

This letter responds to an annual survey. (This is a GIL.)

May 18, 2020

Dear Xxxx:

This letter is in response to your email dated January 6, 2020, 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:

We are writing to ask you to complete the questionnaires for the **TAX SURVEY** on behalf of your state. The survey covers many of the gray areas of state tax law. Your responses will provide useful guidance for taxpayers in complying with your state’s laws.

Attached is an Excel spreadsheet containing the questions for 2020. You may notice that this year’s questionnaire looks different than last year’s. As you will see, this year two columns of the spreadsheet have all of your state’s responses and comments for 2019. Adjacent columns are there for you to record your responses and comments for 2020. To avoid any errors, please fill out the 2020 column even if the answer has not changed from 2019.

There has also been a change to how your comments are displayed this year. There is now a comment box for each question and another for comments that apply to multiple questions, instead of using one comment box for both general and question specific comments. If you are adding or revising question specific comments please use the 2020 comment box that relates to that question directly. If you are adding or revising comment that applies to multiple questions or all questions in a category, please use the 2020 comment box at the end of the category. You can either scroll down for this comment or click the hyperlinked text in the chart. If you would like to add or change information you have previously recorded in the comments section, please make those modifications in **red font**.

Additionally, we ask that you note where you have intentionally left questions blank. We are required to follow-up regarding any unanswered questions; and making note of intentionally unanswered questions allows us to process and analyze the data faster. This can be accomplished by typing “blank” or “no response” in the answer column or simply noting in your email that questions were left blank intentionally.

The questionnaires should be completed based on state law as of January 1, 2020.

Some new questions have been added to this year’s questionnaire. The new questions and subsections are denoted in [blue font](#).

In addition to the format change and addition of new questions, we have also included a new column where you may include feedback or notes on the questions in this year’s questionnaire. Information included in this column will not be published are part of our survey report. Any feedback you choose to provide is greatly appreciated and will be incredibly helpful in drafting future versions of our questionnaire.

Please return your questionnaires to us by March 13, 2020. Your completed Excel spreadsheets should be e-mailed to me.

Your responses, along with the responses we receive from other states, will be published by PUBLICATION, a leading publisher of international, federal, and state tax analysis. More information about PUBLICATION can be found at WEBSITE.

If you have any questions about this or if there is any way I can help you to complete this year’s questionnaire, please contact me.

I am looking forward to working with you.

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In your questionnaire, you have stated, in part, as follows:

Section I: Sales Tax Policies

- A. Identify any statute, regulation, or administrative pronouncement that sets forth your state’s sales tax nexus policy.**
- B. Application of Nexus Standards**
- C. Economic Nexus: Sales Threshold**
- D. Nexus Enforcement Policies**
- E. Sales Tax Sourcing and Method of Delivery**
- F. Sharing Economy**
- G. Marketplace Facilitators (New for 2020)**

Section II: Sales Tax Nexus Creating Activities

Please indicate “Yes” or “No” to show whether each of the following activities or relationships performed by an out-of-state corporation would, by itself, create substantial nexus with your state for purposes of triggering the imposition of sales tax collection

requirements on the out-of-state corporation. When determining whether the listed activity/relationship would create substantial nexus, assume that each item is the only activity/relationship the out-of-state corporation has in your state. Also assume that the out-of-state corporation has no property or employees located in your state.

A “Yes” response means that an out-of-state retailer's performance of the listed activity/relationship would, by itself, create substantial nexus and trigger the imposition of sales tax collection requirements on the out-of-state retailer. A “No” response means that an out-of-state retailer's performance of the listed activity/relationship would not, by itself, trigger nexus for purposes of your state's sales tax.

For the questions that you believe require more than a “yes” or “no” answer, set forth in the comment section the factors that your state would consider in making a nexus determination.

- A. General Activities**
- B. Remote Sales**
- C. Other Remote Sales Transactions**
- D. Temporary or Sporadic Presence**
- E. Activities of Unrelated Parties**
- F. Financial Activities**
- G. Activities with Affiliates**
- H. Internet Activities**
- I. Activities Related to Digital Property**
- J. Distribution and Delivery**
- K. Third-Party Solicitation Activities and Attributional Nexus**
- L. Transactions Involving Franchise Agreements**
- M. Service Providers**
- N. Cloud Computing**
- O. Registration with State Agencies/Departments**
- P. Drop Shipment Transactions**

Section III. Refund Claims, Qui Tam and Class Action Lawsuits

- A. Refund Claims**
- B. Qui Tam and Class Action Lawsuits**

XV. Local Sales Taxes

- A. Local Sales Taxes**

DEPARTMENT’S RESPONSE:

We are unable to respond to your nexus survey in the format provided. 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.

Nexus:

Effective January 1, 2020, nexus in Illinois includes marketplace facilitators, meeting certain thresholds. See Public Acts 101-0009 and 101-0604. Marketplace facilitators, meeting either of the two thresholds are required to register to collect and remit Illinois Use Tax for sales made through their marketplace. Marketplace sellers selling through the marketplace are not responsible for collecting and remitting Illinois Use Tax on those sales. See 86 Ill. Adm. Code 150.804.

Marketplace Facilitator:

Marketplace facilitator means a person who, pursuant to an agreement with an unrelated third-party marketplace seller, directly or indirectly through one or more affiliates facilitates a sale by an unrelated third-party marketplace seller by performing both of the following activities: (1) Listing or advertising for sale by the marketplace seller in a marketplace, tangible personal property that is subject to Illinois Use Tax; and (2) either directly or indirectly, through agreements or arrangements with third parties, collecting payment from the customer and transmitting that payment to the marketplace seller regardless of whether the marketplace facilitator receives compensation or other consideration in exchange for its services. If a marketplace facilitator meets certain thresholds, it is considered a retailer maintaining a place of business in Illinois for each sale of tangible person made through its marketplace resulting in Illinois Use Tax. A marketplace facilitator must register to collect and remit Illinois Use Tax to the Illinois Department of Revenue.

Marketplace Seller:

Marketplace seller means a person that sells or offers to sell tangible personal property through a marketplace operated by an unrelated third-party marketplace facilitator. A marketplace seller only includes persons who incur an Illinois Use Tax liability on their sales to Illinois purchasers. Sales of tangible personal property to Illinois purchasers that are subject to Illinois Retailers' Occupation Tax are not subject to the provisions of 86 Ill. Adm. Code 150.804.

A marketplace seller shall be held harmless for liability for the collection and remittance if Illinois Use Tax when a marketplace facilitator fails to correctly collect and remit tax after having been provided with information by a marketplace seller to correctly collect and remit tax.

If a marketplace facilitator demonstrates to the satisfaction of the Illinois Department of Revenue that its failure to correctly collect and remit Illinois Use Tax on a sale resulted from its good faith reliance on incorrect or insufficient information provided by a marketplace seller, it shall be relieved of liability for the tax on that sale. In that case, a marketplace seller is liable for any resulting Illinois Use Tax due.

Note: Sales to Illinois purchasers made through the marketplace resulting in Illinois Retailers' Occupation Tax liability are the responsibility of the marketplace seller. In that case, the marketplace seller is considered the retailer for sales resulting in Retailers' Occupation Tax liability and the marketplace seller must register to remit Illinois Retailers' Occupation Tax and any applicable local taxes to the Illinois Department of Revenue.

Economic Nexus – Sales Thresholds:

A marketplace facilitator must meet either of the following thresholds to be considered the retailer for each sale of tangible personal property made through its marketplace on behalf of marketplace sellers: (1) the cumulative gross receipts from retail sales of tangible personal property to purchasers

in Illinois made through the marketplace by both the marketplace facilitator and marketplace sellers are \$100,000 or more; or (2) the marketplace facilitator and marketplace sellers selling through the marketplace cumulatively enter into 200 or more separate transactions through the marketplace for the sale of tangible personal property to purchasers in Illinois.

The thresholds are determined by examining the gross receipts and number of separate transactions (see, 86 Ill. Adm. Code 150.804), excluding the following types of sales: (1) sales for resale must be excluded (see, 86 Ill. Adm. Code 130.201); (2) sales of tangible personal property that are required to be registered with an Illinois agency, including motor vehicles, watercraft, aircraft, and trailers, when these sales are made from locations outside Illinois to Illinois purchasers must be excluded; and (3) sales made through the marketplace on behalf of a marketplace seller or by a marketplace facilitator that are subject to Retailers' Occupation Tax must be excluded.

A marketplace facilitator shall determine on a quarterly basis, ending on the last day of March, June, September, and December, whether it meets either of the thresholds listed above for the preceding 12-month period. If the marketplace facilitator meets either threshold for a 12-month period, it is considered a retailer maintaining a place of business in Illinois and is required to collect and remit the Use Tax and file returns for one year for all sales made over its marketplace.

At the end of that one-year period, the marketplace facilitator shall determine whether it met either threshold during the preceding 12-month period. If the marketplace facilitator met either threshold for the preceding 12-month period, it is considered a retailer maintaining a place of business in Illinois and is required to collect and remit Use Tax and file returns for the subsequent year for all sales made over its marketplace.

If, however, at the end of a one-year period a marketplace facilitator that was required to collect and remit the Use Tax determines that it did not meet either threshold during the preceding 12-month period, the marketplace facilitator shall subsequently determine on a quarterly basis, ending on the last day of March, June, September, and December, whether it meets either threshold for the preceding 12-month period.

Activities Related To Digital Property:

The Department does not consider the viewing and downloading of video, text and other data over the internet to be the transfer of tangible personal property. Therefore, such viewing and/or downloading activity over the internet would not be subject to liability under the Retailers' Occupation Tax Act, Use Tax Act, Service Occupation Tax Act, or Service Use Tax Act. Please note, however, the transfer of any canned software (or update of canned software) is considered the transfer of tangible personal property and will be subject to Retailers' Occupation Tax and Use Tax liability, regardless of the means of delivery. See 86 Ill. Adm. Code 130.1935(a). The transfer or sale of canned software downloaded electronically would be taxable.

Refund Claims:

If a taxpayer pays an amount of tax under the Retailers' Occupation Tax Act that is not due, either as a result of a mistake of fact or an error of law, the taxpayer may file a claim for credit with the Department. See 86 Ill. Adm. Code 130.1501. Please note that only persons who have actually paid tax to the Department can file a claim for credit. In other words, if a purchaser has paid tax to the retailer, only that retailer can file a claim for credit. No credit shall be given the taxpayer unless the

taxpayer shows that he or she has borne the burden of the tax or has unconditionally repaid the amount of the tax to the purchaser from whom it was collected. The retailer must first refund tax money paid by the purchaser before proceeding with the claim.

Once the retailer has done this, he or she must apply for the credit in the manner described in the regulation. Retailers are not required by law to apply for such credits; rather, this procedure is voluntary. Whether or not the retailer refunds the tax paid and files a claim for credit with the Department is a private matter between the retailer and the purchaser.

Qui Tam and Class Action Lawsuits:

Pursuant to the Illinois False Claims Act, 740 ILCS 175, a private party acting as a relator on behalf of the State, may bring a lawsuit against a taxpayer for underpaying sales tax. Further, Illinois courts have recognized class action suits for recovery of wrongly paid taxes. See *Geary v. Dominick's Finer Foods, Inc.*, 129 Ill. 2d 389 (1989); *Harrison Sheet Steel Co. v. Lyons*, 15 Ill. 2d 539 (1959).

Local Sales Taxes:

The Illinois Department of Revenue is responsible for administering local retailers' occupation and service occupation taxes. See, e.g., 65 ILCS 5/8-11-1, Home Rule Municipal Retailers' Occupation Tax and 65 ILCS 5/8-11-5, Home Rule Municipal Service Occupation Tax. Illinois statutes do not, in general, authorize the imposition of local use taxes on general merchandise. Generally, there are no local use taxes administered by the Department on general merchandise.

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,

Debra M. Boggess
Associate Counsel

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