

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

December 8, 2008

Dear Xxxxx:

This letter is in response to your letter dated October 17, 2008, 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:

I am writing to request a determination of sales taxability for our situation.

We are an S corporation, since 1954 incorporated in the STATE. Our company is located in CITY/STATE. We have customers throughout the United States. Historically, we have had employees working only in the state of STATE. We are interviewing a person from the state of Illinois and if we do hire this individual, he or she will be working out of their home in a sales capacity for our company.

We are a data compilation company, focusing primarily in the education, healthcare, religion and civic fields. Our product to our clients is the data, such as name and mailing address of these institutions, in addition to providing data elements such as number of students enrolled in a school, congregation size of a church, number of beds in a hospital, etc. Our clients use this data in their marketing efforts, whether it be by direct mail advertising, phone sales, or personal sales calls. Our clients, of course, market their products not only within the state of Illinois but most likely across the United States.

If we do hire the Illinois resident, he (or she) will be a regional territory sales manager, selling our data lists to clients throughout the multi-state regional territory. The Illinois resident will not have any of our data files in your state, as our database and processing center is here in CITY/STATE. Orders will be processed in CITY and delivered to our clients usually by electronic delivery, either by email or FTP (file transfer protocol).

We need a determination of the taxability effect of having a sales employee residing in the state of Illinois, and secondly: is the data we sell to our clients subject to sales tax in the state of Illinois, or is there an exemption. Thank you for considering this matter.

DEPARTMENT'S RESPONSE:

Service Occupation Tax

You have inquired about transactions that appear to be service transactions. Illinois Retailers' Occupation and Use Taxes do not apply to sales of service that do not involve the transfer of tangible personal property to customers. However, if tangible personal property is transferred incident to sales of service, this will result in either Service Occupation Tax liability or Use Tax liability for the servicemen depending upon their activities. For your general information see of 86 Ill. Adm. Code 140.101 through 140.109 regarding sales of service and Service Occupation Tax which can be accessed on the department's website.

You indicated that the data you sell to your clients is delivered to them by electronic delivery. If the electronically delivered data is not computer software, but is merely an informational database or directory of information, then the sale of such electronically delivered data would generally not be considered a sale of tangible personal property and would not be subject to Retailers' Occupation Tax or Use Tax liability.

Nexus

Determinations regarding the subject of nexus are normally very fact specific. 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, may be useful to you in determining whether your client 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%.

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,

Debra M. Boggess
Associate Counsel

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