

A manufacturer or wholesaler whose products are sold by numerous distributors in Illinois may assume the responsibility of collecting and remitting Retailers' Occupation Tax on behalf of all sales made by those distributors under the provisions of 86 Ill. Adm. Code 130.550. See 86 Ill. Adm. Code 130.550. (This is a GIL.)

December 10, 2010

Dear Xxxxx:

This letter is in response to your letter dated April 13, 2010, in which you request information. The Department issues two types of letter rulings. Private Letter Rulings ("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 on 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. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.tax.illinois.gov to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

This letter is a request for a **Private Letter Ruling** regarding the application of Retailers' Occupation Tax and Use Tax to BUSINESS' out-of-state wholesale sales to independent distributors (resellers) in Illinois, and to its out-of-state retail sales to customers in Illinois. Several different Illinois DOR representatives have given us their opinion that we should qualify to charge 6.25% sales tax to all customers statewide as an out-of-state retailer, and we would like an official ruling.

STATEMENT OF FACTS

- 1) BUSINESS is a direct sales organization. The company manufactures and sells many different types of products. These products are primarily ordered online via the Internet and shipped to individual customers nationwide.
- 2) BUSINESS is an out-of-state corporation, with all sales order processing and shipments occurring in CITY/STATE. All customer orders are shipped from STATE to Illinois via common carrier.
- 3) BUSINESS voluntarily remits sales tax in Illinois. The company currently files monthly ST-1 and ST-2 tax returns, and remits tax in quarterly prepayment installments and a month-end reconciliation. All sales tax calculations are

currently made based on the applicable Retailers' Occupation Tax rate at the ship-to address.

- 4) BUSINESS has no physical presence in Illinois. It sells to independent distributors living in Illinois at the whole sale [sic] cost. These independent distributors are not employees of the company, and are free to charge whatever the market will bear resulting in a profit or loss.
- 5) Sales tax is charged to independent distributors' orders based on the full suggested retail price rather than the wholesale price of the products in the order.

CONTRACTS, LICENSES, AGREEMENTS, INSTRUMENTS, OTHER DOCUMENTS

BUSINESS Inc. is registered with the Illinois DOR.

DISCLOSURES

The tax period at issue is all monthly tax periods going forward. BUSINESS does not currently have any audits or litigation pending with the Department.

To the best of our knowledge, the Department has not ruled on this particular issue or a similar issue in the past. BUSINESS has not submitted the same or similar issue to the Department in the past, nor have we withdrawn a previous request prior to the issuance of a letter ruling.

SUPPORTING EVIDENCE

On March 12, 2010, we were orally advised by MR. A, Revenue Tax Specialist I, that given the above statement of facts, BUSINESS should file its monthly ST-1 returns as an out-of-state retailer, and that it did not need to file the ST-2 form. Mr. A confirmed this opinion with his supervisor, and cited Title 86 Part 150 Section 150.801: 'When Out-of-State Retailers Must Register and Collect Use Tax.'

CONTRARY EVIDENCE

Illinois General Information Letter ST 07-0048-GIL (5/23/2007) implies that the sale of tangible personal property by an out-of-state direct sales company is subject to Retailers' Occupation Tax as opposed to Use Tax:

The Retailers' Occupation Tax does not apply to sales of intangibles. Therefore, registration fees are not generally part of the gross receipts that are subject to Retailers' Occupation Tax liability. However, if in return for payment of the registration fee tangible personal property is transferred, then the fee is subject to Retailers' Occupation Tax. The same analysis applies to fees charged to attend monthly business meetings.

IDENTIFICATION OF TRADE SECRET INFORMATION

Please omit any public mention of our trade secrets, including:

1. BUSINESS' name and address.
2. BUSINESS' order fulfillment process.

3. BUSINESS' tax nexus status.
4. BUSINESS' tax calculation process.

Thank you for your assistance in providing a Private Letter Ruling. I look forward to your response.

DEPARTMENT'S RESPONSE:

The Department's regulation "Public Information, Rulemaking and Organization" provides that "[w]hether to issue a private letter ruling in response to a letter ruling request is within the discretion of the Department. The Department will respond to all requests for private letter rulings either by issuance of a ruling or by a letter explaining that the request for ruling will not be honored." 2 Ill. Adm. Code 1200.110(a)(4). Further, the Department's regulations regarding Private Letter Rulings provide that "[i]f there is case law or there are regulations dispositive of the subject to the request, the Department will decline to issue a letter ruling on the subject." 86 Ill. Adm. Code 1200.110(a)(3)(D). The Department declines to issue a Private Letter Ruling since its regulations are dispositive of the subject of your request. Although we are not providing you with a Private Letter Ruling, we hope the following general information will be of assistance.

The Illinois Retailers' Occupation Tax Act imposes a tax upon persons engaged in this State in the business of selling tangible personal property to purchasers for use or consumption. See 86 Ill. Adm. Code 130.101. The tax is measured by the seller's gross receipts from retail sales made in the course of such business. "Gross receipts" means the total selling price or the amount of such sales. The retailer must pay Retailers' Occupation Tax to the Department based upon its gross receipts, or actual amount received, from the sale of the tangible personal property.

In Illinois, Use Tax is imposed on the privilege of using, in this State, any kind of tangible personal property that is purchased anywhere at retail from a retailer. See 35 ILCS 105/3; 86 Ill. Adm. Code 150.101. These taxes comprise what is commonly known as "sales" tax in Illinois. If the purchases occur in Illinois, the purchasers must pay the Use Tax to the retailer at the time of purchase. The retailers are then allowed to retain the amount of Use Tax paid to reimburse themselves for their Retailers' Occupation Tax liability incurred on those sales. If the retailer does not collect the Use Tax from the purchaser for remittance to the Department, the purchaser is responsible for remitting the Use Tax directly to the Department. See 86 Ill. Adm. Code 150.130.

An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers.

Another type of retailer is the retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in Illinois" is described in 86 Ill. Adm. Code 150.201(i). This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The United States Supreme Court in *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax laws. The Supreme Court has set out a 2-prong test for nexus. The first prong is whether the Due Process Clause is satisfied. Due process will be satisfied if the person

or entity purposely avails itself or himself of the benefits of an economic market in a forum state. *Quill* at 1910. The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause.

A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis, will trigger Use Tax collection responsibilities. Please refer to *Brown's Furniture, Inc. v. Zehnder*, 171 Ill.2d 410, (1996).

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax liability on the purchase of the goods and have a duty to self-assess and remit their Use Tax liability directly to the State.

When an Illinois retailer sells tangible personal property and delivers it in Illinois, sales tax is due unless an exemption can be documented. The resale exemption is applicable when making sales to a purchaser who will in turn sell the tangible personal property. For general information regarding resale certificates, the Department's regulation for resale certificates, "Seller's Responsibility to Obtain Certificates of Resale and Requirements for Certificates of Resale," is found at 86 Ill. Adm. Code 130.1405.

It is unclear from your letter whether sales are limited to independent distributors or the Company is collecting Retailers' Occupation Tax on behalf of the independent distributors. The Department's regulation "Filing of Returns for Retailers by Suppliers Under Certain Circumstances", 86 Ill. Adm. Code 130.550, explains that manufacturers, importers or wholesalers can enter into an "agency agreement" with the Department, whereby they register, file returns and remit Retailers' Occupation Tax on behalf of their local distributors. Please note that such arrangement must be accepted by the Department and is subject to any written objections of the retailers that would be affected.

The Agency Agreement (RR-80) may be used to obtain approval of such an arrangement with the Department. Under this type of agreement, the manufacturers, importers or wholesalers sell products to local distributors and collect tax from the distributors based upon the selling price to the ultimate consumers. The applicable tax is not based upon the sale to the local distributors. The appropriate tax must be collected for the sale to the distributors' ultimate customers, which includes State and any applicable local tax. In general, the determination of any local tax liability will depend on the location where the sale takes place. See, for example, 86 Ill. Adm. Code 270.115.

When manufacturers, importers or wholesalers operate under this type of agency agreement, the local distributors need not register, file returns or remit taxes since the manufacturers, importers or wholesalers have agreed to this responsibility. The local distributors should, however, retain a copy of the agreement. If they fail to provide such documentation upon demand by the Department, they will be required to register, file returns, and remit the appropriate amount of tax directly to the Department. Distributors who prefer to register and remit their own taxes may opt out of the agency agreement.

Taxpayers may acquire form RR-80 (Agency Agreement) by contacting the Department's Central Registration Unit, attention Manager, located at Illinois Department of Revenue, 101 West Jefferson, Springfield, Illinois 62702.

I hope this information is helpful. If you require additional information, please visit our website at www.tax.illinois.gov or contact the Department's Taxpayer Information Division at (217) 782-3336. If you are not under audit and you wish to obtain a binding PLR regarding your factual situation, please submit a request conforming to the requirements of 2 Ill. Adm. Code 1200.110 (b).

Very truly yours,

Richard S. Wolters
Associate Counsel

RSW:msk