

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

June 4, 2010

Dear Xxxxx:

This letter is in response to your letter dated October 29, 2009, 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:

FIRM submits this Anonymous Ruling Request on behalf of its client, respectfully requesting a ruling on whether certain affiliated out-of-state companies are required to register to collect and remit Illinois' Retail Occupations Tax [sic] or Use Tax as a result of specified activities in Illinois.

I. Facts

This ruling request relates to the sale and distribution of gift codes to consumers located in Illinois. The gift codes may be redeemed to purchase goods and services from retailers who sell over the Internet.

'Gift Code Issuer' sells gift codes directly to consumers over the Internet. Consumers purchasing gift codes over the Internet may choose to receive the gift code by e-mail, by printing a gift certificate on their printer, or by receiving a tangible gift card via mail.

Gift Code Issuer also sells gift codes to unrelated, third party wholesalers ('Wholesalers'). Wholesalers sell the gift codes to brick-and-mortar retail establishments ('Retail Establishments') for resale or sell the gift codes directly to consumers, who will purchase the gift codes while at Retail Establishment locations. Gift codes sold to consumers at Retail Establishments are transferred to the consumer

using a tangible gift card. The Retail Establishments are located in numerous states, not including Illinois.

Gift cards used to transfer the gift codes are imprinted with the name of an Internet marketplace ('Internet Marketplace'). The Internet Marketplace is operated by 'Website Operator,' and affiliated of Gift Code issuer. The Internet Marketplace provides a virtual marketplace where consumers may purchase tangible personal property and services from various 'Internet Retailers.'

Two of the Internet Retailers are affiliated with Gift Code Issuer and Website Operator ('Affiliate Internet Retailers'). Affiliate Internet Retailers sell services and tangible personal property to consumers via the Internet. All tangible personal property sold by the Affiliate Internet Retailers is delivered to consumers via common carrier.

The Internet Marketplace also includes numerous Internet Retailers that are not related to Gift Code Issuer, Website Operator or the Affiliate Internet Retailers. Consumers may use the value contained in the gift codes to purchase goods and services from either Affiliate Retailers or unrelated Internet Retailers via the Internet Marketplace. When the gift code is redeemed, the Website Operator generates a receivable to collect the amount of the redemption from Gift Code Issuer, and generates a payable to pay the amount of the redemption to the Internet Retailers. These redemption terms are the same whether the Internet Retailer is an Affiliate Internet Retailer or an unrelated, third party Internet Retailer.

Gift Code Issuer contracts with an independent, third party ('Processor') to arrange for the production of tangible gift cards to transfer gift codes sold at Retail Establishment locations. The tangible gift cards are distributed to the Retail Establishments by the Wholesalers. The tangible gift card is provided for the benefit of the party selling the gift code to the consumer as the card provides a physical medium to transfer the gift code. Gift Code Issuer does not own or have title to the tangible gift card at any point in time, nor does the tangible gift card have value independent from the gift code.

Gift codes are sold to consumers using alternative methods. When a consumer seeks to purchase a gift code at a Retail Establishment, Gift Code Issuer sells the gift code to the Wholesaler. The Wholesaler sells the gift code to the Retail Establishment (who sells it to the consumer). Alternatively, the Wholesaler may sell the gift code to the consumer directly, and provide the Retail Establishment a commission. Gift Code Issuer retains title to the gift code until these sale transactions take place.

The gift code does not have any value until the gift code is activated with a specific dollar value. Once a gift code is sold, the Retail Establishment commences the activation of the purchased gift code using electronic equipment that is owned by the Retail establishment and connected to the Wholesaler's network. The Retail Establishment transmits to the Wholesaler the information necessary to activate the gift code. The Wholesaler then transmits this information to Processor, and Processor transmits this information to Gift Code Issuer. Gift Code Issuer pays Processor a processing and fixed card fee at the time of activation.

Under the proposed transactions ('Proposed Transactions'), Wholesalers would begin selling gift codes to Retail Establishments located in Illinois or directly to Illinois consumers at Retail Establishment locations. Gift code Issuer and Affiliate Internet

Retailers are not physically present in Illinois, as none of these entities have offices, employees, tangible personal property or real property located within the state.

II. Issues

1. Are sales of gift codes to Illinois residents subject to one of Illinois's [sic] sales or use taxes?
2. Under the Proposed Transactions, will Gift Code Issuer be required to register to collect and remit one of Illinois' sales or use taxes?
3. Under the Proposed Transactions, will the Affiliate Internet Retailers be required to register to collect and remit one of Illinois' sales or use taxes on their separate sales of tangible personal property to consumers located in Illinois?
4. Would the above conclusions change if Gift Code Issuer sold the gift codes directly to Retail Establishments located in Illinois?

III. Legal Framework for Analysis

A. U.S. Constitution

Federal constitutional limitations, as well as limitations imposed by federal law, are the foundation for state taxation. The Commerce Clause limits the states from levying a tax on income that is unduly burdensome on interstate commerce. The U.S. Supreme Court has held that a tax on interstate commerce is permissible under the Commerce Clause if the tax is: (1) applied to an activity with substantial connection (nexus) to the state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the taxing state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The Due Process Clause also prevents a state from taxing a business unless the business has some connection with the taxing state. There must be a definite link or minimum connection between the in-state activities of the taxpayer and the state before the state may impose its tax.

In its analysis of sales and use tax nexus, the U.S. Supreme Court has emphasized that physical presence is required in order to create Commerce Clause substantial nexus. In *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the U.S. Supreme Court held that the Commerce Clause bars a state from imposing a use tax collection duty on an out-of-state seller with no physical presence in the state. Thus, the 'bright-line' physical presence standard first established by the Supreme Court in *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967), was reaffirmed by the Court in *Quill* and continued to govern today.

The Supreme Court has also held that 'the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales.' *Tyler Pipe Industries, Inc. v. Dept. of Revenue*, 483 U.S. 232 (1987) (internal quotes omitted). Thus, when considering 'attributional nexus' fact patterns, the state is bound to consider both the substantial nexus – i.e., physical presence – of an entity's representative, as well as whether the presence of said representative is specifically directed to 'establishing and maintaining a market' in the state for the sales at issue.

B. Illinois's [sic] Sales and Use Taxes

1. Imposition of Tax

The Illinois Retailers' Occupation Tax ('ROT') is a sales tax imposed upon persons engaged in the business of selling tangible personal property at retail. 35 Ill. Comp. Stat. § 120/2-10. The Illinois Use Tax ('UT') is a complementary use tax imposed upon the privilege of using tangible personal property in Illinois. 35 Ill. Comp. Stat. § 105/3.¹

Illinois does not specifically define the term 'tangible personal property' in its statutes or regulations. 'However, Illinois courts have generally understood tangible personal property to mean all material things with intrinsic value except real property such as land, buildings, and attached fixtures, or intangibles such as stocks, bonds, cash, copyrights and licenses.' Ill. Private Ltr. Rul. No. ST 07-0001-PLR (May 1, 2007) (citing *Farrand Coal Company v. Halpin*, 10 Ill. 2d 507 (1957); Administrative Hearing Decision No. UT 02-2, *Dept. of Revenue v. John Doe* (April 30, 2002)).

On several occasions, the Department of Revenue has ruled that gift certificates are intangible property, the sale of which is not subject to Illinois ROT or UT:

The sale of gift certificates represents an intangible right to purchase merchandise at some future time. Therefore, sales of gift certificates are not subject to [ROT] liability because they are considered sales of intangibles. However, when the gift certificates are redeemed on the purchase of tangible personal property, tax is due on the selling price of that property, whether partially or wholly funded by the gift certificate.

Ill. Dept. of Rev, General Info. Ltr. No. ST 07-0063-GIL (June 12, 2007); *see also* Ill. Dept. of Rev. General Info. Ltr. No. ST 06-0125-GIL (June 7, 2006); Ill. Dept. of Rev. General Info. Ltr. No. ST 06-0109 (April 28, 2006) (holding that the sale of 'points' enabling the owner to later acquire tangible personal property were intangible rights analogous to gift certificates, and thus their sale was not subject to tax).

2. Registration and Collection Requirement

Illinois imposes a registration and collection requirement on persons engaged in the business of selling tangible personal property at retail. 35 Ill. Comp. Stat. § 120/2. A 'retailer' is defined as a person engaged in the business of making sales at retail. 35 Ill. Comp. Stat. § 105/2. A 'sale at retail' is defined as the transfer of ownership of tangible personal property for the purpose of use, and not for the purpose of resale. 35 Ill. Comp. Stat. § 105/2.

In addition, in order for a retailer to be subject to Illinois' sales/use tax jurisdiction, the retailer must maintain a 'place of business' in Illinois. 35 Ill. Comp. Stat. § 105/2. A 'place of business' includes an office, distribution house, sales house, warehouse or other place of business. 35 Ill. Comp. Stat. § 105/2. Additionally, a 'place of business' in the state includes any agent or other representative 'operating within the state under

¹ Illinois also imposes a Service Occupation Tax ('SOT') upon persons engaged in the business of selling services. 35 Ill. Comp. Stat. § 115/3-40. The SOT is imposed upon the transfer of tangible personal property acquired as an incident to the purchase of service, and thus only applies if tangible personal property is actually transferred. 35 Ill. Comp. Stat. § 115/3-40. The Illinois Service Use Tax ('SUT') is a complementary use tax imposed upon the use of tangible personal property 'acquired as an incident to the purchase of service.' 35 Ill. Comp. Stat. § 110/3.

the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent or other representative is located here permanently or temporarily, or whether such retailer or subsidiary is licensed to do business in this State.’ 35 Ill. Comp. Stat. § 105/2.

Illinois regulations provide some additional guidance. According to the regulations, a ‘retailer maintaining a place of business in this state’ also includes the following:

- (1) A retailer having or maintaining, directly or through a subsidiary, an office, distribution house, sales house, warehouse, or other place of business; or having an agent or other representative operating in the state under the authority of a retailer or its subsidiary;
- (2) Soliciting orders for tangible personal property by means of telecommunication or television shopping system with the intent to be broadcast in the state;
- (3) Soliciting orders for tangible personal property by means of advertising pursuant to a contract with a broadcaster or publisher located in the state;
- (4) Soliciting orders for tangible personal property by mail, if the solicitation is substantial and recurring, and the retailer benefits from banking, financing, debt collection, telecommunication, or marketing activities in the state, or benefits from the location of repair, service, or installation facilities in the state;
- (5) Being owned by or controlled by the same interests that own or control any retailer engaging in business in the same or similar line of business in this State;
- (6) Having a franchisee or licensee operate under the retailer’s trade name;
- (7) Soliciting orders over cable television in the state pursuant to a contract with a cable television operator located in the state; and
- (8) Engaging in activities in Illinois that would result in nexus under the law of the retailer’s domicile.

86 Ill. Adm. Code § 150.201(i).

3. Affiliate Nexus

As discussed above, subsection (5) of Regulation 150.201 contains an ‘affiliate nexus’ provision. This provision contains two requirements that must be met before the Department may impose tax collection responsibilities upon a retailer with affiliates in the state, namely: (1) the in-state retailer and out-of-state retailer must be ‘controlled’ by the same interests; and (2) the in-state retailer must engage in the ‘same or similar line of business’ in Illinois as the out-of-state retailer. Neither the Illinois Department of Revenue nor the courts have developed a test to define the term ‘same or similar line of business.’ However, the statutory language suggests that for activities to be considered in the ‘same line of business,’ the retail activities of the in-state and out-of-state retailers must be closely related to each other (e.g., same product lines).

There is also a wide range of interpretative guidance in Illinois with respect to attributional nexus. In Illinois General Information Letter ST 99-0364-GIL (Nov. 29, 1999), an out-of-state company had a mail order business that solicited and sold to Illinois residents. The company had no other contacts with the state, and thus was not collecting Illinois sales or use taxes on its direct mail sales. The out-of-state company was planning to set up agency agreements with retailers based in Illinois, and inquired as to whether these agency agreements would create nexus with Illinois, and require the company to collect use and sales tax on its direct mail sales. The Department stated that agency agreements with in-state retailers generally did *not* create nexus with Illinois, as long as the retailers resold the products only on their own behalf. The Department suggested that there would be nexus if the retailers were divisions of the out-of-state company, were authorized to solicit orders on behalf of the out-of-state company, or were otherwise authorized to act as representatives of the out-of-state company in any other capacity.

In Illinois General Information Letter ST 99-0352-GIL, (Nov. 18, 1999), a company planned to open a processing facility in Illinois. This facility would receive and process books that were rejected by customers of an out-of-state publisher. The out-of-state publisher used only common carriers and the U.S. Postal service to ship the books, and otherwise had no contacts with Illinois. The processing company inquired as to whether it would be subject to use taxes or service occupation taxes, and also inquired as to whether its presence would subject to out-of-state publisher to sales and use tax collection duties in Illinois. The Department stated that the processor's presence would not create nexus between the out-of-state publisher and Illinois, as the out-of-state publisher was merely using the company in Illinois to deliver or process merchandise. Also, because the processor was not soliciting sales for the publisher and not otherwise authorized to act for the publisher, no nexus was created over the out-of-state publisher.

In Illinois General Information Letter ST 95-0519-GIL (Dec. 29, 1995), an out-of-state company sold consumer goods by mail and telephone. The out-of-state seller contemplated entering an agreement with a telephone marketing company located in Illinois. The telephone marketing company would solicit orders by telephone and forward the orders to a distributor outside of Illinois for shipment. The Department stated that contracting with the Illinois telemarketer would qualify the out-of-state seller as a 'retailer maintaining a place of business in Illinois.' 86 Ill. Admin. Code 150.201(i). Accordingly, the company would be required to collect and remit state use tax on sales to Illinois customer. However, the Department stated that its conclusion was premised upon the assumption that the telemarketer would act as a sales representative for the out-of-state company.

IV. Analysis

A. Gift Codes Do Not Constitute Tangible Personal Property or Services Subject to Illinois ROT or UT

Gift codes provide consumers with the right to acquire tangible personal property or services from Internet Retailers. Thus, gift codes are intangible rights that represent a form of payment and function as a cash equivalent. Gift codes are not tangible personal property as they cannot be touched, measured, seen or otherwise perceived by the senses. Because gift codes are not tangible personal property, the sale of gift codes is not subject to Illinois ROT or UT. See, Ill. Dept. of Rev. General Info. Ltr. No. ST 07-

0063-GIL (June 12, 2007), see also Ill. Dept. of Rev. General Info. Ltr. No. ST 06-0125-GIL (June 7, 2006); Ill. Dept. of Rev. General Info. Ltr. No. ST 06-0109-GIL (April 28, 2006).

B. Gift Code Issuer Will Not Be Required to Register to Collect Illinois ROT or UT

1. Constitutional Limitations

Gift Code Issuer will not be required to register for and collect Illinois ROT or UT as a result of the Proposed Transactions because Gift Code Issuer will not have a physical presence in the state. Gift Code Issuer sells gift codes, which are intangible rights to purchase property from Internet Retailers, and engages in its business from facilities located wholly outside Illinois. Gift Code Issuer will not have any offices or employees in Illinois, nor will Gift Code Issuer own real or tangible personal property located within the state. Therefore, Gift Code Issuer will not satisfy *Quill's* physical presence nexus standard.

Gift Code Issuer will not establish attributional nexus with Illinois because no representatives will be performing market-related activities in Illinois on Gift Code Issuer's behalf. As discussed above, Gift Code Issuer sells gift codes to Wholesalers for resale; Wholesalers then resell the gift codes to Retail Establishments or directly to consumers at Retail Establishments. The activities that will be performed by Wholesalers and Retail Establishments in Illinois will be performed for the benefit of those entities and not for Gift Code Issuer's benefit. Thus, Gift Code Issuer will not have nexus with Illinois by virtue of others' Illinois activities.

2. Illinois Law

Gift Code Issuer will not be required to register to collect and remit Illinois ROT or UT because Gift Code issuer is not a 'retailer' under Illinois law. As discussed above, a 'retailer' is defined as a person engaged in the business of making 'sales at retail,' which are defined as 'the transfer of ownership of tangible personal property for the purpose of use...' 35 Ill. Comp. Stat. § 105/2. Gift Code Issuer is not a 'retailer' because Gift Code Issuer does not make sales of tangible personal property. Rather, Gift Code Issuer sells gift codes that are not subject to Illinois tax.

Gift Code Issuer will not be required to register to collect and remit ROT or UT because Gift Code Issuer will not maintain a place of business in Illinois. Gift Code Issuer conducts its business wholly from outside of the state, and will not have any real or tangible personal property or employees in the state. Specifically, Gift Code Issuer will not have an office, distribution house, sales house, warehouse or other place of business in the state, nor will it have an agent or other representative operating within Illinois under the authority of Gift Code Issuer or its subsidiary. Further, Gift Code Issuer will not solicit orders for tangible personal property by means of telecommunications, advertising, by mail or cable. Nor will Gift Code Issuer have a franchisee or licensee operating under its trade name.

Finally, Gift Code Issuer will not fall within the state's affiliate nexus provision. The affiliate nexus provision under Illinois law has the following two requirements: (1) an in-state retailer and out-of-state retailer are 'controlled' by the same interests; and (2) the in-state retailer engages in the 'same or similar line of business' in Illinois as the out-of-

state retailer. In this case, the requirements are not met. There is no common interest controlling Gift Code Issuer and an in-state retailer who is engaged in a similar line of business in Illinois.

Gift Code Issuer is not subject to Illinois' registration and collection requirements.

C. Affiliate Internet Retailers Will Not Be Required to Register and Collect Illinois ROT or UT

1. Constitutional Limitations

Affiliate Internet Retailers also will not be required to register and collect Illinois sales and use tax based upon U.S. Constitutional principles. Affiliate Internet Retailers are Internet sellers of tangible personal property and services, and engage in business from facilities located wholly outside Illinois. All deliveries of tangible personal property to Illinois consumers will continue to be made into the state via common carrier. Affiliate Internet Retailers will not have any offices or employees in Illinois, nor will they own real or tangible personal property located in the state. Therefore, Affiliate Internet Retailers will not satisfy *Quill's* physical presence standard..

Affiliate Internet Retailers also lack nexus with Illinois based upon the attributional nexus standard established in *Tyler Pipe* because no other entity is performing market-related activities in Illinois on behalf of Affiliate Internet Retailers. Under the Proposed Transactions, gift codes will be sold to Illinois consumers at Retail Establishments. Consumers may redeem the gift codes for goods and services with any Internet Retailer in the Internet Marketplace, and the terms of redemption are the same whether the consumer purchases property or services from an affiliate or other Internet Retailer. Finally, as discussed above, all of the activities performed by Wholesalers and the Retail Establishments in Illinois will be performed for the benefit of those entities' own sales of gift codes within the state. For each of these reasons, Affiliate Internet Retailers will not acquire nexus with Illinois by virtue of Wholesalers' or Retail Establishments' physical presence or activities within the state.

2. Illinois Law

Affiliate Internet Retailers will not be required to register to collect and remit Illinois ROT or UT as a result of the Proposed Transactions because they do not maintain a place of business within the state. Affiliate Internet Retailers conduct business wholly from outside of the state, and will not have any real or tangible personal property or employees in the state. They will not have an office, distribution house, sales house, warehouse or other place of business in the state, nor will they have an agent or other representative operating within Illinois under their authority. Further, Affiliate Internet Retailers will not solicit orders for tangible personal property by means of telecommunications, advertising, by mail or cable. Nor will Affiliate Internet Retailers have a franchisee or licensee operating under their trade name.

Affiliate Internet Retailers also will not be required to register to collect and remit Illinois tax under the state's affiliate nexus provision. As discussed above, Illinois' affiliate nexus provisions have two requirements: (1) an in-state retailer and out-of-state retailer must be 'controlled' by the same interests; and (2) the in-state retailer must engage in the 'same or similar line of business' in Illinois as the out-of-state retailer. Affiliate

Internet Retailers are not related to any in-state retailers who are engaged in a similar line of business and thus this provision does not apply.

Affiliate Internet Retailers are not subject to Illinois' registration and collection requirements.

D. The Aforementioned Conclusions Will Not Change if Gift Code Issuer Sells Directly to Retail Establishments Located in Illinois

In the event that Gift Code Issuer sells gift codes directly to Illinois Retail Establishments for resale to consumers within the state (rather than to Wholesalers), the aforementioned conclusions will not change. The direct sale of gift codes to Retail Establishments will not cause Gift Code Issuer or Affiliate Internet Retailers to have a physical presence in the state, as they will continue to engage in business from facilities located outside of Illinois, and will not have any offices, employees or property in Illinois. Moreover, the activities performed by Retail Establishments in Illinois will inure to the benefit of the Retail Establishments. Retail Establishments will not be performing market-related activities on Gift Code Issuer's or Affiliate Internet Retailer's behalf. Similarly, Gift Code Issuer's direct sales to Retail Establishments will not create an Illinois statutory registration and collection responsibility.

V. Conclusions

1. Gift Code issuer will not be subject to Illinois's [sic] ROT and UT registration and collection responsibilities under the Proposed Transactions. This conclusion will not change if Gift Code Issuer sells gift codes directly to Retail Establishments.
2. Affiliate Internet Retailers will not be subject to Illinois's [sic] ROT and UT registration and collection responsibilities under the Proposed Transactions. This conclusion will not change if Gift Code Issuer sells gift codes directly to Retail Establishments.

In advance of the issuance of a response to this request for a ruling, we respectfully request that the Department of Revenue contact us to discuss any facts or questions that may arise. Please feel free to contact INDIVIDUAL.

DEPARTMENT'S RESPONSE:

A request for a Private Letter Ruling must be made by an identified taxpayer or by a taxpayer's representative under a power of attorney from that identified taxpayer. The Department will not issue Private Letter Rulings to taxpayer representatives for anonymous or unidentified taxpayers. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which 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 subsections (b) and (c), which can be found on the Department's Internet website.

NEXUS

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.

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.

GIFT CODES/CARDS

It is important to note that when a gift card is redeemed, tax is due on the selling price of the item purchased, whether partially or wholly funded by a gift card. Persons who are engaged in the business of selling cards or coupons, which entitle purchasers to the right to redeem those cards for tangible personal property, are not engaged in selling tangible personal property. Rather, they are making sales of intangibles. Such sales are not subject to the Retailers’ Occupation Tax. However, when those cards or coupons are redeemed for tangible personal property, retailers transferring tangible personal property incur Retailers’ Occupation Tax liability based on their gross receipts from sales.

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

DMB:msk