

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

January 12, 2012

Dear:

This is in response to your letter dated September 13, 2011 in which you state the following:

I have a client that presently has retail customers located in the State of Illinois and seeks clarity as to whether my client has a tax nexus in Illinois and if so, would like to avail themselves of the terms of Illinois' voluntary disclosure program.

A description of my client's business in Illinois:

My client is located in STATE and operates a 24/7 call center for national retailers with multi-site locations. These retailers call my client to request on-demand repair and maintenance services, such as plumbing and electrical, at any one of their retail locations. My client will then engage and dispatch a company located near the retail location to perform the required service. The local company will invoice my client for time and materials including sales tax. My client will then invoice the national retailer for the time and material with an up charge for the dispatching and services provided.

Example:

A retail store located in a mall in Chicago, Illinois has a leaking faucet in its bathroom. The store manager calls my client, in STATE, to request the repair, my client engages a plumbing contractor in the Chicago area. The plumbing contractor fixes the leak and invoices my client. My client then invoices the headquarters of the retailer (not located in Illinois) for the repair services at an amount slightly higher than the plumbing contractor's charges to my client.

Based on the above, my client and I would like guidance as to the tax nexus of my client's business activities as described. As mentioned earlier, if tax nexus exists, then my client is willing to participate in the voluntary disclosure program.

The following is information you require to make a determination as to Voluntary Disclosure:

1. My client began doing business in Illinois in 2002.
2. My client is a STATE based logistics company that coordinates contracted labor on an as-needed basis for its national customers that may have locations in Illinois.
3. My client does not own or lease property in Illinois.
4. My client does not perform any marketing activities in Illinois.
5. My client does not have payroll, inventory, personal property or a physical presence in the State.
6. My client has not been contacted by the Illinois Department of Revenue or the Multistate Tax Commission.
7. My client has not filed nor remitted any type of tax to Illinois.
8. The estimated taxable sales for the last four years are approximately \$4,800,000.
9. My client proposes to file the necessary tax returns in order to be compliant with State law.
10. My client's year end is December 31.

11. My client will utilize the allocation factors in preparation of the Illinois Business Tax Returns and therefore estimates a minimum tax liability.
12. My client files a Subchapter S Corporate Federal tax return.
13. My client does not make deliveries into the State.
14. My client does not have any outstanding liabilities with the State.

According to the Department of Revenue ("Department") regulations, the Department may issue only two types of letter rulings: Private Letter Rulings ("PLR") and General Information Letters ("GIL"). The regulations explaining these two types of rulings issued by the Department can be found in 2 Ill. Adm. Code §1200, or on the website <http://www.tax.illinois.gov/LegalInformation/regs/part1200>.

Due to the nature of your inquiry and the information presented in your letter, we are required to respond with a GIL. GILs are designed to provide background information on specific topics. GILs, however, are not binding on the Department.

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.

The citation for the Illinois Department of Revenue regulation clarifying nexus is 86 Ill. Adm. Code Section 100.9720 and can be found on the Department's website at <http://tax.illinois.gov/LegalInformation/regs/Part100/100-9720.pdf>. Please refer to subsections (c)(4) entitled "Unprotected Activities," (c)(5) entitled "Protected Activities" and (c)(6) entitled "Independent Contractors." This will provide you with a helpful guideline in determining whether your client's activities will subject them to Illinois income taxation.

Your question is whether your client will owe Illinois income taxes as a result of operating a 24/7 call center for national retailers with multi-site locations. Your client's business consists of coordinating contracted labor on an as-needed basis for its national customers, some of them located in Illinois. Apparently the "contracted" work is done by independent contractors as your client "does not have payroll, inventory, personal property or a physical presence in [Illinois]." However, the regulation states that the use of independent contractors may only afford a nonresident immunity from taxation for "limited activities." The fact that your client's business is entirely set up around using independent contractors on a regular basis may jeopardize the protections afforded in 86 Ill. Adm. Code Section 110.9720(c)(6).

The question of nexus is highly fact-dependent. Therefore, the Department does not issue rulings regarding whether a taxpayer has nexus with the State. Such a determination can only be made in the context of an audit where a Department auditor has access to all relevant facts and circumstances. Based on the limited facts presented in your letter, however, it seems likely that contracting sales of services in Illinois on a regular basis will subject your client to Illinois income taxation.

IITA Section 304(a)(3)(C-5) is most applicable to the situation addressed in your letter because your

client's activities are sales *other than* sales of tangible personal property. IITA Section 304(a)(3)(C-5) states as follows:

- (C) Sales, other than sales governed by paragraphs (B), (B-1), (B-2), (B-5) and (B-7), are in this State if:

...

(iv) Sales of services are in this State if the services are received in this State. For the purposes of this section, gross receipts from the performance of services provided to a corporation, partnership, or trust may only be attributed to a state where that corporation, partnership, or trust has a fixed place of business. If the state where the services are received is not readily determinable or is a state where the corporation, partnership, or trust receiving the service does not have a fixed place of business, the services shall be deemed to be received at the location of the office of the customer from which the services were ordered in the regular course of the customer's trade or business. If the ordering office cannot be determined, the services shall be deemed to be received at the office of the customer to which the services are billed. If the taxpayer is not taxable in the state in which the services are received, the sale must be excluded from both the numerator and the denominator of the sales factor. The Department shall adopt rules prescribing where specific types of service are received, including, but not limited to, publishing, and utility service.

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.

Regarding your desire for voluntary disclosure, Section 3-10(c) of the Uniform Penalty and Interest Act ("UPIA;" 35, ILCS 735/3-10(c)) limits the period of assessment in certain cases where a taxpayer voluntarily discloses its failure to file a tax return. The section states:

In the case of a failure to file a return required by law that is voluntarily disclosed to the

Department, in accordance with regulations promulgated by the Department for receiving the voluntary disclosure, the tax may be assessed no more than 4 years after the original due date of each return required to have been filed.

For more information on voluntary disclosures, please refer to 86 Ill. Adm. Code 210.126 which may be accessed from the Department's website at <http://tax.illinois.gov/LegalInformation/regs/part210/210-126.pdf>.

As stated above, this is a general information letter 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