

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

October 2, 2008

Dear Xxxxx:

This letter is in response to your letter dated September 15, 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 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.

A. Description of Relevant Facts

1. General Background

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.

2. Proposed Recruiting Activities

Taxpayer would like to conduct activities relating to recruiting candidates for employment, including on-campus recruiting at various Illinois universities. 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 below 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.

B. Issue Presented and Proposed Legal Conclusion

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 customer 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?

1. 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.*, 50 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 '[r]ecruiting, 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.

2. 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 [sic] 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 [sic] 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 150.201(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.

DEPARTMENT’S RESPONSE:

Your letter makes inquiry regarding nexus for Taxpayer for purposes of the Illinois Income Tax, Retailers’ Occupation Tax or Use Tax. This letter addresses only the Retailers’ Occupation Tax or Use Tax aspects of your request. A response concerning the Income Tax aspect will be sent from the Income Tax Department under separate cover.

Determinations regarding the subject of nexus are normally very fact specific. The Department has found that the best manner to determine nexus is for a Department auditor to examine all relevant facts and information. The following guidelines, however, may be useful to you in determining whether your client would be considered "a retailer maintaining a place of business in Illinois" subject to Use Tax collection obligations.

Whether a retailer is subject to Illinois Retailers’ Occupation Tax (sales tax) liability or is required to collect Illinois Use Tax from its Illinois customers depends upon whether that retailer has sufficient “nexus” with the State of Illinois so that the retailer will be subject to Illinois law. The following information outlines the principles of nexus.

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 law. 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. This could include independent contractors. 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 refer to *Brown's Furniture, Inc. v. Zehnder*, 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 on the purchase of the out-of-State goods and have a duty to self-assess their Use Tax liability and the customer must remit the amount directly to the State. The Use Tax rate is 6.25%.

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. 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,

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