

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

October 29, 2015

Re: Illinois income tax

Dear Xxxxx:

This is in response to your letter dated September 11, 2015 in which you request a private letter ruling. 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 PLR will not be issued for an anonymous or unidentified taxpayer. 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 GIL.

Your letter states as follows:

I am writing on behalf of my client who prefers to remain anonymous at this time. If a private letter ruling is not available on an anonymous basis, the client would like the most formal response available from your state.

Facts:

The client is a STATE domiciled C corporation in the business of manufacturing coated sand. The sand is delivered outside of STATE via leased rail car. The rail cars deliver the sand to a transload site for unloading. Based on the rail availability, the leased rail cars are in your state filled with sand waiting to be unloaded or stored on the rail empty.

Issue:

The client filed a corporation income tax return in your state. The client has been audited by the state of STATE for corporation income tax purposes. The issue in question is whether the client's use of leased rail cars creates nexus outside STATE and in particular in your state. STATE claims under STATE nexus rules that if the only activity in a state is the use of leased rail cars that nexus is not created. They believe no activity beyond Public Law 86-272 has occurred. Accordingly, STATE is using their sales throwback rules to increase the STATE apportionment to include sales to your state previously reported to your state.

Questions:

1. Based on the facts presented, does the client have corporation income tax nexus in your state?

2. Based on the facts presented, what are the chances the client would receive a refund of taxes paid to your state if a timely amended return was filed based on no nexus existing in your state?

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 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.

Regulations Section 100.9720(c)(4) 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 are the following:

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.

Regulations Section 100.9720(c)(5) contains a list of protected activities, including the following:

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.

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.

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 indicated above, Regulations Section 100.9720(c)(5)(N) provides that shipping or delivering tangible personal property into the state by means of leased rail car does not cause a taxpayer otherwise protected under P.L. 86-272 to lose the immunity afforded under the federal law. However, although the Department will not issue a ruling with respect to nexus, and your letter does not provide sufficient information to make such a determination, the storage of empty delivery vehicles within Illinois may cause a taxpayer to lose immunity under P.L. 86-272.

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)