

General Information Letter: Nexus issues are not generally suitable for resolution by letter ruling.

March 11, 2011

Dear:

This is in response to your letter dated November 22, 2010 in which you state the following:

We are a registered agent service, and we provide services to clients in all 50 states, including yours. Our services include providing a physical address to our clients, where a process server could deliver a law suit to us on our clients behalf. We subcontract with a local law firm, and they scan the documents to us if they receive something locally. Our business is qualified with the Secretary of State, and has to be listed on peoples filings as the registered agent. Since we began in 2008, we have been reporting income to all states on the personal level, and some States have had a business gross receipts tax on top of my personal return, based upon which state our client needed our assistance in and the dollar amounts made there. As we have started researching individual state rules regarding nexus and income tax filing requirements, we believe that we have filed income taxes in error in nearly all states.

The purpose of this letter is to ask for some clarification about whether our business has nexus in your state or not. Although state rules vary slightly, in general, we have learned that in order to have nexus, one or more of the following must be true:

1. Employees located or working in your state
2. Owned or leased property in your state
3. More than \$250,000 gross income earned in your state
4. At least 25% of our total business property, payroll, or income in your state.

All of our property and all of our employees are located in the state of STATE (a state with income tax). And we are far below the \$250,000 threshold for gross income. We really only make a few thousand dollars in each State, and do not plan on making a lot of money in each State. Therefore, we believe that we do not have nexus in nearly all of the 50 states. If that is true, we also do not have an income tax filing requirement. We recognize that each state's rules are slightly different, however. For this reason, we want to hear from you directly regarding nexus rules in your state, and what the rules are for reporting income to your state. We wish to abide by the rules, but what we have found is we make so little that we're sending in small amounts to State, and most of what we've sent in so far, we wouldn't have had to. It is so time consuming and cumbersome for not a lot of money. Hopefully you will provide some clarity in this matter for us. Please call me with any questions. Either way, a formal response would be best if available, along with a plan of action to shut down our account with the Department of revenue if you determine we are allowed to.

\* \* \* \*

The determination as to whether a taxpayer has nexus to subject it to Illinois Income Tax is extremely

fact-specific. Therefore, the Department does not issue rulings regarding whether a particular taxpayer has nexus with the State. However, general information regarding nexus with Illinois for income tax purposes may be provided.

Section 201 of the Illinois Income Tax Act ("IITA"), 35 ILCS 5/101 et seq, imposes a tax measured by net income on taxpayers for the privilege of earning or receiving income in this State. The Due Process and Commerce Clauses of the Federal Constitution limit the power of Illinois to subject foreign taxpayers to Illinois tax. The Due Process Clause requires that there exist some minimum connection between a state and the person, property, or transaction it seeks to tax (Quill Corp. v. North Dakota, 504 U.S. 298, 112 S.Ct. 1904 (1992)). Similarly, the Commerce Clause requires that the tax be applied to an activity with a substantial nexus with 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 IITA, Illinois can demonstrate the connection, or nexus, necessary to subject a foreign corporation to tax. Therefore, unless protected by Public Law 86-272, a foreign corporation is liable for Illinois income tax where any portion of its income is allocated to Illinois.

Public Law 86-272 precludes any state from subjecting a nondomiciliary corporation to a net income tax where such corporation's only activities within the state for the taxable year consist of solicitation activities for sales of tangible personal property. Regarding Public Law 86-272, Department Regulations Section 100.9720(c)(2)(A) states:

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.

Section 100.9720(c)(4) of the Department Regulations contains a list of activities that are considered to be beyond "mere solicitation" for purposes of P.L. 86-272. Included in that list of unprotected activities is the following:

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.

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.

According to the facts presented in your letter, your services include providing a physical address in Illinois to your clients where a process server may deliver documents. Your business is qualified with the Secretary of State because it is "listed" on court filings as the "registered agent." Although you have no employees in Illinois, you "subcontract" with local law firms to accept deliveries on your behalf as the "registered agent." Under the protected activities list in (c)(5) of Department Regulations paragraph (H) explains that "coordinating ... deliveries without payment or other consideration" would be protected. In your case, however, there is payment involved in "delivering" documentation to your clients that come from process servers. Your activities are likely unprotected and will be considered beyond "mere solicitation" for purposes of P.L. 86-272. If so, the next question is whether the unprotected activity of "delivering" documents such as court filings is de minimus.

A taxpayer that engages in unprotected activity within Illinois, unless such activity is de minimus, is not entitled to immunity under the federal statute. Regulations Section 100.9720(c)(2)(D) sets forth the test for determining whether unprotected activities are de minimus.

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 minimus 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.

As the above provisions indicate, the conduct of providing a physical address for paying clients in Illinois for process servers to deliver documents to those clients may result in the loss of protection under Public Law 86-272 unless it can be shown that such deliveries are de minimus. A factual determination must be made taking into account the taxpayer's entire business activities.

Section 502(a) of the IITA (35 ILCS 5/502(a)) sets forth the requirements for filing Illinois income tax returns. That section states:

(a) In general. 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.

Under this section, a nonresident must file an Illinois income tax return if it incurs a liability for tax imposed under Section 201 of the IITA (or in the case of a corporation qualified to do business in Illinois, if it is required to file a federal return). A nonresident is liable for Illinois income tax under Section 201 if it computes "Illinois net income" as defined under IITA Section 202. IITA Section 202 defines Illinois net income as that portion of the taxpayer's "base income" as defined in Section 203, which is allocated or apportioned to Illinois under the provisions of Article 3 of the IITA, less certain deductions.

As stated above, this is a GIL which does not constitute a statement of policy that either applies, interprets or prescribes tax law. It is not binding on the Department. Should you have additional questions, please do not hesitate to contact our office.

Sincerely,

Heidi Scott  
Associate Counsel - Income Tax