

This letter discusses nexus. See *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018); 86 Ill. Adm. Code 150.803. (This is a GIL.)

November 9, 2020

Dear Xxxxx:

This letter is in response to your letter dated September 23, 2019, 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:

I am writing to clarify what sales are used to determine if we reach the threshold of \$100,000 annual sales in a twelve month period.

We are a sign contractor in STATE. We have been registered and remitting sales & use tax for many years in Illinois. Most of our sales in Illinois are pylon signs mounted in concrete or signs attached to a building to identify the business. We manufacture in CITY and ship to local subcontractors for installation. My understanding is that these are real property contracts. All of our material is purchased in STATE with a resale certificate. We accrue 6.25% use tax on material cost for signs installed in Illinois and remit directly to the State.

Occasionally we ship signs to Illinois that are not installed. On these sales we charge 6.25% sales tax.

The above mentioned real property income would be significantly above \$100,000. However, the tangible personal property sales (signs not installed) would typically not reach \$100,000 in a 12 month period.

Under these circumstances, are we required to start collecting local tax on July 1, 2020?

I have previously exchanged emails with the Taxpayer Assistance Division and they recommended that I write your office for clarification.

Thank you for your help with this matter.

DEPARTMENT'S RESPONSE:

It is not possible to provide a specific response based on the limited information in your letter. However, we hope that the following information is helpful.

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. See, e.g., 86 Ill. Adm. Code 270.115.

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 Illinois" is found at 35 ILCS 105/2 and described further, in part, 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.

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 has a physical presence in Illinois will 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.

A retailer is required to collect Use Tax if it has 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 a 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. The provisions of this paragraph 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 this state under such contracts exceed \$10,000 during the preceding four quarterly calendar ending on the last day of March, June, September, and December;

A retailer required to collect Use Tax if it has 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 do 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.

The provisions of this paragraph apply only if the cumulative gross receipts from sales of tangible personal property by you to customers in this state under all such contracts exceed \$10,000 during the preceding four quarterly periods ending on the last day of March, June, September, and December.

- 2) Remote retailers without a physical presence in Illinois. In *South Dakota v. Wayfair, Inc.*, 585 U.S. ____ (2018), 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.”

Public Act 100-587 implemented the U.S. Supreme Court *Wayfair* nexus standards. It requires remote retailers with no physical presence in Illinois to register and collect and remit Use Tax, as provided below:

- 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 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.

Remote retailers must apply the following rules governing whether a transaction should be included or excluded when determining if they meet either of the thresholds in subsection (b)(1):

- 1) Sales for resale are excluded.
- 2) Sales of tangible personal property that is required to be registered with an agency of this State, including motor vehicles, watercraft, aircraft, and trailers, that are made from locations outside Illinois to Illinois purchasers are excluded. Taxes on these items will continue to be paid, as required by Section 10 of the Use Tax Act, by purchasers as a condition of titling or registering these items.

- 3) Occasional sales must be excluded. Occasional sales are not considered sales at retail.
- 4) Sales made by a remote retailer that are subject to Retailers' Occupation Tax are excluded.
- 5) All sales of tangible personal property, other than those excluded by items 1 – 4, even if they are exempt from tax, are included for purposes of calculating the thresholds. See 86 Ill. Adm. Code 150.803(c)(3)(E).

When person is acting as a construction contractor, it is not making a “sale” that counts toward the threshold because it is the user of the tangible personal property. When it makes a sale of a sign without installation, it is making a sale that counts towards the threshold.

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).

Public Acts 101-0031 and 101-0604 enacted the Leveling the Playing Field for Illinois Retail Act. The Act implements a series of structural changes to the Illinois sales tax law that are intended to “level the playing field” between Illinois-based retailers and remote retailers by imposing State and local retailers’ occupation taxes on Illinois retailers, remote retailers and marketplace facilitators alike. Public Acts 101-0031 and 101-0604 require “remote retailers” to collect and remit State and local retailers’ occupation taxes. Beginning January 1, 2021, you must remit Retailers’ Occupation Tax if you are a remote retailer and either of the following thresholds was met during the preceding four quarterly periods ending on the last day of March, June, September, and December:

- 1) The cumulative gross receipts from sales of tangible personal property by you to purchasers in Illinois was \$100,000 or more; or
- 2) you entered into 200 or more separate transactions for the sale of tangible personal property to purchasers in Illinois. [35 ILCS 120/2(b)]

You are a “remote retailer” if you do not maintain within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent or other representative operating within this State under your authority or a subsidiary of yours, irrespective of whether such place of business or agent is located here permanently or temporarily or whether you or your subsidiary is licensed to do business in this State. 35 ILCS 120/1.

The Department has filed proposed rules implementing the new requirements for remote retailers and marketplace facilitators. The proposed rules can be found on the Department’s website. 86 Ill. Adm. Code 131. The new requirements for remote retailers and marketplace facilitators are effective January 1, 2021, not July 1, 2020.

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. 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 will be permanently affixed to or incorporated 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.

It is important to note that since construction contractors are the end users of the materials that they permanently affix to real estate, their customers incur no Use Tax liability and the construction contractors have no legal authority to collect the Use Tax from their customers. However, many construction contractors pass on the amount of their Use Tax liabilities to customers in the form of higher prices or by including provisions in their contracts that require customers to "reimburse" the construction contractor for his or her tax liability. Please note that this reimbursement cannot be billed to a customer as "sales tax," but can be listed on a bill as a reimbursement of tax. The choice of whether a construction contractor requires a tax reimbursement from the customer or merely raises his or her price is a business decision on the construction contractor's part.

Section 130.1940(c) addresses situations where tangible personal property is permanently affixed or incorporated into a structure incident to a construction contract. As previously noted, a construction contractor does not incur Retailers' Occupation Tax liability as to receipts from labor furnished and tangible personal property (materials and fixtures) incorporated into a structure as an integral part thereof for an owner when furnished and installed as an incident of a construction contract. A construction contract that provides for both the sale and installation of tangible personal property that is permanently affixed or incorporated into a structure may separately state the cost of installation and the cost of the tangible personal property and remain a construction contract for sales tax purposes. The fact that the installation costs and the tangible personal property costs are separately stated in the contract or on the billing does not change the tax consequences of the transaction.

If subcontractors are utilized and are acting as construction contractors, the transaction between the general contractors and the subcontractors is not a taxable transaction. The subcontractors incur Use Tax liability on any tangible personal property that they purchase for incorporation into real estate. If, however, general contractors make purchases and then contract to have subcontractors do the installation, the general contractors incur Use Tax liability because they are making the purchases of such tangible personal property.

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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