

General Information Letter: Nexus determinations are not the proper subject of a letter ruling.

October 12, 2006

Dear:

This is in response to your letter dated August 16, 2006, in which you request a Letter Ruling. Department of Revenue ("Department") regulations require that the Department issue only two types of letter rulings, Private Letter Rulings ("PLRs") and General Information Letters ("GILs"). 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. GILs do not constitute statements of agency policy that apply, interpret or prescribe the tax laws and are not binding on the Department. For your general information, the regulation governing the issuance of letter rulings, 2 Ill. Adm. Code Part 1200 regarding rulings and other information issued by the Department, can be accessed at the Department's website. That address is <http://tax.illinois.gov/>.

Although you have not specifically requested either type of ruling, the nature of your question and the information provided require that we respond only with a GIL.

In your letter you state as follows:

The purpose of this inquiry is to determine if a contemplated action by a New York Corporation client of mine will subject it and possibly its employees to the Illinois Corporate Income tax and/or the Illinois personal non-resident income tax.

Currently, we are having discussions which are centered around the leasing of an apartment in and around the Chicago area. My client has customers throughout the Midwest and it has been demonstrated that instead of shuttling our sales people in and out of hotels and flying in and out of the area, it would be cost effective to lease an apartment for their use. Question 1, does this action give rise to nexus in your state and subject the client to Illinois corporate income tax?

Part 2. Our employees would be meeting with customers from Illinois as well as surrounding areas. It has been estimated that the presence in Illinois could average 5 to 7 times a month for as many as two people. Question 2, does this presence give rise to filing non-resident income taxes by those employees?

Finally, do your allocation factors consider sales made to customers inside the state?? Sales originating inside the state??

Ruling

1. Nexus

The United States Constitution restricts a state's power to subject to income tax foreign corporations. The due process clause requires that there exists 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, 112 S. Ct. 1904 (1992)). Similarly, the commerce clause requires that a state's tax be applied only to activities with a substantial nexus to the taxing state (*id.*). Where any part of a foreign corporation's income is allocable to Illinois in accordance with the provisions of Article 3 of the Illinois Income Tax Act (IITA), 35 ILCS 5/301 et seq., Illinois can demonstrate the connection or nexus necessary to subject a foreign corporation to tax. Therefore, unless protected by P.L. 86-272, 15 USCA 381, a foreign corporation is liable for Illinois income tax where any portion of its income is allocated to Illinois.

Nexus questions are extremely fact-specific and are appropriately decided in the context of an audit or judicial determination. For that reason, the Department does not issue ruling letters regarding nexus issues. Illinois has formulated regulatory guidelines that can be used in making nexus determinations. These are located at 86 Ill. Adm. Code 100.9720, and may be accessed at:

<http://tax.illinois.gov/LegalInformation/Regs/index.htm>.

Under 86 Ill. Adm. Code 100.9720(c)(4)(O)(ix), leasing an apartment in Illinois would be sufficient to create nexus with this State.

2. Filing Requirements

IITA 502(a) provides in part:

A return with respect to the taxes imposed by this Act shall be made by every person for any taxable year:

- (1) For which such person is liable for a tax imposed by this Act, or
- (2) In the case of a resident or in the case of a corporation which is qualified to do business in this State, for which such person is required to make a federal income tax return, regardless of whether such person is liable for a tax imposed by this Act.

You state that the employees in question are all nonresidents. As such, they would only be required to file an IL-1040 if they owe Illinois income tax. The rule governing allocation of compensation income in the case of nonresidents is found at IITA Section 302(a). That law provides that compensation income is allocable to Illinois if it is "paid in this State." Under IITA Section 304(a)(2)(B), compensation is "paid in this State" if:

- (i) The individual's service is performed entirely within this State;
- (ii) The individual's service is performed both within and without this State, but the Service performed without this State is incidental to the individual's service performed within this State; or
- (iii) Some of the service is performed within this State and either the base of operations,

or if there is no base of operations, the place from which the service is directed or controlled is within the State, or the base of operations or the place from which the service is directed or controlled is not in any state in which the service is performed, but the individual's residence is in this State.

3. Attribution of corporate income

For tax years ending on/after 12/31/2000, business income is apportioned to Illinois based solely on the sales factor. Illinois Income Tax Act (IITA) Sec. 304(h). Your correspondence does not indicate the nature of your client's business. For manufacturing and most service companies, the rules regarding the sales factor can be found at IITA 304(a)(3). Special apportionment rules exist for insurance companies (IITA Sec. 304(b)), financial organizations (IITA Sec. 304(c)), and transportation service companies (IITA Sec. 304(d)). Regulations implementing and explicating the statutory rules can be found at 86 Ill. Adm. Code 100.3000 et seq. on the Department's website.

As stated above, this is a GIL which does not constitute a statement of policy that applies, interprets or prescribes the tax laws, and it is not binding on the Department. If you wish to obtain a PLR which will bind the Department with respect to the application of the law to specific facts, please submit a request conforming to the requirements of 2 Ill. Adm. Code Part 1200.

Sincerely yours,

Jackson E. Donley,
Senior Counsel-Income Tax