

Blog Post

In Search of Revenue – Chicago Issues Bulletin on Economic Nexus For Streaming and Cloud Services

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On January 21, 2021, the City of Chicago’s Department of Finance issued an informational bulletin clarifying its position regarding economic nexus for Chicago’s amusement tax as applied to streamed amusements and Chicago’s personal property lease transaction tax (PPLTT). It also announced a “safe harbor” that businesses can rely upon when analyzing nexus. Chicago states that it will utilize the state of Illinois’ thresholds (i.e., (i) the sales of tangible personal property or services to customers in Illinois are \$100,000 or more; or (ii) the retailer or service provider enters into 200 or more separate transactions for sales of tangible personal property or services to Illinois customers in the past 12 month period^[1]) as applied to customers in the City to analyze whether a business has nexus with the City.

Despite this seemingly bright-line test, the Bulletin then explains that these thresholds are merely factors and it will look at the business’s activity in the City, any physical presence, advertising to Chicago customers, and “any other facts that support or oppose the conclusion that the entity has purposefully availed itself of the privilege of carrying on business in Chicago.”

The City also announced a safe harbor – if an out-of-state entity received under \$100,000 in revenue

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from Chicago customers during the most recent 12 month period, that entity will not be expected to collect the Chicago amusement tax as applied to streamed amusements and the PPLTT.[2] This safe harbor is limited by the following conditions:

- The entity cannot have any other significant contacts with Chicago;
- The safe harbor only applies prospectively, beginning July 1, 2021 (no refunds or credits will be granted for taxes paid or remitted before that date);
- If an out-of-state entity no longer qualifies for the safe harbor, it must
 1. register with the City’s Department of Finance within 60 days,
 2. begin collecting Chicago taxes within 90 days,
 3. continue collecting Chicago taxes for at least twelve months; and
- The safe harbor only addresses whether a provider has a duty to collect taxes from its customers; it does not affect whether a customer has a duty to pay those taxes.

Prior to this Bulletin, the City was silent on their position with respect to economic nexus. This left many taxpayers guessing what nexus standards should be applied to their transactions in the City. While the Bulletin helps to clarify this standard, it still leaves a broad swath of activity open to interpretation because it did not impose a comprehensive threshold. Rather, it indicates that economic activity is an important factor in determining nexus and it will use that information to make a determination going forward. Similarly, its “bright-line” safe harbor is equally disappointing in that it is not a bright-line at all. The first limitation pulls it back from a bright-line test into a morass – what will be considered “other significant contacts” with the City?

Chicago's Bulletin arrives on the tails of Illinois' "Leveling the Playing Field" which became effective as of January 1, 2021.^[3] This law amended, and attempted to correct, issues with Illinois' economic nexus rules by imposing state and local retailers' occupation taxes on Illinois retailers and remote retailers alike. Unfortunately, like Chicago's Bulletin, these changes only added more uncertainty for many taxpayers as it changed the sourcing rules and arguably made them more complex. Further, in both instances, these rules could be deemed unconstitutional and may be challenged in the future.

Of course, some guidance is better than no guidance at all. In light of this Bulletin, and the state's economic nexus rules, taxpayers should be put on notice that the City will look to impose economic nexus provisions and will likely be aggressive in its determinations, especially due to its significant budget deficits and mounting obligations. This interpretation, coupled with increased taxes Citywide, including the loss of the lower cloud tax rate (all leases in the City are now taxed at 9 percent as of January 1, 2021), is indicative of the City's need for additional revenue. While it is no surprise that the City has taken this position, taxpayers should continue to review their nexus thresholds with Chicago with this new interpretation in mind and an understanding of the City's continued search for revenue.

[1] 35 ILL. COMP. STAT. 105/2, 110/2.

[2] As you may know, the City of Chicago takes the position that if an entity is located in Illinois, it generally has nexus with the City of Chicago for tax purposes.

[3] Public Acts 101-31 and 101-604.

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