

This letter responds to an annual survey. See 86 Ill. Adm. Code Parts 130, 140, 150 and 271.
(This is a GIL.)

July 30, 2009

Dear Xxxxx:

This letter is in response to your email dated June 3, 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:

ABC, in conjunction with COMPANY, annually undertakes a major information collection effort with respect to the application of the tax laws of the states. ABC's goal in gathering this information is to assemble and publish the PUBLICATION. As the market has shown, such a publication is a useful reference source for departments of revenue, attorneys, corporate tax departments, and public accounting firms.

ABC is in the process of updating the *PUBLICATION* for its 2010 annual edition. Accordingly, we ask for your state's assistance in preparing this important publication. I have attached two Microsoft Word files—one for income tax and one for sales tax—to serve as this year's questionnaire. This year we have updated the format for the sales tax questionnaire because of the positive feedback we received from you on the changes to the income tax questionnaire. Although the sales tax questionnaire has a new look, you should be able to easily track your prior year responses to this year's questionnaire. (If you do not have a copy of your 2008 response, and it would be helpful to you in completing the 2009 questionnaire, please let me know and I will email you a copy.)

This year, the numbering scheme and the sequence of the questions remains essentially the same, however, we have tried to adopt a more user-friendly format for the sales tax portion of the questionnaire. Also, please note that the new questions are highlighted in red font. Therefore, you should be able to easily follow the changes from

last year to this year. Because of anticipated time constraints for respondents, again this year we are asking that you only respond to the questions for which your answers require a change and the new questions. All unanswered questions will be considered the same as last year's answer unless otherwise noted.

Please complete the 2009 questionnaire and return it by July 15, 2009, via email. The enclosed questionnaire should be answered in accordance with laws in effect as of July 1, 2009. If there is legislation pending or recently enacted that would alter your answers, please explain any such changes that you are aware of at the time the questionnaire is completed.

If you have any questions about the questionnaire or individual questions, please contact me. Thank you for your continued cooperation and support. Your contributions are extremely valuable in maintaining the quality of this outstanding reference work. A complimentary copy of the *PUBLICATION* will be sent to you when it is published next year.

Note: It would be very helpful to me if you could email me back, confirming your receipt of the questionnaire and that you will be the respondent for your state.

In your questionnaire, you have stated and made inquiry, in part, as follows:

[16] NEXUS

.....

Does your state require the collection of sales/use tax when a retailer makes sales of tangible personal property or services through an independent contractor or other representative if the retailer has an agreement with an in-state resident who directly or indirectly refers potential customers to the retailer for consideration via a link on an Internet Web site or otherwise? Yes No

If YES, is there a threshold level below which such an agreement would not create nexus? Yes No

If YES, what is the amount of that threshold?
 \$5,000 \$10,000 Other, specify:

[46] WEB SITE DESIGN AND HOSTING. Which items are subject to sales/use tax (check all that apply)?

- Charges for Web site design or creation
- Referral fees for Web site links paid to the Web site owner
- Charges for Web site hosting services
- Sponsorship fees paid to Web sites for prominence on a site
- Advertising revenues for Web site advertising

DIGITAL PRODUCTS. Does your state impose sales/use tax on these items when sold in digital form (check all that apply)?

- Books Movies Recorded music
- Magazines Newspapers

- Subscriptions to magazines or newspapers
- Streaming video Remote access software
- Digital automated service (DAS)
- Other, specify

IN-FLIGHT SERVICES

Does your state impose sales/use tax on these in-flight services (check all that apply)?

- Internet access Telephone communications
- Fee-based entertainment (movies, etc.)

If YES, which flights are subject to tax?

- Only intrastate flights
- Only interstate flights that either land or takeoff in state
- Both intrastate flights and interstate flights that land or takeoff in state

PERSONAL RESPONSIBILITY STATUTES

Does your state have personal responsibility statutes that allow the state to collect unpaid taxes, interest, and penalties from certain “responsible persons” when the corporation, partnership, LLC, or LLP cannot pay its tax liability? Yes No

If YES, which individuals are considered a “responsible person” under the statutes?

- Owner Officer Non-employee return preparer
- Director Controller
- Tax Manager or other employee with tax filing responsibilities

Other, specify:

If YES, which taxes do the statutes apply to?

- All taxes
- Only trust taxes, like sales tax or withholding

DEPARTMENT’S RESPONSE:

The Department does not approve nor endorse private tax publications. We are providing general information regarding the questions highlighted your email to the Department. We are unable to answer in the requested “yes” or “no” format; and, accordingly, we are providing references to the applicable statutes and regulations.

16. Nexus.

You ask whether a retailer has a Use Tax collection obligation when it enters into an agreement with Illinois residents in which it agrees to pay commissions to the resident for directly or indirectly referring potential customers to the retailer through a link on that resident’s website. Illinois is considering the promulgation of a regulation that addresses this issue. Otherwise, the Department’s regulation at 86 Ill. Adm. Code 150.201 identifies when a retailer is “maintaining a place of business in Illinois.” As you can see from Section 150.201, representatives, including independent contractors, can create nexus for a retailer.

46. Website Design and Hosting.

The Illinois Retailers' Occupation Tax Act imposes a tax upon persons engaged in this State in the business of selling tangible personal property at retail to purchasers for use or consumption. See 86 Ill. Adm. Code 130.101. In Illinois, Use Tax is imposed on the privilege of using, in this State, any kind of tangible personal property that is purchased anywhere at retail from a retailer. See 86 Ill. Adm. Code 150.101. These taxes comprise what is commonly known as "sales" tax in Illinois.

Illinois Retailers' Occupation and Use Taxes do not apply to sales of service. If tangible personal property is transferred incident to sales of service, this will result in either Service Occupation Tax liability or Service Use Tax liability for the servicemen depending upon his activities. However, if no tangible personal property is transferred incident to the sales of service, the Service Occupation Tax and Service Use Tax do not apply. For your general information see of 86 Ill. Adm. Code 140.101 through 140.109 regarding sales of service.

The provision of professional or consulting services that do not include the transfer of tangible personal property with the provision of such services does not result in Service Occupation Tax or Use Tax liability. The transfer of any tangible personal property such as, for example, written reports, tangible media (CDs) and training manuals incident to a sale of service would result in Service Occupation Tax liability or Use Tax liability. See 86 Ill. Adm. Code 140.01 *et seq.*

Generally, sales of "canned" computer software are taxable retail sales in Illinois. Sales of canned software are taxable regardless of the means of delivery. For instance, the transfer or sale of canned computer software downloaded electronically would be taxable. However, if the computer software consists of custom computer programs, then the sales of such software may not be taxable retail sales. See 86 Ill. Adm. Code 130.1935(c). Custom computer programs or software must be prepared to the special order of the customer. Charges for updates of canned software are fully taxable pursuant to Section 130.1935. If the updates qualify as custom software under Section 130.1935(c), they may not be taxable.

The Department believes that the proper forum for providing guidance regarding transactions involving computer software hosting and computer software Application Service Providers (ASPs) is through a formal administrative rulemaking process rather than through individual inquires such as letter ruling requests. Unfortunately, we cannot provide you with a time frame as to when such a rulemaking process will be initiated. We recommend that you monitor the Department's website for information regarding when this rulemaking will be proposed.

Digital Products.

Information or data that is electronically transferred or downloaded is not considered the transfer of tangible personal property in this State. See 86 Ill. Adm. Code 130.2105(a)(3). However, canned computer software is considered taxable tangible personal property regardless of the form in which it is transferred or transmitted, including tape, disc, card, electronic means or other media. See 86 Ill. Adm. Code 130.1935. If the computer software consists of custom computer programs, then the sales of such software may not be taxable retail sales. See Section 130.1935(c).

In-flight Services.

Internet access, telephone communications and fee-based entertainment are not subject to Retailers' Occupation Tax or Use Tax. In-flight telecommunications services may be subject to the Telecommunications Excise Tax Act.

Personal Responsibility Statutes.

Unless otherwise specified in a tax Act, the Uniform Penalty and Interest Act applies to all taxes administered by the Department of Revenue. 35 ILCS 735/3-1A. Any officer or employee of any taxpayer subject to the provisions of a tax Act administered by the Department who has the control, supervision or responsibility of filing returns and making payment of the amount of any trust tax imposed in accordance with that Act and who willfully fails to file the return or make the payment to the Department or willfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount of tax unpaid by the taxpayer including interest and penalties thereon. 35 ILCS 735/3-7.

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.

Very truly yours,

Richard S. Wolters
Associate Counsel

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