

ST 13-0036-GIL 07/31/2013 MISCELLANEOUS

This letter responds to an annual survey. See 86 Ill. Adm. Code, Parts 120, 130, 140, and 160. (This is a GIL.)

July 31, 2013

Dear:

This letter is in response to your email dated June 10, 2013, 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](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:

The UNIVERSITY, in conjunction with PUBLISHER, annually undertakes a major information collection effort with respect to the application of the tax laws of the states. UNIVERSITY's goal in gathering this information is to assemble and publish the GUIDE. As the market has shown, such a publication is a useful reference source for departments of revenue, attorneys, corporate tax departments, and public accounting firms.

UNIVERSITY is in the process of updating the *Guide* for its 2014 annual edition. Accordingly, we ask for your state's assistance in preparing this important publication. I have attached two Microsoft Word files—one for income tax and one for sales tax—to serve as this year's questionnaire. The questionnaire follows the same format as in past years. (If you do not have a copy of your 2012 response, and it would be helpful to you in completing the 2013 questionnaire, please let me know and I will email you a copy.)

This year, the numbering scheme and the sequence of the questions remains essentially the same. Also, please note that the new questions are highlighted in red font. Therefore, you should be able to easily follow the changes from last year to this year. Because of anticipated time constraints for respondents, again this year we are asking that you only respond to the questions for which your answers require a change and the new questions. All unanswered questions will be considered the same as last year's answer unless otherwise noted.

Please complete the 2013 questionnaire and return it by July 15, 2013. The enclosed questionnaire should be answered in accordance with laws in effect as of July 1, 2013. If there is legislation pending or recently enacted that would alter your answers, please explain any such changes that you are aware of at the time the questionnaire is completed.

Beginning in the fall 2000, UNIVERSITY began a tuition assistance program for state department of revenue employees in appreciation for their assistance in publishing the GUIDE. A limited amount of tuition assistance is available for courses in UNIVERSITY's Online Graduate Certificate in State and Local Taxation. This Certificate program is the first of its kind in the nation to be offered totally online. To receive the Certificate, students must complete the four-course curriculum. For further information about the program or available tuition assistance contact Mr. Z at the UNIVERSITY.

If you have any questions about the questionnaire or a specific question, please contact me. Thank you for your continued cooperation and support. Your contributions are extremely valuable in maintaining the quality of this outstanding reference work. A complimentary copy of the *2014 GUIDE* will be sent to you when it is published next year.

#### DE MINIMIS RULE FOR SALES TAX NEXUS

- Does your state provide a *de minimis* level of activity below which in-state sales activity can be conducted without creating nexus?  Yes  No
  - If YES, what is the standard?
    - 1 day
    - Less than 3 days
    - Less than 5 days
    - Other, explain: \_\_\_\_\_

**[64] BUY ONE, GET ONE FREE (BOGO).** Vendors frequently offer additional products as free incentives to induce customers to purchase their product. These incentive programs are frequently referred to as “buy one, get one free” programs. They have grown in popularity in recent years.

- If a vendor offers a free item with the purchase of a specific item, i.e., buy product ABC, get product XYZ for free, assuming no increase in price for the item purchased (item ABC), does the vendor owe use tax on the cost of the free item (item XYZ)?
- If a vendor offers a 50% discount on the purchase of the second item with the purchase of the first item (buy item ABC, get item XYZ for 50% off list price), does the vendor owe use tax on any portion of the discounted item (item XYZ)?
  - If YES, on what portion?  50%  Other, explain: \_\_\_\_\_
- If the vendor offers a free item (item XYZ) with the purchase of a non-taxable item (item ABC), assuming no increase in price for the item purchased (item ABC), does the vendor owe use tax on the cost of the free item (item XYZ)?
- If the vendor offers free shipping with the purchase of a specific item, assuming no increase in price for the item purchased, does the vendor owe use tax on the cost of the free service, if it is taxable in your state?

**[65] SEMINARS**

YES NO

- |                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> <li>▪ Does your state impose sales tax upon the fee for “live” seminars occurring in your state? <input type="checkbox"/> <input type="checkbox"/></li> <li>▪ If YES, are only certain types of seminars taxed (e.g., personal improvement seminars versus technical topics related to employment)? <input type="checkbox"/> <input type="checkbox"/></li> <li>▪ If YES, what type(s) of seminars are taxed? _____</li> </ul> |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

**[66] WEBINARS.** In recent years the Internet has provided the capability to reach an unlimited audience through Webinars, facilitated by broadcast over the Internet. Typically, these Webinars are initially offered in a live broadcast and then available at a later date as an archived broadcast. The primary distinction between the live and archived broadcast is the ability of the participant to interact with the instructor and others during the Webinar.

YES NO

- |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> <li>▪ Does your state impose tax upon live Webinars that allow for interaction between the instructor and student during the broadcast? <input type="checkbox"/> <input type="checkbox"/></li> <li>▪ If YES, do you consider it taxable as a service or a digital audiovisual work?<br/> <input type="checkbox"/> Service    <input type="checkbox"/> Digital audiovisual work    <input type="checkbox"/> Other, explain: _____</li> </ul> |
| <ul style="list-style-type: none"> <li>▪ Does your state impose tax upon archived Webinars that allow participants to listen to earlier broadcasts without the opportunity for interaction with the instructor during the program? <input type="checkbox"/> <input type="checkbox"/></li> </ul>                                                                                                                                                                                |
| <ul style="list-style-type: none"> <li>▪ If archived Webinars are taxable because they lack interaction between the instructor and students, would they still be taxable if students had an opportunity to ask questions via email to a facilitator who may or may not be the instructor in the Webinar or take a test to demonstrate knowledge gained from the program? <input type="checkbox"/> <input type="checkbox"/></li> </ul>                                          |
| <ul style="list-style-type: none"> <li>▪ Frequently, books and other study materials are provided as part of the fee for seminars and Webinars. If these materials are provided at no additional charge to the fee for the program, does the seminar provider owe use tax on the cost of the materials provided? <input type="checkbox"/> <input type="checkbox"/></li> </ul>                                                                                                  |
| <ul style="list-style-type: none"> <li>▪ If the materials are self-produced by hiring writers to develop and publish them, are those aggregate charges subject to tax, i.e., costs of the writers, editors, paper, etc. used to publish the study materials? <input type="checkbox"/> <input type="checkbox"/></li> </ul>                                                                                                                                                      |
| <ul style="list-style-type: none"> <li>Is some portion of the aggregate charge for development of the materials not taxable? For example, are the fees or wages paid to writers and editors for the materials non-taxable? <input type="checkbox"/> <input type="checkbox"/></li> <li>▪ If YES, what portion of the charges are non-taxable? _____</li> </ul>                                                                                                                  |

**DEPARTMENT’S RESPONSE:**

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.

Section 2a of the Retailers' Occupation Tax Act, 35 ILCS 120/2a, makes it unlawful for any person to engage in the business of selling tangible personal property at retail in Illinois without first obtaining a certificate of registration from the Illinois Department of Revenue. This applies to all persons whether they sell at swap meets, flea markets, or as transient vendors along the roadside.

The Department sometimes has collection officers at Illinois swap meets and flea markets who are authorized to collect and provide receipts for Retailers' Occupation Tax incurred at the event. Any such tax liability paid directly to a Department collection officer that is evidenced by a receipt need not be reported to the Department on a return. See 86 Ill. Adm. Code 130.2045, 130.501 and 130.510.

The State applies the foregoing standards to determine nexus. It does not have a "de minimis" standard.

### Discounts

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.

Gross receipts subject to Retailers' Occupation Tax are defined as all the consideration actually received by the seller. If a seller provides a discount to a purchaser and does not receive a reimbursement or rebate from any source for that discount, only the (discounted) amount received by the seller is taxable. For example, if a retailer sells an item for \$10 and the purchaser provides the retailer with a \$1 in-store coupon for which the retailer receives no reimbursement from the manufacturer of the item or any other source, the retailer's gross receipts of \$9 are subject to Retailers' Occupation Tax. See 86 Ill. Adm. Code 130.2125(b)(1).

When a retailer receives full or partial coupon reimbursement (from a manufacturer, distributor or any other source), the retailer incurs Retailers' Occupation Tax liability on the receipts received from the purchaser and the amount of any coupon reimbursement. For example, if a retailer lists an item for sale for \$15 and the purchaser provides the retailer with a \$5 manufacturer's coupon for which the retailer receives full reimbursement from the manufacturer of the item, the retailer's gross receipts are the \$10 received from the customer and the \$5 received from the manufacturer for a total of \$15 that is subject to Retailers' Occupation Tax. See 86 Ill. Adm. Code 130.2125(b)(2).

When a retailer provides a purchaser with the opportunity to receive a free item conditioned on the purchase of a separate item (two-for-one, buy one get one free, etc.), with or without a coupon issued by the retailer, the retailer's gross receipts are measured only by the amount actually received from the purchaser for both items. Thus, tax is only incurred on the amount actually received from the purchaser. The retailer does not incur tax based upon the value of the free item received because technically the item was not free and no gift was intended. The retailer was simply offering a special price for both items sold. The result presumes that the retailer is not being reimbursed for the free item by the manufacturer or other source.

Likewise, if a retailer provides a customer with a card, coupon or other certificate later to be used to reduce ("discount") the purchase price of an item or items and the retailer is not to be reimbursed for that discount from a manufacturer or any other source, the amount representing that discount would not be subject to Retailers' Occupation Tax liability. See in general 86 Ill. Adm. Code 130.2125(b)(1).

### Seminars and Webinars

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 servicemen depending upon his activities. See 86 Ill. Adm. Code 140.101 through 140.109 regarding sales of service and Service Occupation Tax.

Under the Service Occupation Tax Act, businesses providing services (*i.e.* servicemen) are taxed on tangible personal property transferred as an incident to sales of service. See 86 Ill. Adm. Code 140.101. The purchase of tangible personal property that is transferred to the service customer may result in either Service Occupation Tax liability or Use Tax liability for the servicemen depending upon his activities. The serviceman's liability may be calculated in one of four ways: (1) separately-stated selling price of tangible personal property transferred incident to service; (2) 50% of the servicemen's entire bill; (3) Service Occupation Tax on the servicemen's cost price if the servicemen are registered

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de minimis servicemen; or (4) Use Tax on the servicemen's cost price if the servicemen are de minimis and are not otherwise required to be registered under Section 2a of the Retailers' Occupation Tax Act.

See the Department's Administrative Rule concerning the taxation of seminar materials. 86 Ill. Adm. Code 140.129.

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