

General Information Letter: Nexus issues are not a proper subject for letter ruling.

October 14, 2008

Dear:

This is in response to your letter dated September 15, 2008 in which you request a general information letter (GIL). A GIL is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code § 1200.120(b) and (c), which may be accessed from the Department's web site at www.Iltax.com. The following information relates to Illinois income tax. Your request in regard to Illinois sales tax has been forwarded to the Sales and Excise Tax Division and will be addressed by a separate ruling.

Your letter states as follows:

COMPANY LLP submits this request for a general information letter on behalf of an affiliated group of legal entities that operate ecommerce websites (hereinafter collectively referred to as "Taxpayer"). Taxpayer is considering whether to send representatives into the State of Illinois for the purpose of recruiting candidates for employment. It wishes to obtain advice from the Department of Revenue (the "Department") concerning whether its recruiting activities, as described below, would create nexus for Taxpayer for purposes of the Illinois Income Tax, Retailers Occupation Tax or Use Tax. A prompt response would be appreciated, as Taxpayer needs to make a decision by October 31, 2008 as to whether to engage in the recruiting activities for the remainder of the 2008-09 school year.

Taxpayer is an affiliated group of corporations that operate ecommerce websites that offer a wide selection of products and services for sale to customers by both Taxpayer and third parties via the Internet. Sales of tangible personal property at retail via the Internet are made by Taxpayer's retailing entities ("Retailers"). All of the Retailers are located outside of Illinois; Retailers do not operate any retail stores or own any real property in Illinois. For purposes of this ruling request, please assume that Taxpayer's present activities do not create Illinois nexus for income or sales/use tax purposes.

Taxpayer would like to conduct activities relating to recruiting candidates for employment, including on-campus recruiting at various Illinois universities, which could include the UNIVERSITY1, UNIVERSITY2, UNIVERSITY3, UNIVERSITY4 and the UNIVERSITY5, among others. Other recruiting activities would include participating in conferences, seminars, job fairs, career expos, open houses, and similar events, solely for the purpose of recruiting potential candidates for employment outside Illinois. The activities described in this paragraph and the two paragraphs below are collectively referred to as the "recruiting activities."

Taxpayer would recruit candidates for employment with any or all of Taxpayer's legal entities and business operations, including, but not limited to sales, human resources, marketing, computer-related services and legal. The type and number of employment opportunities would vary from year to year. All such employment would be located outside of Illinois.

Taxpayer representatives would visit Illinois for the sole purpose of recruiting potential candidates for employment and conducting on-campus interviews of students for possible out-of-state employment. No hiring decisions would be made at the in-state event or interviews. Instead, the in-state interviews would be preliminary screens designed to determine which

candidates would be invited back to Taxpayer's offices for more in-depth employment interviews.

Would Taxpayer be subject to the duty to collect and remit Illinois Income Tax, Retailers Occupation Tax or Use Tax on Internet sales to Illinois customers in light of its proposed recruiting activities, if Taxpayer does not engage in any other activities sufficient to establish nexus with Illinois for income or sales/use tax purposes?

Income Tax

The above described activities would not create nexus for Taxpayer for Illinois Income Tax purposes, for the following reasons:

The United States Constitution restricts a state's power to subject foreign corporations such as Taxpayer to income tax. The Due Process Clause requires that there exist some minimum connection between a state and the person, property or transaction the state seeks to tax. *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). The Commerce Clause requires that a state's tax be applied only to activities with a substantial nexus to the taxing state. *Id.* In addition, a state's tax jurisdiction is limited under Public Law 86-272 (15 U.S.C. § 381), which precludes a state from subjecting a nondomiciliary corporation to a net income tax where such corporation's only activities within the state for the taxable year consist of the solicitation of orders for sales of tangible personal property.

In *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 227 (1992), the Supreme Court held that business activities constituting the "solicitation of orders" include activities ancillary to requests for purchases. The Court also held that a taxpayer does not forfeit protection under P.L. 86-272 when it engages in *de minimus* activities that are unrelated to the solicitation of orders.

The Illinois Administrative Code addresses nexus issues within the context of P.L. 86-272 at 86 Ill. Adm. Code 100.9720. Section 9720 contains a list of "protected activities" that will not cause the loss of immunity for otherwise protected sales. 86 Ill. Adm Code 100.9720(a)(5). Among the list of protected activities are "recruiting, training or evaluating sales personnel, including occasionally using homes, hotels or similar places for meetings with sales personnel." 86 Ill. Adm. Code 100.9720(c)(5)(K). Thus, Taxpayer's recruiting activities with respect to sales positions is a "protected activity" that does not create nexus for the Taxpayer in Illinois for income tax purposes.

Taxpayer's recruiting activities related to candidates for non-sales positions also do not create nexus for Taxpayer in Illinois because they are a *de minimus* activity which establish only a trivial additional connection with this State. Taxpayer's travel to Illinois is for the sole purpose of recruiting new employees. No hiring decisions are made during the recruiting activities. Moreover, the type and number of employment positions would vary from year to year, depending upon the companies' needs.

Sales/Use Tax

The recruiting activities also would not create nexus for Taxpayer for purposes of the Retailers'

Occupation Tax or the Use Tax, for the following reasons:

First, Taxpayer is not an Illinois Retailer because it does not accept purchase orders in Illinois or maintain an inventory in Illinois from which it fills Illinois orders. As a result, it has no obligation to remit Retailers' Occupation tax on gross receipts from sales or to collect the corresponding Use Tax incurred by purchasers.

Second, Taxpayer is not a "retailer maintaining a place of business in Illinois" with an obligation to collect and remit Use Tax to the State on behalf of its Illinois customers. This is true even if Taxpayer engages in the recruiting activities described above. The recruiting activities are far removed from the activities identified by the Department as creating an obligation to collect and remit Use Tax. See, e.g., 86 Ill. Adm. Code 150.801 (When Out-of-State Retailers Must Register and Collect Use Tax). Section 150.801 provides the following examples of cases in which a retailer is required to collect and remit Use Tax:

(1) Retailers who have Illinois retail outlets which are subject to the Retailers' Occupation Tax Act are required to collect and remit the Use Tax, as such, when shipping tangible personal property to the purchasers in Illinois from outside Illinois, in interstate mail transactions which have no connection with such Illinois outlets, even though such completely interstate mail transactions would not be subject to the Retailers' Occupation Tax.

(2) Out-of-State retailers, who have any kind of place of business in Illinois or any kind of order-soliciting or order-taking representative either stationed in Illinois or coming into Illinois from time to time, must collect and remit the Use Tax, as such, from Illinois purchasers for use even though the seller is not required to pay Retailers' Occupation tax when he does nothing in Illinois except to solicit orders.

86 Ill. Adm. Code 150.801(c)(1) & (2). Both of these examples emphasize the presence of sales-related activities in the state – either the presence of a retail store or an order soliciting or order taking representatives. The recruiting activities do not match either example. Nor do they match any of the examples set forth in the definition of "retailer maintaining a place of business in this state" set forth in 86 Ill. Adm. Code 150.120(i).

Third, imposing a duty to collect and remit Use Tax as a result of the recruiting activities would violate the constitutional standards set forth in *Quill* and its progeny, because they do not establish a substantial nexus with the State of Illinois.

Conclusion: For these reasons, the Taxpayer respectfully asks the Department to issue a general information letter indicating that, based on the facts as described above, the Taxpayer's recruiting activities do not create an obligation to remit Illinois Income Tax, Retailers' Occupation Tax or Use Tax.

RULING

The determination whether a taxpayer has nexus with Illinois is extremely fact-specific. Therefore, the Department does not issue rulings regarding whether a taxpayer has nexus with the State. However, as described below, it is likely that Taxpayer's non-sales recruiting activities in Illinois would result in

the loss of protection under Public Law 86-272.

Public Law 86-272, 73 Stat. 555, 15 U.S.C.A. §381 (1959), denies a State the power to tax net income derived within the State by any person from interstate commerce if the only business activities of the person within the State consist of "solicitation of orders ... for sales of tangible personal property," where the orders are sent outside the State for approval or rejection and are filled by shipment or delivery from a point outside the State. Regarding P.L. 86-272, Department Regulations Section 100.9720(c)(2)(A) states:

If a nonresident taxpayer's activities exceed "mere solicitation," as set forth in subsection (a) of PL 86-272 ... it obtains no immunity under that federal statute. The taxpayer is subject to Illinois income tax and personal property tax replacement income tax for the entire taxable year and its business income is apportioned under IITA Section 304. Whether a nonresident taxpayer's conduct exceeds "mere solicitation" depends upon the facts in each particular case.

Department Regulations Section 100.9700(c)(2)(C) defines the phrase "solicitation of orders" as follows:

Solicitation of orders means speech or conduct that explicitly or impliedly invites an order and activity ancillary to invitations for an order.

i) To be ancillary to invitations for orders, an activity must serve no independent business function for the seller apart from its connection to the solicitation of orders.

ii) Activity that a seller would engage in apart from soliciting orders shall not be considered ancillary to the solicitation of orders.

iii) Assignment of an activity to a salesperson does not, merely by such assignment, make that activity ancillary to solicitation of orders.

iv) Activity that attempts to promote sales is not ancillary, nor is activity that facilitates sales. PL 86-272 only protects ancillary activity that facilitates the invitation of an order.

Department Regulations Section 100.9720(c)(5)(K) provides specifically that recruiting sales personnel is considered a protected activity. Accordingly, Taxpayer's activities in Illinois related to recruiting sales personnel do not result in the loss of protection under P.L. 86-272. However, recruiting non-sales personnel is not among the protected activities enumerated in the regulations, and would not otherwise be considered solicitation of orders or activity ancillary to solicitation of orders. Recruiting activities related to non-sales personnel serve an independent business function apart from solicitation of orders. Therefore, such recruiting activities in Illinois result in the loss of protection under P.L. 86-272, unless the activities are considered de minimus.

In Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214 (1992), the United States Supreme Court held that a taxpayer does not forfeit protection under P.L. 86-272 by engaging in de minimus activities that exceed solicitation of orders. (Id. at 231). Department Regulations Section 100.9720(c)(2)(D) states the following regarding the determination whether otherwise non-protected activities may be considered de minimus:

De minimus activities are those that, when taken together, establish only a trivial additional connection with this State. An activity regularly conducted within this State on a regular or systematic basis or pursuant to a company policy (whether such policy is in writing or not) shall normally not be considered trivial. Whether an activity consists of a trivial or non-trivial additional connection with this State is to be measured on both a qualitative and quantitative basis. If the activity either qualitatively or quantitatively creates a non-trivial additional connection with this State, then the activity exceeds the protection of PL 86-272. The amount of unprotected activities conducted within this State relative to the amount of protected activities conducted within this State is not determinative of the issue of whether the unprotected activities are de minimus. The determination of whether an unprotected activity creates a non-trivial connection with this State is made on the basis of the taxpayer's entire business activity, not merely its activities conducted within this State. An unprotected activity that would not be de minimus if it were the only business activity of the taxpayer conducted in this State will not be de minimus merely because the taxpayer also conducts a substantial amount of protected activities within this State, nor will an unprotected activity that would be de minimus if conducted in conjunction with a substantial amount of protected activities fail to be de minimus merely because no protected activities are conducted in this State.

Applying the above regulation to the facts stated in your letter, it is likely that the non-sales recruiting activities would not qualify as de minimus. These activities appear to fall within the second sentence of Regulations Section 100.9720(c)(2)(D), as an activity regularly conducted within Illinois on a regular or systematic basis or pursuant to a company policy. As a result, the recruiting activities would not normally be considered trivial.

As stated above, this is a GIL. A GIL does not constitute a statement of policy that applies, interprets or prescribes the tax laws, and it is not binding on the Department.

Sincerely,

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