

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

January 2, 2014

Dear Xxxxx:

This letter is in response to your letters dated March 22, 2013, and October 9, 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 to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provide

On behalf of #1 COMPANY (the 'Company') #2 COMPANY (the PLATFORM COMPANY'), #3 COMPANY and #4 COMPANY, we respectfully request the Illinois Department of Revenue to issue a Private Letter Ruling pursuant to 2 Ill. Adm. Code 1200.110 with respect to the factual situation set forth below.

Preliminary Information

- Enclosed please find original Forms IL-2848, Power of Attorney, authorizing us to represent the Company, PLATFORM COMPANY, #3 COMPANY and #4 COMPANY before the Illinois Department of Revenue (the 'Department').
- This Private Letter Ruling ('PLR') is requested to determine the Retailers' Occupation Tax and Use Tax consequences of the actual business practices of the Company, the PLATFORM COMPANY, #3 COMPANY and #4 COMPANY.
- To our knowledge, neither the Company, nor the PLATFORM COMPANY, or #3 COMPANY or #4 COMPANY is involved in an audit or litigation pending with the Department in regard to this or any other tax matter.
- To our knowledge, the Department has not previously ruled on the same or similar issue for the Company, the PLATFORM COMPANY, #3 COMPANY and #4 COMPANY.
- In addition, neither the Company, nor the PLATFORM COMPANY, or #3 COMPANY or #4 COMPANY has submitted the same or similar issue to the Department.

- The Company, PLATFORM COMPANY any, #3 COMPANY and #4 COMPANY request that certain information be redacted from the PLR prior to dissemination to others. Please delete the name and address of the Company, the PLATFORM COMPANY, #3 COMPANY and #4 COMPANY, and please delete the quoted excerpts from the agreements of the Company and the PLATFORM COMPANY with local retail merchants and #3 COMPANY and #4 COMPANY. Please also delete amended copies of the website screenshots.
- Neither the Company, nor the PLATFORM COMPANY, #3 COMPANY and #4 COMPANY is not aware of any authority contrary to the authorities referred to and cited below.

Statement of Material Facts

The Company's Web Platform (Illinois-Retailer-to-Illinois-Customer Online Sales)

The Company provides an internet platform for customers to order specialty food items and culinary delicacies online from local 'brick-and-mortar' retail merchants in Illinois. The Company's website, lists for sale a variety of locally grown items, organic foods and hand-prepared products, including fresh produce, meats, seafood, chocolates, breads and sauces. The website is designed to enable customers to shop both by perusing virtual shopping market aisles (i.e., by category of food type) and by reviewing products listed by local retail merchant vendors.

The web platform provides a retailer-to-consumer online format offering an intuitive, appealing and user-friendly centralized marketplace for specialty food items. The web platform serves as an intermediary processing and collection agent for local retail merchants to reach individual buyers seeking online access to products not offered among the generic, mass-produced items available at national supermarket chains. After an order is placed on the web platform, the local retail merchant vendor typically prepares and packages the items comprising the order for pick-up. An unrelated logistics company, hired by the Company to provide delivery services, then picks up the order and brings it to a third-party warehouse, where the Company has rented storage space, to be sorted and aggregated for delivery to the customer. Some local retail merchant vendors use the Company's rented space at the third-party warehouse to facilitate order fulfillment. (In the case of a local retail merchant vendor's use of the Company's rented storage space, the Company will receive and fulfill the customer's order with respect to the stored items on the retailer's behalf.) Most orders are delivered to the customer by the logistics provider. A small percentage of the orders, though, are mailed to the customer via common carrier (FedEx, UPS, USPS).

Certain of the products listed and sold on the Company's web platform are offered and fulfilled by a limited liability company under common ownership with the Company, #3 COMPANY. The Company has the same written agreement for the use of its web platform by #3 COMPANY as it does with each of the unrelated local retail merchant vendors. #3 COMPANY is operated entirely separate and completely independent of the Company. #3 COMPANY has its own federal tax identification number and is registered with the Illinois Department of Revenue for purposes of the Retailers' Occupation Tax and Illinois Use Tax. The products of #3 COMPANY available on the

web platform currently consist of certain produce items, although these offerings may be expanded in the future to include a broader variety of items.

The logistics company hired by the Company to deliver orders to Illinois customers is a for-hire trucking company based in Illinois. The logistics company is responsible for operating, maintaining and servicing the delivery trucks. However, because of regulations governing the use of vehicle advertisements, the Company and the logistics provider agreed that certificate of title with respect to the trucks would be registered in the Company's name in order to allow the Company's name and logo to be displayed on the trucks. The logistics provider, though, maintains full operational control over the trucks and the deliveries.

The Company's agreement with the local retail merchant vendors (including #3 COMPANY) provides that, as the operator of the web platform, the Company must receive complete information from the local retail merchant vendors for listing correct Retailers' Occupation Tax ('ROT') amounts for the corresponding products sold on the web platform. Local retail merchant vendors set the pricing schedule for the products listed on the web platform, although they are required to increase the listed product prices by up to X%, if and to the extent that, the Company so requests. Customers do not pay any markup, commission, fee, premium or other charge or compensation for accessing and using the Company's web platform. The Company remits (net of its commissions and other charges) the gross purchase price collected from the customers to the local retail merchant vendors, plus the ROT amounts calculated on the gross purchase price. The details of the local retail merchant vendors' ROT responsibility are set forth in the Company's agreement with each of the local retail merchant vendors, as follows:

[REDACTED].

Interstate (STATE-Retailer-to-Illinois-Customer) Sales on the STATE Web Platform

The PLATFORM COMPANY provides a similarly-formulated and structured parallel web platform (the 'STATE Web Platform') for local retail merchant vendors in the greater CITY, STATE, area selling specialty food items to individual customers. The STATE Web Platform, which shares the online address offers customers located in Illinois (and elsewhere in the U.S.) the ability to purchase products listed for sale by local retail merchant vendors in CITY. An interstate (STATE-retailer-to-Illinois-customer) order submitted on the STATE Web Platform is processed and fulfilled in a similar manner as intrastate Illinois orders submitted on the Company's web platform, as described above. When an Illinois customer orders products from a local retail merchant vendor in CITY using the STATE Web Platform, the corresponding items usually are prepared and packaged by the CITY retail merchant vendor. (If the STATE local retail merchant vendor has the particular items ordered warehoused in the PLATFORM COMPANY's rented storage space, then the PLATFORM COMPANY will process and fulfill the order with respect to the particular stored item.) An unrelated logistics company operating in CITY and hired by the PLATFORM COMPANY picks up the items for intermediary storage at CITY warehouse space rented by the PLATFORM COMPANY. Theo [sic] order is then compiled and mailed to the customer in Illinois. All interstate (STATE-retailer-to-Illinois-customer) orders are delivered to Illinois customers using common carrier shipping (FedEx, UPS, USPS).

The PLATFORM COMPANY uses the same agreement as the Company with respect to its local retail merchant vendors, as described above. The local retail merchant vendors in CITY do not maintain any business or have any presence in Illinois – they do not have own or lease any tangible personal property or real estate in Illinois, they do not employ any individuals or hire any agents or representatives in Illinois and they do not engage in any other type of commercial activity in Illinois which could be considered a retail business in Illinois. Thus, in the case of an interstate (STATE-retailer-to-Illinois-customer) order sold and fulfilled using the STATE Web Platform, no Illinois Use Tax is charged and collected from the Illinois customers because no ROT is incurred by the out-of-state by the local retail merchant vendors in CITY.

In the future, certain of the products listed for sale on the STATE Web Platform may include offerings of a limited liability company under common ownership with the PLATFORM COMPANY and the Company, #4 COMPANY. The PLATFORM COMPANY has entered into the same written agreement for the anticipated future use of the STATE Web Platform by #4 COMPANY as the one used for unrelated local retail merchant vendors in the CITY area. #4 COMPANY is operated entirely separate and completely independent of both the PLATFORM COMPANY and the Company. #4 COMPANY has its own federal tax identification number and is registered with the STATE for collecting and remitting the STATE sales and use tax. Although no products of #4 COMPANY currently are listed on the STATE Web Platform, it is anticipated that items of #4 COMPANY will soon be available on the STATE Web Platform for purchase by Illinois customers. Similar to the unrelated local retail merchant vendors in CITY, #4 COMPANY does not maintain any business or have any presence or contacts in Illinois which could be [sic] give rise to a retail business for purposes of the ROT and Illinois Use Tax (#4 COMPANY does not and will not own or lease any tangible personal property or real estate in Illinois, and does not and will not employ any individuals or hire any agents or representatives in Illinois).

The Contemplated Web Platforms (Out-of-State-Retailer-to-Illinois-Customer Sales)

It is contemplated that not-yet-formed limited liability companies under common ownership with the Company and the PLATFORM COMPANY ('Contemplated Web Platform Companies') will be used to expand the current network of two web platforms (namely, the web platform operated by the Company and the STATE Web Platform operated by the PLATFORM COMPANY) to include additional web platforms for retail merchant vendors located in states other than Illinois and STATE (the 'Contemplated Web Platforms'). In the same manner that the STATE Web Platform in CITY replicates and operates in parallel fashion to the Company's web platform in Illinois, the Contemplated Web Platforms would be formulated and operated as part of the multiple web platform structure of one-web-platform-per-state in states besides Illinois and STATE. The Contemplated Web Platforms would enable retail merchant vendors in other states besides Illinois and STATE to list for sale their specialty food items.

In addition, not-yet-formed limited liability companies under common control with the Company and the PLATFORM COMPANY ('Future Affiliated Local Retailers') may be separately established and independently operated in other states besides Illinois and STATE in order to sell specialty food items on the Contemplated Web Platforms to Illinois customers (as well as non-Illinois customers). If and to the extent that Future

Affiliated Local Retailers are established, they would operate on a single-company-per-state basis, similar to #3 COMPANY and #4 COMPANY, respectively. Each Future Affiliated Local Retailer would register to collect local sales and use taxes in the particular state and local jurisdiction in which it operates, and the Future Affiliated Local Retailers would not charge Illinois Use Tax to Illinois customers with respect to sales on the Contemplated Web Platforms, since no ROT would be incurred by the Future Affiliated Local Retailers. Like #4 COMPANY and the unrelated local retail merchant vendors in CITY, the Future Affiliated Local Retailers would not maintain any business or have any other presence or contacts in or with Illinois which could give rise to a retail business for purposes of the ROT. Each of the Future Affiliated Local Retailers would be completely independent of the particular Contemplated Web Platform Company which is located in the same state as the local Affiliated Local Retailer as well as the other Contemplated Web Platform Companies in other states.

Ruling Requested

On behalf of the Company, the PLATFORM COMPANY, #3 COMPANY and #4 COMPANY we respectfully request that the Illinois Department of Revenue provide the following rulings:

- The Company's Web Platform
- The Company will not be liable for the Illinois Retailers' Occupation Tax ('ROT') or Illinois Use Tax with respect to intrastate (Illinois-retailer-to-Illinois-customer) sales of products by local retail merchant vendors in Illinois (including #3 COMPANY).
- #3 COMPANY
- #3 COMPANY, as well as other local retail merchant vendors in Illinois, will only be liable for the ROT on sales of products on the Company's web platform to Illinois customers. Illinois local retailer merchant vendors, including #3 COMPANY, will not incur any ROT liability with respect to sales of products on the Company's web platform to out-of-state customers because delivery of all such orders will be made by common carrier.
- The PLATFORM COMPANY
- Neither the Company nor the PLATFORM COMPANY will be liable for the ROT or the Illinois Use Tax with respect to interstate (STATE-retailer-to-Illinois-customer) sales of products by local retail merchant vendors in STATE, including anticipated sales of products by #4 COMPANY, on the STATE Web Platform.
- #4 COMPANY
- #4 COMPANY will not be required to collect and remit the Illinois Use Tax by reason of its anticipated sales of products on the STATE Web Platform to Illinois customers, because #4 COMPANY will not be deemed to have nexus to the state of Illinois for purposes of the ROT.
- The Contemplated Web Platforms

The Contemplated Web Platform Companies will not be liable for the ROT or the Illinois Use Tax with respect to interstate (out-of-state-retailer-to-Illinois-customer) sales of products by local retail merchant vendors (including Future Affiliated Local Retail Companies) in any of the continental United States besides Illinois and STATE on any of the Contemplated Web Platforms to Illinois customers.

- The Future Retail Companies

The Future Affiliated Retail Companies will not be required to collect and remit the Illinois Use Tax by reason of its anticipated sales of products on the Contemplated Web Platforms to Illinois Customers, because none of the Future Affiliated Retail Companies will be deemed to have nexus to the state of Illinois for purposes of the ROT.

Relevant Authorities and Factual Analysis

The Illinois Retailers' Occupation Tax is imposed upon persons engaged in Illinois in the business of selling at retail tangible personal property. 86 Ill. Adm. Code 130.101. The Illinois Use Tax is imposed on purchasers by taxing the use of tangible personal property in Illinois purchased at retail from a retailer See 86 Ill. Adm. Code 150.101. 'Purchase at retail' means the acquisition of the ownership of, or title to, tangible personal property through a sale at retail. 86 Ill. Adm. Code 150.201(b). 'Sale at retail' means any transfer of the ownership of or title to tangible personal property to a purchaser, for the purpose of use, and not for the purpose of resale in any form as tangible personal property for a valuable consideration (See 86 Ill. Adm. Code 150.201(d)).

The Company's Web Platform

Section 130.1915 of the Illinois Department of Revenue Regulations imposes an ROT obligation on the part of an 'agent', 'auctioneer' or other intermediary selling agent only where such agent is 'acting on behalf of undisclosed principal' retailer. These regulations that the state ROT does not apply to an intermediary selling agent who is 'acting on behalf of a known or disclosed principal' retailer. Rather, when an intermediary selling agent is acting for a known or disclosed principle retailer, the receipts from the sale are taxable only to the principal retailer (as long as such principal retailer is engaged in the business of selling property). Under the regulations, a principal retailer is deemed to be disclosed to a purchaser when the principal retailer is made known to the purchaser at or before the time of the sale. Thus, it is clear that when an intermediary selling agent makes a sale for a disclosed principal retailer, the disclosed principal is the only person responsible for ROT on the sale.

In ST 07-0027-GIL (May 16, 2007), the Department discussed whether the provider of an [sic] web platform for the sale of school yearbooks to students would be liable for the ROT under 86 Ill. Adm. Code 130.1915 discussed above. The web platform in that case processed the orders submitted online and billed the school's students for the purchased yearbooks. The web platform provider also operated a call center for assisting with the yearbook sales. Payment for the yearbooks purchased online was collected by the web platform operator (students made checks out to the order of the

website), and the corresponding amounts were then remitted to the school with a deduction by the web platform operator for its fee. The Department concluded that the ROT liability of the web platform operator depended on whether or not the students purchasing the yearbooks were disclosed or knew that the website was selling the yearbooks on behalf of the school.

As elaborated on above, the Company's web platform operates as a retailer-to-consumer virtual marketplace for local specialty food items. The web platform functions precisely as the type of intermediary selling agent described in 86 Ill. Adm. Code 130.1915. All of the local retail vendor merchants located in Illinois are registered as retailers with the Department of Revenue.

Every individual item listed for sale on the Company's web platform is clearly identified as being sold by the corresponding local retail merchant vendor, including items listed by #3 COMPANY. In fact, many of the products listed for sale are specifically associated by customers with particular local retail merchants because of the specialized or unique nature of the product. Each of the items listed on the web platform for sale are displayed under a prominent overhead banner specifically identifying the particular local retail merchant vendor's name (see website screenshot attached hereto as Exhibit A). In addition, underneath the display of every item on the web platform, there is a second graphic listing the name of the corresponding local retail merchant vendor and providing a link to additional background information on the web platform about the particular merchant vendor including #3 COMPANY (see website screenshot attached hereto as Exhibit B).

The STATE Web Platform and The Contemplated Web Platforms

Effective July 1, 2011, an out-of-state entity may be required to register and collect Illinois Use Tax if such out-of-state entity has a contract with a person in Illinois under which –

- the out-of-state entity sells the same or substantially similar products as the Illinois resident using an identical or substantially similar name, trade name, or trademark as the Illinois resident, and
 - the out-of-state entity pays a commission or other consideration to the Illinois resident based on the out-of-state entity's sales of tangible personal property, and
 - the out-of-state entity's cumulative gross receipts from all sales made to Illinois customers under all such contracts exceed \$10,000 over the previous four quarterly periods.
- 35 Ill. Comp. Stat. 105/2.

As elaborated on above, the PLATFORM COMPANY and the Company separately operate and distinctly maintain parallel web platforms. The STATE Web Platform only lists for sale products offered by local retail merchant vendors in the CITY, STATE area. The Companies web platform only lists items for sale of local retail merchant vendors in Illinois. The PLATFORM COMPANY does not enter into contractual agreements, maintain any business relationship with or pay any commissions to the Company or any local retail merchant vendors in Illinois (including #3 COMPANY). Likewise the Company does not enter into any contracts, maintain any other business relationship

with or pay any compensation to retail merchant vendors located in CITY (including #4 COMPANY) or elsewhere outside of Illinois. Customers in Illinois ordering items from local retail merchant vendors in CITY do so only by accessing and using the STATE Web Platform. Illinois customers cannot submit orders for any out-of-state local retail merchant vendors' products (including any items which may be listed for sale in the future by #4 COMPANY) on the Company's web platform. Thus, the PLATFORM COMPANY is not required to register and collect Illinois Use Tax with respect to interstate (CITY-to-vendor-to-Illinois-customer) orders, because the PLATFORM COMPANY does not 'maintain a place of business' in Illinois within the meaning of 35 Ill. Comp. Stat. 105/2.

Even if one were to assume that the PLATFORM COMPANY is within the scope of the application of 35 Ill. Comp. Stat. 105/2 – although, as discussed above, the PLATFORM COMPANY should be treated as not having nexus with Illinois – the operation of the STATE Web Platform serves the same intermediary sales agent function under 86 Ill. Adm. Code 130.1915 as the Company's web platform, more fully explained above. Therefore, the PLATFORM COMPANY should have no ROT or Illinois Use Tax liability under 86 Ill. Adm. Code 130.1915.

Additional web platforms may be established by the Contemplated Web Companies in states beyond Illinois and STATE, as elaborated on above. These web platforms will be operated in tandem, according to a similar parallel structure, with the Company's web platform and the STATE Web Platform. If and to the extent that the existing web platform network is expanded to include future web platforms of the Contemplated Web Platform Companies in additional states, Illinois customers would be able to submit an interstate order from a local retail merchant vendor located outside of Illinois (and STATE) only by accessing the Contemplated Web Platform to be operated in the same state by the corresponding Contemplated Web Platform Company as the particular local retail merchant vendor is located. The Contemplated Web Platform Companies will not enter into any contracts, maintain any business relationships or pay any compensation to the Company or any other person located in Illinois. Accordingly, in the event that Contemplated Web Platforms are established in other states, the Contemplated Web Platform Companies (and the Company, as well) should not be required to register and collect Illinois Use Tax.

Conclusion

We respectfully request that the Department issue the enumerated rulings requested (under the above-heading 'Rulings Requested') for the reasons stated above. If the Department cannot make either such a ruling, we request that the Department contact us to determine what additional information is required or allow these ruling requests to be rescinded.

DEPARTMENT'S RESPONSE:

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. If the purchases occur in Illinois, the purchasers must pay Use Tax to the retailer at the time of purchase. The retailers are then allowed to retain the amount of Use Tax paid to reimburse themselves for the Retailers' Occupation Tax liability incurred on those sales.

The Department spent considerable time evaluating your letter ruling request. After reviewing your request, the Department has decided to decline your request for a nexus determination. We believe that nexus determinations are best made by auditors who are able to conduct the fact-intensive investigation that is required to make these determinations. The following information outlines the principles of nexus. We hope it is helpful to you.

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. Many retailers that do not have nexus with the State have chosen to voluntarily register as Use Tax collectors as a courtesy to their Illinois customers so that those customers are not required to file returns concerning the transactions with those retailers.

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:ikm