

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

August 18, 2015

Dear Mr. XXXX:

This letter is in response to your letter dated June 25, 2015, in which you request 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:

The COMPANY 1 (COMPANY 1), in conjunction with COMPANY 2, annually undertakes a major information collection effort with respect to the application of the tax laws of the states. COMPANY 1's goal in gathering this information is to assemble and publish the *PUBLICATION* (*PUBLICATION*). As the market has shown, such a publication is a useful reference source for departments of revenue, attorneys, corporate tax departments, and public accounting firms.

COMPANY 1 is in the process of updating the *PUBLICATION* for its 2016 annual edition. Accordingly, we ask for your state's assistance in preparing this important publication. I have attached two Microsoft Word files—one for income tax and one for sales tax—to serve as this year's questionnaire. The questionnaire follows the same format as in past years. (If you do not have a copy of your 2014 response, and it would be helpful to you in completing the 2015 questionnaire, please let me know and I will email you a copy.)

This year, the numbering scheme and the sequence of the questions remains essentially the same. Also, please note that the new questions are highlighted in **bold, red font**. Therefore, you should be able to easily follow the changes from last year to this year. Because of anticipated time constraints for respondents, again this year we are asking that you only respond to the questions for which your answers require a change and the new questions. All unanswered questions will be considered the same as last year's answer unless otherwise noted.

Please complete the 2015 questionnaire and return it by July 31, 2015, via email to: XXX@COMPANY1.com. The enclosed questionnaire should be answered in accordance with laws in effect as of July 1, 2015. If there is legislation pending or recently enacted that would alter your answers, please explain any such changes that you are aware of at the time the questionnaire is completed.

Beginning in the fall 2000, COMPANY 1 began a tuition assistance program for state department of revenue employees in appreciation for their assistance in publishing the *PUBLICATION*. A limited amount of tuition assistance is available for courses in COMPANY 1's Online Graduate Certificate in State and Local Taxation. This Certificate program is the first of its kind in the nation to be offered totally online. To receive the Certificate, students must complete the four-course curriculum. For further information about the program or available tuition assistance contact YYYY at the COMPANY 1 (YYYY@COMPANY1.com or (XXX) XXX-XXXX.

If you have any questions about the questionnaire or a specific question, please contact me at XXXX@COMPANY1.com (email) and I will promptly respond. Thank you for your continued cooperation and support. Your contributions are extremely valuable in maintaining the quality of this outstanding reference work. A complimentary copy of the *PUBLICATION* will be sent to you when it is published next year.

[32] ADVERTISING AGENCIES

▪ Which services performed by an advertising agency are subject to sales/use tax (check all that apply)?

- ☐ Developing concepts for advertising themes and campaigns
- ☐ Writing advertising copy or commercial jingles
- Production of preliminary art if: ☐ No finished art is produced ☐ Finished art is produced
- Production of finished art if delivered as: ☐ Tangible personal property ☐ Digital product
- ☐ Production of the master copy of a commercial video tape, if produced or stored in state
- ☐ Charge for copies of master copy of commercial video tape, if distributed in state
- ☐ Charges for advertising space in magazines and newspapers or airtime on television or radio
- ☐ Web site design
- ☐ Web site maintenance
- ☐ Public relations time not associated with producing tangible personal property
- ☐ Public relations time associated with producing tangible personal property
- ☐ Creation of logos or animated graphics if included in total Web site design cost
- ☐ Creation of logos or animated graphics if separate and optional from Web site design cost
- ☐ Creation of online banner advertising if included in total Web site design cost
- ☐ Creation of online banner advertising if separate and optional from Web site design
- ☐ Creation of online videos if included in total Web site design cost
- ☐ Creation of online videos if separate and optional from Web site design cost

[44] LOCAL TAXATION

NEXUS. If your state imposes local sales/use taxes, a taxpayer:

- ☐ Must have a physical presence in each local jurisdiction to be required to collect the tax
- ☐ Physical presence in one jurisdiction necessitates tax collection in all local jurisdictions in the state

MEASURE OF TAX

- Is the measure of tax the same at the state and local jurisdictional level? ☐ Yes ☐ No
 - If NO, how do they differ?
 - ☐ Exemptions differ, explain:
 - ☐ Tax measure differs, explain:

RATE OF TAX

- Do all local jurisdictions impose a sales tax? ☐ Yes ☐ No
 - If NO, what local jurisdictions do not impose a sales tax (check all that apply)?
 - ☐ No local sales tax in any jurisdiction ☐ City ☐ County ☐ School District
 - ☐ Special District (name: _____)
- Do all local jurisdictions impose a use tax? ☐ Yes ☐ No
 - If NO, what local jurisdictions do not impose a use tax (check all that apply)?
 - ☐ No local use tax in any jurisdiction ☐ City ☐ County ☐ School District
 - ☐ Special District (name: _____)
- Do all local jurisdictions impose the same rate of tax (e.g., all cities are authorized to impose a 0.5% sales tax)? ☐ Yes ☐ No
 - If NO, what are the authorized rates or ranges of rates by taxing jurisdiction?
 - City _____ County _____ School District _____
 - Special District (name: _____)

JURISDICTIONAL BOUNDARIES

- Do some local taxing jurisdictions have non-geographical boundaries (e.g., eastern part of one county and the adjoining western part of another county)?
 - ☐ Yes ☐ No

ADMINISTRATION

- Does the state administer all local taxes, i.e., collect receipts and perform audits for local jurisdictions?
 - ☐ Yes

☐ No, local jurisdictions audit and collect their own taxes

[68] Common Mistakes Corporations Make In Filing Returns and Remitting taxes

▪ What are the most common mistakes that corporations make in filing sales and use tax returns and remitting sales and use taxes? For ease of presentation in a chart, please organize your response as a bullet point list, as follows:

1.

2.

3.

and so on

DEPARTMENT'S RESPONSE:

We are unable to respond to your survey in the format provided. However, we hope you find the following information helpful.

Advertising Agencies

The State of Illinois does not specifically impose a tax on advertising. 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. 86 Ill. Adm. Code 130.101. The Use Tax Act imposes a tax upon the privilege of using in this State tangible personal property purchased at retail from a retailer. 86 Ill. Adm. Code 150.101. If no tangible personal property is being transferred to the customers, then neither Illinois Retailers' Occupation Tax nor Use Tax would apply. Likewise, the Service Occupation Tax Act and Service Use Tax are imposed on the transfer of tangible personal property incident to sales of service. 86 Ill. Adm. Code 140.101 and 160.101. Depending on the nature of the transaction, Service Occupation Tax or Service Use Tax could apply, but if no tangible personal property is being transferred to customers incident to the advertising services being provided, then neither Illinois Service Occupation Tax nor Service Use Tax would apply.

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 recently 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 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 ILCS 105/2(1.1).

Measure of Tax

The State Retailers' Occupation Tax imposes a general merchandise rate on the sale of tangible personal property of 6.25% of gross receipts. Food, drugs and medical appliances are taxed at the State rate of 1%. Units of local government authorized by statute to impose an occupation tax generally are allowed to set the rate of tax. Most units of local government cannot tax titled and registered items, food, drugs and medical appliances as part of their occupation taxes. Occupation taxes imposed by units of local government that are administered by the Illinois Department of Revenue generally are subject to the same exemptions contained in the State Retailers' Occupation Tax Act.

Local Taxation

Whether a retailer must collect certain local taxes is a very fact intensive inquiry, and the answer depends upon a number of factors. We suggest you refer to our regulations on sourcing which were recently 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 and in specific localities within Illinois. See, for example, 86 Ill. Adm. Code 693.115(c).

Rate of Tax

Generally, home rule and non-home rule municipalities, counties, school districts and special districts may impose 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. Not all units of local government impose the same rate of tax. Not all units of local government impose a use tax. A tax rate finder is located on the Department's website.

Jurisdictional Boundaries

Generally, local occupation taxes that are imposed by units of local government are confined to the geographic boundaries of the local government adopting the tax. However, some local occupation taxes imposed by special districts may cover multiple jurisdictions, for example, transit taxes.

Administration

The Department does not administer all local taxes. One must review the statute authorizing a local tax to determine if the tax is administered by the Department.

Common Filing Mistakes

The Department has prepared a document that identifies common sales tax filing mistakes. It is located on the Department's website at:

<http://tax.illinois.gov/Businesses/AvoidCommonSalesTaxFilingMistakes.htm>

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,

Cara Bishop
Associate Counsel

CB:mdb