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DEPARTMENT OF REVENUE

NOTICE OF PROPOSED AMENDMENT

TITLE 86: REVENUE  
CHAPTER I: DEPARTMENT OF REVENUE

PART 220  
HOME RULE COUNTY RETAILERS' OCCUPATION TAX

Section

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**AUTHORITY:** Implementing the Home Rule County Retailers' Occupation Tax Law of the Counties Code [55 ILCS 5/5-1006] and authorized by Section 2505-95 of the Civil Administrative Code of Illinois [20 ILCS 2505/2505-95].

**SOURCE:** Adopted August 5, 1959; amended at 3 Ill. Reg. 44, p. 185, effective October 19, 1979; codified at 6 Ill. Reg. 9681; amended at 15 Ill. Reg. 5783, effective April 9, 1991; amended at 24 Ill. Reg. 8105, effective May 26, 2000; amended at 24 Ill. Reg. 18345, effective December 1, 2000; emergency amendment at 38 Ill. Reg. 4047, effective January 22, 2014, for a maximum of 150 days; amended at 38 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_.

**Section 220.115 Jurisdictional Questions**

a) Definitions:

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county, including all territory within cities, villages or incorporated towns, including an incorporated town that has superseded a civil township.

When used in this Part, “Selling Activities” refer to those activities that comprise “an occupation, the business of which is to sell tangible personal property at retail.” Ex-Cell-O Corp. v. McKibbin, 383 Ill. 316, 321 (1943). “Selling Activities”

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include “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.” *Id.*

b) Retailer’s Selling Activities Determine Taxing Jurisdiction

- 1) Occupation of Selling. The Home Rule County Retailers’ Occupation Tax Law [55 ILCS 5/5-1006] authorizes home rule counties to impose a tax on those engaged in the business of selling tangible personal property at retail within the county. 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”).
- 2) Composite of Selling Activities. 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, paragraph 32 (citing *Ex-Cell-O Corp. v. McKibbin*, 383 Ill. 316, 321-22 (1943)).
- 3) Multijurisdictional Retailers. Some retailers are engaged in retail operations with Selling Activities in multiple jurisdictions within the State, or in jurisdictions located in more than one State. The Selling Activities that comprise these businesses “are as varied as the methods which men select to carry on retail businesses.” *Ex-Cell-O Corp. v. McKibbin*, 383 Ill. 316, 321 (1943). Consequently, “it is . . . not possible to prescribe by definition which of

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the many activities must take place in [a jurisdiction] to constitute it an occupation conducted in [that 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, paragraph 36.

- 4) Statutory Intent. It is the intent of the Home Rule County Retailers’ Occupation Tax that retailers will incur local retailer’s occupation tax in a jurisdiction in Illinois if they “enjoyed the greater part of governmental [services and] protection” in that jurisdiction. Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130, paragraph 34 (quoting Svithiod Singing Club v. McKibbin, 381 Ill. 194, 197 (1942)). 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).
- 5) Determination of Taxing Jurisdiction. Applying the provisions in subsections (b)(1) and (b)(4) 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, paragraphs 30-35.
- 6) Substance over Form. 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, paragraph 31. For example, the Department will not look to the

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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 related to the sales.

- 7) Same Standard Applies to Intrastate and Interstate Retailers. For purposes of determining where a retailer is engaged in the business of selling, it does not matter whether the retailer is engaged in Selling Activities in taxing jurisdictions in multiple States, or in multiple jurisdictions in this State. The legal standard is the same. The retailer is engaged in the business of selling in the taxing jurisdiction where its predominant and most important Selling Activities take place. Ex-Cell-O Corp. v. McKibbin, 383 Ill. 316 (1943); Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130 paragraph 30 (“[T]he location of the business of selling inside or outside the state controls . . .[.]”). If a retailer engages in some Selling Activities in a taxing jurisdiction in this State, but that retailer’s predominant Selling Activities are outside the State, the retailer’s obligation to collect and remit taxes on Illinois sales is governed by the Illinois Use Tax Act. 35 ILCS 105/2 (defining “retailer maintaining a place of business in the State”); Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130 paragraph 31 (“some combination of activities within the state are insufficient for the retail occupation tax to apply”) (citing Automatic Voting Machs. v. Daley, 409 Ill. 438, 447 (1951)).
- 8) Because it is not practicable for retailers to divide retailer’s occupation tax among competing jurisdictions, a retailer subject to the Retailers’ Occupation Tax is engaged in the business of selling in only one location in Illinois for each sale.
- c) Application of Composite of Selling Activities Test to Retailers Conducting Selling Activities in Multiple Taxing Jurisdictions.

Every retailer maintaining a place of business in this State shall determine the taxing jurisdictions in which it is engaged in the business of selling with respect to each of its sales by applying the standards set forth below, except where a retailer is engaged in particular selling activities identified by a statute that specifies the taxing jurisdiction where retailers engaged in such activities shall remit retailer’s occupation tax. Such retailers shall remit retailer’s occupation tax as directed by statute notwithstanding anything in these rules to the contrary.

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- 1) Primary Selling Activities. Without attempting to anticipate every kind of fact situation that may arise, taxpayers that divide Selling Activities among personnel located in multiple jurisdictions shall consider the following Selling Activities to determine where they are engaged in the business of selling:
  - A) Location of sales personnel exercising discretion and authority to solicit customers on behalf of, and to bind the seller to a sale;
  - B) Location where the seller takes action that binds it to the sale, which may be acceptance of purchase orders, submission of offers subject to unilateral acceptance by the buyer, or other actions that bind the seller to the sale;
  - C) The location where payment is tendered and received, or from which invoices are issued;
  - 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; and,
  - E) The location of the retailer's headquarters, which is the principal place from which the business of selling tangible personal property is directed or managed. In general, this is the place at which the offices of the principal executives are located. Where executive authority is located in multiple jurisdictions, the place of daily operational decision making is the headquarters.
- 2) A retailer engaging in three or more Primary Selling Activities in one location in the State shall remit the Retailers' Occupation Tax imposed by the taxing bodies with authority to impose Retailers' Occupation Tax on those engaged in the business of selling in that location. A retailer engaging in three or more Primary Selling Activities outside the State shall collect and remit tax to the State to the extent required by the Illinois Use Tax Act, except as provided in subsection (d).
- 3) Application of Primary Selling Activities to Common Selling Operations. Retailers engaged in selling operations with a single location where the Primary

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Selling Activities predominate constitute the vast majority of retailers in the State. Subsections (c)(3)(A) through (c)(3)(D) of this Section apply the Primary Selling Activities to certain common selling operations and identify the location where the Department will presume the seller is engaged in the business of selling with respect to each sale.

- A) Over the Counter Sales. If a purchaser is present at a place of business owned or leased by a retailer and there enters into an agreement with the retailer's sales personnel to purchase tangible personal property, and makes payment for that property at the same place of business, then the retailer's occupation tax for that sale is incurred at the retailer's place of business where the sale occurred regardless of whether the purchaser takes immediate possession of the tangible personal property, or the retailer delivers or arranges for the property to be delivered to the purchaser.
  - B) Sales Through Vending Machines. A retailer is engaged in the business of selling food, beverages or other tangible personal property through a vending machine at the location where the vending machine is located when the sale is made if (1) the vending machine is a device operated by coin, currency, credit card, token, coupon or similar device that dispenses food, beverage or other tangible personal property; (2) the food, beverage or other tangible personal property is contained within the vending machine and dispensed from the vending machine; and (3) the purchaser takes possession of the purchased food, beverage or other tangible personal property immediately.
  - C) 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 actually are made. The vehicle carrying the stock of goods for sale is regarded as a portable place of business.
- 4) Secondary Selling Activities. If the Primary Selling Activities listed in subsection (c)(1) of this Section occur in multiple jurisdictions, but no individual jurisdiction has more than two Primary Selling Activities, the

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following additional Selling Activities shall be considered to determine the jurisdiction in which the retailer is engaged in the business of selling.

- A) Location where marketing and solicitation occur;
  - B) Location where the seller engages in activities necessary to procure goods for sale;
  - C) Location of the retailer's officers, executives or employees with authority to set prices or determine other terms of sale if determinations are made in a location different than that identified in (c)(1)(A), above;
  - D) 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;
  - E) Location where title passes; and,
  - F) Location where the retailer displays goods to prospective customers, such as a showroom.
- 5) Except as provided in subsection (d), a retailer that is not engaged in the business of selling in a jurisdiction under (c)(2) is engaged in the business of selling in the jurisdiction where its inventory is located under (c)(1)(D), or where its headquarters is located under (c)(1)(E), whichever jurisdiction is the location where more Selling Activities occur, considering both Primary and Secondary Selling Activities.
- 6) A retailer that is not engaged in the business of selling in a jurisdiction under (c)(2) or under (c)(5), is presumed to be engaged in the business of selling at the location of its headquarters absent clear and convincing evidence to the contrary.

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d) Presumptions Applying to Certain Selling Operations:

- 1) For certain classes of retailers with unique, complicated, or widely dispersed Selling Activities, determining appropriate tax situs in every situation presents substantial administrative difficulties for both retailers and tax enforcement personnel. Subsections (d)(2)-(d)(5) provide administrative “short cuts” that balance the administrative difficulties presented by certain selling operations against the need for accurate tax assessment.
- 2) In-state Inventory/Out-of-state Selling Activity. If a retailer’s Selling Activities take place in taxing jurisdictions outside this State, except that the tangible personal property that is sold is in an inventory in the possession of the retailer located within a jurisdiction in Illinois at the time of its sale (or is subsequently produced by the retailer 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 by the retailer will determine where the retailer is engaged in business with respect to that sale. Chemed Corp., Inc. v. Department of Revenue, 186 Ill. App. 3d 402 (4th Dist. 1989).
- 3) Sales over the Internet: When a customer places an order for the purchase of tangible personal property through a consumer-based retailer website available without limitation on the world wide web and the retailer ships the property to the customer in this State, the Department will presume that the retailer’s predominant Selling Activities take place outside of this State. Therefore, such a sale will be subject to the Illinois Use Tax Act unless there is clear and convincing evidence the retailer’s predominant and most important Selling Activities take place in this State. Clear and convincing evidence sufficient to overcome the presumption provided for in this subsection includes, but is not limited to, the following circumstances:
  - A) the tangible personal property that is sold is in an inventory in the possession of the retailer located within a jurisdiction in Illinois at the time of its sale (or is subsequently produced by the retailer in the jurisdiction), in which case the retailer is engaged in the business of selling in the jurisdiction where the property is located at the time of the sale with respect to that sale;

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- B) the customer takes possession of the tangible personal property at a place of business owned or leased by the retailer in the State, in which case the retailer is engaged in the business of selling in the jurisdiction where the customer takes possession of the property with respect to that sale.
- 4) Leases with an option to purchase. A lease with a dollar or other nominal option to purchase is considered to be a conditional sale subject to Retailers' Occupation Tax. 86 Ill. Adm. Code 130.2010(a). Persons selling tangible personal property to a nominal lessee or bailee for use or consumption under a conditional sales agreement are presumed to be engaged in the business of selling at the physical location of the property at the time the parties enter into the conditional sales agreement.
- 5) Sales of Coal or Other Minerals. A retail sale by a producer 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 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

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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.