ST 10-0010-GIL 02/26/2010 NEXUS

This letter discusses nexus. See Quill Corp. v. North Dakota, 112 S.Ct. 1904 (1992). (This is a GIL.)

February 26, 2010

Dear Xxxxx:

This letter is in response to your e-mail dated January 21, 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:

> We are writing to ask you to complete the questionnaire for the 2010 Survey on behalf of your state. Attached below is an excel spreadsheet for you to record your responses.
>
> If you have any questions about this or if there is any way I can help you to complete this year's questionnaire, please contact me.
>
> 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.
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> The questionnaire should be completed based on state law as of December 31, 2009.
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> Your responses, along with the responses we receive from other states, will be published by a leading publisher.
>
> Please return the completed questionnaire to us by February 22, 2010. After answering the new questions and updating your responses from last year, please e-mail the excel spreadsheet to me.
>
> I look forward to working with you.

. . . . . .

In your questionnaire, you have stated, in part, as follows:

XI. Sales Tax Nexus Policies

Please identify any statute, regulation, or administrative pronouncement that sets forth your state's sales tax nexus policy.

XII. Sales Tax Nexus Creating Activities

Please indicate 'yes' or 'no' to show whether each of the following activities or relationships performed by an out-of-state corporation would, by itself, create substantial nexus with your state for purposes of triggering the imposition of sales tax collection requirements on the corporation. When determining whether the listed activity/relationship would create substantial nexus, assume that each item is the only activity/relationship the corporation has in your state. Also assume that the out-of-state corporation has no property or employees located in your state.

A 'yes' response means that an out-of-state corporation's performance of the listed activity/relationship would, by itself, create substantial nexus and trigger the imposition of sales tax collection requirements on the corporation. A 'no' response means that an out-of-state corporation's performance of the listed activity/relationship would not, by itself, trigger nexus for purposes of your state's sales tax.

For the questions that you believe require more than a 'yes' or 'no' answer, please set forth in the comments section the factors that your state would consider in making a nexus determination.

A. General Activities

B. Remote Sales

C. Temporary or Sporadic Presence

D. Activities of Unrelated Parties

E. Financial Activities

F. Activities with Affiliates

G. Internet Activities

H. Activities Related to Digital Property (New for 2010)

I. Conformity to Streamlined Sales and Use Tax Agreement (SSUTA) Provisions (as of January 1, 2010)

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 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.

COMPUTER SOFTWARE AND DIGITAL GOODS

Generally, retail sales or transfers of “canned” computer software are taxable in Illinois regardless of the means of delivery. For instance, the sale or transfer of canned computer software downloaded electronically would be taxable. However, if the computer software consists of custom computer programs, then the sales of such software may not be taxable retail sales. See 86 Ill. Adm. Code 130.1935(c). Custom computer programs or software must be prepared to the special order of the customer.

Charges for updates of canned software are fully taxable pursuant to Section 130.1935. If the updates qualify as custom software under Section 130.1935(c), they may not be taxable. If

transactions for the licensing of computer software meet all of the criteria provided in subsection (a)(1) of Section 130.1935, neither the transfer of the software nor the subsequent software updates will be subject to Retailers' Occupation Tax. A license of software is not a taxable retail sale if:

A) It is evidenced by a written agreement signed by the licensor and the customer;

B) It restricts the customer's duplication and use of the software;

C) It prohibits the customer from licensing, sublicensing or transferring the software to a third party (except to a related party) without the permission and continued control of the licensor;

D) The licensor has a policy of providing another copy at minimal or no charge if the customer loses or damages the software, or permitting the licensee to make and keep an archival copy, and such policy is either stated in the license agreement, supported by the licensor's books and records, or supported by a notarized statement made under penalties of perjury by the licensor; and

E) The customer must destroy or return all copies of the software to the licensor at the end of the license period. This provision is deemed to be met, in the case of a perpetual license, without being set forth in the license agreement.

Please note that it is very common for software to be licensed over the internet and the customer to check a box that states that they accept the license terms. Acceptance in this manner does not constitute a written agreement signed by the licensor and the customer for purposes of subsection (a)(1)(A) of Section 130.1935. To meet the signature requirement for an exempt software license, the agreement must contain the written signature of the licensor and customer.

A license of canned software is subject to Retailers' Occupation Tax liability if all of the criteria set out in 86 Ill. Adm. Code 130.1935(a)(1) are not met.

The Department does not consider the viewing and downloading of video, text and other data over the internet to be the transfer of tangible personal property. Therefore, such viewing and/or downloading activity over the internet would not be subject to liability under the Retailers' Occupation Tax Act, Use Tax Act, Service Occupation Tax Act, or Service Use Tax Act. Please note, however, the transfer of any canned software (or update of canned software) is considered the transfer of tangible personal property and will be subject to Retailers' Occupation Tax and Use Tax liability, regardless of the means of delivery. See 86 Ill. Adm. Code 130.1935(a). The transfer or sale of canned software downloaded electronically would be taxable.

STREAMLINED SALES AND USE TAX AGREEMENT (SSUTA)

Illinois is not a member of to the SSUTA and is not in compliance with the SSUTA. Public Act 92-221, effective August 2, 2001, created the Simplified Sales and Use Tax Administration Act, which authorized Illinois to enter into multistate discussions to review and/or amend the Streamlined Sales and Use Tax Agreement and which authorized the Illinois Department of Revenue to enter into the Streamlined Sales and Use Tax Agreement. Illinois has not enacted the conforming legislation required to be in compliance with the Agreement. However, beginning on September 1, 2009, Illinois began taxing candy, soft drinks, and grooming and hygiene products using definitions similar to SSUTA definitions.

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

RSW:msk