

Sales of discount cards, which enable purchasers to take advantage of exclusive discounts, are sales of intangibles and therefore are not subject to Retailers' Occupation Tax on gross receipts from those sales. (This is a GIL.)

December 8, 1998

Dear Mr. Xxxxx:

This letter is in response to your letter dated July 23, 1998. We regret the delay in our response. The nature of your letter and the information you have provided require that we respond with a General Information Letter which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 86 Ill. Adm. Code 1200.120(b) and (c), enclosed.

In your letter, you have stated and made inquiry as follows:

Per my discussion with your office, I would like to obtain the Ruling that would apply to the **Sales and Use Tax for the State of Illinois**, as it relates to BUSINESS. As requested, below is an overview of the company.

BUSINESS plans to sell PRODUCT (the 'PRODUCT') for thirty-four dollars and ninety-five cents (\$34.95) by way of the Internet. BUSINESS plans to utilize the Internet to sell directly to the consumer as well as allowing travel agents and tour promoters the ability to sell the PRODUCT to their clients. The travel agent, tour promoter or other resellers, as we may choose, will be paid a flat commission per card on each of their individual sales of the PRODUCT.

The PRODUCT will allow the cardholder to take advantage of exclusive discounts and savings from products, services and tourist attractions from businesses throughout the city of CITY. In order to receive the discount(s) the cardholder will need to present the PRODUCT to the merchant at the point of purchase. The cardholder will also be able to use the PRODUCT at participating tourist attractions Worldwide. The PRODUCT will expire twelve months from the month of purchase.

Included with the PRODUCT, is a free copy of BUSINESS's Magazine and a promotional prepaid thirty (30) minute calling card. The Magazine will be published by BUSINESS and will be a reference guide to the discounts and savings available to the Cardholder and will not be made available for resale. The thirty (30) minute prepaid calling card will be purchased by BUSINESS and will be a promotional give-a-way to promote first year sales of the PRODUCT.

All businesses that provide an exclusive discount(s) for our Cardholders will receive a free full-page ad promoting the discount(s) in the Magazine. Paid advertising will also be accepted and sold at a rate of thirty-five thousand dollars (\$35,000.00) for an annual full-page ad.

In addition, BUSINESS plans to offer a 900 number for access to HotLine. The HotLine will provide the caller with up to date entertainment information about CITY at a cost of ninety-five cents (\$.99) for the first minute and ninety-five cents (\$.99) for each additional minute.

In my phone conversation, it was indicated that it would take as long as 30 days for BUSINESS to receive a response. Anything that could be done to expedite this request would be greatly appreciated and I would like to thank you in advance for all your help.

If you have any questions or require any additional information, please do not hesitate to contact me at #####.

Illinois taxes the retail sale and use of tangible personal property under two separate but related statutes. The Retailers' Occupation Tax Act imposes a tax upon persons engaged in the business of selling at retail tangible personal property. 35 ILCS 120/2 (1996 State Bar Edition). The Use Tax Act imposes a tax upon the privilege of using in this State tangible personal property purchased at retail from a retailer. 35 ILCS 105/3 (1996 State Bar Edition).

An Illinois retailer is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois retailer is liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by purchasers.

The definition of a "retailer maintaining a place of business in Illinois" is set forth at 86 Ill. Adm. Code 150.201(i), see enclosed. An out-of-State retailer maintaining a place of business in this State is required to register with the State as an Illinois Use Tax collector. See the enclosed copy of 86 Ill. Adm. Code 150.801. The retailer must collect and remit Use Tax to the State on behalf of its Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The final type of retailer is simply the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax law. A retailer in this situation does not incur Retailer' 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 on the purchase of the out-of-State goods and have a duty to self-assess their Use Tax liability and remit the amount directly to the State.

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 sales tax laws. The Supreme Court has set out a two-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 himself or itself of the

benefits of an economic market in a forum state. *Id.* 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 does not mean simply an office or other physical building. Under Illinois tax law, it also includes the presence of any representative or other agent of the seller. The representative need not be a sales representative and it is immaterial for tax purposes that the representative's presence is temporary.

Sales of discount cards, which enable purchasers to take advantage of exclusive discounts, are not sales of tangible personal property and therefore are not taxable in Illinois. Sales of such cards represent sales of intangibles, and since the Retailers' Occupation Tax and Use Tax are triggered upon the transfer of tangible personal property, no sales tax liability attaches to such sales.

The Telecommunications Excise Tax (35 ILCS 630/1 *et seq.*) is imposed upon the act or privilege of originating or receiving intrastate or interstate telecommunications in Illinois at the rate of 7% of the gross charges for such telecommunications purchased at retail from retailers.

Charges for "900 number" calls are specifically subject to the Telecommunications Excise Tax. See 86 Ill. Adm. Code 495.100(h), enclosed. The tax must be collected from the purchaser by a retailer maintaining a place of business in this State.

Sales of prepaid telephone cards by retailers are not subject to Retailers' Occupation Tax. However, the Telecommunications Excise Tax consequences from sales of cards by retailers may vary depending upon whether we would deem the retail stores to be retailers of telecommunications.

In some cases, retail stores purchase telephone cards from telephone service providers and then sell the cards to customers at marked-up prices. In this scenario, we do not consider the retail stores to be retailers of telecommunications. In that case, the retail store is not responsible for collecting Telecommunications Excise Tax at the point of sale of the card to its customer or at any other point. The tax is incurred at the time the telecommunications originate or are received in a taxable manner, and the amount of telecommunications charges for which the cards are redeemed by the telephone service providers would include any amount of Telecommunications Excise Tax incurred. The telephone service providers charge the phone calls and the tax against the balance of the cards as they are responsible for collecting and remitting the tax.

However, in other cases, the stores may purchase telecommunications units from telephone service providers and sell them at retail to their customers. This situation is similar to hotels that sell telecommunications services. See Section 495.110. In these cases, the retail stores would be required to register as telecommunications retailers and collect and remit Telecommunications Excise Tax. The tax base would be the amounts charged to card purchasers for the taxable services subsequently provided (i.e., calls that originate or terminate in Illinois).

When cards are sold in Illinois, the Department presumes calls will originate or terminate in this State. Retail stores have the burden to establish that charges are exempt from the Telecommunications Excise Tax. The only way to document this would be through records of the telephone service providers. Therefore, as a practical matter, because retail stores will not know at the time sales are made what taxable services cardholders will later consume, retail stores should charge tax on the full sales price of the cards.

In general, a donor who purchases tangible personal property and gives it away in Illinois makes a taxable use of the property when making the gift. See 86 Ill. Adm. Code 150.305(c), enclosed. When such a gift is made, the donee incurs no Use Tax liability.

I hope this information is helpful. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b).

Very truly yours,

Gina Roccaforte
Associate Counsel

GR:msk
Enc.