

Nexus issues are not generally suitable for resolution by letter ruling.

April 3, 2014

Re: Illinois income tax

Dear Xxxxx:

This is in response to your letter dated January 24, 2014 in which you request an advisory opinion. Department of Revenue ("Department") regulations require that the Department issue only two types of letter rulings, Private Letter Rulings ("PLRs") and General Information Letters ("GILs"). 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 against 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. A GIL is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code § 1200.120(b) and (c).

The nature of your request and the information provided requires that we respond with a General Information Letter (GIL).

Your letter states as follows:

The purpose of this letter is to seek an advisory opinion with respect to certain tax questions related to business transacted in the state of Illinois by the Corporation.

The Corporation is an institution within the Company which also consists of Affiliates throughout the United States. The Company is a Government Sponsored enterprise, created by legislation. The Corporation is headquartered in State and the Corporation's primary function is to issue, market and handle Securities on behalf of the Company.

In 2013, the Corporation purchased data hosting services through a commercial provider, Company 1. The Corporation does not own any of the computer hardware operating in the Company 1 facility. However, the Corporation does own or license some of the software used to manage its proprietary information on the Company 1 servers. Services hosted on this equipment include e-mail, electronic file and data storage, print services and other business software applications.

With respect to the facts as set forth above, the Corporation is seeking guidance with respect to our potential tax liabilities in the State of Illinois. Specifically, does the activity described create a "nexus" in the State of Illinois which would bring about a tax liability for the Corporation? If so, can you advise as to what filing would be required?

### **RULING**

The determination as to whether a taxpayer has nexus with Illinois is extremely fact-specific. Therefore, the Department does not issue rulings regarding whether a taxpayer has nexus with the State. For information regarding nexus, see Department of Revenue Regulations Section 100.9720 (accessible from the Department's website). In addition, the following general information may be provided.

The United States Constitution restricts a state's power to subject to income tax foreign corporations and other nonresidents. The Due Process Clause requires that there exist some minimum connection between a state and the person, property, or transaction the state seeks to tax. (*Quill Corp. v. N. Dakota*, 504 U.S. 298 (1992)) Similarly, the Commerce Clause requires that a state's tax be applied only to activities with a substantial nexus to the taxing state. (*Id.*) In addition, Illinois may not assert jurisdiction to tax where a corporation falls under the protection provided under Public Law 86-272. (15 U.S.C. § 381) Public Law 86-272 precludes any state from subjecting a non domiciliary 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.

Section 502(a) of the Illinois Income Tax Act ("IITA" ; 35 ILCS 5/502(a)) sets forth the requirements for filing Illinois income tax returns. The section states in pertinent part as follows:

(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. Under IITA Section 203, base income is generally determined by starting with the taxpayer's federal taxable income (adjusted gross income in the case of an individual), and adjusting that amount by certain statutorily prescribed addition and subtraction modifications. Base income must then be classified as between non business income and business income, and allocated and apportioned to Illinois, respectively, according to the rules set forth in Article 3 of the IITA.

Section 304 of the Illinois Income Tax Act ("IITA"; 35 ILCS 5/304) contains apportionment rules that determine the amount of business income of a nonresident that is taxable in Illinois where the income is derived from Illinois and one or more other states. Under Section 304(a) and (h), the general apportionment rule requires a taxpayer to multiply its business income for the taxable year by its sales factor. Section 304(a)(3)(A) defines the "sales factor" as the fraction consisting of the taxpayer's total sales in Illinois during the taxable year over its total sales everywhere during the taxable year. The apportionment required under Section 304(a) is to be performed following the close of the taxpayer's taxable year. The taxpayer determines its total business income for the taxable year, and then apportions to Illinois that part of such income that bears the same ratio as the taxpayer's Illinois sales for the taxable year bears to total taxable year sales.

IITA Section 304(a)(3) provides various rules for determining whether sales are sourced to Illinois for sales factor purposes. IITA Section 304(a)(3)(C-5)(iv) allocates sales of services to numerator of the apportionment formula:

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 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 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.

As stated above, this is a GIL. A GIL does not constitute a statement of policy that applies, interprets or prescribes the tax laws, and it is not binding on the Department. If you wish to obtain a PLR which will bind the Department, please submit a request conforming to the requirements of 2 Ill. Adm. Code § 1200.110(b).

Sincerely,

Brian L. Stocker  
Associate Counsel (Income Tax)