



VILLAGE OF CHANNAHON

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March 17, 2014

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

Via Email: paul.berks@illinois.gov

**Re: March 21st Public Hearing
Proposed Local Sales Tax Sourcing Regulations**

Dear Mr. Berks:

On behalf of the Village of Channahon, I would like to request that Channahon be given the opportunity to present testimony at the March 21st public hearing on the proposed rules for the various retailers' occupation taxes. The following is a brief summary of the testimony that will be presented.

Testimony will be presented on the impact of the rules upon Channahon, its retailers and what Channahon believes to be the potential impact on retailers and municipalities throughout the state. Also, we will discuss why there is a greater need for certainty than is provided in the proposed rules.

We will discuss why Channahon believes that certain provisions of the proposed rules do not comply with Hartney.

We will provide suggested changes to the proposed rules that we believe bring the rules into compliance with Hartney, provide greater clarity for retailers and governmental entities, and diminish risks that are inherent to the current proposed rules.

Enclosed are two exhibits for your consideration and review and should you have any questions, please feel free to contact me at 815-467-6644 or jpena@channahon.org.

Sincerely,

Ignacio J. Pena
Village Administrator

PROPOSED CHANGES TO PROPOSED RULE SECTION 220.115

James A. Murphy
Mahoney, Silverman & Cross, LLC
Joliet, Illinois

Initial Comments:

- The proposed revisions are written to ensure that the Rules comply with the Illinois Supreme Court's decision in *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130.
- The proposed revisions are also written to ensure that retail occupation taxes are the primary source of collecting taxes on retail selling activities and that use taxes are only used for sales for which there are insufficient activities within the state to impose a retailer occupation tax as a matter of constitutional law. This is in keeping with the recognition that use taxes have been adopted to complement retail occupation taxes, *Irwin Indus. Tool Co. v. Ill. Dep't of Revenue*, 238 Ill.2d 232, 340 (2010), and that the retailers occupation tax should apply whenever a retailer's activities in Illinois exceed "mere sollicitaion". *Int'l Stanley Corp. v. Dept of Revenue*, 40 Ill. App. 3d 397 (1st Dist 1976). To ensure that the focus is on the retail occupation taxes, the revisions make sure that the focus of any inquiry is on what activities are occurring within the State and not on activities occurring outside the State.
- The Illinois Supreme Court's Decision in *Hartney* found that IDOR had the ability to create short cuts so long as those rules neither expanded nor limited the scope of the statute. These rules have been adopted as such short cuts applying the principles set forth in various Illinois Supreme Court cases that have applied retailer occupation taxes.
- There is a possibility that discrepancies will arise between siting taxes for purposes of a municipal tax, a county tax, and the RTA tax. For example, if a retailer has a showroom in one location, inventory in a second location and corporate offices in another location, it is possible that the showroom would be found to be the predominant location for siting a municipal ROT tax as between three municipalities. However, if both the inventory and the headquarters were located within the same county, the combination may be such that the county where both were located had more selling activity than where the municipality where the showroom is located. It is therefore suggested that a separate rule be adopted to address this issue. Furthermore, each rule dealing with a local municipality should be written to refer to the type of municipality involved. For example in the proposed revisions (b)(3) makes it clear that the activities in one county in Illinois are to be compared to the activities in another county in Illinois.

Section 220.115 Jurisdictional Questions

EMERGENCY

a) Definitions

- a) 1). County Defined. When used in this Part, "county" includes all territory located within the county, including all territory within cities, villages or incorporated towns, including an incorporated town that has superseded a civil township.

2). In-person Sale Defined. When used in this Part, “in-person sale” means the formation of a binding sales contract where both seller and purchaser are physically present in the county at the time the binding contract is entered into.

COMMENT:

• **The definition of in-person sale is added for use in what is now subparagraph (c)(2) to describe sales that occur at showrooms or stores where the tangible property is located in an inventory within another jurisdiction in the State. Traditionally, this type of sale has most of the attributes of an over-the-counter sale described in the rule with the exception that the inventory is not located on site.**

b) Retailer’s Selling Activities Determine Taxing Jurisdiction

- 1) The Home Rule County Retailer’s Occupation Tax Law authorizes home rule counties to impose a tax on those engaged in the business of selling tangible personal property at retail within the county. 55 ILCS 5/5-1006. Because the statute imposes a tax on the retail business of selling and not on specific sales, the jurisdiction in which the sale takes place is not necessarily the jurisdiction where the retailers’ occupation tax is owed. Rather, it is the jurisdiction where the seller is engaged in the business of selling that can impose the tax. *Automatic Voting Machs. v. Daley*, 409 Ill. 438, 447 (1951) (“In short, the tax is imposed on the ‘occupation’ of the retailer and not upon the ‘sales’ as such.”) (citing *Mahon v. Nudelman*, 377 Ill. 331 (1941) and *Standard Oil Co. v. Dep’t of Finance*, 383 Ill. 136 (1943)); see also *Young v. Hulman*, 39 Ill.2d 219, 225 (1968) (“the retailers occupational tax...imposes liability upon the occupation of Selling at retail and not on the Sale itself”). By allowing the county to impose tax on retailers who conduct business in the county, the Home Rule County Retailers’ Occupation Tax Law links the retailer’s tax liability to where it principally enjoys the benefits of government services. *Svithiod Singing Club v. McKibbin*, 381 Ill. 194, 199 (1942).
- 2) Illinois Supreme Court - fact-specific inquiry. The Illinois Supreme Court has held that the occupation of selling is comprised of “the composite of many activities extending from the preparation for, and the obtaining of, orders for goods to the final consummation of the sale by the passing of title and payment of the purchase price.” *Ex-Cell-O Corp. v. McKibbin*, 383 Ill. 316, 321 (1943). Additional activities that are necessary to the occupation of retail sales include activities related to the procurement of goods for resale. Thus, establishing where “the taxable business of selling is being carried on” requires a fact-specific inquiry into the composite of activities that comprise the retailer’s business. *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130 ¶ 32 (citing *Ex-Cell-O Corp. v. McKibbin*, 383 Ill. 316, 321-22 (1943)). At the same time, the Illinois Supreme Court has recognized that agencies may include “presumptions or other shortcuts” in administrative decision making. *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130 ¶ 59. These rules contain such determinations based on a consideration of the multiple factors that have been identified in various

Illinois Supreme Court decisions as being sufficient to impose a retailers occupation tax.

COMMENT:

- **As long as the Court has recognized that all activities related to the occupation of retail sales should be considered, any itemized list contained in the rule should be as expansive as necessary to include all items that are required to be engaged in the business of retail sales.**

3) Determination of Taxing Jurisdiction. Applying the provisions in subsections (b)(1)-(b)(2) of this section, a seller incurs Home Rule County Retailers' Occupation Tax in the county if its ~~predominant and most important~~ selling activities take place within the county are more significant in the county- than in any other county in the State. Isolated or limited business activities within a ~~jurisdiction~~ county do not constitute engaging in the business of selling in that county when other more significant selling activities occur ~~outside the jurisdiction in another county within the State,~~ and the business ~~predominantly~~ takes greater advantage of government services provided by such other county. Ex-Cell-O Corp. v. McKibbin, 383 Ill. 316, 322-23 (1943); Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130 ¶¶ 30-35.

COMMENT:

- **The terms “predominant” and “most important” are far too subjective and indefinite. Predominate has been sometimes defined as being equal to or greater than fifty percent. This interpretation could lead to confusion where the selling activities are so widely dispersed that it could not be said that fifty percent of the activities occur in one location. Such an interpretation would leave no test or a test that could not be met.**

The term “most important” also is subject to confusion. For example, there are many activities that are critical to retail sales. These activities include among others procurement of the merchandise, the sale of the merchandise (including acceptance of an offer) and payment for the merchandise. Without these, a person cannot continue to be engaged in retail sales. Such activities are thus all the most important since they are critical.

Furthermore, when “predominant” is used in conjunction with the term “most important.” Thus, the retailer must meet both criteria in order for the tax to apply.

The term “more significant” is suggested as an alternative as a means of comparing activity within one jurisdiction to activities within similar jurisdictions to determine which among several similar jurisdictions has the most significant sales activities which are benefited by the governmental services provided by similar jurisdictions.

- **By changing the text, it also becomes clear that the comparison is to be made between counties within the State and not to activities out of the State.**

c) Guidance on the Application of the Composite of Selling Activities Test to Common Selling Operations

- ~~1) In general. For most retailers, the jurisdiction in which they are engaged in the business of selling is not open to reasonable dispute because it is obvious where the most significant activities take place. Retailers engaged in common selling operations, with a clear location of predominant selling activities, constitute the vast majority of retailers in the State. Subsections (c)(2) (c)(7) of this Section provide guidance on applying the fact specific “composite of selling activities” test to common and longstanding selling operations.~~

COMMENT:

- **It is suggested that the above paragraph be taken out since it does not establish any type of test, is not accurate, and is likely to be less accurate in the future as the nature of retail sales evolves and changes with technology. It is also not accurate given the focus on many items of consideration that do not take at place in one location.**

- ~~2) 1) Over-the-counter sales. When a person makes an over-the-counter sale of tangible personal property in a jurisdiction county and (a) the purchaser takes possession of the property immediately; or (b) the seller ships the property to the purchaser from the location where the sale was made, then the seller is engaged in the business of selling with respect to that sale in the jurisdiction county where the over-the-counter sale occurred.~~
- 2) When a person makes an in-person sale of tangible personal property in a county at a location that is owned or leased by the seller, then the seller is engaged in the business of selling with respect to that sale in the county where the in-person sale occurred.
- 3) In-state inventory/out-of-state selling activities. If a retailer’s selling activity takes activities all take place outside this State, but except that the tangible personal property that is sold is in an inventory of the retailer located within a jurisdiction county in Illinois at the time of the sale (or is subsequently produced *in the jurisdiction*) by the retailer) then delivered in Illinois to the purchaser, then the jurisdiction county where the property is located at the time of the sale or when it is subsequently produced by the retailer will determine where the ~~seller~~ retailer is engaged in business with respect to that sale. Chemed Corp., Inc. v. Department of Revenue, 186 Ill. App.3d (4th Dist. 1989).

COMMENT:

- **The location of inventory is a selling activity under (d)(2)(D). As proposed by IDOR the rule refers to inventory in this subparagraph as though it were not a selling activity. The**

suggested language is to demonstrate that the location of inventory is an exception to the “all”. The changes are thus to avoid any confusion that might otherwise arise.

• It is suggested that the term “produced” should be clarified. As it stands now, it is unclear whether it means that the personal property is placed in the inventory through any means or is limited to items that are manufactured by the retailer.

- 4) Sales Through Vending Machines. The seller’s place of engaging in business when making sales through a vending machine is the place where the inventory for stocking the vending machine is located when the sales are made, provided that place is within the State. If the inventory for stocking the vending machine is located out of the State, the place of engaging in business shall be where the vending machine is located.

COMMENT:

• The retailer is far more likely to benefit from government services where the inventory is located than from where individual vending machines are located.

- 5) Sales From Vehicles Carrying Uncommitted Stock of Goods. The seller’s place of engaging in business when making sales and deliveries (not just deliveries pursuant to previously completed sales, but actual sales and deliveries) from a vehicle in which a stock of goods is being carried for sale is the place where the inventory for stocking the vehicle is located when such inventory is located within the State. When the inventory for stocking the vehicle is located outside of the State, the seller’s place of engaging in business is the place at which the sales and deliveries happen to be made – the vehicle carrying the stock of goods for sale being regarded as a portable place of business.

COMMENT:

• Like sales from vending machines, the retailer is far more likely to benefit from government services where the inventory is located than from where the vehicle happens to be located at the time of a sale.

- 6) Sales of Coal or Other Minerals. A retail sale by a produced of coal or other mineral mined in Illinois is a sale at retail in the jurisdiction where the coal or other mineral mined in Illinois is extracted from the earth. For the purposes of this Section, “extracted from the earth” means the location at which the coal or other mineral is extracted from the mouth of the mine.

A)A retail sale is a sale to a user, such as a railroad, public utility or other industrial company, for use. “Mineral” includes not only coal, but also oil, sand, stone taken from a quarry, gravel and any other thing commonly regarded as a mineral and extracted from the earth.

B) A mineral produced in Illinois, but shipped out of Illinois by the seller for use outside Illinois, will generally be tax exempt under the Commerce Clause of the Federal Constitution (i.e., as a sale in interstate commerce). This exemption does not extend, however, to sales to carriers, other than common carriers by rail or motor, for their own use outside Illinois if the purchasing carrier takes delivery of the property in the jurisdiction and transports it over its own line to an out of State destination.

C) A sale by a mineral producer to a wholesaler or retailer for resale would not be a retail sale by the producer and so would not be taxable. The taxable sale (the retail sale) is the final sale to the user, and local retailers' occupation tax on that sale will go to the jurisdiction where the retailer is engaged in the business of selling as provided in this Section.

7) Order Acceptance Not Doing Business in the County

A) Except ~~Provided that there are other primary selling activities, as otherwise provided defined in subsections (c)(2)-(c)(6)), within the State,~~ acceptance of purchase orders for the sale of tangible personal property in a jurisdiction county does not constitute engaging in the business of selling in the jurisdiction county in which orders are accepted if the following conditions are met: (i) the seller has no other selling activity in the jurisdiction county except receipt and acceptance of purchase orders; (ii) all orders for the purchase of tangible personal property are submitted to the seller in the jurisdiction county by means of telephone or Internet; and (iii) the seller's employees or agents who accept purchase orders record information relayed by the customer (such as purchaser's name and address; price, type and quantity of items; and method of payment and delivery), but do not negotiate or exercise discretion on behalf of the seller.

B) If acceptance is the only primary selling activity, as defined in (d)(2) within the State, the retailer is conducting business in the location where acceptance occurs.

COMMENT:

- **The first line referencing (c)(2) through (c)(6) is deleted because it does not add anything to the remainder of the paragraph; it only causes confusion. If there are only the activities listed in this paragraph that are being done, a retailer will not be doing any of the items listed in (c)(2) through (c)(6). The reference to these subsections is thus superfluous.**
- **Hartney did not proclaim that acceptance by itself could never determine where a person was engaged in the occupation of retail sales. However, as initially drafted by IDOR, the proposed rule appears to make such a determination. The suggested changes to 7(A) and 7(B) are added to clarify that acceptance may be determined to be sufficient when there are no other selling activities within the State. This also now conforms with (d)(2)(C), which identifies acceptance as a primary selling activity. This is a corollary to (c)(3), which also is based upon one primary selling activity being located within the State. It is also consistent**

with the proposition that retail occupation taxes are to benefit those municipalities within the State that provide the greatest amount of government services. If there are no other selling activities occurring within the State, the county where acceptance occurs is necessarily providing more government services to the seller than any other county in the State.

~~B) C)~~ The place of engaging in the business of selling for retailers with multiple locations in Illinois who accept purchase orders in a ~~jurisdiction~~ county and who meet the criteria set forth in subsection (c)(7)(A) shall be determined based on the composite of selling activities engaged in ~~outside elsewhere within the jurisdiction in which purchase orders are accepted~~ State, in accordance with subsections (d)(2)-(d)(4).

COMMENT:

• The above changes are made to clarify that determinations are to be made on the basis of activities that occur inside the State, not those that may occur outside the State.

d) Application of Composite of Selling Activities Test to Multi-Jurisdictional Intrastate Retailers

1) In General. Some sellers are engaged in retail operations with selling activities in multiple ~~jurisdictions~~ counties in Illinois that do not fall within any of the categories identified in subsection (c) of this regulation. The selling activities that comprise these businesses “are as varied as the methods which men select to carry on retail business.” Ex-Cell-O Corp. v. McKibbin, 383 Ill. 316, 321 (1943). Consequently, “it is...not possible to prescribe by definition which of the many activities must take place in [a jurisdiction]... [I]t is necessary to determine each case according to the facts which reveal the method by which the business was conducted.” Ex-Cell-O Corp. v McKibbin, 383 Ill. 316, 321-22 (1943); see also Hartney Fuel Oil Co. v Hamer, 2013 IL 115130 ¶ 36. ~~The location of the selling activities most important to each retailer’s business of selling dictates the jurisdiction where it is engaged in the business of selling.~~

COMMENT:

• The last line of the sentence has been taken out because it is inconsistent with the proposition that retail occupation taxes are linked to the provision of government services. Furthermore, the term “most important to the retailer’s business” is vague and it is a subjective test based upon the retailer’s determination. It appears to be a determination of what the retailer believes distinguishes it from other retailers. For example, if many retailers are selling widgets, what is most important to one retailer will not be the same as for another retailer. One may find a competitive advantage by focusing on price, another on the variety of widgets it stocks, a third on the quality of widgets, and a fourth on service of the widgets.

- 2) Primary Factors. Without attempting to anticipate every kind of fact situation that may arise, taxpayers that divide selling activities among personnel located in multiple ~~jurisdictions~~ counties ~~should consider~~ must use the following selling activities to determine where they are engaged in the business of selling, and therefore, the correct taxing jurisdiction to source their sales (the presence of three of the five following factors within a county shall be sufficient to source a sale to such county):
- A) Location of officers, executives and employees with discretion to negotiate on behalf of, and to bind, the seller, *Automatic Voting Machs. v. Daley*, 409 Ill. 438, 440 (1951); *Marshall & Huschart Mach. Co. v. Dep't of Revenue*, 18 Ill. App. 2d 496, 501 (1960); *Int'l-Stanley Corp. v. Dep't of Revenue*, 40 Ill. App. 3d 397, 406 (1st Dist. 1976); *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130 ¶ 62;
- B) ~~Location where offers are prepared and made, *Automatic Voting Machs. v. Daley*, 409 Ill. 438, 441, 452 (1951);~~ The location where the seller takes action that contractually binds the seller which is either (1) the place from which it submits an offer than can be unilaterally accepted by the purchaser, or (2) the location where it accepts a purchase order, *Ex-Cell-O Corp. v. McKibbin*, 383 Ill. 316 (1943); *Automatic Voting Machs. v. Daley*, 409 Ill. 438, 452 (1951); and
- C) ~~Location where purchase orders are accepted or other contraction actions that bind the seller to the sale are completed, *Ex-Cell-O Corp. v. McKibbin*, 383 Ill. 316 (1943) *Auotmatic Voting Machs. V. Daley*, 409 Ill. 438, 452 (1951); and~~
- D) ~~C) Location of inventory if tangible personal property that is sold is in the retailer's inventory at the time of its sale or delivery, *Int'l-Stanley Corp. v. Dep't of Revenue*, 40 Ill. App. 3d 397, 401, 406 (1st Dist. 1976); *Chemed Corp., Inc. v. State*, 186 Ill. App.3d 402, 421-22 (4th Dist. 1989).~~
- D) Location where purchase orders or other contractual documents are received *Standard Oil Co. v. Dept of Revenue*, 383 Ill. 136 (1942); *Norton v. Dept of Revenue*, 340 U.S. 534 (1951).
- E) Location where payment is received. *Standard Oil Co. v. Dept of Revenue*, 383 Ill. 136 (1942).

COMMENT:

• Since a Seller cannot both make an offer and accept the offer on a single sale, paragraphs B and C have been condensed into one paragraph to avoid confusion. Both paragraphs recognize that is the binding action taken by the seller that is important.

• Paragraphs D and E have been added to the primary factors and removed from the secondary factors to reflect the decisions cited.

• Also added to the above section is a test that three of five primary factors will be determinative of where it is appropriate to report where a seller is located for purposes of the tax. This test is multi-factored in accordance with Hartney, and it provides a greater degree of certainty to retailers.

2) Secondary Factors. If, after consideration of the factors listed in subsection (d)(2) of this Section, the ~~jurisdiction~~ county in which the seller is engaged in the business of selling is ~~unclear~~ undetermined, the following additional factors ~~should be considered~~ must be used to resolve the issue (in applying these four additional factors, they should be added to the five primary factors and the presence of five of the combined nine factors in any county shall be sufficient to source a sale to that county, or if no county has five of the combined factors then the county with more of the combined factors than any other county shall be considered the source of the sale):

A) Location where marketing and solicitation occur, *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130 ¶ 62;

~~B) Location where purchase orders or other contractual documents are received when purchase orders are accepted, processed, or fulfilled in a location or locations different from where they are received;~~

~~C) Location of the delivery of the property to the purchaser, *Ex-Cell-O Corp. v. McKibbin*, 383 Ill. 316, 323 (1943); Location where title passes, *Int'l-Stanley Corp. v. Dep't of Revenue*, 40 Ill. App. 3d 397, 406 (1st Dist. 1976); and~~

C) Location of the retailer's ordering, billing, accounts receivable and other administrative functions, *Federal Bryant Mach. Co. v. Dep't of Revenue*, 41 Ill. 2d 64, 68 (1968); *Automatic Voting Mach. v. Daley*, 409 Ill. 438, 452 (1951); *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130 ¶ 62.

D) The location where pricing is set if such location is different from the location of the negotiation, if any.

3) Principles Underlying Determination of Seller's Location

A) When a retailer's selling activities are spread through multiple Illinois ~~jurisdictions~~ counties, and where the retailer is engaged in the business of selling presents a close question, the Seller's determination of the place where it is engaged in the business of retail sales shall govern until the Department

notifies the Seller in writing that another jurisdiction should be used for reporting where the Seller is engaged in the business of retail sales. Provided, however, if the Department determines that the Seller's determination of where to report the sales was not made in good faith and that the rules clearly dictated that the jurisdiction reported should have been somewhere other than where the Seller reported to be engaged in the business of retail sales, the Department may adjust the allocation of taxes and may recover any unpaid taxes from the retailer consistent with time limitations provided in governing statutes. If a seller does not have a majority of the primary factors in any county and after using the combined factors stated in subsections (d)(2) and (d)(3) there is no county that has more of the combined factors than any other county, the Department will may then evaluate the factors in subsections (d)(2) and (d)(3) of this Section in order to source the seller's sales, in keeping with the principle that the retailer incurs local retailers' occupation tax in the jurisdiction where it enjoyed the greater part of governmental protectiveservices [and] benefitted by being conducted under that protection.²²with access to such services. Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130 ¶ 34 (quoting Svithiod Singing Club v. McKibbin, 381 Ill. 194, 197 (1942)).

COMMENT:

- **The above changes are made to provide some objectivity and certainty in the sourcing of sales and to provide retailers with some workable guidelines in applying the factors stated. The factors are also adjusted slightly to reflect their importance in the case law. The change also removes the redundancy of using both title location and delivery location as separate factors since title transfer location under Illinois law is the delivery location. The change is further made to provide retailers with an assurance that they will not suffer adverse consequences for making a good-faith determination of where taxes are to be sited. At the same time, it gives the Department flexibility to change the location of where taxes are to be sited on a prospective basis when the Department determines that such is necessary. And, in extreme cases, where retailers have not acted in good faith in reporting where they have been engaged in the occupation of retail sales, the Department may go back and make appropriate adjustments.**
- **The change to the above provision is to take out the internal inconsistency of the rule so that it only refers to governmental services and not both governmental services and governmental protection. It is notable, that the RTA would never be able to establish that it provided governmental protection.**

B) 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, thus, where the seller is subject to local retailers' occupation tax. *Marshall & Huschart Mach. Co. v. Dep't of Revenue*, 18 Ill.2d 496, 501 (1960); *Fed. Bryant Mach. Co. v. Dep't of Revenue*, 40 Ill.2d 64, 67 (1968); *Int'l Stanley Corp. v. Dep't of Revenue*, 40

~~Ill. App. 3d 397, 406 (1st Dist. 1976); Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130 ¶ 31. For example, the Department 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 subsections (d)(2) and (d)(3).~~

COMMENT:

- **Of all the provisions in the proposed Rules, the last subparagraph creates the most uncertainty and possibly undermines the viability of the Rules since it potentially assumes to give IDOR powers beyond what the legislature could even delegate to IDOR if it wanted to. It further raises due process questions due to its vagueness. Finally, looking through corporate existence (i.e. piercing the corporate veil) is not supported and was not even discussed by the cases the Department has cited. Indeed, piercing the corporate veil of subsidiary or affiliate corporations based on an ad hoc determination by the Department is counter to Illinois corporate law and Illinois Supreme Court decisions. See e.g. Superior Coal Co. v. Department of Finance, 377 Ill. 282 (1941).**

Analysis of Emergency Rules Adopted by Illinois Department of Revenue

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Section 220.115 Jurisdictional Questions EMERGENCY

a) County Defined

When used in this Part, “county” includes all territory located within the county, including all territory within cities, villages or incorporated towns, including an incorporated town that has superseded a civil township.

NO COMMENT

b) Retailer’s *Selling Activities* Determine Taxing Jurisdiction

- 1) The Home Rule County Retailer’s Occupation Tax Law authorizes home rule counties to impose a tax on those engaged in the business of selling tangible personal property at retail within the county. 55 ILCS 5/5-1006. Because the statute imposes a tax on the retail business of selling and not on specific sales, the jurisdiction in which the sale takes place is not necessarily the jurisdiction where the retailers’ occupation tax is owed. Rather, *it is the jurisdiction where the seller is engaged in the business of selling that can impose the tax.* Automatic Voting Machs. v. Daley, 409 Ill. 438, 447 (1951) (“In short, the tax is imposed on the ‘occupation’ of the retailer and not upon the ‘sales’ as such.”) (citing Mahon v. Nudelman, 377 Ill. 331 (1941) and Standard Oil Co. v. Dep’t of Finance, 383 Ill. 136 (1943)); see also Young v. Hulman, 39 Ill.2d 219, 225 (1968) (“the retailers occupational tax...imposes liability upon the occupation of Selling at retail and not on the Sale itself”). By allowing the county to impose tax on retailers who conduct business in the county, the Home Rule County Retailers’ Occupation Tax Law links the retailer’s tax liability to where it *principally* enjoys the benefits of government services. Svithiod Singing Club v. McKibbin, 381 Ill. 194, 199 (1942).

COMMENT:

• Use of the term “selling activities” is a confusing term due to conflicting usage in this rule and an apparent exclusion of other activities that are part of the business of selling. The conflicting usage is found by comparing (c)(3) with (d)(2). Under (c)(3), it appears that the location of inventory is not a “selling activity” whereas, under (d)(2), it is specifically listed as a “selling activity.” Furthermore, as the Emergency Rule recognizes the Illinois Supreme Court has found that ROT is a “tax on the occupation of selling and not the sales themselves.” *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130 P30. The tax is thus based on the entirety of an entities business that is related to the sale of goods at retail. This necessarily includes the purchasing of goods for resale, the setting of prices, and the marketing of the goods, all of which under the Emergency Rule may or may not fall under the term “selling activities.”

• The above paragraph appears to presume that when one is engaged in the business of selling, the seller only conducts such business in one jurisdiction. Yet, there is no reason to believe that an entity cannot be engaged in the business of selling in more than one location. Indeed, the Emergency Rules acknowledge this. See (c)(3) and (d)(1). There is thus a disconnect between the statute, the Emergency Rules, and the interpretation of both. New legislation could and should clarify this.

• Pegging tax liability to where an entity principally enjoys the benefit of government services is better done by way of a real estate taxes or a user fee. Within the realm of retail sales, an entity with a headquarters, a store, and a warehouse all in different places enjoys the benefits of government services in all three locations. How is it to be determined where it “principally” enjoys such benefits?

- 2) Illinois Supreme Court - fact-specific inquiry. The Illinois Supreme Court has held that the occupation of selling is comprised of “the composite of many activities extending from the preparation for, and the obtaining of, orders for goods to the final consummation of the sale by the passing of title and payment of the purchase price.” *Ex-Cell-O Corp. v. McKibbin*, 383 Ill. 316, 321 (1943). Thus, establishing where “the taxable business of selling is being carried on” requires a fact-specific inquiry into the composite of activities that comprise the retailer’s business. *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130 ¶ 32 (citing *Ex-Cell-O Corp. v. McKibbin*, 383 Ill. 316, 321-22 (1943)).

COMMENT:

• The business of selling goes beyond those listed. This is in part recognized in the remainder of the rule. See (d). But, there is more. Acquiring the products to be sold and all that goes into that is also part of the business of retail sales because one cannot sell what one does not have.

- 3) Determination of Taxing Jurisdiction. Applying the provisions in subsections (b)(1)-(b)(2) of this section, a seller incurs Home Rule County Retailers’ Occupation Tax in the county if its *predominant and most important selling activities* take place in the county. Isolated or limited business activities within a jurisdiction do not constitute engaging in the business of selling in that jurisdiction when other *more significant selling activities* occur outside the jurisdiction, and the business predominantly takes advantage of government services provided by other jurisdictions. *Ex-Cell-O Corp. v. McKibbin*, 383 Ill. 316, 322-23 (1943); *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130 ¶¶ 30-35.

COMMENT:

• The reference to “predominant and most important selling activities” is both vague and overbroad. A sale cannot occur unless the retailer (1) has something to sell, (2) receives an offer, (3) accepts the offer, and (4) gets paid for the good. Each of these is critical to being in the business of being in retail sales. Isolated activities can thus be the most important

activities because they are crucial. Hence, with regard to these activities it cannot be said that there ever is a “more significant” selling activity or activities. For example, if acceptance occurs in one jurisdiction, it cannot be said that there are “more significant selling activities” elsewhere because, without acceptance, there is no sale.

• Again, it is unclear what is meant by “selling activities.” See Comment to paragraph (b)(1) above.

c) Guidance on the Application of the Composite of Selling Activities Test to Common Selling Operations

- 1) In general. For most retailers, the jurisdiction in which they are engaged in the business of selling is not open to reasonable dispute because it is obvious where the most significant *selling activities* take place. Retailers engaged in common selling operations, with a clear location of predominant selling activities, constitute the vast majority of retailers in the State. Subsections (c)(2)-(c)(7) of this Section provide guidance on applying the fact-specific “composite of selling activities” test to common and longstanding selling operations.

COMMENT:

• Again, it is unclear what is meant by “selling activities.” See Comment to paragraph (b)(1) above.

- 2) Over-the-counter sales. When a person makes an over-the-counter sale of tangible personal property in a jurisdiction and (a) the purchaser takes possession of the property immediately; or (b) the seller ships the property to the purchaser from the location where the sale was made, then the seller is engaged in the business of selling with respect to that sale in the jurisdiction where the over-the-counter sale occurred.

COMMENT:

• While it may seem evident to the author of these rules that a retailer is engaged in the business of selling where over-the-counter sales are made, it is not obvious under the remainder of the Emergency Rules that this is where ROT should be applied. For large retailers such as Walgreens and Sears, which both have headquarters in Illinois, the location of the officers or employees that actually set the price for goods sold in their various stores is probably at headquarters separate from the individual stores. Further, it is likely that there are locations for storing inventory at locations other than the stores. Other activities such as marketing and purchasing of goods to be sold are likely to occur at headquarters and not at individual stores. Thus, these retailers also receive the benefit of government services at locations other than at their stores. Finally, it is likely that the cashiers engaged in the over-the-counter sales do not have the discretion to refuse a sale or set the price for a sale; it being likely that these matters are determined at corporate headquarters. Compare with (c)(7) and (d)(2)(A).

- 3) In-state inventory/out-of-state selling activity. If a retailer's selling activity takes place outside this State, but the tangible personal property that is sold is in an inventory of the retailer located within a jurisdiction in Illinois at the time of its sale (or is subsequently produced in the jurisdiction), then delivered in Illinois to the purchaser, the jurisdiction where the property is located at the time of the sale or when it is subsequently produced will determine where the seller is engaged in business with respect to that sale. *Chemed Corp., Inc. v. Department of Revenue*, 186 Ill. App.3d (4th Dist. 1989).

COMMENT:

• **This provides a single factor test that is no different than the one rejected by *Hartney*. The rule rejected as a single factor test was where there was acceptance and delivery in the state. Under this provision, it is where inventory is located so long as delivery is in the State.**

• **A further question arises: If the location of inventory is sufficient for determining application of ROT when the other selling activities occur outside of Illinois, why should it be less significant when the other selling activities occur in Illinois? There really is no reason to make such a distinction. Yet, the above paragraph appears to make the location of inventory superior to all other selling activities combined. This paragraph thus conflicts with (d)(2).**

4) Long Term or Blanket Contracts

A) Under a long term blanket or master contract that is definite as to price and quantity, but must be implemented by the purchaser placing specific orders when goods are wanted, the location of the seller's place of business where subsequent specific orders are placed will determine where the seller is engaged in business for those orders.

B) The seller's place of engaging in the business of selling for long term blanket or master contracts that do not require the purchaser to place specific orders when goods are due shall be determined in accordance with subsections (d)(2)-(d)(4) of this Section

COMMENT:

• **Subparagraph A of the above sets forth a single factor test being where the order is placed. This is in opposition to the ruling in *Hartney*. This paragraph is also contradicted by paragraph (d)(2), below, which makes the place where orders are received only a secondary consideration.**

- 5) Sales Through Vending Machines. The seller's place of engaging in business when making sales through a vending machine is the place where the vending machine is located when the sales are made.

COMMENT:

• In most circumstances the location of the vending machine is not the location where the business predominantly takes advantage of government services provided by other jurisdictions. Rather, the retailer is most likely to take advantage of government services where the retailer's main office is located, where its delivery vehicles are located, and where the inventory to stock vending machines is located. Indeed, a retailer is likely to take no advantage of government services based on the location of its vending machines. This provision thus appears to be inconsistent with (b)(3).

- 6) Sales From Vehicles Carrying Uncommitted Stock of Goods. The seller's place of engaging in business when making sales and deliveries (not just deliveries pursuant to previously completed sales, but actual sales and deliveries) from a vehicle in which a stock of goods is being carried for sale is the place at which the sales and deliveries happen to be made – the vehicle carrying the stock of goods for sale being regarded as a portable place of business.

COMMENT:

• In most circumstances the location of the vehicle is not the location where the business predominantly takes advantage of government services provided by other jurisdictions. This provision thus appears to be inconsistent with (b)(3).

- 7) [Intentionally omitted].

- 8) Order Acceptance Not Doing Business in the County

- A) Except as otherwise provided in subsections (c)(2)-(c)(6), acceptance of purchase orders for the sale of tangible personal property in a jurisdiction does not constitute engaging in the business of selling the jurisdiction in which orders are accepted if the following conditions are met: (i) the seller has no other selling activity in the jurisdiction *except receipt and acceptance of purchase orders*; (ii) all orders for the purchase of tangible personal property are submitted to the seller in the jurisdiction by *means of telephone or Internet*; and (iii) the seller's employees or agents who accept purchase orders record information relayed by the customer (such as purchaser's name and address; price, type and quantity of items; and method of payment and delivery), but do not negotiate or exercise discretion on behalf of the seller.

COMMENT:

• Since acceptance is essential to being engaged in retail sales, this paragraph is at odds with paragraph (b)(3) which indicates that the tax is to be where the most important selling activity occurs. It is also at odds with (d)(2) which makes the location of acceptance equal with location of officers, location of preparation of offers and location of inventory. Indeed, if there is acceptance of an offer it means that the retailer did not prepare an offer. Therefore, the only other selling activities that are on an equal footing with acceptance are where the officers are located and where the inventory is located. Often these will be different places.

• There is no reason that receipt of an order by telephone or internet should matter to the business. This appears to exclude receiving orders by mail, but there is no logical reason to make such a distinction.

• If the fact that employees have no ability to negotiate or exercise discretion is relevant, it is also relevant for other types of sales activities. For example, if there is a sale at a big box store such as Walmart, it can be expected that the individual at the cash register does not have discretion to refuse to sell or alter the price; such policies and determinations can be expected to come from corporate headquarters. Accordingly, over-the-counter sales have diminished significance under this reasoning.

• This also leaves a gap, or may lead to the State losing money for retailer whose only activity in the State is the acceptance of sales. Does the State/IDOR want to lose these tax revenues and leave it to individual purchasers to report and pay use tax?

• This rule appears to be in violation of *Hartney*. *Hartney* determined that the statute requires a fact intensive inquiry that could neither be broadened nor narrowed by a regulation. However, the above paragraph does not look at all factors. Rather, it focuses on a few and declares that such factors *will never* establish that a person is engaged in the business of retail sales within that municipality. In some instances, this conclusion will also mean that the person is not conducting retail sales anywhere in Illinois. For example, under the above paragraph, if an entity sets up an office in which sales orders are received and accepted and the seller's employees who accept purchase orders record information relayed by the customer (such as purchaser's name and address; price, type and quantity of items; and method of payment and delivery), and all other sales activity occurs outside of Illinois, there will be no retail occupation tax in Illinois. Accordingly, even if the seller sets up a free standing office which is staffed by the seller's employees – and the seller thereby receives the benefits of more government services in such jurisdiction than any other jurisdiction in Illinois, ROT may not be imposed.

B) The place of engaging in the business of selling for retailers who accept purchase orders in a jurisdiction and who meet the criteria set forth in subsection (c)(7)(A) shall be determined based on the composite of selling activities engaged in outside the jurisdiction in which purchase orders are accepted, in accordance with subsections (d)(2)-(d)(4).

COMMENT:

• **This paragraph suggests that, when there is a retailer that accepts sales in one jurisdiction where there is no other sales activity in that jurisdiction, there will necessarily be some other jurisdiction where there is a greater amount of sales activity. This is not necessarily the case since it may be that all activities are dispersed. Furthermore, the criteria in (d)(2)-(d)(4) include acceptance of sales (d)(2)(C), receipt of orders (d)(3)(B), and administrative functions (d)(3)(E).**

d) Application of Composite of Selling Activities Test to Multi-Jurisdictional Intrastate Retailers

- 1) In General. Some sellers are engaged in retail operations with *selling activities in multiple jurisdictions in Illinois* that do not fall within any of the categories identified in subsection (c) of this regulation. The selling activities that comprise these businesses “are as varied as the methods which men select to carry on retail business.” *Ex-Cell-O Corp. v. McKibbin*, 384 Ill. 316, 321 (1943). Consequently, “it is...not possible to prescribe by definition which of the many activities must take place in [a jurisdiction]...[I]t is necessary to determine each case according to the facts which reveal the method by which the business was conducted.” *Ex-Cell-O Corp. v. McKibbin*, 383 Ill. 316, 321-22 (1943); see also *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130 ¶ 36. The location of the selling activities most important to each retailer’s business of selling dictates the jurisdiction where it is engaged in the business of selling.

COMMENT:

• **What the above provision hints at, but which the rules barely address, is the fact that many retailers have selling activities in multiple states. What is specifically not addressed is whether the test laid out in this rule is to determine whether a sales tax or use tax should be applied. If it is used in such a way, it may be that a significant number of municipalities will lose ROT revenues.**

- 2) Primary Factors. Without attempting to anticipate every kind of fact situation that may arise, taxpayers that divide selling activities among personnel located in multiple jurisdictions should consider the following selling activities to determine where they are engaged in the business of selling, and therefore, the correct taxing jurisdiction:

- A) *Location of officers, executives and employees with discretion to negotiate on behalf of, and to bind, the seller*, *Automatic Voting Machs. v. Daley*, 409 Ill. 438, 440 (1951); *Marshall & Huschart Mach. Co. v. Dep’t of Revenue*, 18 Ill. App. 2d 496, 501 (1960); *Int’l-Stanley Corp. v. Dep’t of Revenue*, 40 Ill. App. 3d 397, 406 (1st Dist. 1976); *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130 ¶ 62;

- B) Location *where offers are prepared and made*, Automatic Voting Machs. v. Daley, 409 Ill. 438, 441, 452 (1951);
- C) Location *where purchase orders are accepted* or other contracting actions that bind the seller to the sale are completed, Ex-Cell-O Corp. v. McKibbin, 383 Ill. 316 (1943); Automatic Voting Machs. v. Daley, 409 Ill. 438, 452 (1951); and
- D) *Location of inventory* if tangible personal property that is sold is in the retailer's inventory at the time of its sale or delivery, Int'l-Stanley Corp. v. Dep't of Revenue, 40 Ill. App. 3d 397, 401, 406 (1st Dist. 1976); Chemed Corp., Inc. v. State, 186 Ill. App.3d 402, 421-22 (4th Dist. 1989).

COMMENT:

• **The above paragraph appears to give equal weight to each of the factors listed. However, it is not clear that this is supported by the cases that are cited. In those cases the court usually looks to the total activities occurring in Illinois and contrasts – though does not balance against - the total activities occurring outside of Illinois. There is thus no true standard for making the above determination. This could be addressed by legislation. Further, at least one case makes evident that the cases relied upon were never meant to be used for picking between two jurisdictions in Illinois. The approach used was not a comparison between activities in Illinois and activities outside of Illinois, but rather only on whether there were enough activities within Illinois. In *Int'l-Stanley Corp. v. Dep't of Revenue*, 40 Ill. App. 3d 397, 406 (1st Dist. 1976), the court stated:**

[T]he proper criterion to be applied here is not so much the quantum of activities outside of the State as it is the nature, character and significance of activities of plaintiff within the State of Illinois directly related to the business of retail selling.

- 3) Secondary Factors. If, after consideration of the factors listed in subsection (d)(2) of this Section, the jurisdiction in which the seller is engaged in the business of selling is unclear, the following additional factors should be considered to resolve the issue:
 - A) Location *where marketing and solicitation occur*, Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130 ¶ 62;
 - B) Location where *purchase orders or other contractual documents are received* when purchase orders are accepted, processed, or fulfilled in a location or locations different from where they are received;
 - C) *Location of the delivery* of the property to the purchaser, Ex-Cell-O Corp. v. McKibbin, 383 Ill. 316, 323 (1943);

- D) Location *where title passes*, Int'l-Stanley Corp. v. Dep't of Revenue, 40 Ill. App. 3d 397, 406 (1st Dist. 1976); and
- E) *Location of the retailer's ordering, billing, accounts receivable and other administrative functions*, Federal Bryant Mach. Co. v. Dep't of Revenue, 41 Ill. 2d 64, 68 (1968); Automatic Voting Mach. v. Daley, 409 Ill. 438, 452 (1951); Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130 ¶ 62.

COMMENT :

• **In *Automatic Voting Machine Corp. v. Daley*, 409 Ill. 438, 440, 452 (1951), the court emphasized that the taxpayer maintained its billing department in New York, and all payments set forth in this cause were made to the plaintiff in New York. Thus, based on *Automatic Voting Machine*, it appears that (d)(3)(E) should be a primary factor rather than a secondary factor.**

4) Principles Underlying Determination of Seller's Location

- A) When a retailer's selling activities are spread through multiple Illinois jurisdictions, and where the retailer is engaged in the business of selling presents a close question, the Department will evaluate the factors in subsections (d)(2) and (d)(3) of this Section in keeping with the principle that the retailer incurs local retailers' occupation tax in the jurisdiction *where it "enjoyed the greater part of governmental protection [and] benefitted by being conducted under that protection."* Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130 ¶ 34 (quoting Svithiod Singing Club v. McKibbin, 381 Ill. 194, 197 (1942)).

COMMENT:

• **Again there is a question of where an entity enjoys the greater part of governmental protection and benefitted by being conducted under that protection. To begin with, this provides a different consideration than "government services" referred to in (b)(3) by limiting the services to those that provide "protection" – apparently fire and police. At a minimum, there should be a clear test as to whether to look to all government services or merely police and fire protection.**

- B) 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, thus, where the seller is subject to local retailers' occupation tax. Marshall & Huschart Mach. Co. v. Dep't of Revenue, 18 Ill. 2d 496, 501 (1960); Fed. Bryant Mach. Co. v. Dep't of Revenue, 41 Ill. 2d 64, 67 (1968); Int'l-Stanley Corp. v. Dep't of Revenue, 40 Ill. App. 3d 397, 406 (1st Dist. 1976); Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130 ¶ 31. For example, the Department 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 subsections (d)(2) and (d)(3).

COMMENT:

• None of the cases cited in the above paragraph stand for the stated proposition. Rather, each of the cases stands for the proposition that “courts may look through the form of a putatively interstate transaction” to determine “*whether* [not where] the business of selling has taken place in the state.” *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130 P31. Furthermore, of the cases cited *Hartney* did not reach the question of whether or where the sale occurred but rather found that the taxpayer justifiably relied upon IDOR regulations in citing its taxes.

• It is not entirely clear what this paragraph means. It appears to be an attempt to address procurement companies which are owned by parent corporations. But, the above paragraph creates more questions than it answers.

First, what authority does it have to disregard a corporate entity?

Second, if the Department does not look to the location of the party that is owned by or has common ownership with a purchaser, where will it look. It cannot look to the purchaser because the purchaser is not in the occupation of retail sales. It also cannot look to the wholesaler because that sale was made on a wholesale basis, i.e. not for final sale.

Third, does this paragraph mean that the Department will return any taxes collected and paid as retail occupation taxes to the retailer and then seek to collect a use tax? Or, does it mean that the Department will return the sales tax collected by the retailer and seek to impose the tax on the wholesaler on the basis that the sale by the wholesaler was actually one to the end user?

• The paragraph states that the Department will not look to the location of the retailer if it is owned by or has common ownership with a purchaser if “in substance, it does not conduct the selling activities identified in subsections (d)(2) and (d)(3).” What does this mean? Does it mean that a retailer that is owned by a purchaser of its goods must conduct all the activities listed in (d)(2) and (d)(3) or merely some of them. And, must these activities be conducted in the municipality, the State of Illinois, or anywhere in the world?