

General Information Letter: Nexus issues are generally not appropriate for general information letters.

June 30, 2010

Dear:

This is in response to your letter dated May 24, 2010 in which you request a letter ruling. The following is in response to your request with respect to Illinois income tax. Your request with respect to sales and use tax has been referred to the Sales Tax Division and will be addressed by a separate ruling. The nature of your request and the information provided with respect to Illinois income tax requires that we respond with a General Information Letter (GIL). 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), which may be accessed from the Department's website at [www.Iltax.com](http://www.Iltax.com).

Your letter states as follows:

I am writing to you for confirmation as to whether my company, COMPANY1, Inc., has nexus in Illinois or not. We are being audited by the STATE Department of Revenue, who is questioning our nexus status and believes we no longer qualify.

COMPANY1, Inc., a Value-Added Reseller of COMPANY2, is a STATE company, established in 19XX. We were told by the Illinois Department of Revenue that as soon as we entered your state and began working with companies in our industry, we needed to register with the State of Illinois, which we did. As a result, we have been paying Sales Tax collected from customers and filing Corporate Income Tax Returns. We did open an office in CITY1, Illinois, from 0X/01/19XX through 0X/31/20XX, but closed it and merged operations back into our facility in CITY2, STATE.

I called the Illinois Department of Revenue at 2:41 PM on Friday, 05/21/10, and discussed our Sales Tax situation with Miss Z (Phone #800-732-8866). She indicated that because we have no location in Illinois, the sales to Illinois companies should be considered interstate commerce and sales taxes due should be the consumers', our customers' responsibility, not ours. She elaborated that we have been paying the sales tax to Illinois voluntarily, and we can stop collecting it. We were audited by the Illinois Department of Revenue for Sales Tax several years ago and were told we were doing everything correctly. We just needed to update some of the customer Exemption Certificates we had on file. Can you tell me which is correct as it applies to us? Please provide a ruling as to whether we should continue to collect and pay sales tax or not.

STATE doesn't believe we have nexus because we haven't had 30 man-hours per year in Illinois, and all the hours we have accumulated haven't been by a representative with the authority to close sales. The auditor has informed me that based on this interpretation, I may have to request the State of Illinois to refund any Income/Franchise Taxes we've paid in the past and pay them to STATE instead.

I spoke with Mr. Y at the Illinois business hotline (Phone #217-524-4772) at 2:14 PM today. He told me Illinois doesn't have a time frame to satisfy to qualify for nexus, and that we would have nexus due to the fact have gone into Illinois to do business and we are registered with

the Revenue Department. It is at Mr. Ys' recommendation that I'm writing to you to request an opinion on these issues, too.

Would you please provide me with something in writing I can give to the State of STATE to clarify our nexus position and responsibility for filing and paying Sales and Corporate/Franchise Income Tax to the State of Illinois?

## **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 web site). 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 the case of foreign corporations, Illinois may assert nexus to tax unless the 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:

- E) Conducting training courses, seminars or lectures for personnel other than personnel involved only in solicitation of sales of tangible personal property.
- F) Providing any kind of technical assistance or services, including, but not limited to, engineering assistance or design service, when one of the purposes of the assistance or service is other than the facilitation of the solicitation of orders.
- H) Approving or accepting orders.

- 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.

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 the above provisions indicate, the conduct of training activities, or service activities unrelated to the solicitation of orders, results in the loss of protection under Public Law 86-272 unless those activities are de minimus. Whether an unprotected activity is de minimus is not based on a 30 man-hour standard. Rather, a factual determination must be made taking into account the taxpayer's entire business activity.

Section 502(a) of the Illinois Income Tax Act ("IITA" ; 35 ILCS 5/502(a)) sets forth the requirements for filing Illinois income tax returns. That section states in pertinent part as follows:

(a) In general. A return with respect to the taxes imposed by this Act shall be made by every person for any taxable year:

(1) For which such person is liable for a tax imposed by this Act, or

(2) In the case of a resident or in the case of a corporation which is qualified to do business in this State, for which such person is required to make a federal income tax return, regardless of whether such person is liable for a tax imposed by this Act.

Under this section, a nonresident must file an Illinois income tax return if it incurs a liability for tax imposed under Section 201 of the IITA (or in the case of a corporation qualified to do business in Illinois, if it is required to file a federal return). A nonresident is liable for Illinois income tax under Section 201 if it computes "Illinois net income" as defined under IITA Section 202. IITA Section 202

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defines Illinois net income as that portion of the taxpayer's "base income" as defined in Section 203, which is allocated or apportioned to Illinois under the provisions of Article 3 of the IITA, less certain deductions. The above provisions may be accessed from the Department's web site.

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)