

This letter discusses the rules regarding nexus. See *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, 376 Ill. Dec. 294 (2013). See 86 Ill. Adm. Code 270.115. (This is a GIL.)

May 31, 2017

Dear Xxxxx:

This letter is in response to your letter dated January 30, 2017, in which you requested 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:

We, the GROUP in STATE have been promoting bilateral business relations between the United States and COUNTRY for over 60 years.

We have a question regarding the Illinois Sales Tax. We would very much appreciate if you could help us in this matter.

To provide some background information:

One of our clients – a COUNTRY **company with no physical presence in the US** – would like to distribute its products through COMPANY. Therefore the client will send products to an **NAME warehouse of COMPANY in Illinois**.

Would you please confirm and comment on the following below:

1. Our client needs to fill REG 1 Form – for Foreign National Incorporates and Fax it to 217-785-6013. Where it Says “Social Sec No” it shall be stated “Foreign Nationality.” Online registration is requiring a Social Security Number.
2. There is no punishment on a late registration in Illinois for our client, if COMPANY is first using an NAME warehouse outside of Illinois and then distributes our client’s products to the warehouse in Illinois without giving notice to our client in advance.

3. Our client needs to update its registration information monthly and inform the department of revenues in Illinois about his last transactions.
4. COMPANY unfortunately does not give any information about correct invoicing in Illinois. **Does our client need to print a Tax Identification Number on the invoice regardless weather [sic] it is an interstate commerce (use tax) or a domestic commerce (sales tax)? Are there other requirements?**
5. Sales Tax of 6 1/4% only occur, if both the end-user and the NAME warehouse are located in Illinois, regardless of the district inside Illinois. **Are there any differences between the districts of Illinois? May the responsibility to collect sales tax be devolved on COMPANY?**
6. Use Tax of 6 1/4% occur, if the NAME warehouse is located outside of Illinois and the purchasing end-user is located in Illinois.
7. Assuming that the NAME warehouse is located outside of Illinois, the end-user is obliged to transfer use tax to the Department of Revenues in Illinois. **Is there a punishment on our client on failure to collect use tax? Is COMPANY generally collecting use tax instead of the end-user?**
9. Illinois is an origin-based sales tax state.
10. **With respect to the question above would you please comment on 2011 Main Street Fairness Act ("amazon tax law") regarding the conflict with the Internet Tax Freedom Act?**
9. Illinois is not imposing additional taxes on such interstate commerce where from the NAME warehouse in Illinois products are being shipped to a foreign state.

We would appreciate if you could respond in writing (via mail).

Although it is explained on your homepage that your Department cannot respond via e-mail, we would like to give your our e-mail address just in case.  
**EMAIL.COM**

## **DEPARTMENT'S RESPONSE:**

### Retailers' Occupation Tax and Use Tax

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 the Use Tax to the retailer at the time of purchase. The retailers are then allowed to reduce the amount of Use Tax they must remit by the amount of Retailers' Occupation Tax liability which they are required to and do pay to the Department with respect to the same sales. See 86 Ill. Adm. Code 150.130.

### Registration

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. However, persons who exclusively make either wholesale sales and/or exempt sales are not required to register and remit Retailers' Occupation Tax. The tax applies only to sales of tangible personal property for use and consumption, and not for resale. Consequently, if all of your sales are for resale, you will not be required to register, file returns and remit tax. You may, however, want to obtain a resale number from the Department so that you have the ability to provide your suppliers with valid Certificates of Resale. See 86 Ill. Adm. Code 130.1405. So long as you do not make taxable retail sales, and engage exclusively in wholesale and/or exempt transactions, registration for a resale number will not expose you to reporting and tax remittance requirements. If, however, you make any sales at retail (non-resale or sales to end users), you will be required to register to collect and remit taxes.

To register with the Department the company must provide us a taxpayer identification number. One can be obtained from the United States Internal Revenue Service.

### Nexus

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 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. See 86 Ill. Adm. Code 270.115.

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.

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 35 ILCS 105/2(1.1).

Your letter mentions that your client sells its products via the COMPANY.COM platform. Your client may not have a collection obligation in Illinois if it does not meet any of the nexus requirements outlined above. However, please be advised that a special rule exists when a retailer's selling activities take place outside of Illinois but the tangible personal property sold is in an inventory in the possession of the retailer located within a jurisdiction in Illinois at the time of sale or is subsequently produced by the retailer in the jurisdiction. Please see 86 Ill. Adm. Code 270.115(d)(2). If your client falls within this description, your client would be required to collect and remit taxes, both State and local, on sales to Illinois customers.

### Local taxes

Generally, home rule and non-home rule municipalities, counties, school districts and special districts may impose local occupation taxes. See Illinois Municipal Code (65 ILCS 5) and Counties Code (55 ILCS 5). Special Districts (for example, airport, forest preserves, fire protection, park, sanitary, transit and water) can be found in Chapter 70 of the Illinois Compiled Statutes beginning with 70 ILCS 5 and ending at 70 ILCS 3720. Not all units of local government impose a local occupation tax, and not all units of local government impose the same rate of tax. A tax rate finder is located on the Department's website.

### Local sourcing

The determination where the retailer in the business of selling is a fact-specific inquiry. In response to the Illinois Supreme Court decision in *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, 376 Ill. Dec. 294 (2013), the Illinois Department of Revenue revised the administrative rules that govern the sourcing of local retailers' occupation taxes. See, for example, 86 Ill. Adm. Code 270.115. The rules provide that:

"The occupation of selling is comprised of "the composite of many activities extending from the preparation for, and the obtaining of, orders for goods to the final consummation of the sale by the passing of title and payment of the purchase price". *Ex-Cell-O Corp. v. McKibbin*, 383 Ill. 316, 321 (1943). Thus, establishing where "the taxable business of selling is being carried on" requires a fact-specific inquiry into the composite of activities that comprise the retailer's business. *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, paragraph 32 (citing *Ex-Cell-O Corp. v. McKibbin*, 383 Ill. 316, 321-22 (1943)). 86 Ill. Adm. Code 270.115(b)(2).

### Interstate shipments

The Department's regulation regarding Sales of Property Originating in Illinois, 86 Ill. Adm. Code 130.605(d) provides that tax does not apply to gross receipts from sales in which the seller either by carrier (when the carrier is not also the purchaser) or by mail, under the terms of his agreement with the purchaser, delivers the goods from a point in this State to a point outside this State not to be returned to a point within this State. The fact that the purchaser actually arranges for the common carrier or pays the carrier that effects delivery does not destroy the exemption. However,

it is critical that the seller is shown as the consignor or shipper on the bill of lading. If the purchaser is shown as either the consignor or the shipper, the exemption will not apply.

Please note that under Section 130.605(g), retailers who ship property to freight forwarders who take possession of the property in Illinois and ship the property to foreign countries, not to be returned to the United States, are making exempt sales in foreign commerce and do not incur Retailers' Occupation Tax liability on the gross receipts from those sales. However, there is no exemption for property delivered in Illinois to foreign vessels. If foreign vessels purchase items of tangible personal property from Illinois retailers and have those items delivered to the vessels in an Illinois port, the sale is made in Illinois, the purchaser takes possession of the items in Illinois, and therefore, the sale is taxable. In order to reflect this exemption on the ST-556 form, one should check the "other" box and note that the sale was made into foreign commerce.

To establish that the gross receipts from any given sale are exempt because the tangible personal property is delivered by the seller from a point within this State to a point outside this State under the terms of an agreement with the purchaser, the seller will be required to retain in his records, to support deductions taken on his tax returns proof that satisfies the Department that there was an agreement and a bona fide delivery outside this State of the property that is sold. See 86 Ill. Adm. Code 130.605(f).

#### Character of sale

We do not have any knowledge of the contractual relationship between you and COMPANY and cannot provide any guidance regarding the parties' tax collection obligations. However, it is a seller's responsibility to determine the character of the sale at the time of the sale. A person who sells tangible personal property to a purchaser who may use or consume such property within the meaning of the Act, but who also may resell such property, must determine, at the time when he sells the property to such purchaser, whether the purchaser is buying the property "for use or consumption" within the meaning of the Act or whether the purchaser is buying the property "for resale". Section 2c of the Act provides that purchasers of tangible personal property for resale shall apply to the Department for resale numbers. In determining whether a sale is for resale, the seller shall request that the purchaser provide a resale number and certification that the sale is for resale. This determination is required in order that the seller may properly file the returns required by the Act and compute his tax liability. So long as the seller obtains a certificate of resale from the purchaser that contains all information required by Section 130.1405, the seller need not verify that the tangible personal property he sells for resale is actually resold. See 86 Ill. Adm. Code 130.1401(a).

#### Voluntary disclosure

If your client is concerned that it may owe Illinois sales tax, it may want to contact the Department's Board of Appeals. The Board of Appeals administers a voluntary disclosure program that can provide for limited liabilities for participants who come forward and disclose their liabilities. Please see 86 Ill. Adm. Code 210.126 for information about the voluntary disclosure program.

I recommend that your client review the Department's regulations, specifically 86 Ill. Adm. Code Parts 130 and 150, regarding the Retailers' Occupation Tax Act and the Use Tax Act. The Department's regulations and information regarding registration, filing returns and remitting tax can be found on our website at [www.tax.illinois.gov](http://www.tax.illinois.gov).

I hope this information is helpful. If you require additional information, please contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Richard S. Wolters  
Associate Counsel

RSW:bkl