

ST 18-0015-GIL 04/13/2018 NEXUS

This letter addresses nexus, construction contractors, and sales for resale. See *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992); 86 Ill. Adm. 130.1940; 86 Ill. Adm. Code 130.2075; and 86 Ill. Adm. 130.1405. (This is a GIL.)

April 13, 2018

Dear Xxxxx:

This letter is in response to your letter dated December 28, 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 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:

This week, I spoke to PERSON and PERSON1 and I would like formal approval of what they confirmed and PERSON1 told me to write you to obtain it.

We are a distributor of garage door parts and components to garage door manufacturers, distributors, and installers. We have distribution centers in CITY (HQ), CITY1, CITY2, and CITY3 and have a manufacturing facility in CITY4, STATE and CITY5, STATE1. We do not sell to the end user.

We recently hired (September) an engineer in Illinois but he is not selling or distributing nor do we have a facility in Illinois. He is working out of his house and just designing.

Based on these facts, are we required to charge sales tax to our customers in Illinois? Again, our customers are not the end user and our engineer is not selling nor distributing.

I appreciate your response to this. Both PERSON and PERSON1 stated that we were not required to charge sales tax. Another individual I talked to (did not get his name) told me the same thing last week.

Could you please confirm this?

Thank you for your cooperation, understanding, and consideration.

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 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.

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.

Another type of retailer is a retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in this State" 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).

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 in this State” was amended to include additional types of retailers. A retailer maintaining a place of business in this State 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 in this State 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).

CONSTRUCTION CONTRACTORS

Your letter states that you do not sell to the end user. However, if you make sales to construction contractors in Illinois, you are selling to the end user, because Illinois law treats construction contractors as end users for Retailers’ Occupation and Use Tax purposes.

A contract that provides for both the sale and installation of tangible personal property that is permanently affixed or incorporated into a structure is considered a construction contract. The tax liabilities regarding construction contractors in Illinois may be found at 86 Ill. Adm. Code 130.1940 and 130.2075 on the Department’s website. The term construction contractor includes general

contractors, subcontractors, and specialized contractors such as landscape contractors. This would include persons who install and repair garage doors. In Illinois, construction contractors are deemed end users of tangible personal property purchased for incorporation into real property. As end users of such tangible personal property, these contractors incur Use Tax liability for such purchases based upon their cost price of the tangible personal property. See 86 Ill. Adm. Code 130.1940 and 86 Ill. Adm. Code 130.2075.

Therefore, any tangible personal property that a construction contractor purchases that he or she will permanently affix to or incorporate into real property in this State will be subject to Use Tax. If such contractors did not pay the Use Tax liability to their suppliers, those contractors must register and self-assess their Use Tax liability and pay it directly to the Department. If the contractors have already paid a tax in another state regarding the purchase or use of such property, they will be entitled to a credit against their Illinois Use Tax liability to the extent that they have paid tax that was properly due to another state. See 86 Ill. Adm. Code 150.310.

With respect to your sales to Illinois construction contractors, you must determine, based on the information above regarding nexus, whether your company must register with the Illinois Department of Revenue and collect Use Tax from these customers.

SALE FOR RESALE

With respect to your sales to persons other than construction contractors or other end users in Illinois, the following is a discussion of the Department's rule on sales for resale.

If a seller has nexus in Illinois, in order to document the fact that its sale to a purchaser is a sale for resale, a seller is obligated by Illinois to obtain a valid Certificate of Resale from the purchaser. See 86 Ill. Adm. Code 130.1405. A Certificate of Resale is a statement signed by the purchaser that the property purchased by him is purchased for purposes of resale. In addition to the statement that the property is being purchased for resale, a Certificate of Resale must contain:

- 1) The seller's name and address;
- 2) The purchaser's name and address;
- 3) A description of the items being purchased for resale;
- 4) Purchaser's signature, or the signature of an authorized employee or agent of the purchaser, and date of signing; and
- 5) Registration Number, Resale Number, or a statement that the purchaser is an out-of-State purchaser who will sell only to purchasers located outside the State of Illinois.

The Department provides a standard form for documenting sales for resale. This form can be obtained from the Department's website.

The obligations of a seller with respect to accepting a Certificate of Resale were addressed in *Rock Island Tobacco and Specialty Company v. Illinois Department of Revenue*, 87 Ill.App.3d 476, 409 N.E.2d 136, 42 Ill. Dec. 641 (3rd Dist. 1980). The *Rock Island* court held that when a retailer obtains a proper Certificate of Resale that contains a registration or resale number that is valid on the date it is given, the seller's liability is at an end. If the purchaser uses that item himself or herself (*i.e.*, it was not purchased for resale), the Department will proceed against the purchaser, not the seller,

provided the above stated conditions are met. The purchaser's registration or reseller number can be verified at the Department's website by clicking on the "Tax registration inquiry" box.

Failure to present an active registration number or resale number and a certification to the seller that a sale is for resale creates a presumption that a sale is not for resale. This presumption may be rebutted by other evidence that all of the seller's sales are sales for resale or that a particular sale is a sale for resale. For example, other evidence that might be used to document a sale for resale, when a registration number or resale number and certification to the seller are not provided, could include an invoice from the purchaser to his customer showing that the item was actually resold, along with a statement from the purchaser explaining why it had not obtained a resale number and certifying that the purchase was a purchase for resale in Illinois. The risk run by a seller in accepting such other documentation and the risk run by purchasers in providing such other documentation is that an Illinois auditor is more likely to require that more information be provided as evidence that the particular sale was, in fact, a sale for resale.

In sum, a valid resale certificate must contain all of the information required in 86 Ill. Adm. Code 130.1405. For your reference, this information is also listed above.

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,

Samuel J. Moore
Associate Counsel

SJM:bkI