

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

September 7, 2009

Dear Xxxxx:

This letter is in response to your letter dated January 9, 2009, 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:

We are writing to ask you to complete the questionnaire for the 2009 Survey on behalf of your state. Attached below is an excel spreadsheet, which contains all of your state's responses from last year. Please review the spreadsheet and indicate in red font the responses you wish to change.

If you have any questions about this or if there is any way I can help you to complete this year's questionnaire, please contact me.

The survey covers many of the gray areas of state tax law. Your responses will provide useful guidance for taxpayers in complying with your state's laws.

The questionnaire should be completed based on state law as of December 31, 2008.

This year's questionnaire includes some new questions.

Specifically, Section X asks about your state's policies in regard to net operating losses. We also revised the last question in Section XI regarding your state's conformity to the Streamlined Sales and Use Tax Agreement.

As in previous years, the questionnaire asks you about nexus-creating activities for income tax and sales tax purposes, deductions for state and local income taxes,

conformity to federal I.R.C. §338(h)(10) elections, conformity to the I.R.C. §108 exclusion of income from discharge of indebtedness, the tax treatment of intangible holding companies, and whether your state employs a throwback and/or throwout rule. It also asks about reportable transaction and disclosure requirements and voluntary disclosure audit programs. In addition, it asks you to indicate the extent of your state's conformance to the Streamlined Sales and Use Tax Agreement.

Your responses, along with the responses we receive from other states, will be published by COMPANY.

Please return the completed questionnaire to us by February 20, 2009. After answering the new questions and updating your responses from last year, please e-mail the excel spreadsheet to me.

I look forward to working with you.

.....

XI. Sales Tax

A. State Statutes, Regulations, or Administrative Pronouncements Specifically Addressing Sales Tax Nexus

Please identify any statute, regulation, or administrative pronouncement that sets forth your state's sales tax nexus policy.

Statute(s) addressing sales tax nexus:

Regulation(s) addressing sales tax nexus:

Administrative pronouncement(s) addressing sales tax nexus:

B. Sales Tax Nexus Creating Activities

Please indicate 'yes' or 'no' to show whether each of the following activities or relationships performed by an out-of-state corporation would, by itself, create substantial nexus with your state for purposes of triggering the imposition of sales tax collection requirements on the corporation. When determining whether the listed activity/relationship would create substantial nexus, assume that each item is the only activity/relationship the corporation has in your state. Also assume that the out-of-state corporation has no property or employees located in your state.

A 'yes' response means that an out-of-state corporation's performance of the listed activity/relationship would, by itself, create substantial nexus and trigger the imposition of sales tax collection requirements on the corporation. A 'no' response means that an out-of-state corporation's performance of the listed activity/relationship would not, by itself, trigger nexus for purposes of your state's sales tax.

For the questions that you believe require more than a 'yes' or 'no' answer, please set forth in the comments section the factors that your state would consider in making a nex

The corporation:

Response

1. sells tangible personal property to residents in your state from outside the state (e.g., by telephone, over the Internet, via catalog/direct mail, or otherwise) and has an employee visit your state four or more times during the year
2. sells tangible personal property to residents in your state from outside the state and authorizes an employee or third party (e.g., sales representative, independent contractor, or affiliated company) to solicit sales in the state
3. authorizes an employee or third party (e.g., independent contractor, affiliated company, or other representative) to install, deliver, service, or repair merchandise in your state
4. uses an employee or third party (e.g., independent contractor, affiliated company, or other representative) to investigate, handle or resolve customer issues, provide training or technical assistance, or otherwise provide customer service to customers in your state
5. delivers merchandise to customers in your state in company-owned vehicles or by means other than common carrier or the U.S. Postal Service
6. attends or participates in trade shows held in your state, and
 - (a) makes no sales and takes no orders at the trade show
 - (b) makes sales and/or accepts orders at the trade show
 - (c) limits trade show activities in the state to no more than five days annually
7. sells tangible personal property while temporarily located in your state for up to three days
8. hires independent contractors to perform warranty or repair services on tangible personal property located in your state
9. hires an unaffiliated printer in the state and stores raw materials or finished goods at the in-state printer's plant
10. hires an unrelated call center or fulfillment center located in your state to process telephone and electronic orders that primarily derive from out-of-state customers
11. issues credit cards to customers who reside in your state
12. enters into an advertising contract with a cable station, radio station, print publication or electronic publication that is located in your state
13. holds a certificate of authority to conduct business in the state, or is otherwise registered with the Secretary of State or any state regulatory agency in your state
14. collects delinquent accounts using a collection agency in your state or hires attorneys or other third parties to file collection suits in courts in your state
15. uses a company in your state to drop-ship merchandise to customers

16. is affiliated with an entity that sells tangible personal property or services to customers in your state, and
 - (a) the in-state affiliate sells similar merchandise and uses common trade names, trademarks or logos
 - (b) uses the in-state affiliate to accept returns, take orders, perform customer service or distribute advertising materials on its behalf
 - (c) sells tangible personal property over the Internet or by catalog and has an affiliated company that operates a retail store in your state
17. has employees or representatives occasionally enter the state to meet with in-state suppliers of goods or services
18. sells tangible personal property over the Internet and operates a Web site which is maintained on a server located in your state
19. uses an Internet link or enters into an affiliation linking arrangement with a third party that:
 - (a) is located in your state
 - (b) maintains a Web site on a server that is located in your state

Comments: (Please indicate the question to which you are referring)

C. Conformity to Streamlined Sales and Use Tax Agreement (SSUTA) Provisions (as of January 1, 2009)

Your state:

Response

1. is a full member (fully compliant) with the SSUTA
2. is in compliance with the SSUTA except for sourcing
3. has adopted some SSUTA provisions
4. has not adopted any SSUTA provisions
5. REVISED QUESTION FOR 2009: has one sales tax rate that applies to all taxable sales everywhere.

Comments: (Please indicate the question to which you are referring)

DEPARTMENT'S RESPONSE:

State Statutes, Regulations, or Administrative Pronouncements Specifically Addressing Sales Tax Nexus:

Please see General Information Letter ST 09-0087-GIL on the Department's website as an example of the Department's General Information Letter rulings addressing sales tax nexus issues.

Sales Tax Nexus:

We are unable to respond to your nexus survey in the format provided. 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.

Conformity to Streamlined Agreement:

Your state:

- | | | |
|----|--|-----------|
| 1. | is a full member (fully compliant) with the SSUTA | NO |
| 2. | is in compliance with the SSUTA except for sourcing | NO |
| 3. | has adopted some of SSUTA provisions | SEE BELOW |
| 4. | has not adopted any SSUTA provisions | SEE BELOW |
| 5. | has one sales tax rate that applies to all taxable sales | NO |

everywhere

Questions 3 & 4: Public Act 92-221, effective August 2, 2001, created the Simplified Sales and Use Tax Administration Act, which authorized Illinois to enter into multistate discussions to review and/or amend the Streamlined Sales and Use Tax Agreement and which authorized the Illinois Department of Revenue to enter into the Streamlined Sales and Use Tax Agreement. Illinois has not enacted the conforming legislation required to be in compliance with the Agreement. However, beginning on September 1, 2009, Illinois began taxing candy, soft drinks, and grooming and hygiene products using definitions similar to Streamlined Sales and Use Tax Agreement definitions.

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).

Sincerely,

Samuel J. Moore
Associate Counsel