

May 4, 2014

Mr. Paul Berks
Deputy General Counsel
Illinois Department of Revenue
100 West Randolph Street, 7th Floor
Chicago, Illinois 60601

Re: Proposed amendments to 86 Ill. Admin. Code Sections 220.115, 270.115, 320.115, 370.115, 395.115, 630.120, 670.115, 690.115, 693.115, and 695.115 as published in the February 7, 2014 Illinois Register

Dear Mr. Berks:

The Illinois Chamber of Commerce, the Illinois Retail Merchants Association and the Illinois Manufacturers' Association submit the following comments regarding the above-mentioned proposed amendments. Our comments will apply to all of the impacted local retailers' occupation taxes.

We recognize the difficulty of developing regulations for the many different type of retail transactions that exist today and that also anticipate the new and unique methods of doing business that continually evolve as a result of ever-changing technologies. We urge the Department to provide clear guidance to the taxpayers charged with collecting both State and local retailers' occupation taxes, their customers and all of the local governments impacted by these regulations. Unfortunately, we do not believe the proposed amendments to the local retailers' occupation tax rules provide the clarity and guidance that will be needed. Our key concerns are as follows:

1. The 9-Factor Test:

The primary factor/secondary factor test outlined in the proposed amendments creates uncertainty for retailers because it does not indicate how important each factor is in determining a sale location, or how many factors must occur in a selling location in order for a retailer to be deemed "engaged in the occupation of selling" in that location. The Supreme Court in Hartney recognized that purchase order acceptance alone was insufficient to determine where a retailer was engaged in the occupation of selling and held that other factors must also be taken into consideration, but it did not prohibit the Department from providing more detailed guidance in determining the location of selling activity.

While each retailer engages in a "composite of activities", the Department's primary factors should focus on those activities necessary to accomplish a sale of tangible personal property—for example the Department could look to 1) acceptance of an offer to buy or sell at a particular price or quantity, 2) negotiation of terms of payment and 3) the transfer of the property or title to the purchaser or the determination of how the property (or title thereto) will be transferred or ultimately delivered to the purchaser. These factors are core activities consistent with the definition of a "sale" found in the Illinois Uniform Commercial Code at Section 2-401, which states that a "sale" consists of the passing of title from the seller to the buyer for a price. A presumption could be established that persons engaged in all of the above-listed activities in a particular jurisdiction are presumed to be engaged in the occupation of

selling in that jurisdiction. This type of analysis is consistent with and actually provides justification for almost all of the “special rules” listed in subsection (c) of the proposed rules—with the exception of the rule for “out-of-state selling activities” —and would provide internal consistency for the rules. Ultimately, there can be no sale of tangible personal property unless all three of these activities takes place. We also question the use of delivery location as a secondary factor since the customer’s location should not be used to determine the location where the seller is engaged in the occupation of selling.

2. Principles Underlying Determination of Seller’s Location

Subsection 4(A) provides that when a retailer’s selling activities are spread through multiple Illinois jurisdictions, and where the retailer is engaged in the business of selling is a close question, the Department will look to the jurisdiction where the retailer “enjoyed the greater part of governmental protection and benefitted by being conducted under that protection.” The proposed regulations do not provide guidance for making such a determination, however. Will a retailer enjoy governmental protection in the municipality or county where it is registered to do business, where it has the most square footage, or where it pays the most in property taxes? If this is the underlying principle to be used to determine the location of selling, then the Department should identify the standards that they will apply in making such a determination, as is required under the Administrative Procedure Act when an agency of state government is using discretionary standards.

3. Looking Through Form to Substance

Subsection 4(b) provides that the Department may look through the form of a putatively multijurisdictional transaction to its substance to determine where enough of the business of selling took place and will “not look to the location of a party that is owned by or has common ownership with a supplier or a purchaser if that party does not, in substance, conduct the selling activities identified in subsection (d)(2) or (d)(3).” If the Department, in its discretion, looks beyond the selling activities of a business entity to a parent or affiliated company, the Department should identify the standards and procedures for determining how and when it will do so, as is required by the APA.

4. Examples of Common Selling Activities

The Department should provide examples for determining the location of common types of transactions. Common selling activities not specifically addressed in the regulations include:

- Over-the-counter sales where inventory is shipped from an offsite warehouse or an affiliated retailer at another location,
- Existing long-long term contracts or sales arrangements, including keep-full contracts,
- Application of the rules to taxpayers using the expanded temporary storage exemption,
- Sales through internet kiosks located in retail locations,
- Electronic order submission to an Illinois retailer,
- Retailer outsourcing of order acceptance, payment receipt and delivery determinations to a call center,
- In-store pick-up of items ordered on the internet or by phone, and
- Businesses using direct pay permits.

Customers, as well as retailer, have a right to know the tax implications of engaging in these varied types of purchasing activities.

We encourage the Department to revise these regulations so that these critical issues are addressed. Retailers, consumers and local governments need guidelines for determining where the location of selling takes place that are consistent, easy to understand and apply, and that take into account modern selling practices. As drafted, the regulations do not provide that clear guidance and will only promote disputes between local taxing jurisdictions. As tax collectors, acting on behalf of the State of Illinois, retailers should be provided clear guidance in determining applicable rates of tax to apply to sales in Illinois.

Respectfully submitted,

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