

This letter addresses sales for resale and drop shipments. See 86 Ill. Adm. Code 130.1405 and 86 Ill. Adm. Code 130.225. (This is a GIL.)

October 6, 2020

Dear Xxxx:

This letter is in response to your letter dated January 22, 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 if COMPANY should charge sales tax on the attached invoice.

COMPANY is a computer data storage solutions business located in STATE. In the attached invoice, COMPANY made a taxable sale of \$\$\$ to a STATE buyer, COMPANY1, but shipped directly to the end customer, COMPANY2, in Illinois in September 20XX. COMPANY charges sales tax of \$\$\$ on the invoice. See attached invoice.

In August 20XX COMPANY made another taxable sale of \$\$\$ to another Illinois customer and collected sales tax of \$\$\$\$. With both taxable sales to Illinois customers, COMPANY made more than \$\$\$ in annual taxable sales to Illinois customers during 2019 (\$\$\$ + \$\$\$=\$\$\$). With the annual sales exceeding the economic nexus thresholds, and Illinois adopting the Wayfair decision on October 1, 2018, and COMPANY having collected sales tax from the sales in August, COMPANY registered for sales tax recently.

The buyer in STATE, COMPANY1, requested COMPANY to refund them sales tax of \$\$\$ charged on the attached invoices. We informed COMPANY1 based on the above

reasons COMPANY needs to collect tax but COMPANY1 insisted COMPANY to refund them the tax amount.

We would like to ask you to determine if COMPANY should collect tax on the attached invoice and submit it to Illinois department of revenue or should refund the tax to COMPANY1.

Thank you for your attention on this matter!

DEPARTMENT'S RESPONSE:

Your letter does not contain sufficient information for the Department to determine whether the tangible personal property that COMPANY1 purchased from your company and was drop shipped to the end customer was a purchase for resale by COMPANY1. Based on the language in your letter, however, you state that the purchase from COMPANY was "shipped directly to the end customer," which makes it appear that the purchase was a purchase for resale. If that was the case, I hope the following information is helpful.

Drop Shipments

The Department's regulations entitled "Drop Shipments," found at 86 Ill. Adm. Code 130.225, and "Seller's Responsibility to Obtain Certificates of Resale and Requirements for Certificates of Resale," found at 86 Ill. Adm. Code 130.1405, explain in detail the Department's position on the acceptance of Certificates of Resale by sellers from out-of-State purchasers.

A drop-shipment situation is normally one in which an out-of-State purchaser (Purchaser) makes a purchase for resale from a company (Company) which is registered with Illinois and has that Company drop-ship the property to the Purchaser's customer (Customer) located in Illinois. For purposes of this discussion, it is assumed that Purchaser is an out-of-State company that is not registered with the State of Illinois and does not have sufficient nexus with Illinois to require it to collect Illinois Use Tax.

Company, as a seller required to collect Illinois tax, must either charge and collect tax or document appropriate exemptions when making deliveries in Illinois. In order to document the fact that its sale to Purchaser is a sale for resale, Company is obligated by Illinois to obtain a valid Certificate of Resale from 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 retailer'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 retailer, 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 retailer 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.

As indicated earlier, it appears that the transaction between your company and COMPANY1 was a purchase from your company for resale by COMPANY1. COMPANY1, however, did not provide a Certificate of Resale. Failure to present an active registration number or resale number and a certification to the seller that a sale is for resale, or other evidence that all of the seller's sales are sales for resale or that a particular sale is a sale for resale creates a presumption that a sale is not for resale. As such, tax was properly charged and collected.

Out-of-State Retailer

An out-of-State retailer (a "remote retailer") making sales to Illinois purchasers from locations outside Illinois is required to register with the Department and collect and remit Use Tax on those sales if it falls within the definition of a "retailer maintaining a place of business in this State" in Section 2 of the Use Tax Act, 35 ILCS 105/2. The Department is authorized to require these retailers to act as tax collectors because they have established sufficient contacts, or nexus, with Illinois. There are two groups of remote retailers that must collect Use Tax on sales to Illinois purchasers:

- 1) Remote retailers with a physical presence in Illinois. Prior to October 1, 2018, remote retailers had to have a physical presence in Illinois before they could be required to collect Use Tax. The types of activities constituting a physical presence, as limited by the series of court cases described below, are found in Section 2 of the Use Tax Act's definition of a "retailer maintaining a place of business" in Illinois. See, 35 ILCS 105/2. The physical presence requirement was established in a series of United States Supreme Court decisions. See, for example, *Scripto v. Carson*, 362 U.S. 207 (1960); *National Bellas Hess v. Department of Revenue of the State of Illinois*, 386 U.S. 753

(1967); *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992). In 1996, the Illinois Supreme Court ruled that remote retailers need only “more than the slightest” physical presence to be required to collect Use Tax. See *Brown’s Furniture v. Wagner*, 171 Ill.2d 410 (1996). Any remote retailer that currently has a physical presence in Illinois will continue to be required to act as a Use Tax collector. Regulations describing these types of retailers are found at 86 Ill. Adm. Code 150.801 and 150.802.

- 2) Remote retailers without a physical presence in Illinois. In *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, the U.S. Supreme Court upheld a South Dakota statute that imposed tax collection obligations on remote retailers that met specific selling thresholds but had no physical presence in the state. This decision abrogated the longstanding physical presence requirement of *Quill*, deeming it “unsound and incorrect.” Illinois Public Act 100-587 enacted nexus standards, effective October 1, 2018, that are virtually identical to those upheld in *Wayfair*. This non-physical presence nexus we will call “*Wayfair* nexus.”

Following are the requirements for *Wayfair* nexus in Illinois. Public Act 100-587 (adding item (9) to the definition of “retailer maintaining a place of business in this State” at 35 ILCS 105/2) requires remote retailers with no physical presence in Illinois to register and collect and remit Use Tax, as provided below (see emergency and proposed rules found at 86 Ill. Adm. Code 150.803):

- 1) Beginning October 1, 2018, a retailer making sales of tangible personal property to purchasers in Illinois from outside of Illinois must register with the Department and collect and remit Use Tax if:
 - a) The cumulative gross receipts from sales of tangible personal property to purchasers in Illinois are \$100,000 or more; or
 - b) The retailer enters into 200 or more separate transactions for the sale of tangible personal property to purchasers in Illinois.
- 2) A retailer shall determine on a quarterly basis, ending on the last day of March, June, September, and December, whether he or she meets either of the criteria of paragraph (1) for the preceding 12-month period. If the retailer meets either of the criteria of paragraph (1) for a 12-month period, he or she 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.
 - a) At the end of that one-year
 - a) At the end of that one-year period, the retailer shall determine whether he or she met either of the criteria of paragraph (1) during the preceding 12-month period. If the retailer met either of the criteria in paragraph (1) for the preceding 12-month period, he or she 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.
 - b) If at the end of a one-year period a retailer that was required to collect and remit the Use Tax determines that he or she did not meet either of the criteria in paragraph (1) during the preceding 12-month period, the retailer shall subsequently determine on a quarterly basis, ending on the last day of March, June, September, and December, whether he or she meets either of the criteria of paragraph (1) for the preceding 12-month period.

In determining whether a remote retailer meets the thresholds above, sales for resale are excluded. See 86 Ill. Adm. Code 150.803(c)(3)(E)(i). In addition, if a remote retailer makes exclusively

nontaxable sales, he or she is not subject to the *Wayfair* nexus requirements. See 86 Ill. Adm. Code 150.803(c)(2). If, however, the remote retailer makes both taxable and nontaxable sales into Illinois, all sales are included, including the nontaxable sales (other than sales for resale and other sales specified at 86 Ill. Adm. Code 150.803(c)(3)(E)). See 86 Ill. Adm. Code 150.803(c)(3)(E)(v). Illinois taxes tangible personal property transferred incident to a service under the Service Occupation Tax and the Service Use Tax (see 86 Ill. Adm. Code 150.101 et seq. and 160.101 et seq.), but does not tax services per se.

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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