

An out-of-State retailer falling under the definition of a "retailer maintaining a place of business in this State is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801. (This is a GIL.)

December 28, 1998

Dear Mr. Xxxxx:

This letter is in response to your letter dated November 9, 1998. 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:

OUR CUSTOMER, COMPANY HAS REQUESTED THAT WE PROVIDE TO THEM A FORMAL RULING OF THE TAXABILITY OF THEIR PRODUCT BEING SHIPPED INTO YOUR STATE.

THE PRODUCT WE PROVIDE TO COMPANY IS REFERRED TO AS A VINYL APPLICATOR PACK (VAP). COMPANY FURNISHES THIS PRODUCT TO ITS WHOLESALE DISTRIBUTORS FOR THE PURPOSE OF DEMONSTRATING ITS ROOFING PRODUCT TO POTENTIAL CUSTOMERS.

THE VAP CONSISTS OF A MULTIPLE POUCH VINYL SHEET, A HEADER CARD AND PIECES OF COMPANY' ROOFING PRODUCT INSERTED IN THE POUCHES. THE ROOFING PRODUCT CAN BE REMOVED FROM THE POUCH FOR EXAMINATION. SEE THE FOLLOWING PAGE FOR AN EXAMPLE OF THE PRODUCT.

BUSINESS SUPPLIES ALL MATERIAL AND LABOR FOR THE VAP, EXCEPT FOR THE ACTUAL ROOFING PRODUCT.

COMPANY INFORMS BUSINESS AS TO THE QUANTITY AND DESTINATION POINT OF THE VAP. WE PACKAGE AND ARRANGE FOR SHIPPING OF THE VAP.

COMPANY STATES THAT THEY PROVIDE THE VAP FREE OF CHARGE TO THEIR DISTRIBUTORS AND THAT THEY DEEM THE VAP AS HAVING NO VALUE.

PLEASE PROVIDE TO US, BUSINESS, IN WRITING A FORMAL DETERMINATION OF THE TAXABILITY OF THIS TRANSACTION.

The Illinois Retailers' Occupation Tax Act, 35 ILCS 120/1 et seq., imposes a tax upon persons engaged in the business of selling tangible personal property at

retail. The tax is imposed at the rate of 6.25% of gross receipts from sales of tangible personal property made in the course of business. See 35 ILCS 120/2-10. The Use Tax Act, 35 ILCS 105/1 et seq., imposes a tax upon the privilege of using in this State tangible personal property purchased at retail from a retailers. The tax is imposed at the rate of 6.25% of the selling price or the fair market value of the tangible personal property. See 35 ILCS 105/3-10.

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. These provisions should be read together with the United States Supreme Court case, *Quill v. North Dakota*, 112 S.Ct. 1904 (1992).

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.

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 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 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.

We encourage you to apply the guidelines above to determine whether your company's activities trigger Use Tax collection obligations.

In general, shipping and handling or delivery charges are includable in the gross receipts subject to tax unless the buyer and seller agree upon such charges separately from the selling price of the tangible personal property which is sold. In addition, such charges must be reflective of the costs of shipping and

delivery. To the extent that these charges exceed the costs of shipping, they are subject to tax. See 86 Ill. Adm. Code 130.415, enclosed. As a technical proposition, handling charges represent a retailer's cost of doing business, and are consequently always includable in gross charges subject to tax. See the enclosed copy of 86 Ill. Adm. Code 130.410. However, when such charges are stated in combination with shipping charges, they will be nontaxable to the extent the above tests are met.

The best evidence that shipping and handling or freight charges have been contracted for separately from the selling price is a separate contract for shipping and handling or freight charges. A separate listing of freight charges on an invoice, by itself, is insufficient. However, documentation that demonstrates that purchasers had the option of taking delivery of the property at the sellers' location for the agreed purchase price, or having delivery made by the seller for the agreed purchase price plus an ascertained or ascertainable delivery charge, will suffice.

Mail order delivery charges are deemed to be agreed upon separately from the selling price of the tangible personal property being sold so long as the mail order form requires a separate charge for delivery and so long as the charges designated as transportation or delivery or shipping and handling are actually reflective of the costs of such shipping, transportation or delivery. See subsection (d) of Section 130.415. If the retailer charges a customer shipping and handling or delivery charges that exceed the retailer's cost of providing the transportation or delivery the excess amount is subject to tax.

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,

Martha P. Mote
Associate Counsel

MPM:msk
Encl.