

General Information Letter: Installation of equipment sold to Illinois customers is not an activity protected by Public Law 86-272.

December 10, 2009

Dear:

This is in response to your letter dated October 30, 2009 in which you request information regarding nexus for Illinois income tax purposes. The nature of your request and the information provided requires that we respond with 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 website at www.Iltax.com.

Your letter states as follows:

This letter is concerning nexus as it relates to corporate income tax only. Our products are exempt from sales and use tax as they are used in the manufacturing process.

We were located in Illinois when we first started business in 19XX, but moved up to STATE on 1/1/20XX. Our accountant continued to file Illinois tax returns apportioning our income between Illinois and STATE, but now I wonder whether that is correct.

We import machinery from various countries for sale in North America. These machines are huge, so when they are sold, they are shipped from the port of entry directly to the customer. We do install these machines with our own people, who are based out of our office.

We also stock parts here in STATE for sale to any customers who own our machines. When parts are shipped, they go by COMPANY1 or COMPANY2. We do not own our own trucks.

So, we have frequent sales of parts to Illinois customers, but infrequent machinery sales to Illinois customers. We may only sell 5 machines a year and none may go to Illinois. All sales are generated from our office in STATE basically by telephone, but we may visit a customer from time to time to secure a sale.

RULING

The determination whether a taxpayer has nexus with Illinois is extremely fact-specific. Therefore, the Department does not issue nexus rulings. However, the following general information may be provided.

Public Law 86-272, 73 Stat. 555, 15 U.S.C.A. §381 (1959), states in pertinent part as follows:

No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection,

and , if approved, are filled by shipment or delivery from a point outside the State; and
(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1). 15 U.S.C. 381(a).(West 1997).

Under the above language, protection under Public Law 86-272 applies on an all-or-nothing basis for each taxable year. A person is exempt from state taxation for a taxable year if its activities during that taxable year are limited to the activities described in the statute. If the person's activities during the taxable year exceed those described, then the protection afforded under the statute does not apply for that taxable year. See Department Regulations Section 100.9720(c)(11).

Public Law 86-272 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 Public Law 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)(D) includes on this list:

- (D) Installation or supervision of installation at or after shipment or delivery.

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 Public Law 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 provisions to the facts stated in your letter, whether or not COMPANY3 is protected from Illinois tax under Public Law 86-272 for a particular taxable year likely depends on whether or not it has machine sales to Illinois customers for that taxable year. Under Department Regulations Section 100.9720(c)(4)(D), COMPANY3's installation of machines sold to Illinois customers is an unprotected activity, and consequently results in loss of the protection otherwise afforded under Public Law 86-272. Therefore, in taxable years in which COMPANY3 installs a machine sold to an Illinois customer, it will be subject to Illinois income tax. Its sales factor numerator for such taxable years would include gross receipts from both machine and parts sales made to Illinois customers. On the other hand, in taxable years in which COMPANY3 does not have machine sales to Illinois customers, it may well be exempt from Illinois income tax under Public Law 86-272. You have indicated that for parts sales, COMPANY3 ships the property from its office in STATE for delivery to customers by a third party carrier. Assuming that no unprotected activities occur in Illinois during such years, the provisions of Public Law 86-272 would apply.

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)