

General Information Letter: Sales made in Illinois by mobile sales unit are sufficient to provide nexus with the State.

October 19, 2009

Dear:

This is in response to your letter dated August 31, 2009 in which you request a general information letter (GIL). A GIL is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code § 1200.120(b) and (c), which may be accessed from the Department's web site at www.Iltax.com. The following information relates to Illinois income tax. Your request in regard to Illinois sales tax has been forwarded to the Sales and Excise Tax Division and will be addressed by a separate ruling.

Your letter states as follows:

In review of the revenue act of Illinois I am looking for a definition of *de minimis*. This letter is requesting a decision ruling on whether or not the following scenario constitutes nexus:

Total sales everywhere are \$51 million with \$420,000 in Illinois of which 8% of this number (\$33,000) is made on a mobile unit that travels to Illinois once or twice a year. The remaining 92% of sales to Illinois are accepted and rejected outside the state and are shipped via common carrier. There is no property or payroll within Illinois

RULING

The determination whether a taxpayer has nexus with Illinois is extremely fact-specific. Therefore, the Department does not issue rulings regarding whether a taxpayer has nexus with the State. However, as described below, it is likely that making mobile unit sales in Illinois as described in your letter would result in the loss of protection under Public Law 86-272.

Public Law 86-272, 73 Stat. 555, 15 U.S.C.A. §381 (1959), denies a State the power to tax net income derived within the State by any person from interstate commerce if the only business activities of the person within the State consist of "solicitation of orders ... for sales of tangible personal property," where the orders are sent outside the State for approval or rejection and are filled by shipment or delivery from a point outside the State. Regarding P.L. 86-272, Department Regulations Section 100.9720(c)(2)(A) states:

If a nonresident taxpayer's activities exceed "mere solicitation," as set forth in subsection (a) of PL 86-272 ... it obtains no immunity under that federal statute. The taxpayer is subject to Illinois income tax and personal property tax replacement income tax for the entire taxable year and its business income is apportioned under IITA Section 304. Whether a nonresident taxpayer's conduct exceeds "mere solicitation" depends upon the facts in each particular case.

Department Regulations Section 100.9700(c)(2)(C) defines the phrase "solicitation of orders" as follows:

Solicitation of orders means speech or conduct that explicitly or impliedly invites an order and activity ancillary to invitations for an order.

- i) To be ancillary to invitations for orders, an activity must serve no independent business function for the seller apart from its connection to the solicitation of orders.
- ii) Activity that a seller would engage in apart from soliciting orders shall not be considered ancillary to the solicitation of orders.
- iii) Assignment of an activity to a salesperson does not, merely by such assignment, make that activity ancillary to solicitation of orders.
- iv) Activity that attempts to promote sales is not ancillary, nor is activity that facilitates sales. PL 86-272 only protects ancillary activity that facilitates the invitation of an order.

Department Regulations Section 100.9720(c)(4) lists specific activities that are considered beyond solicitation and therefore unprotected by Public Law 86-272. Section 100.9720(c)(4)(O)(viii) includes on this list:

Mobile stores, i.e. vehicles with drivers who are sales personnel making sales from the vehicles.

In Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214 (1992), the United States Supreme Court held that a taxpayer does not forfeit protection under P.L. 86-272 by engaging in de minimus activities that exceed solicitation of orders. (Id. at 231). Department Regulations Section 100.9720(c)(2)(D) states the following regarding the determination whether otherwise non-protected activities may be considered de minimus:

De minimus activities are those that, when taken together, establish only a trivial additional connection with this State. An activity regularly conducted within this State on a regular or systematic basis or pursuant to a company policy (whether such policy is in writing or not) shall normally not be considered trivial. Whether an activity consists of a trivial or non-trivial additional connection with this State is to be measured on both a qualitative and quantitative basis. If the activity either qualitatively or quantitatively creates a non-trivial additional connection with this State, then the activity exceeds the protection of PL 86-272. The amount of unprotected activities conducted within this State relative to the amount of protected activities conducted within this State is not determinative of the issue of whether the unprotected activities are de minimus. The determination of whether an unprotected activity creates a non-trivial connection with this State is made on the basis of the taxpayer's entire business activity, not merely its activities conducted within this State. An unprotected activity that would not be de minimus if it were the only business activity of the taxpayer conducted in this State will not be de minimus merely because the taxpayer also conducts a substantial amount of protected activities within this State, nor will an unprotected activity that would be de minimus if conducted in conjunction with a substantial amount of protected activities fail to be de minimus merely because no protected activities are conducted in this State.

Applying the above regulation to the facts stated in your letter, it is likely that making sales in Illinois from a mobile sales unit once or twice a year would not qualify as de minimus. As indicated in the regulation, an unprotected activity that is not de minimus standing alone does not become de minimus because the taxpayer also conducts a substantial amount of protected activities within the

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State. Therefore, that 92% of your Illinois sales would otherwise be protected under P.L. 86-272 does not cause the remaining 8% of your sales to be considered de minimus. The mobile sales unit activity you describe appears to fall within the second sentence of Regulations Section 100.9720(c)(2)(D), as an activity regularly conducted within Illinois on a regular or systematic basis or pursuant to a company policy. As a result, such sales would not normally be considered trivial.

As stated above, this is a GIL. A GIL does not constitute a statement of policy that applies, interprets or prescribes the tax laws, and it is not binding on the Department.

Sincerely,

Brian L. Stocker
Associate Counsel (Income Tax)