

ST 18-0005-GIL 02/09/2018 NEXUS

This letter responds to a questionnaire regarding nexus. *See Quill Corp. v. North Dakota*, 112 S. Ct. 1904 (1992). (This is a GIL.)

February 9, 2018

Dear Xxxxx:

This letter is in response to your email dated November, 16, 2017, in which you requested 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:

We are writing to ask you to complete the questionnaires for the **2018 SURVEY** on behalf of your state. Attached is an Excel spreadsheet containing the questions for 2018. One column of the spreadsheet has all of your state’s responses for 2017. An adjacent column is there for you to record your responses for 2018. To avoid any errors, please fill out the 2018 column even if the answer has not changed from 2017.

Additionally, we ask that you note where you have intentionally left questions blank. We are required to follow-up regarding any unanswered questions; and making note of intentionally unanswered questions allows us to process and analyze the data faster. This can be accomplished by typing “blank” or “no response” in the answer column or simply noting in your email that questions were left blank intentionally.

The survey covers many of the gray areas of state tax law. Your responses will provide useful guidance for taxpayers in complying with your state’s laws.

The questionnaires should be completed based on state law as of January 1, 2018.

If you would like to add or change information you have previously recorded in the comments section, please make those modifications in red font.

Some new questions have been added to this year's questionnaires. The new questions and subsections are denoted in blue font.

Please return your questionnaires to us. Your completed Excel spreadsheets should be e-mailed to me.

Your responses, along with the responses we receive from other states, will be published by COMPANY, a leading publisher of international, federal, and state tax analysis. More information about COMPANY can be found at www.XXX.com.

If you have any questions about this or if there is any way I can help you to complete this year's questionnaires, please contact me.

DEPARTMENT'S RESPONSE:

We are unable to respond to your nexus survey in the format provided. Determinations regarding nexus are very fact specific and cannot be addressed in the context of a General Information Letter. However, we can provide you with basic guidelines that may be used to determine whether a seller would be considered "an Illinois retailer" subject to Retailers' Occupation Tax liability or "a retailer maintaining a place of business in Illinois" subject to Use Tax collection duties from their Illinois customers.

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 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 35 ILCS 105/2(1.1).

Illinois does not require out-of-state retailers who do not maintain a place of business in this State to report sales of tangible personal property made to Illinois residents. Illinois also does not require out-of-state retailers to notify in-State customers of their obligation to pay use tax.

THE SHARING ECONOMY

The Hotel Operators' Occupation Tax Act ("HOOT") imposes a tax upon persons engaged in the business of renting, leasing or letting rooms in a hotel, as defined in the Act. HOOT defines "hotel" to include any building or buildings in which the public may, for consideration, obtain living quarters, sleeping or housekeeping accommodations. See 35 ILCS 145/2(1). HOOT defines "rent" as "the consideration received for occupancy, valued in money, whether received in money or otherwise, including all receipts, cash, credits and property or services of any kind or nature." See 35 ILCS 145/2(6). The definition of "rent" must be read in conjunction with the term "occupancy." HOOT defines "occupancy" as "the use or possession, or the right to the use or possession, of any room or rooms in a hotel for any purpose, or the right to the use or possession of the furnishings or to the services and accommodations accompanying the use and possession of the room or rooms." See 35 ILCS 145/2(3). Persons subject to the tax imposed by this Act may reimburse themselves for their tax liability under this Act by separately stating such tax as an additional charge. See 35 ILCS 145/3(e).

Therefore, in the context of the provision of short-term accommodations that are rented through the use of a third-party platform, the third-party platform is not generally liable for HOOT. Rather, the tax obligation is on the owner/host of the accommodations which are being rented. The tax is imposed on the gross rental receipts received by the owner/host.

The Automobile Renting Occupation and Use Tax ("AROT") imposes a tax on persons engaged in the business of renting automobiles in Illinois under rental terms of one year or less. See 35 ILCS 155/1 *et seq.* Also see 86 Ill. Adm. Code 180.101. This tax is imposed at the rate of 5% of the gross receipts from such business. "Gross receipts" means all consideration received by a rentor for the rental of automobiles under lease terms of one year or less. "Renting" means any transfer of the possession or the right to possession of an automobile to a user for valuable consideration. 35 ILCS 155/2. Rentors shall collect the tax from rentees by adding the tax to the rental price of the automobile, when rented for use, in the manner prescribed by the Department. The tax imposed by this Section shall, when collected, be stated as a distinct item separate and apart from the rental price of the automobile. See 35 ILCS 155/4.

Companies making short term rentals of automobiles, such as Avis and Hertz, are responsible for paying the tax. The tax obligation is on the owner of the automobile which is being rented. The tax is imposed on the gross receipts received by the owner of the automobile.

SERVICE PROVIDERS

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. 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 86 Ill. Adm. Code 150.101. These taxes comprise what is commonly known as "sales" tax in Illinois.

Illinois Retailers' Occupation and Use Taxes do not apply to sales of service that do not involve the transfer of tangible personal property to customers. However, if tangible personal property is transferred incident to sales of service, this will result in either Service Occupation Tax liability or Use Tax liability for the serviceman depending upon his or her activities. For your general information, see 86 Ill. Adm. Code 140.101 through 140.109 regarding sales of service and Service Occupation Tax.

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,

Richard S. Wolters
Associate Counsel

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