

Under the Liquor Control Act of 1934, out-of-state wineries who are going to sell wine directly to Illinois residents must complete an Application For State Of Illinois Winery Shipper's License ("Direct Shipping Permit") and collect and remit tax to the Department of Revenue. See 235 ILCS 5/5-1.

June 5, 2015

Dear Mr. and Mrs. XXXX:

This letter is in response to your letter dated March 13, 2015, 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:

I am the owner of COMPANY 1 and my wife NAME is the owner of COMPANY 2. Both are OUT-OF-STATE liquor stores with no presence in Illinois. Both stores have websites with terms and conditions that follow the rules of the Uniform Commercial Code and state the following: "The buyer assumes title of purchased goods once they leave our premises. The buyer is solely responsible for the shipment of purchased alcoholic beverages and for determining the legality and the tax/duty consequences of having the alcoholic beverages shipped to any state." We paid OUT-OF-STATE sales tax on all the shipping charges on both in-state and out-of-state orders. We also paid OUT-OF-STATE sales tax on the invoice subtotals on our out-of-state orders up until DATE. At that time, our accountant confirmed with the OUT-OF-STATE Department of Taxation and Finance that we do not need to collect OUT-OF-STATE sales tax on out-of-state shipments.

In DATE we read industry news on a law firm sending summonses to out-of-state wine stores that shipped to Illinois and didn't collect and send to Illinois the sales taxes. We found more news on this law firm and have included the articles. Most of the news focused on the sales tax not being collected on the shipping charges and we found it to be very confusing and complex. We quickly excluded Illinois as an eligible state for shipping and then called the IDOR several times. All the agents we spoke to thought no tax was due and did not think we needed to file. However, in order to protect ourselves from the actions of this law firm we decided to register both businesses with the IDOR and pay sales tax on the shipping charges. We then

thought sales taxes would also be due on the rest of the invoice amount (why only the shipping charges) so we amended the sales tax returns to pay the tax on the invoice subtotal amounts as well.

We are now writing to seek a Letter Ruling on whether any sales tax is due to Illinois on these orders. We were not aware of any sales taxes due to Illinois before reading the news on this topic. We still consider all our orders to be OUT-OF-STATE transactions but remain confused as to whether any sales tax is due to Illinois.

DEPARTMENT'S RESPONSE:

Nexus

An "Illinois Retailer" is one who makes sales of tangible personal property in Illinois. 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. Our regulations were recently amended in response to the Illinois Supreme Court's decision in Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130. The regulations specify the selling activities that trigger Retailers' Occupation Tax liability in Illinois.

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.

Beginning July 1, 2011, the definition of a "retailer maintaining a place of business" was amended to include additional types of retailers. A retailer maintaining a place of business also includes a retailer having a contract with a person located in this State under which:

- A. The retailer sells the same or substantially similar line of products as the person located in this State and does so using an identical or substantially similar name, trade name, or trademark as the person located in this State; and
- B. The retailer provides a commission or other consideration to the person located in this State based upon the sale of tangible personal property by the retailer. See 35 ILCS 105/2(1.2).

These provisions only apply if the cumulative gross receipts from sales of tangible personal property by the retailer to customers in this State under all such contracts exceed \$10,000 during the preceding 4 quarterly periods. Please note that in *Performance Mktg. Ass'n, Inc. v. Hamer*, 998 N.E. 2d 54 (2013) the Illinois Supreme Court struck down 35 ILCS 105/2(1.1) and 35 ILCS 110/2(1.1), a “click-thru nexus provision” enacted in 2011. However, new provisions became effective January 1, 2015. The following provisions address the court’s concerns in *Performance Mktg. Ass'n, Inc. v. Hamer*, 998 N.E. 2d 54 (2013).

Beginning January 1, 2015, a retailer maintaining a place of business also includes a retailer having a contract with a person located in this State under which the person, for a commission or other consideration based upon the sale of tangible personal property by the retailer, directly or indirectly refers potential customers to the retailer by providing to the potential customers a promotional code or other mechanism that allows the retailer to track purchases referred by such persons.

Examples of mechanisms that allow the retailer to track purchases referred by such persons include but are not limited to the use of a link on the person's Internet website, promotional codes distributed through the person's hand-delivered or mailed material, and promotional codes distributed by the person through radio or other broadcast media. These provisions apply only if the cumulative gross receipts from sales of tangible personal property by the retailer to customers who are referred to the retailer by all persons in Illinois under such contracts exceed \$10,000 during the preceding 4 quarterly periods ending on the last day of March, June, September, and December. A retailer meeting these requirements shall be presumed to be maintaining a place of business in Illinois but may rebut this presumption by submitting proof that the referrals or other activities pursued within this State by such persons were not sufficient to meet the nexus standards of the United States Constitution during the preceding 4 quarterly periods. See ILCS 105/2(1.1).

Liquor Tax

Under the Liquor Control Act of 1934, out-of-state wineries who are going to sell wine directly to Illinois residents must complete an Application For State Of Illinois Winery Shipper’s License (“Direct Shipping Permit”). Further, a licensee who is not otherwise required to register under the Retailers’ Occupation Tax Act must register under the Use Tax Act to collect and remit use tax to the Department of Revenue for all gallons of wine that are sold by the licensee and shipped to persons in this State. 235 ILCS 5/5-1.

Shipping (delivery) and Handling Charges

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. 35 ILCS 120/2; 86 Ill. Adm. Code 130.101. 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. 35 ILCS 105/3; 86 Ill. Adm. Code 150.101.

If a seller delivers the tangible personal property to the buyer, and the seller and the buyer agree upon the transportation or delivery charges separately from the selling price of the tangible personal property which is sold, then the cost of the transportation or delivery service is not a part of the "selling price" of the tangible personal property which is sold, but instead is a service charge, separately contracted for, and need not be included in the figure upon which the seller computes his or her tax liability. See the Department's regulation at 86 Ill. Adm. Code 130.415(d).

A separate listing on an invoice of such charges is not sufficient to demonstrate a separate agreement. The best evidence that transportation or delivery charges were agreed to separately and apart from the selling price is a separate and distinct contract for transportation or delivery. However, documentation which demonstrates that the purchaser had the option of taking delivery of the property, at the seller's location, for the agreed purchase price, or having delivery made by the seller for the agreed purchase price, plus an ascertained or ascertainable delivery charge, will suffice. Note, as stated in Section 130.415 of the Department's regulations, if the charges for transportation or delivery exceed the cost of delivery or transportation, the excess amount is subject to tax. For further information, see *Nancy Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 919 N.E.2d 926 (2009).

As you can see from the information provided, out-of-state retailers that do not have sufficient nexus with Illinois do not incur Retailers' Occupation Tax on sales into Illinois and are not required to collect Use Tax on behalf of its Illinois customer. The customers of those retailers, however, still incur Use Tax liability on the purchase of any goods from the out-of-State retailers and have a duty to self-assess and remit their Use Tax liability directly to the Illinois Department of Revenue.

Claim For Credit

Only the taxpayer who filed the original return on which the tax was paid may file a claim for credit. In addition, the claim for credit must be filed within the statute of limitations for filing claims. The general rules regarding claims for credit are discussed in the following paragraphs.

If taxpayers pay amounts of taxes under the Retailers' Occupation Tax Act that are not due, either as a result of a mistake of fact or an error of law, the taxpayers may file claims for credit with the Department. No credit shall be given the taxpayers unless they show that they have borne the burden of the tax or have unconditionally repaid the amount of the tax to their customers from whom it was collected. See 86 Ill. Adm. Code 130.1501. The claims for credit must be prepared and filed upon forms provided by the Department containing the information listed in Section 130.1501(b). Taxpayers should not make adjustments on their next return or amend the return for the period in which the overpayment occurred.

Under Illinois sales tax laws, retailers are not required to file claims for credit. The Department has no authority to compel sellers to file a claim for credit. Whether or not sellers refund the taxes paid to them by their customers and file claims for credit with the Department is a private matter between sellers and purchasers. The statute of limitations for filing claims for credit is described in Section 130.1501(a)(4). The language is somewhat confusing but, boiled down, it means that the statute of limitations is 3 to 3 ½ years and expires in 6 month blocks. For example, on July 1, 2013, the statute of limitations expired for claims to recover taxes that were erroneously paid in the first 6 months of 2010.

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.

Very truly yours,

Debra M. Boggess
Associate Counsel

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