

**Illinois Department of Revenue
Regulations**

Title 86 Part 100 Section 100.9720 Nexus

TITLE 86: REVENUE

**PART 100
INCOME TAX**

Section 100.9720 Nexus

- a) IITA Section 201(a) imposes the Illinois Income Tax, a tax measured by net income, on *individuals, corporations, trusts and estates for the privilege of earning or receiving income in or as a resident of this State*. IITA Section 201(c) imposes a second tax measured by net income, the Personal Property Tax Replacement Income Tax, on *corporations, partnerships and trusts for the privilege of earning or receiving income in or as a resident of this State*. In general, a resident of this State will always be subject to these taxes. Activity conducted in interstate commerce may establish sufficient nexus with Illinois to permit imposition of these taxes on a non-resident taxpayer, as well, when the non-resident earns or receives income in this State within the meaning of the IITA. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076 (1977); *Quill v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904 (1992). However, the fact that Article 3 of the IITA requires a non-resident taxpayer to allocate or apportion income to this State does not create a presumption that the taxpayer has nexus.
- b) Standards for determining sufficient tax nexus are found in federal statutes regulating interstate commerce, in United States Constitutional jurisprudence, and in Illinois tax statutes.
- c) The scope of federal statutes limiting nexus for imposition of Illinois income and replacement taxes are described in this subsection (c):
 - 1) Public Law 86-272. In 1959, Congress enacted PL 86-272 (15 USC 381-384), which prohibits states and their political subdivisions from imposing a net income tax on nonresident taxpayers who operate primarily in interstate commerce and whose activity within a state is limited. PL 86-272 provides in pertinent part:
 - A) No state or political subdivision thereof shall have the power to impose . . . a net income tax on the income derived within such state by any person from interstate commerce if the only business activities within such state by or on behalf of such person during such taxable year are either, or both of the following:
 - i) the solicitation of orders by such person, or his representative, in such state for sales of tangible personal property, which orders are sent outside the state for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the state; and

- ii) the solicitation of orders by such person, or his representative, in such state in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in subsection (c)(1)(A)(i).
 - B) The provisions of subsection (c)(1)(A) of this Section shall not apply to the imposition of a net income tax by any State or political subdivision thereof, with respect to --
 - i) Any corporation which is incorporated under the laws of such state; or
 - ii) any individual who, under the laws of such state, is domiciled in, or a resident of, such state.
 - C) For the purposes of subsection (c)(1)(A) of this Section, a person shall not be considered to have engaged in business activities within a state during any taxable year merely by reason of sales in such state, or the solicitation of orders for sales in such state, of tangible personal property on behalf of such person by one or more independent contractors whose activities on behalf of such person in such state consist solely of making sales, or soliciting orders for sales, of tangible personal property.
 - D) For purposes of this subsection (c)(1)--
 - i) The term "independent contractor" means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities; and
 - ii) the term "representative" does not include an independent contractor.
- 2) The terms of PL 86-272 affect nexus for taxation under the IITA according to the following principles:
 - A) If a nonresident taxpayer's activities exceed "mere solicitation", as set forth in subsection (a) of PL 86-272 (subsection (c)(1)(A) of this Section), it obtains no immunity under that federal statute. The taxpayer is subject to Illinois income tax and personal property tax replacement income tax for the entire taxable year and its business income is apportioned under IITA Section 304. Whether a nonresident taxpayer's conduct exceeds "mere solicitation" depends upon the facts in each particular case.
 - B) Nature of Property Being Sold

- i) PL 86-272 immunizes solicitation only for sale of tangible personal property. Efforts to sell intangibles, such as services, franchises, patents, copyrights, trademarks and service marks, are not protected, nor is solicitation for the leasing, renting or licensing of tangible personal property.
 - ii) The sale, delivery and the solicitation for the sale or delivery of any type of service that is not either ancillary to solicitation, or otherwise set forth as a protected activity under subsection (c)(5), is also not protected under PL 86-272 or this Section.
- C) Solicitation of Orders. Solicitation of orders means speech or conduct that explicitly or implicitly invites an order and activity ancillary to invitations for an order.
 - i) To be ancillary to invitations for orders, an activity must serve no independent business function for the seller apart from its connection to the solicitation of orders.
 - ii) Activity that a seller would engage in apart from soliciting orders shall not be considered ancillary to the solicitation of orders.
 - iii) Assignment of an activity to a salesperson does not, merely by such assignment, make that activity ancillary to solicitation of orders.
 - iv) Activity that attempts to promote sales is not ancillary, nor is activity that facilitates sales. PL 86-272 only protects ancillary activity that facilitates the invitation of an order.
- D) De minimus activities are those that, when taken together, establish only a trivial additional connection with this State. An activity regularly conducted within this State on a regular or systematic basis or pursuant to a company policy (whether such policy is in writing or not) shall normally not be considered trivial. Whether an activity consists of a trivial or non-trivial additional connection with this State is to be measured on both a qualitative and quantitative basis. If the activity either qualitatively or quantitatively creates a non-trivial connection with this State, then the activity exceeds the protection of PL 86-272. The amount of unprotected activities conducted within this State relative to the amount of protected activities conducted within this State is not determinative of the issue of whether the unprotected activities are de minimus. The determination of whether an unprotected activity creates a non-trivial connection with this State is made on the basis of the taxpayer's entire business activity, not merely its activities conducted within this State. An unprotected activity that would not be de minimus if it were the only business activity of the taxpayer conducted in this State will not be de minimis merely because the taxpayer also conducts a substantial amount of protected activities within this State, nor will an unprotected activity that would be de minimus if conducted in conjunction with a substantial amount of protected

activities fail to be de minimus merely because no protected activities are conducted in this State.

- 3) Listing of Specific Unprotected and Protected Activities.
 - A) Subsection (c)(4) lists specific activities that are considered to be beyond "mere solicitation" and, therefore, unprotected by PL 86-272.
 - B) Subsection (c)(5) lists specific activities that are considered by this State to be "protected activities". Included on the list of "protected activities" are those specific activities that are protected by PL 86-272 and those specific activities that this State, in its discretion, deems worthy of protection. Inclusion of an activity on the listing of "protected activities" is neither a declaration nor an admission by this State that the activity must be afforded protection under PL 86-272.

- 4) Unprotected Activities. The following activities (assuming they are not de minimus) do not constitute "mere solicitation" of orders, nor are they ancillary, nor otherwise protected under PL 86-272. If one or more of the following activities are conducted within this State, an otherwise protected nonresident taxpayer shall become subject to taxation by Illinois.
 - A) Making repairs or providing maintenance or service to the property sold or to be sold.
 - B) Collecting current or delinquent accounts, whether directly or by third parties, through assignment or otherwise.
 - C) Investigating credit worthiness.
 - D) Installation or supervision of installation at or after shipment or delivery.
 - E) Conducting training courses, seminars or lectures for personnel other than personnel involved only in solicitation of sales of tangible personal property.
 - F) Providing any kind of technical assistance or services, including, but not limited to, engineering assistance or design service, when one of the purposes of the assistance or service is other than the facilitation of the solicitation of orders.
 - G) Investigating, handling, or otherwise assisting in resolving customer complaints, other than mediating direct customer complaints when the sole purpose of such mediation is to ingratiate the sales personnel with the customer.
 - H) Approving or accepting orders.
 - I) Repossessing property.

- J) Securing deposits on sales.
- K) Picking up or replacing damaged or returned property.
- L) Hiring, training, or supervising personnel, other than personnel involved only in solicitation.
- M) Maintaining a sample or display room in excess of two weeks (14 days) at any one location within the State during the tax year.
- N) Carrying samples for sale, exchange or distribution in any manner for consideration.
- O) Owning, leasing, or maintaining any of the following facilities or property in-state:
 - i) Repair shop.
 - ii) Parts department.
 - iii) Any kind of office other than an in-home office as described as permitted under subsections (c)(4)(Q) and (c)(5)(B).
 - iv) Warehouse.
 - v) Meeting place for directors, officers, or employees.
 - vi) Stock of goods other than samples for sales personnel or that are used entirely ancillary to solicitation.
 - vii) Telephone answering service that is publicly attributed to the nonresident or to an employee or agent of the nonresident in his or her representative status.
 - viii) Mobile stores, i.e., vehicles with drivers who are sales personnel making sales from the vehicles.
 - ix) Real property or fixtures to real property of any kind.
- P) Consigning stock of goods or other tangible personal property to any person, including an independent contractor, for sale.
- Q) The maintenance of any office or other place of business in this State that does not strictly qualify as an "in-home" office as described in subsection (c)(5)(M) shall, by itself, cause the loss of protection under PL 86-272. A telephone listing or other public listing within the State for the nonresident or for an employee or other representative of the nonresident in such capacity or other indication through advertising or business literature that the nonresident or its employee or representative can be contacted at a specific address within the State shall normally be determined as the

nonresident maintaining within this State an office or place of business attributable to the nonresident or to its employee or representative in a representative capacity. However, the normal distribution and use of business cards and stationary identifying the employee's or representative's name, address, telephone and fax numbers and affiliation with the nonresident shall not, by itself, be considered as advertising or otherwise publicly attributing an office to the nonresident or to its employee or other representative.

- R) Entering into franchising or licensing agreements; selling or otherwise disposing of franchises and licenses; or selling or otherwise transferring tangible personal property pursuant to such franchise or license by the franchiser or licensor to its franchisee or licensee within the State.
 - S) Conducting any activity that is not on the list of "protected activities" in subsection (c)(5), and that is not entirely ancillary to requests for orders, even if the activity helps to increase purchases.
- 5) Protected Activities. The following in-state activities will not cause the loss of immunity for otherwise protected sales:
- A) Soliciting orders for sales by any type of advertising.
 - B) Soliciting orders for sales by an in-state resident employee or representative of the nonresident, so long as that person does not maintain or use any office or place of business in the State besides an "in-home" office as described in subsection (c)(5)(M).
 - C) Carrying samples and promotional materials only for display or for distribution without charge or other consideration.
 - D) Furnishing and setting up display racks and advising customers on the display of the nonresident's products without charge or other consideration.
 - E) Providing automobiles to sales personnel for their use in conducting protected activities.
 - F) Passing orders, inquiries and complaints on to the home office.
 - G) Missionary sales activities; i.e., the solicitation of indirect customers for the nonresident's goods. For example, a manufacturer's solicitation of retailers to buy the manufacturer's goods from the manufacturer's wholesale customers would be protected if those solicitation activities are otherwise immune.
 - H) Coordinating shipment or delivery without payment or other consideration and providing information relating to shipment or delivery either prior or subsequent to the placement of an order.

- I) Checking of customers' inventories without charge (for re-order, but not for other purposes such as quality control).
 - J) Maintaining a sample or display room for two weeks (14 days) or less at any one location within the State during the tax year.
 - K) Recruiting, training or evaluating sales personnel, including occasionally using homes, hotels or similar places for meetings with sales personnel.
 - L) Mediating direct customer complaints when the purpose is solely for ingratiating the sales personnel with the customer and facilitating requests for orders.
 - M) Owning, leasing, using or maintaining personal property for use in the employee's or representative's "in-home" office located within the residence of the employee or other representative that is not publicly attributed to the nonresident or to the employee or other representative of the nonresident in a representative capacity or automobile, when that use is solely limited to the conducting of protected activities. Therefore, the use of personal property such as a cellular telephone, facsimile machine, duplicating equipment, personal computer and computer software, shall not, by itself, remove the protection under this Section, so long as the use of the office is limited to:
 - i) soliciting and receiving orders from customers;
 - ii) transmitting orders outside the State for acceptance or rejection by the nonresident; or
 - iii) other activities that are protected under PL 86-272 or this Section.
 - N) Shipping or delivering goods into this State by means of vehicles or other modes of transportation owned or leased by the nonresident taxpayer or by means of private carrier, whether by motor vehicle, rail, water, air or other carrier and irrespective of whether a shipment or delivery fee or other charge is imposed, directly or indirectly, upon the purchaser.
- 6) Independent Contractors. PL 86-272 provides immunity to certain in-state activities, if conducted by an independent contractor, that would not be afforded if performed by the nonresident or its employees or other representatives.
- A) Notwithstanding the provisions of subsection (c)(4), independent contractors may engage in the following limited activities in the State without the nonresident's loss of immunity:
 - i) soliciting sales;
 - ii) making sales;
 - iii) maintaining an office.

- B) Sales representatives who represent a single principal are not considered to be independent contractors and are subject to the same limitations as those provided under PL 86-272 and this Section.
 - C) Maintenance of a stock of goods in the State, by the independent contractor under consignment or any other type of arrangement with the nonresident, except for purposes of display and solicitation, shall remove the protection.
- 7) Application of Destination State Law in Case of Conflict.
- A) When it appears that Illinois and one or more other states that are signatories to the "Statement of Information concerning practices of the Multistate Tax Commission and Signatory States under PL 86-272" have included or will include the same receipts from a sale in their respective sales factor numerators, at the written request of the nonresident, the states will, in good faith, confer with one another to determine which state should be assigned the receipts. The conference shall identify what law, regulation or written guideline, if any, has been adopted in the state of destination with respect to the issue. The state of destination shall be that location at which the purchaser or its designee actually receives the property, regardless of F.O.B. (Free on Board) point or other conditions of sale.
 - B) In determining which state is to receive the assignment of the receipts at issue, preference shall be given to any clearly applicable law, regulation or written guideline that has been adopted in the state of destination. However, except in the case of the definition of what constitutes "tangible personal property", Illinois is not required by this Section to follow any other state's law, regulation or written guideline should Illinois determine that to do so:
 - i) would conflict with Illinois laws, regulations, or written guidelines; and
 - ii) would not clearly reflect the income-producing activity of the nonresident within Illinois.
 - C) Notwithstanding any provision set forth in this Section to the contrary, as between Illinois and any other signatory state, Illinois agrees to apply the definition of "tangible personal property" that exists in the state of destination to determine the application of PL 86-272 and issues of throwback, if any. Should the state of destination not have any applicable definition of tangible personal property so that it could be reasonably determined whether the property at issue constitutes tangible personal property, then each signatory state may treat the property in any manner that would clearly reflect the income-producing activity of the nonresident within that state.

- 8) Application of this Section to Foreign Commerce
 - A) PL 86-272 specifically applies, by its terms, to "interstate commerce" and does not directly apply to foreign commerce. The states are free, however, to apply the same standards set forth in PL 86-272 to business activities in foreign commerce to ensure that foreign and interstate commerce are treated on the same basis. Such an application also avoids the necessity of expensive and difficult efforts in the identification and application of the varied jurisdictional laws and rules existing in foreign countries.
 - B) Illinois will apply the provisions of PL 86-272 and of this Section to business activities conducted in foreign commerce. Therefore, whether business activities are conducted by a nonresident selling tangible personal property into a country outside of the United States from a point within Illinois or by a nonresident selling such property into Illinois from a point outside of the United States, the principles under this Section apply equally to determine whether the sales transactions are protected and the nonresident is immune from taxation in either Illinois or in the foreign country, as the case might be, and whether, if applicable, Illinois will apply its throwback provisions.
 - 9) Application to Corporation Incorporated in this State or to a Person Resident or Domiciled in this State. The protection afforded by PL 86-272 and this Section does not apply to any corporation incorporated within Illinois or to any person who is a resident of or domiciled in Illinois.
 - 10) Registration or Qualification to do Business. A business that registers or otherwise formally qualifies to do business within Illinois does not, by that fact alone, lose its protection under PL 86-272.
 - 11) Loss of Protection for Conducting Unprotected Activity During Part of a Tax Year. The protection afforded under PL 86-272 and this Section shall be determined on a tax year by tax year basis. Therefore, if at any time during a tax year the nonresident conducts activities that are not protected under PL 86-272 or this Section, no income earned or received in this State by the nonresident during any part of that tax year shall be protected from taxation under PL 86-272 or this Section.
- d) Illinois Statutory Provisions. PA 88-361 amended the Illinois Income Tax Act to provide that *a person not otherwise subject to the tax imposed under the IITA shall not become subject to the tax imposed by the IITA by reason of:*
- 1) *that person's ownership of tangible personal property located at the premises of a printer in this State with which the person has contracted for printing; or*
 - 2) *activities of the person's employees or agents located solely at the premises of a printer and related to quality control, distribution, or printing services performed by a printer in the State with which the person has contracted for printing. (IITA Section 205(f))*

- e) U.S. Constitutional Jurisprudence. If not protected by U.S. or Illinois statute, an income-producing activity may, nonetheless, be protected from State taxation by principles of U.S. Constitutional jurisprudence. Controlling decisions that assert protections afforded by the Interstate Commerce Clause, the Foreign Commerce Clause and the Due Process Clause are accepted by this State as limitations on the reach of its income tax and personal property tax replacement income tax statutes. However, nothing stated in this subsection (e) shall prevent Illinois from challenging taxpayer assertions of U.S. Constitutional protection.

- f) Application of the Joyce Rule. In determining whether the activity of a nonresident taxpayer conducted in this State is sufficient to create nexus for application of Illinois income tax or replacement tax, the principles established in Appeal of Joyce Inc., Cal. St. Bd. of Equal. (11/23/66), commonly known as the "Joyce rule," shall apply. Only activity conducted by or on behalf of the nonresident taxpayer shall be considered for this purpose. Because the income of a partnership, a Subchapter S corporation or any other pass-through entity is treated as income of its owners, activity of a pass-through entity is conducted on behalf of its owners. Activity conducted by any other person, whether or not affiliated with the nonresident taxpayer, shall not be considered attributable to the taxpayer, unless the other person was acting in a representative capacity on behalf of the taxpayer.

(Source: Amended at 26 Ill. Reg. 17250, effective November 18, 2002)