

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

December 12, 2008

Dear Xxxxx:

This letter is in response to your letter dated April 6, 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:

Please accept this letter as a formal request for a letter ruling on the above listed tax account.

We have recently changed the structure of our business. The owner of COMPANY was formerly co-owner of a business in Illinois that has since gone out of business and COMPANY had shipped directly from that business to COMPANY customers which were located in Illinois. Therefore we had been collecting and paying Illinois sales tax. In recent conversation with agents at your Department, we've been given conflicting instruction and are in need of clarification.

Currently, we do 2 different methods of distribution:

1. COMPANY distributes parts made in others states by other companies and occasionally we ship directly to COMPANY customers in Illinois from those locations.
2. COMPANY also manufactures some parts where stages of work on those parts are done by some of our vendors which are located in Illinois.
  - A. There can be times when those parts are shipped to us here in Wisconsin to go into our stock and then could be shipped to Illinois.
  - B. There can be times when those parts are shipped directly to our Illinois customers from the particular Illinois vendor that finishes the final product.

In these instances the bill of lading comes from our sales office here in Wisconsin as 3<sup>rd</sup> party bill/ship-to and all trucking invoices are received and paid from this office.

In the letter of ruling would you kindly specify the rate and type of tax, as well as the item number on the tax form ST-1 Sales and Use Tax Return for each of the occurrences as listed above. Thank you.

## **DEPARTMENT'S RESPONSE:**

Whether a retailer is subject to Illinois tax as an "Illinois retailer" required to collect Retailers' Occupation Tax or a "retailer maintaining a place of business in Illinois" required to collect Use Tax on behalf of its customers depends in part on whether the retailer has nexus with Illinois.

Determinations regarding nexus are very fact specific and cannot be addressed in the context of a General Information Letter. However, we can provide you with basic guidelines that may be used to determine whether a seller would be considered "an Illinois retailer" subject to Retailers' Occupation Tax liability or "a retailer maintaining a place of business in Illinois" subject to Use Tax collection duties from their Illinois customers.

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 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 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. Many retailers that do not have nexus with the State have chosen to voluntarily register as Use Tax collectors as a courtesy to their Illinois customers so that those customers are not required to file returns concerning the transactions with those retailers.

The situation described in question 1 is addressed by the state's "drop shipment" rules. Those rules can be found at 86 Ill. Adm. Code 130.225.

For the situation described in subsection A of question 2, please see the Department's rules on temporary storage exemptions. There are several temporary storage exemptions in Illinois. Authority for the temporary storage exemptions is found in the Use Tax Act at 35 ILCS 105/3-55, subsections (e), (f), and (j). The administrative rules governing temporary storage are found in 86 Ill. Adm. Code 150.310, "Exemptions to Avoid Multi-State Taxation." However, please note the provisions of 150.310(a)(6)(F) concerning items shipped back into Illinois.

With respect to the situation described in subsection B of question 2, if COMPANY owns the product when the Illinois vendor finishes it and ships it to your Illinois customer, the product may be considered to be an item in COMPANY's inventory in Illinois which would result in COMPANY being an Illinois retailer subject to State and local retailers' occupation taxes. (See 86 Ill. Adm. Code 130.605 and 270.115)

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. 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).

Sincerely,

Samuel J. Moore  
Associate Counsel

SJM:msk