

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

October 15, 2008

Dear Xxxxx:

This letter is in response to your letter dated September 25, 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.tax.illinois.gov](http://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:

The Taxpayer requests that the following ruling be issued:

The Taxpayer is not required to collect or remit Illinois sales tax on consignment sales in the situation described below:

### **FACTS**

The Taxpayer functions as an internet retailer. It has physical presence and sales tax nexus only in New Jersey. The Taxpayer has consignment agreements with 2 retailers who are unrelated with each other and with The Taxpayer. The first retailer has nexus in Illinois, and The Taxpayer, as consignee, collects and pays over sales tax on sales shipped to Illinois customers. (The Taxpayer is registered to collect and remit sales tax). The second retailer has no nexus to Illinois, but The Taxpayer, as consignee, ships some of the second retailer's goods to Illinois customers. The agreements between The Taxpayer and both consignors is that The Taxpayer is responsible for collecting and paying all required sales tax. All of the Taxpayer's shipments to Illinois are done via common carrier from locations outside of Illinois.

### **RULING REQUESTED**

The Taxpayer requests a ruling that no sales tax need be collected or remitted on the sales of the second retailer.

## **DISCUSSION**

The United States Supreme Court has ruled that in determining sales tax collection responsibility, its precedents have 'created a safe harbor for vendors 'whose only connection with customers in the [taxing] State is by common carrier or the United States mail.'<sup>1</sup> Thus, there is no sales tax collection or remittance responsibility in the absence of taxable nexus.

The Hellerstein treatise State Taxation (WGL) describes consignments:

Under common law, a consignment is a special type of bailment in which property is transferred by the consignor to the consignee for the purpose of selling the property. Upon sale, the consignee returns the sales price to the consignor, less a commission. Thus, a consignment involves two transfers of property: (1) the transfer by the consignor to the consignee, and (2) the transfer to the third-party purchaser. The sale by the consignee to the purchaser is clearly a sale for sales tax purposes. Some state statutes make this explicit. The initial transfer to the consignee, however, generally is not considered a sale for sales tax purposes. The transaction is more in the nature of a transfer to an agent or bailee to act on behalf of the principal or bailor for the purpose of transferring title to a purchaser.<sup>2</sup>

There is very little authority on what circumstances create sales tax nexus in connection with consignment sales. Although nexus for sales tax purposes is not necessarily the same as nexus for income tax purposes, the two are related. The Illinois statute on Nexus states that a consignor was subject to Illinois income tax where it had retained title to inventory while it was in Illinois.<sup>3</sup> Implied in the statute is that Illinois tax liability in consignment sales is governed by the general rule which requires some degree of nexus.

An Illinois publication on the (Emergency) Amnesty Program Requirements states that a retail mail order and internet business that makes sales to Illinois customers may be liable for collecting Illinois sales tax where there was an affiliated company that sold similar goods and had Illinois nexus.<sup>4</sup>

In The Taxpayer's situation, there is no avoidance of Illinois sales tax with respect to the second consignor. In The Taxpayer's situation, neither consignor nor consignee has any Illinois nexus. The Taxpayer's contractual obligation to collect and remit Illinois sales tax in connection with the sale of the first consignor's goods is derivative from the first consignor's Illinois nexus, and therefore its arrangement with the first consignor should not have any tax effect on the sales of the second consignor's goods.

## **SUMMARY**

The Taxpayer requests a ruling that its obligation to collect and remit sales tax with respect to Illinois destination sales of its first consignor does not require it to collect and remit sales tax with respect to other Illinois destination sales of other consignors in the

absence of any Illinois nexus. If you need any further information, of [sic] if you are contemplating a decision adverse to The Taxpayer, please contact me.

## **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). Your letter fails to meet the requirements of the regulation in a number of respects. For example, private letter rulings will not be issued to taxpayer representatives for anonymous or unidentified taxpayers; furthermore, the taxpayer representative also must provide a power of attorney with the request signed by the taxpayer. Because the written consignment agreement with the second retailer was not provided to the Department as required by the regulation we lack sufficient information regarding the second retailer and your contractual relationship with the retailer to make any ruling. Therefore, it is the Department's position that we must decline to issue a Private Letter Ruling.

Determinations regarding the subject of nexus are normally very fact specific. As a result, the Department generally declines to make nexus determinations in the context of private letter rulings. 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, are useful in determining whether a person 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%.

When auctioneers or agents are involved in selling activities, the person who is liable for Retailers' Occupation Tax will depend on whether the auctioneer or agent is working on behalf of a disclosed or undisclosed principal. 86 Ill. Adm. Code 130.1915 ("Auctioneers and Agents"). This rule also applies to consignment transactions. An auctioneer or agent acting on behalf of an unknown or undisclosed principal is considered to be the owner of the tangible personal property that will be sold and is responsible for paying Retailers' Occupation Tax on the gross receipts from the sale, as well as filing a sales tax return. However, if the auctioneer or agent is acting on behalf of a known or disclosed principal, the sale of the tangible personal property is taxable to the principal and not the auctioneer or agent.

A principal is deemed to be disclosed to a purchaser for use or consumption only when the name and address of such principal is made known to such purchaser at or before the time of the sale and when the name and address of the principal appears upon the books and records of the auctioneer or agent. See Section 130.1915(b). Please be advised, however, that if the tangible personal property sold would constitute an occasional sale by the disclosed principal, then the sale is not taxable. See 86 Ill. Adm. Code 130.110 ("Occasional Sales"). If tax is due, it is based upon the total selling price, including any commission.

I hope this information is helpful. If you require additional information, please visit our website at [www.tax.illinois.gov](http://www.tax.illinois.gov) or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Richard S. Wolters  
Associate Counsel

RSW:msk

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<sup>1</sup> *Quill Corp. v. North Dakota*, 504 US 298, 315, 112 S. Ct. 1904 (1992)

<sup>2</sup> ¶13.01A[4]

<sup>3</sup> IL Admin. Code 100.9720(c)(6)(C)

<sup>4</sup> IL. Admin Code 521.105 (Emergency) Amnesty Program Requirements