

This letter discusses nexus. See *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992). (This is a GIL.)

June 22, 2007

Dear Xxxxx:

This letter is in response to your letter dated April 16, 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.ILTAX.com](http://www.ILTAX.com) 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:

FIRM respectfully requests a ruling on behalf of our client, CLIENT, regarding its potential taxable presence in Illinois for purposes of collecting and remitting Illinois Retailer's Occupation Tax ('ROT') and/or corresponding Use Tax with respect to the following situation.

**GENERAL INFORMATION**

Enclosed please find an original Form IL - 2848 Power of Attorney, authorizing FIRM to represent CLIENT before the Illinois Department of Revenue. Additionally, enclosed are contracts relevant this request.

This Private Letter Ruling ('PLR') is not requested with regard to hypothetical or alternative proposed transactions. The PLR is requested to determine the Retailers' Occupation Tax and/or Use Tax consequences of the actual business practices of CLIENT.

CLIENT is not currently engaged in litigation with the Department with regard to this or any other tax matter. The tax periods at issue are current and ongoing.

To the best knowledge of CLIENT's personnel, and to the best of our knowledge, the Department has not previously ruled regarding this matter for CLIENT. Neither CLIENT nor we have, at any time prior, submitted the same or similar issue to the Department.

CLIENT requests that certain information be deleted from the PLR prior to dissemination to others. CLIENT requests that its name, address, and the name of its representative be deleted. CLIENT also requests the deletion of the names of the other companies mentioned in this request.

### **STATEMENT OF FACTS**

CLIENT, a Delaware corporation, located in STATE, is a retailer of gemstone jewelry. Jewelry is sold directly to customers via television and the Internet. CLIENT has no locations or employees in Illinois and does not maintain or occupy through an agent a place of distribution or sales, storage, or warehouse in the state. CLIENT products are all located at the CLIENT location in STATE and shipped to Illinois via UPS and UPS-Mail Innovations after purchases are made by its customers. CLIENT's shopping programs are transmitted from its studio located outside Illinois. CLIENT reaches/ will reach customers via television via the following agreements:

- CLIENT entered into an agreement with XYZ ('XYZ'), a satellite television provider. The agreement provides that XYZ will distribute CLIENT's programming via its satellite distribution system for video and other programming services. CLIENT's products are thus available through a dedicated television home shopping channel, owned by XYZ. Viewers of the CLIENT channel are able to place orders through the use of a 1-800 number. Orders are accepted at CLIENT's location in STATE.

CLIENT negotiated the contract at XYZ's primary location in California. XYZ's equipment is also located in California. XYZ does not maintain an office or other storage place for CLIENT's products, XYZ is not an affiliate of CLIENT.

- CLIENT entered into an agreement with COMPANY a STATE corporation, as it relates to the purchase of airtime and the distribution of CLIENT's programming on cable television networks. CLIENT has granted COMPANY the right to negotiate and purchase airtime on specified cable systems in specified markets for CLIENT's use. Specifically, CLIENT authorizes COMPANY to purchase airtime (at or below standard costs) on cable systems in certain markets specified by CLIENT. CLIENT then makes payment to COMPANY equal to COMPANY's cost for acquiring the airtime, plus a percentage finder's fee. In reaching agreements with cable operators, COMPANY may utilize, or allow cable operators to utilize, CLIENT marketing and promotional materials in connection with the distribution, marketing, promotion, or advertising of CLIENT's programming.

Neither XYZ, COMPANY, nor the cable operators solicit or sell CLIENT's products. XYZ and the cable operators broadcast the programming of CLIENT. Orders are sent through the Internet or through 1-800 numbers. The orders are received and accepted in STATE.

### **OPINIONS REQUESTED**

- CLIENT's activities do not create a taxable presence in Illinois for purposes of collecting and remitting Illinois Retailer's Occupation Tax ('ROT') or Use Tax.
- CLIENT's relationship with XYZ does not create a taxable presence in Illinois for purposes of collecting and remitting Illinois Retailer's Occupation Tax ('ROT') or Use Tax.
- CLIENT's relationships with COMPANY and cable television providers do not create a taxable presence in Illinois for purposes of collecting and remitting Illinois Retailer's Occupation Tax ('ROT') or Use Tax.

### RELEVANT AUTHORITIES

In order for a state to impose a sales or use tax collection and reporting requirement, an entity must have sufficient nexus with the state under both the Due Process and Commerce Clauses of the United States Constitution. An out-of-state entity must have sufficient nexus with a state before that state can impose a use tax collection obligation. The constitutional limitations on the imposition of a duty to collect a use tax on an out-of-state seller have been analyzed by the U.S. Supreme Court in several cases.

In *Quill Corporation v. North Dakota*, a mail order seller sent catalogs to businesses and individuals located in North Dakota soliciting orders for office supplies. 504 U.S. 298 (1992). The *Quill* Court held that 'substantial nexus' does require some level of physical presence in a state before the state can impose a use tax collection requirement. Although the *Quill* Court determined that a certain *de minimis* level of physical presence will not create substantial nexus, there is no bright-line level of physical presence that will constitute substantial nexus. The Commerce Clause, as interpreted by the *Quill* Court, provides absolute protection against a sales/use tax collection and reporting obligation for out-of-state sellers with no physical presence in the taxing state.

Illinois Revised Statutes 35 ILCS 105/2 defines a 'retailer maintaining a place of business in this State' to include: 'a retailer having or maintaining within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent or other representative operating within this State under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent or other representative here permanently or temporarily, or whether such retailer or subsidiary is licensed to do business in this State; **and a retailer soliciting orders for tangible personal property by means of a telecommunication or television shopping system (which utilizes toll free numbers) which is intended by the retailer to be broadcast by cable television or other means of broadcasting, to consumers located in this State.**'

Illinois Private Letter Ruling ST 95-0346-PLR issued in 1995, acknowledged the Illinois statute cited above, but stated that Illinois could not compel a company located outside of the state to collect use tax if its activities are protected by the Due Process and Commerce Clause provision. In this ruling, the payer operated a televised shopping program, airing on both satellite television and cable television. The Department analyzed the facts and the *Quill Corporation v. North Dakota* decision, and concluded that the taxpayer could not be compelled to collect tax based on its televised programming.

## **CONCLUSION**

While CLIENT seeks a determination on the issues raised above, it states the following in support of a conclusion that CLIENT need not charge and collect Illinois tax.

The facts seem to indicate that CLIENT's activities in Illinois should not be deemed to create nexus and an Illinois collection responsibility. CLIENT does not have a physical presence in Illinois. While CLIENT does solicit orders via cable and satellite television, and thus seemingly falls within the definition of 'retailer maintaining a place of business in this state', so did the taxpayer in Letter Ruling ST 95-0346-PLR. [CLIENT cannot rely on this ruling as it was not issued to CLIENT and 10 years have passed since the issuance of the ruling.]

CLIENT's relationship with XYZ should not create an Illinois collection responsibility either. XYZ does not maintain an office or other storage place for CLIENT's products. XYZ does not solicit sale for CLIENT, and is not involved in the selling of CLIENT's product. XYZ's only connection to Illinois with respect to CLIENT is that XYZ's satellites deliver transmissions, including CLIENT programming, to its Illinois customers.

CLIENT's relationships with cable television providers should not create an Illinois collection responsibility either. The cable providers do not maintain an office or other storage place for CLIENT's products. The cable providers do not solicit sales for CLIENT, and are not involved in the selling of CLIENT's product. The cable providers only connection to Illinois with respect to CLIENT is that the cable providers broadcast CLIENT programming, for a fee, to its Illinois customers. Additionally, CLIENT's relationship with COMPANY should not create an Illinois collection responsibility. COMPANY does not maintain an office or other storage place for CLIENT's products. COMPANY does not solicit sales for CLIENT, and is not involved in the selling of CLIENT's product. COMPANY's only connection to Illinois with respect to CLIENT is that COMPANY purchases airtime on behalf of CLIENT. While COMPANY is acting as an agent with respect to the purchase of airtime for CLIENT's programming, these actions should not create nexus for CLIENT, as presence in the state for a purchasing activity should not be deemed substantial nexus, and/or the presence in the state for purchasing television airtime should not be nexus creating, as the underlying item (television airtime) should not create nexus.

Therefore, we respectfully request that the Department issue a ruling that concludes that CLIENT does not have a taxable presence in Illinois for purposes of collecting and remitting Illinois Retailer's Occupation Tax ('ROT') and/or corresponding Use Tax.

If the Department has additional questions, needs additional information, or anticipates a negative response to this request, it is requested that the Department contact the undersigned first to arrange a conference to discuss before a written response is given.

If you have any questions, please do not hesitate to contact me.

## **DEPARTMENT'S RESPONSE:**

The Department declines to make nexus determinations in the context of Private Letter Rulings or General Information Letters because the amount of information required to make those

determinations is often best gathered by an auditor. The following information outlines the principles of nexus. We hope it is helpful to you in determining your client's tax obligations.

An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers.

Another type of retailer is the retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in Illinois" is described in 86 Ill. Adm. Code 150.201(i). This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The United States Supreme Court in Quill Corp. v. North Dakota, 112 S.Ct. 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax laws. The Supreme Court has set out a 2-prong test for nexus. The first prong is whether the Due Process Clause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. Quill at 1910. The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis, will trigger Use Tax collection responsibilities. Please see Brown's Furniture, Inc. v. Wagner, 171 Ill.2d 410, (1996).

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax liability on the purchase of the goods and have a duty to self-assess and remit their Use Tax liability directly to the State. In such instances, those customers must remit their Illinois Use Tax along with a completed Form ST-44, Illinois Use Tax Return unless they are otherwise registered or are required to be registered with the Department and remit their Illinois Use Tax with a Form ST-1, Illinois Sales and Use Tax Return.

I hope this information is helpful. If you require additional information, please visit our website at [www.ILTAX.com](http://www.ILTAX.com) or contact the Department's Taxpayer Information Division at (217) 782-3336. If you are not under audit and you wish to obtain a binding PLR regarding your factual situation, please submit a request conforming to the requirements of 2 Ill. Adm. Code 1200.110 (b).

Very truly yours,

Terry D. Charlton  
Senior Counsel, Sales & Excise Taxes

TDC:msk