

General Information Letter: Sales activities conducted within Illinois by employees of the taxpayer with regard to insurance policies are not protected under Public Law 86-272.

October 5, 2012

Dear:

This is in response to your letter dated July 24, 2012 in which you state the following:

This letter serves as a request from a corporation ("Client") that is interested in a nexus determination, and, if appropriate, initiating estimated tax payments for 2012. It is my understanding that my client may proceed with a no-names nexus determination and then either obtain a named ruling or proceed to voluntarily filing an Illinois tax return for 2012. The facts relating to Client are as follows.

Client is a C-corporation that is incorporated in the state of Connecticut. Client has a calendar year-end. Client is a managing general underwriter, specializing in the marketing, underwriting, pricing and administration of medical stop loss insurance. Client is not required to hold a license to do business in Illinois.

In 2012, Client employed a salesperson in Illinois, who works from a home office. The employee's sole function is to solicit business using his/her personal equipment to call on potential customers. He/she does not accept orders or price products. Those functions, as well as all other functions, are conducted in Connecticut. At this time, it is unclear whether this person will be retained beyond 2012.

Client does not have any property (real or personal) in Illinois.

Client has earned fees from policies which are held by policyholders in Illinois. Client estimates federal taxable income (loss) before NOL or special deductions, on a separate company basis, of (\$13,000,000) in 2012.

Client has asked me to contact you on a confidential basis to explore securing a nexus determination.

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. 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 states in part:

No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, 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:

- (1) 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
- (2) 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 paragraph (1).

Illinois construes the protection of Public Law 86-272 very narrowly. Almost any activity exceeding the parameters of that statute will cause that protection to be forfeited. An out-of-state corporation can lose the immunity provided by Public Law 86-272 where its activities within the state exceed the mere solicitation standard of that law. 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>.

Your letter states that your "Client is a managing general underwriter, specializing in the marketing, underwriting, pricing and administration of medical stop loss insurance." Based on the contents of your letter, it is our impression that your Client sells insurance which is considered "intangible" property. Activities that involve sales other than of tangible personal property (i.e. insurance) are not protected by Public Law 86-272. This is also explained in the above quoted "nexus" regulation, specifically Section 100.9720(c)(2)(B)(i). Accordingly, your company is liable for Illinois income tax on all of its income allocable to Illinois in accordance with Section 304 of the Illinois Income Tax Act ("IITA," 35 ILCS 5/101 et seq.).

Furthermore, IITA Section 502(a)(2) requires that a corporation which is authorized to do business in this State and which is required to file a Federal Income Tax return will be required to file an Illinois income tax return, regardless of whether the corporation is liable for Illinois Income Tax.

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,

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