

A retailer maintaining a place of business in Illinois must collect tax from users in accordance with the Retailers' Occupation Tax Act and the Use Tax Act by adding the tax to the selling price of tangible personal property, when sold for use. See 86 Ill. Adm. 150.401.

June 19, 2015

Dear Mr. XXXX:

This letter is in response to your letter dated, March 17, 2015, 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:

I am the CFO of COMPANY. (Illinois DOR# XXXX-XXXX; FEIN XX-XXXXXXX), an online textbook retailer located in STATE 1. On DATE, I called your tax help line with some questions I had related to sales and use tax collection and remittance. They were very helpful and answered my questions. However, I was told that in order to get a written response for our records I should send a letter directly to the Illinois Department of Revenue at the above address which is the purpose of this letter.

Facts about the Company:

As mentioned above, COMPANY is an internet retailer selling textbooks via our website XXXXXX.com. We primarily work with colleges and universities who wish to eliminate their book [sic] and mortar bookstores and create a white-labeled online bookstore where their students:

- Can log-on through their university credentials;
- Go to a webpage specifically tailored for them showing their courses and required textbooks for those courses;
- Can choose in what form and from who they wish to buy their textbooks (physical copy in new or used condition; digital textbooks; rental textbooks; purchase from an online marketplace or direct from us or a publisher);

- Choose their method of payment (they can pay by credit card or using financial aid vouchers) provided by the institution or other financial aid programs

Once the student chooses what textbook(s) to purchase, COMPANY:

- Transmits data and delivery instructions to our fulfillment partners to ensure the textbooks are delivered to the student. Our fulfillment partners can be textbook publishers, book rental and used textbooks companies, digital textbook providers and marketplace sellers. In some cases, we fulfill textbooks directly from our own inventory located in STATE 2.
- Creates a billing related to the order. If the student chooses to pay by credit card, we bill the student directly. If the student wishes to pay through financial aid vouchers, we bill and collect monies owed directly from the institution providing the financial, usually the college and university.

Other general facts:

- We are located in STATE 1. All contracts are signed from the STATE 1 office by myself or our CEO;
- We have a salesperson and account manager in Illinois. We have no textbooks, retail locations or other property in the state of Illinois.
- We file tax, sales and use tax and withholding returns in Illinois.

Question 1:

I would like to know what sales tax rate we should be charging Illinois consumers. The tax representative I spoke with on the Illinois tax help line told me that we are only obligated to collect and remit the state rate of 6.25% and the consumer would be responsible for any local taxes. Can you answer two questions for me:

- (1) Is COMPANY'S obligation to collect and remit only the state rate of 6.25%?
- (2) Can we collect the state AND local rate and remit it to Illinois to relieve the consumer of any additional payment obligations?

Questions 2:

Many of the institutions we deal with are either tax exempt themselves or provide financial aid vouchers via programs which are tax exempt. We bill the institutions directly for books purchased via financial aid voucher programs. Can you answer the following questions for me as it relates to consumer purchases made via financial aid:

- (1) In cases where the institutions are tax exempt and students purchase textbooks via their own individual credit cards do we need to collect and remit sales tax. I assume yes since they are making the purchases directly.
- (2) In the cases where the institutions and/or financial aid programs are tax exempt and students purchase textbooks via financial aid vouchers do we need to collect and remit sales tax? Your representative told me that we are not obligated to collect and remit any sales tax since we are billing tax exempt institutions.

I would appreciate if you could send me back a written response at:

NAME
ADDRESS

If you have any questions please feel free to call me at XXX-XXX-XXXX EXT XX.

DEPARTMENT'S RESPONSE:

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 makes sales of tangible personal property in Illinois. 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. Our regulations were recently amended in response to the Illinois Supreme Court's decision in *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130. The regulations specify the selling activities that trigger Retailers' Occupation Tax liability in Illinois.

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. 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).

Another 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.

Beginning July 1, 2011, the definition of a “retailer maintaining a place of business” was amended to include additional types of retailers. A retailer maintaining a place of business also includes a retailer having a contract with a person located in this State under which:

- A. The retailer sells the same or substantially similar line of products as the person located in this State and does so using an identical or substantially similar name, trade name, or trademark as the person located in this State; and
- B. The retailer provides a commission or other consideration to the person located in this State based upon the sale of tangible personal property by the retailer. See 35 ILCS 105/2(1.2).

These provisions only apply if the cumulative gross receipts from sales of tangible personal property by the retailer to customers in this State under all such contracts exceed \$10,000 during the preceding 4 quarterly periods. Please note that in *Performance Mktg. Ass'n, Inc. v. Hamer*, 998 N.E. 2d 54 (2013) the Illinois Supreme Court struck down 35 ILCS 105/2(1.1) and 35 ILCS 110/2(1.1), a “click-thru nexus provision” enacted in 2011. However, new provisions became effective January 1, 2015. The following provisions address the court’s concerns in *Performance Mktg. Ass'n, Inc. v. Hamer*, 998 N.E. 2d 54 (2013).

Beginning January 1, 2015, a retailer maintaining a place of business also includes a retailer having a contract with a person located in this State under which the person, for a commission or other consideration based upon the sale of tangible personal property by the retailer, directly or indirectly refers potential customers to the retailer by providing to the potential customers a promotional code or other mechanism that allows the retailer to track purchases referred by such persons.

Examples of mechanisms that allow the retailer to track purchases referred by such persons include but are not limited to the use of a link on the person's Internet website, promotional codes distributed through the person's hand-delivered or mailed material, and promotional codes distributed by the person through radio or other broadcast media. These provisions apply only if the cumulative gross receipts from sales of tangible personal property by the retailer to customers who are referred to the retailer by all persons in Illinois under such contracts exceed \$10,000 during the preceding 4 quarterly periods ending on the last day of March, June, September, and December. A retailer meeting these requirements shall be presumed to be maintaining a place of business in Illinois but may rebut this presumption by submitting proof that the referrals or other activities pursued within this State by such persons were not sufficient to meet the nexus standards of the United States Constitution during the preceding 4 quarterly periods. See ILCS 105/2(1.1).

Your letter mentions that you have a salesperson and account manager in Illinois. Based on this information it would appear that you are required to be registered and collect Use Tax. However, although this may be the case, the activities you describe in your letter may trigger Retailers’ Occupation Tax liability, including local taxes. Without more detailed information, we are unable to make this determination. We suggest you refer to our regulations on sourcing. See, for example, 86 Ill. Adm. Code 693.115(d)(3). For sales over the internet, the Department will presume that the retailer's predominant selling activities take place outside of this State. Therefore, no local taxes will apply, and such a sale would be subject to the Illinois Use Tax Act. In such cases, the

retailer should collect and remit the general merchandise rate of 6.25% unless there is clear and convincing evidence the retailer's predominant and most important selling activities take place in this State. Clear and convincing evidence sufficient to overcome the presumption provided for in this subsection (d)(3) includes, but is not limited to, the following circumstances:

A) the tangible personal property that is sold is in an inventory in the possession of the retailer located within a jurisdiction in Illinois at the time of its sale (or is subsequently produced by the retailer in the jurisdiction), in which case the retailer is engaged in the business of selling in the jurisdiction where the property is located at the time of the sale with respect to that sale;

B) the customer takes possession of the tangible personal property at a place of business owned or leased by the retailer in the State, in which case the retailer is engaged in the business of selling in the jurisdiction where the customer takes possession of the property with respect to that sale.

A retailer maintaining a place of business in Illinois must collect tax from users in accordance with the Retailers' Occupation Tax Act and the Use Tax Act by adding the tax to the selling price of tangible personal property, when sold for use. See 86 Ill. Adm. 150.401. The retailer may not pay the tax that is owed in lieu of collecting it from the consumer.

In your letter, you also ask about purchases made by students who attend tax exempt institutions. Tangible personal property may only be purchased tax free when the sale is made directly to the exempt organization, which possesses a valid and active exemption identification number (E-number). Based on the facts provided in your letter, it is not clear whether you are selling to schools, but in the event that you are selling books to a school, the school should provide a resale certificate when it purchases the books if the school will subsequently resell such books.

Your letter mentions that your website also sells digital textbooks. The Department does not consider the viewing and downloading of text and similar data over the Internet such as downloaded books, musical recordings, newspapers or magazines to be the transfer of tangible personal property. These types of transactions represent the transfer of intangibles and are thus not subject to Retailers' Occupation and Use Tax. However, downloads of canned software, as defined more fully in 86 Ill. Adm. Code 130.1935, are subject to Retailers' Occupation and Use Tax. See 86 Ill. Adm. Code 130.2105(a)(3). The electronic download of a book is not subject to Retailers' Occupation Tax, Use Tax, Service Occupation Tax or Service Use Tax liability in this State regardless of whether it is rented or sold.

Your letter also mentions that students may rent textbooks via your website. Please be aware that Illinois taxes rentals differently than many other states. When schools rent books to students, and the transactions are structured so that they constitute "true leases," then no Retailers' Occupation Tax liability is incurred on the rental receipts. Under Illinois law, "true leases" and "leases" that are actually conditional sales contracts are treated differently for Retailers' Occupation and Use Tax purposes.

True leases generally have no buy out provisions at the close of the leases. If buy out provisions do exist, they must be fair market value buy out options in order to maintain the character

of the true leases. Lessors of tangible personal property under true leases in Illinois are deemed end users of the leased property and they incur Use Tax liability on their cost price of such property. As noted above, no tax liability applies to rental receipts under true leases. The only exception is automobiles rented for one year or less, which are subject to the Automobile Renting Occupation Tax.

Under 86 Ill. Adm. Code 130.2010(a), persons who purport to "lease" the use of property, but in fact sell such tangible personal property to nominal "lessees," are considered to be making conditional sales whose total receipts are subject to Retailers' Occupation Tax. Such would be the case when the agreements contain one dollar or other nominal purchase options.

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,

Cara Bishop
Associate Counsel

CB:kd

