

This letter concerns the payment of the invested capital tax by alternative gas suppliers. See 35 ILCS 615/2a.1. (This is a GIL.)

December 23, 2009

Dear Xxxxx:

This letter is in response to your letter dated June 13, 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:

ABC respectfully requests that the Illinois Department of Revenue issue either a General Information Letter or a Private Letter Ruling on the application of Invested Capital Tax to an Alternative Gas Supplier (AGS). An AGS is defined in Section 19-105 of the Public Utilities Act. This request is being made based on the recommendation of the Excise Tax Division of the Illinois Department of Revenue.

ABC was granted a Certificate of Authority as an Alternative Gas Supplier (AGS) by the Illinois Commerce Commission (ICC). As an AGS, ABC is required to annually certify that it complies with the requirements of the Commission's Certification of an AGS. ABC is not required to file an annual report with the Illinois Commerce Commission as indicated in the business requirement profile for an AGS (See Exhibit A)

The Gas Revenue Tax Act (GRT Act) imposes a tax on persons 'engaged in the business of distributing, supplying, furnishing, or selling gas and subject to the tax imposed by this Act..., an additional tax in an amount equal to .8% of such person's invested capital for the taxable period.' (35 ILCS 615/2.1). In addition, the GRT Act provides that 'The invested capital tax imposed by this Section shall not be imposed upon person's [sic] who are not regulated by the Illinois Commerce Commission.' (35 ILCS 615/2.1).

The statute isn't clear in defining what parties are considered to be 'regulated by the Illinois Commerce Commission' for purposes of the Invested Capital Tax. A broad construction of this term could conceivably include anyone doing business in Illinois,

whereas a narrower construction could include only a very limited number of taxpayers. We believe for the following reasons, a narrower construction of the statute is intended and appropriate and that the Invested Capital Tax should not be imposed on an AGS:

- 1) The term 'Invested Capital' for purposes of the Invested Capital Tax is defined as 'that amount equal to (i) the average of the balances at the beginning and end of the taxable period of the taxpayer's total stockholder's equity and total long-term debt ... **as set forth on the balance sheets included in the taxpayer's annual report to the Illinois Commerce Commission** for the taxable period' 35 ILCS 615/1 (emphasis supplied). Thus, there is an implication that the exemption for those not regulated by the ICC is to be extended to those not required to file annual financial reports with the ICC. An AGS is not required to file annual financial information with the ICC. This would indicate that the Invested Capital Tax is not intended to apply to an AGS. Alternatively, if the tax were to apply, the invested capital of an AGS would arguably be zero.
- 2) The business requirement profile for an AGS is contrasted with the business requirement profile for a Public Utility. These documents are posted on the Illinois Commerce Commission website. (See Exhibits A and B) **The business requirement profile for the Public Utility clearly states that the public utility must pay the Invested Capital Tax on the capital invested in utility plant. There is no requirement that an AGS pay the Invested Capital Tax in the business requirement profile for the AGS.** It is noteworthy that the business requirements of both a Public Utility and an AGS include the requirement to pay the Gas Revenue Tax. Therefore, it appears that the Illinois Commerce [sic] considered the applicability of the Invested Capital tax to an AGS and concluded it did not apply. Furthermore, if the Invested Capital Tax were to apply, it is clear that an AGS would have been misled by the ICC issued business requirements.
- 3) The Invested Capital Tax was never meant to apply to an AGS. In its final report, the Governor's Committee to Replace the Corporate Personal Property Tax described the replacement tax on the invested capital of particular utilities in the following manner: 'Telephone, gas and electric utilities will be subject to an increase in their existing occupational excise taxes equal to .75 percent of their invested capital (common equity, preferred equity and long-term debt) allocable to Illinois. **This increase was agreed to in order to avoid the major shift which would occur if utilities were not made subject to a greater burden than other corporations since they presently pay a major portion of the corporate personal property tax.**' (Final Report of the Governor's Committee to Replace the Corporate Personal Property Tax (April 7, 1979) (emphasis supplied).

From this excerpt, it is clear that the intent of the invested capital tax was to replace the personal property tax paid by utilities, due to their significant investment in personal property. On the other hand, an AGS needs no investment in utility (or similar) property to function as an AGS. Thus the tax was intended to be born by utilities, not alternative gas suppliers, as indicated in points 1) and 2) above.

Thank you for your assistance in this matter. If you have any questions or need additional information, please call me.

DEPARTMENT'S RESPONSE:

Section 2 of the Gas Revenue Tax Act imposes a tax upon persons engaged in the business of distributing, supplying, furnishing or selling gas to persons for use or consumption and not for resale at the rate of 2.4 cents per therm of all gas which is so distributed, supplied, furnished, sold or transported to or for each customer in the course of such business, or 5% of the gross receipts received from each customer from such business, whichever is the lower rate as applied to each customer for that customer's billing period. 35 ILCS 615/2; 86 Ill. Adm. Code 470.110(a).

Section 2a.1 of the Gas Revenue Tax Act imposes upon persons engaged in the business of distributing, supplying, furnishing or selling gas and subject to the tax imposed by Section 2 of the Act, an additional tax in an amount equal to .8% of such persons' invested capital for the taxable period. The invested capital tax is not imposed upon persons who are not regulated by the Illinois Commerce Commission. 35 ILCS 615/2a.1

"Invested capital" means: "that amount equal to (i) the average of the balances at the beginning and end of each taxable period of the taxpayer's total stockholder's equity and total long-term debt, less investments in and advances to all corporations, as set forth on the balance sheets included in the taxpayer's annual report to the Illinois Commerce Commission for the taxable period; (ii) multiplied by a fraction determined under Sections 301 and 304(a) of the "Illinois Income Tax Act""

The taxpayer must file a return for invested capital tax purposes that provides, among other things, the "total proprietary capital and total long-term debt as of the beginning and end of the taxable period as set forth on the balance sheets included in the taxpayer's annual report to the Illinois Commerce Commission for the taxable period." 35 ILCS 615/2a.2.

The Alternative Gas Supplier Law was enacted by the General Assembly effective February 8, 2002. P.A. 92-529; 220 ILCS 5/19-100 *et seq.* The new law amended the Public Utilities Act and created a new category of gas suppliers known as "alternative gas suppliers." An "alternative gas supplier" includes any person "that offers gas for sale, lease or in exchange for other value received to one or more customers, or that engages in furnishing of gas to one or more customers . . ." but excludes gas public utilities as defined by Section 3-105 of the Public Utilities Act. 220 ILCS 5/19-105.

The Department has reviewed the legislative history and language of the Gas Revenue Tax Act, the Alternative Gas Supplier Law and related legislation. It is the Department's conclusion that alternative gas suppliers as defined by the Alternative Gas Supplier Law (220 ILCS 5/19-105) are not liable for the invested capital tax imposed by Section 2a.1 of the Gas Revenue Tax Act.

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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