



## Illinois Petroleum Marketers Association Illinois Association of Convenience Stores

WM. R. DEUTSCH BUILDING • 112 WEST COOK STREET  
P.O. BOX 12020 • SPRINGFIELD, ILLINOIS 62791-2020  
PHONE: 217/544-4609 • FAX: 217/789-0222

---

WILLIAM J. FLEISCHLI  
EXECUTIVE VICE PRESIDENT

May 5, 2014

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

Dear Mr. Berks:

I am the Executive Vice President of the Illinois Petroleum Marketers Association and the Illinois Association of Convenience Stores (collectively "IPMA"), joint trade associations with 300 members who own or supply 3500 gasoline stations and convenience stores in Illinois. On behalf of those members, I submit the following comments on the Department of Revenue's Proposed Amendments to 86 Ill. Adm. Code Sections 220.15, 270.115, 320.115, 370.115, 395.115, 630.120, 670.115, 690.115, 693.115 and 695.115. Our comments are directed to the Home Rule County Retailer's Occupation Tax, but apply equally to all of the affected taxes and proposed regulations.

On November 21, 2013, the Illinois Supreme Court in *Hartney Fuel Oil Company v. Hamer* invalidated the Illinois Department of Revenue's (DOR) rule that had been used by Illinois retailers for decades to determine what local sales taxes were applicable to a sale of their products. The Court found that the existing regulation went beyond the language of the statute.

Illinois businesses, which include members of IPMA, need certainty in state regulations to determine whether to start a business, to expand a business or to stay in business, as well as where to locate a business or how to organize that business. The previous acceptance of purchase order test that had been used in Illinois for decades provided that certainty. The filed proposed rule provides no certainty, only confusion. The purpose of regulations implementing a statute is to assist taxpayers in figuring out how the statute affects them and how to organize their lives and businesses. The proposed rule provides for neither. The rule lists four primary factors that are to be used by taxpayers to determine where they are engaged in the business of selling and therefore the correct taxing jurisdiction: the location of officers, executives and employees with discretion to

negotiate on behalf of the seller, the location where offers are prepared and made, the location where purchase orders are accepted and the location of inventory. After considering these four factors, if the jurisdiction in which the seller is engaged in the business of selling is still unclear, five secondary factors are listed: the location where marketing and solicitation occur, the location where purchase orders are accepted if different from where they are received, the location of the delivery of the property, the location where title passes, and the location of the retailer's other administrative functions. If the jurisdiction of a sale is still unclear, the rule provides two more tests: where the retailer enjoyed the greater part of government protection and it authorizes the Department to "look through the form of a putatively [multijurisdictional] transaction to its substance . . . ."

Instead of one test, the rule provides for eleven tests. If DOR auditors look into and weigh these factors in their decisions on applicable tax jurisdictions, there is no certainty that different auditors will reach the same conclusions based on similar facts throughout Illinois. The tax rules should apply to taxpayers uniformly. The confusion contained in these rules cannot be enforced uniformly. If there are 200 DOR auditors auditing Illinois businesses with similar circumstances, there could be 200 different tax jurisdiction determinations by using these rules. There may need to be rules to implement this statute, but certainty, not confusion, should be the result.

Regarding the four primary factors and the five secondary factors, the rule does not provide for any weighting of those factors. Others have stated that Section d) 4) B) provides some "underlying guidance" but does that mean that the jurisdictional issue will be determined by considerations having nothing to do with an examination of the factors of the sale but rather the nature and extent of local municipal services? The JCAR considered some of these issues in its consideration of the emergency rule version of the proposed rule. When asked by Senator Rezin to explain "how the primary and secondary factors are going to be used to source a sale, you, Mr. Berks, stated "Most multi-jurisdictional retailers will be able to identify these factors and easily determine where they belong, but, for the relatively few cases in which the primary factors are evenly split, secondary factors can be used to break the tie." Minutes of March 19, 2014, JCAR meeting. Is that how the transition between primary factors and secondary factors will be weighted? For the petroleum industry, that may be especially problematic. Section D of the primary factors indicates that "Location of inventory" is one of the selling activities that determine where a retailer is engaged in the business of selling. Many petroleum distributors do not have petroleum products "in inventory." A distributor takes an order from a customer, sends a truck to a pipeline/terminal and loads the petroleum product and then delivers the product to the customer at a third location. Depending on the price at the pipeline/terminal for a subsequent sale, the distributor may acquire the

next load of fuel at a different source. The distributor may have fuel sources in multiple taxing jurisdictions. In that situation inventory may not be a factor, so if a business fails two of the remaining three tests, does that automatically move the issue to consideration of the five secondary factors?

Another question was asked of you at the JCAR meeting by Senator Rezin, “For those companies that were on the border, even after they think they comply with the primary and secondary factors (and there’s nine of them) it still looks like subsection (b) of the emergency rule allows DOR to make a different determination. Doesn’t it create ambiguity if the retailer meets 3 or 4 of the primary factors and a couple of the secondary factors, but DOR can still refute the sourcing determination?” Your answer indicated that this allows DOR to “look through the form of the transaction to its substance.” Isn’t that what Senator Rezin was suggesting? The first nine factors have no weight if the DOR decides to “look through the form of the transaction to its substance . . .”? Later in the same meeting, Senator Richter asked you in part, “It seems to me there is a better way to express DOR’s resolve to crack down on tax cheats than the catch-all provision in subsection (b). Why not assign weights to the primary factors so it would be self-evident to anyone what the answer is?” Your answer suggested that weighting may open up the possibility of manipulation. If that were to occur, the Department can deal with that appropriately at that time. For the purpose of approving these new rules now, the Department should employ any and all means possible to make the primary and secondary factors clear to the taxpayers affected and enforceable. A catch-all provision like subsection (b) that allows DOR to ignore the first nine factors is unacceptable.

There have been many comments filed by interested citizens groups on these rules. IPMA/IACS particularly notes and supports the testimony and comments by the Taxpayer’s Federation of Illinois and the Statement of Testimony filed by the Illinois Retail Merchants’ Association.

Finally, we believe that DOR should heed the recommendation of the Joint Committee on Administrative Rules as a result of its March 19, 2014, meeting. DOR should “continue to work with the affected taxpayers and local governments in attempting to establish, in the permanent rulemaking, standards for determining the situs of sales tax liability that are enforceable and that are understandable by the entities that are affected by them.” We hope these comments assist the Department in crafting this clarity.

Sincerely yours,



William J. Fleischli  
Executive Vice President