

This letter discusses nexus. See *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). See 86 Ill. Adm. Code 150.803. This is a GIL

October 1, 2020

Dear Xxxx:

This letter is in response to your letter dated February 4, 2020, 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](http://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 a STATE based company that is in the business of renting and selling construction crane mats for use on large construction projects. These are large railroad tie size wood timbers, bolted together ranging in size from 4’x12’ to 4’x30’ long. These mats are laid down for heavy equipment (bulldozers, cranes, etc.) to drive on to avoid sinking into soft ground. We have begun renting and selling these crane mats in Illinois.

My understanding from conversations with your sales tax department is as follows:

Sales of these mats are subject to Illinois use tax of 6.25% only, since COMPANY does not have a physical location in Illinois. Sales /use tax is not charged down to the county / city level because of this lack of a physical location in Illinois.

Sales tax is calculated on freight charges invoiced to these customers as long as the freight is included in the sales price and not a separate line item. No use tax needs to be charged if freight is listed as a separate line item.

There is no use or sales tax on rentals of crane mats.

The purpose of this letter is to confirm our understanding of the Illinois sales and use taxes as it pertains to our product, so we properly calculate, collect and remit the correct

sales/use tax to the State of Illinois. Please review this letter and confirm our understanding or advise us of any corrections. Feel free to contact me in person to discuss this matter.

## **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 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. See, e.g., 86 Ill. Adm. Code 270.115.

Another type of retailer is a retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in Illinois" is found at 35 ILCS 105/2 and described further, in part, in 86 Ill. Adm. Code 150.201. 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.

An out-of-State retailer (a "remote retailer") making sales to Illinois purchasers from locations outside Illinois is required to register with the Department and collect and remit Use Tax on those sales if it falls within the definition of a "retailer maintaining a place of business in this State" in Section 2 of the Use Tax Act, 35 ILCS 105/2. The Department is authorized to require these retailers to act as tax collectors because they have established sufficient contacts, or nexus, with Illinois. There are two groups of remote retailers that must collect Use Tax on sales to Illinois purchasers:

- 1) Remote retailers with a physical presence in Illinois. Prior to October 1, 2018, remote retailers had to have a physical presence in Illinois before they could be required to collect Use Tax. The types of activities constituting a physical presence, as limited by the series of court cases described below, are found in Section 2 of the Use Tax Act's definition of a "retailer maintaining a place of business" in Illinois. See, 35 ILCS 105/2. The physical presence requirement was established in a series of United States Supreme Court decisions. See, for example, *Scripto v. Carson*, 362 U.S. 207 (1960); *National Bellas Hess v. Department of Revenue of the State of Illinois*, 386 U.S. 753 (1967); *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992). In 1996, the Illinois Supreme Court ruled that remote retailers need only "more than the slightest" physical presence to be required to collect Use Tax. See *Brown's Furniture v. Wagner*, 171 Ill.2d 410 (1996). Any remote retailer that has a physical presence in Illinois will to be required to act as a Use Tax collector. Regulations describing these types of retailers are found at 86 Ill. Adm. Code 150.801 and 150.802.

A retailer is required to collect Use Tax if it has 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 a 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. The provisions of this paragraph 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 this state under such contracts exceed \$10,000 during the preceding four quarterly calendar ending on the last day of March, June, September, and December;

A retailer required to collect Use Tax if it has 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 do 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.

The provisions of this paragraph apply only if the cumulative gross receipts from sales of tangible personal property by you to customers in this state under all such contracts exceed \$10,000 during the preceding four quarterly periods ending on the last day of March, June, September, and December.

- 2) Remote retailers without a physical presence in Illinois. In *South Dakota v. Wayfair, Inc.*, 585 U.S. \_\_\_\_ (2018), 138 S. Ct. 2080, the U.S. Supreme Court upheld a South Dakota statute that imposed tax collection obligations on remote retailers that met specific selling thresholds but had no physical presence in the state. This decision abrogated the longstanding physical presence requirement of *Quill*, deeming it “unsound and incorrect.” Illinois Public Act 100-587 enacted nexus standards, effective October 1, 2018, that are virtually identical to those upheld in *Wayfair*. This non-physical presence nexus we will call “*Wayfair* nexus.”

Public Act 100-587 implemented the U.S. Supreme Court *Wayfair* nexus standards. It requires remote retailers with no physical presence in Illinois to register and collect and remit Use Tax, as provided below:

- 1) Beginning October 1, 2018, a retailer making sales of tangible personal property to purchasers in Illinois from outside of Illinois must register with the Department and collect and remit Use Tax if:

- a) The cumulative gross receipts from sales of tangible personal property to purchasers in Illinois are \$100,000 or more; or
  - b) The retailer enters into 200 or more separate transactions for the sale of tangible personal property to purchasers in Illinois.
- 2) A retailer shall determine on a quarterly basis, ending on the last day of March, June, September, and December, whether he or she meets either of the criteria of paragraph (1) for the preceding 12-month period. If the retailer meets either of the criteria of paragraph (1) for a 12-month period, he or she is considered a retailer maintaining a place of business in Illinois and is required to collect and remit the Use Tax and file returns for one year.
- a) At the end of that one-year period, the retailer shall determine whether he or she met either of the criteria of paragraph (1) during the preceding 12-month period. If the retailer met either of the criteria in paragraph (1) for the preceding 12-month period, he or she is considered a retailer maintaining a place of business in Illinois and is required to collect and remit Use Tax and file returns for the subsequent year.
  - b) If at the end of a one-year period a retailer that was required to collect and remit the Use Tax determines that he or she did not meet either of the criteria in paragraph (1) during the preceding 12-month period, the retailer shall subsequently determine on a quarterly basis, ending on the last day of March, June, September, and December, whether he or she meets either of the criteria of paragraph (1) for the preceding 12-month period.

In determining whether a remote retailer meets the thresholds above, see 86 Ill. Adm. Code 150.803(c)(3)(E)(i). In addition, if a remote retailer makes exclusively nontaxable sales, he or she is not subject to the *Wayfair* nexus requirements. See 86 Ill. Adm. Code 150.803(c)(2). If, however, the remote retailer makes both taxable and nontaxable sales into Illinois, all sales are included, including the nontaxable sales (other than sales for resale and other sales specified at 86 Ill. Adm. Code 150.803(c)(3)(E)). See 86 Ill. Adm. Code 150.803(c)(3)(E)(v).

Public Acts 101-0031 and 101-0604 enacted the Leveling the Playing Field for Illinois Retail Act. The Act implements a series of structural changes to the Illinois sales tax law that are intended to “level the playing field” between Illinois-based retailers and remote retailers by imposing State and local retailers’ occupation taxes on Illinois retailers, remote retailers and marketplace facilitators alike. Public Acts 101-0031 and 101-0604 require “remote retailers” to collect and remit State and local retailers’ occupation taxes. Beginning January 1, 2021, you must remit Retailers’ Occupation Tax if you are a remote retailer and either of the following thresholds was met during the preceding four quarterly periods ending on the last day of March, June, September, and December:

- 1) The cumulative gross receipts from sales of tangible personal property by you to purchasers in Illinois was \$100,000 or more; or

- 2) you entered into 200 or more separate transactions for the sale of tangible personal property to purchasers in Illinois. [35 ILCS 120/2(b)]

You are a “remote retailer” if you do not maintain within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent or other representative operating within this State under your authority or a subsidiary of yours, irrespective of whether such place of business or agent is located here permanently or temporarily or whether you or your subsidiary is licensed to do business in this State. 35 ILCS 120/1.

The Department has filed proposed rules implementing the new requirements for remote retailers and marketplace facilitators. The proposed rules can be found on the Department’s website. 86 Ill. Adm. Code 131.

### DELIVERY CHARGES

The Department’s regulation regarding transportation and delivery charges can be found at 86 Ill. Adm. Code 130.415 and incorporates the decision rendered in *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 919 N.E.2d 926 (2009). At issue in *Kean* was whether shipping charges for certain Internet purchases of tangible personal property were subject to Illinois sales tax. The Court found in *Kean* that an “inseparable link” existed between the sale and delivery of the merchandise plaintiffs purchased from Wal-Mart’s Internet store. Thus, the court concluded that the outgoing transportation and delivery charges were part of the gross receipts subject to the Retailers’ Occupation Tax. 86 Ill. Adm. Code 130.415(b)(1)(B)(i). An inseparable link exists when (a) the transportation and delivery charges are not separately identified to the purchaser on the contract or invoice or (b) the transportation and delivery charges are separately identified to the purchaser on the contract or invoice, but the seller does not offer the purchaser the option to receive the property in any manner except by the payment of transportation and delivery charges added to the selling price of an item (e.g., the seller does not offer the purchaser the option to pick up the tangible personal property or the seller does not offer, or the purchaser does not qualify for, a free transportation and delivery option). 86 Ill. Adm. Code 130.415(b)(1)(B)(ii). In contrast, if the customer can purchase the tangible personal property without payment of transportation or delivery charges to the retailer, then an inseparable link does not exist and the delivery charges should not be included in the selling price of the tangible personal property. 86 Ill. Adm. Code 130.415(b)(1)(B)(ii)-(iii).

### LEASES

Please note that, except for transactions subject to the Rental Purchase Agreement Occupation and Use Tax Act and the Automobile Renting Occupation and Use Tax Act, the State of Illinois taxes leases differently for Retailers’ Occupation Tax and Use Tax purposes than the majority of other states. For Illinois sales tax purposes, there are two types of leasing situations: conditional sales and true leases. A conditional sale is usually characterized by a nominal or one dollar purchase option at the close of the lease term. Stated otherwise, if lessors are guaranteed at the time of the lease that the leased property will be sold, the transaction is considered to be a conditional sale at the outset of the transaction, thus making all receipts subject to Retailers’ Occupation Tax. See 86 Ill. Adm. Code 130.2010.

A true lease generally has no buyout provision at the close of the lease. If a buyout provision does exist, it must be a fair market value buyout option in order to maintain the character of the true

lease. Lessors of tangible personal property under true leases in Illinois are deemed end users of the property to be leased. As end users of tangible personal property located in Illinois, lessors owe Use Tax on their cost price of such property. The State of Illinois imposes no tax on lease receipts. Consequently, lessees incur no tax liability. See 86 Ill. Adm. Code 130.2010.

The above guidelines are applicable to all true leases of tangible personal property in Illinois except for automobiles leased under terms of one year or less, which are subject to the Automobile Renting Occupation and Use Tax found at 35 ILCS 155/1 *et seq.*

A lease contract meeting the following conditions would generally be considered to be a true lease rather than a conditional sale:

- 1) a customer who has otherwise met the requirements of the agreement can cease making payments and return the property at the end of any lease term without further payment obligation,
- 2) the customer is never under any obligation to purchase the property, and
- 3) the agreement does not guarantee a sale of the tangible personal property at the inception of the contract.

Under the type of lease agreement described above, a lessee is free to walk away from the lease at the end of each lease term and therefore a sale of the property is not guaranteed at the time the lease is entered into. It is the Department's opinion that such an agreement would be a true lease. A lessor engaging in this type of lease should pay Use Tax to his supplier for all items that he purchases to lease. Receipts from the rental of tangible personal property under a true lease are not subject to Retailers' Occupation Tax liability. See 86 Ill. Adm. Code 130.2013(g). Therefore, none of the monthly lease payments would be subject to Retailers' Occupation Tax.

If the lessors already paid taxes in another state with respect to the sale, purchase, or use of the tangible personal property, they would be exempt from Use Tax to the extent of the amount of such tax properly due and paid in such other state. 86 Ill. Adm. Code 150.310(a)(3).

Under Illinois law, lessors may not "pass through" their tax obligations to lessees as taxes. However, lessors and lessees may make private contractual arrangements for a reimbursement of the tax to be paid by the lessees. If lessors and lessees have made private agreements where the lessees agree to reimburse the lessors for the amount of the tax paid, then the lessees are obligated to fulfill the terms of the private contractual agreements.

In a conditional sale situation, if the out-of-State lessor does not have nexus and is not registered with the Department, the lessee/purchaser is obligated to self-assess and remit Use Tax. Since the lessee/purchaser owes Use Tax on the amount of each installment payment, he or she is required to register with the Department to make such tax payments. In many cases out-of-State lessors in these situations register with the Department to collect and remit the use Tax as a courtesy to their customers.

I hope this information is helpful. If you require additional information, please visit our website at [www.tax.illinois.gov](http://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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