otherwise required to be registered under Section 2a of the Retailers' Occupation Tax Act. Such de minimis servicemen handle their tax liability by paying Use Tax to their suppliers. If their suppliers are not registered to collect and remit tax, the servicemen must register, self-assess and remit Use Tax to the Department. The servicemen are considered to be the end-users of the tangible personal

property transferred incident to service. Consequently, they are not authorized to collect a "tax" from the service customers. See 86 Ill. Adm. Code 140.108.

You inquire about what, if any, tax implications may arise from providing an electronic key fob to your customers. The tax implications depend on whether the ownership of the key is transferred to your customers. If ownership of the key is transferred to your customers, please see the above discussion of Service Occupation Tax liability. If ownership of the key is not transferred, please note that any tangible personal property used in this State and purchased at retail is subject to Use Tax.

The Department's regulation regarding the appropriate tax rates to apply to the sale of food, drugs and medicines can be found at 86 Ill. Adm. Code 130.310 (Food, Drugs, Medicines and Medical Appliances). Food that is to be consumed off the premises where it is sold (other than alcoholic beverages, soft drinks, and food that has been prepared for immediate consumption) is taxed at the rate of 1% plus applicable local taxes. Food is defined as any solid, liquid, powder or item intended by the seller primarily for human internal consumption, whether simple, compound or mixed, including foods such as condiments, spices, seasonings, vitamins, bottled water and ice. Products that do not meet the appropriate definitions of food, drugs, medicines and medical appliances, or are food prepared by the vendor for immediate consumption, are taxable at the higher State sales tax rate of 6.25% plus applicable local taxes.

A medicine or drug is defined as any pill, powder, potion, salve, or other preparation intended by the manufacturer for human use and that purports on the label to have medicinal qualities. Therefore, if vitamins, food supplements or meal replacement drink mixes are intended by the manufacturer for human use and purport on the label to have medicinal qualities, such items may be considered to be drugs and are taxed at the low rate of tax. Vitamins, food supplements or meal replacement drink mixes that do not make medicinal claims, would be generally be considered to be food.

Section 2-10 of the Retailers' Occupation Tax Act (35 ILCS 120/2-10) provides that, "[n]otwithstanding any other provisions of this Act, "food for human consumption that is to be consumed off the premises where it is sold" includes all food sold through a vending machine, except soft drinks and food products that are dispensed hot from a vending machine, regardless of the location of the vending machine." As a result, cold sandwiches sold from a vending machine are taxed at the low State rate of 1%. Candy, chips and gum sold from a vending machine are also taxed at the low State rate. Hot sandwiches sold from a vending machine are taxed at the high State rate of 6.25%.

Please note, however, that Section 130.310 regarding food is currently being reviewed and some changes to the regulation are expected.

The applicable local tax rates can be found on the Department's website. The general merchandise rate in Geneva, Illinois, including local taxes, is 7.5%. The rate for qualifying food, drugs and medicines, including local taxes, is 1.75%.

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,

Richard S. Wolters

Associate Counsel

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