

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 16, 2008

Dear Xxxxx:

We apologize for the delay in responding to your letter dated July 24, 2008, in which you request a Private Letter Ruling. 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.

Due to the nature of your inquiry and the information you have provided, we are responding with a GIL. In your letter you have stated and made inquiry as follows:

On behalf of the above-named taxpayer, we are writing to request a private letter ruling.

We are enclosing Illinois Form IL-2848, Power of Attorney, authorizing the undersigned to represent the taxpayer in this matter.

The taxpayer sells licensing rights to use a software product that it has developed.

As evidenced in the enclosed supporting documentation, the software is licensed, not sold, to its customers under a restrictive agreement whose provisions we believe comply with Illinois Department of Revenue Regulations exempting such licensed software from the Retailers' Occupation Tax.

As such, we believe that it is exempt from the Illinois Retailers' Occupation Tax under Title 86, Part 130, Section 130.1935, Computer Software, of the Illinois Department of Revenue Regulations.

This Regulation Section exempts a license of software from the Retailers' Occupation Tax if it meets a list of criterion limiting the licensee's rights.

Due to the materiality of the potential sales transactions and with the stated intent of fully complying with Illinois tax laws, we respectfully request a private letter ruling addressing the issue of whether the taxpayer's license agreement for its customized software is exempt from the Illinois Retailers' Occupation Tax.

Facts

The taxpayer, a Delaware corporation, with offices in CITY, Illinois and CITY/STATE, develops a software product and sells licensing rights to its customers throughout the United States.

The software products developed and licensed (not sold) by the Company allow for customized trading solutions that provide their customers with statistical accuracy of trade order execution for a variety of financial instruments.

The software product is aimed at the financial industry and the Company's customers are primarily professional trading firms.

The Company's primary product is named the 'PRODUCT1' trading system. It is not sold. Rather, it is licensed to the Company's customers.

A copy of the standard licensing agreement along with a more descriptive summary of the product is attached (see Exhibit A).

The taxpayer wishes to note the following points concerning the licensing agreement with its customers.

First, the license is evidenced by a written agreement signed by the Company and the customer,

Second, the license agreement restricts the customer's duplication of the software and use of the software (note Sections 2 and 5 of the Agreement at Exhibit A),

Third, the license agreement also prohibits the customer from licensing, sublicensing or transferring the software to a third party without the permission and continued control by the Company (see Sections 2 and 5 of Agreement at Exhibit A),

Fourth, the Company has a policy of providing another copy of the software at minimal or no charge if the customer loses or damages the software and further allows the customer to make and keep an archival copy of the software for contingency and disaster recovery purposes, and,

Fifth, each customer is required to destroy or return all copies of the software to the Company at the end of the license period (see Section of Agreement at Exhibit A).

Tax Period at Issue

The taxpayer requests the private letter ruling for the period commencing January, 2008 and all periods thereafter.

The taxpayer is not currently under an audit examination by the Illinois Department of Revenue (or any other taxing body) nor is it aware of any litigation pending with the Department.

Statements

1. To the best of their knowledge, neither the taxpayer's officers nor its authorized representative are aware of any Department ruling on this issue or any similar issue. Neither the taxpayer's officers nor its representative have previously submitted a request for a letter ruling on the same or similar issue and withdrew it before the ruling was issued.
2. The taxpayer submits a copy of Title 86, Part 130, Section 130.1935 the Illinois Department of Revenue Regulations which delineates the circumstances when the licensing software is not a taxable retail sale.

The taxpayer and its undersigned representative believe that the provisions of the taxpayers' License Agreement concerning the rights and restrictions of the customer meet the criterion of the aforementioned Regulation Section rendering the licensing of the taxpayer's software exempt from the Retailers' Occupation Tax (see Exhibit B for copy of Title 86, Part 130, Section 130.1935 of the Illinois Department of Revenue Regulations).

3. The taxpayer's officials and its authorized representative are not aware of any authorities that are contrary to the taxpayer's view under similar fact patterns and circumstances and have been unable to locate any such contrary views.

Due to the materiality of the revenue amounts involved in these licensing agreements, the taxpayer wishes to ensure that it has complied with Illinois law and is, thus, requesting this private letter ruling in good faith.

4. The taxpayer requests that the following information be deleted from the publicly disseminated version of the private letter ruling should one be issued:
 - A. Company name
 - B. Company address
 - C. Company telephone number, fax number and website address, and D. Company Product name ('PRODUCT1' and 'PRODUCT2').

On the basis of the foregoing, it is the belief of Company management that the Software licensing agreement between the Company and its customers is exempt from the Retailers' Occupation Tax under Title 86, Revenue Part 130, Section 130.1935 of the Illinois Department of Revenue Regulations.

The Company requests a private letter ruling from the Illinois Department of Revenue addressing the issue of whether the Company software license agreement renders it exempt from the Illinois Retailers' Occupation Tax under the provision of Title 86, Part 130, Section 130.1935.

The taxpayer is enclosing Illinois Form IL-2848, Power of Attorney, signed by a Company official authorizing the undersigned to represent the taxpayer in this matter (see Exhibit C).

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. You may access our website at www.tax.illinois.gov for further information and to review bulletins, regulations, previously issued letters, and other types of information that may be relevant to your inquiry. If you still have questions, you may also contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Terry Charlton
Senior Counsel, Sales & Excise Taxes

TC:msk