Remote Retailers and Leveling The Playing Field Chapter Index

Purpose

This chapter is meant to introduce the auditor to the various rules associated with remote retailers, marketplace facilitators and leveling the playing field.

Disclaimer

This audit manual is designed for internal staff-use only and is intended to provide general information on selected topics to assist Illinois Department of Revenue ("Department" or "IDOR") auditors in the completion of their audits. The contents of this audit manual must not be relied upon for decision making or as a substitute for the official text of statutes, administrative rules, and case law. This manual does not carry the weight or effect of law and is only informational in nature. Auditors must conduct audits in accordance with the pertinent statutes, administrative rules, and case law.

Citations to statutes, regulations, or case law are included to assist the auditors in locating the relevant legal authority as a basis for conducting audits. The manual may be amended at any time without notice by the Department. Nothing in this manual shall contradict the official text of statutes, administrative rules, or case law. In case of any unintended inconsistency, the official text of statutes, administrative rules, and case law controls and must be followed. The Department's Director, General Counsel, and Legal Services Bureau do not sanction any deviation by the Department staff from the official text of statutes, administrative rules, or case law in the performance of job functions.

This manual does not constitute written legal advice or guidance from the Department or its staff to taxpayers or the general public, nor does it give rise to any claim under the Taxpayers' Bill of Rights.

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Illinois has several types of taxes which are collectively referred to as "sales tax." The Retailers' Occupation Tax Act imposes a tax upon persons engaged in this state in the business of selling tangible personal property at retail to purchasers for use or consumption (see 35 ILCS 120/1, *et seq*.). Illinois Use Tax is imposed on the privilege of using, in this state, any kind of tangible personal property purchased anywhere at retail from a retailer (see 35 ILCS 105/1, *et seq*. and 86 Ill. Adm. Code 150.101). In addition, local retailers' occupation taxes are authorized by statute and administered by the Illinois Department of Revenue (IDOR). There are, however, no local use taxes on general merchandise administered by IDOR.

Until October 1, 2018, an out-of-state retailer established nexus through a physical presence in Illinois. Public Act 100-0587 established that effective October 1, 2018, out-of-state retailers without a physical presence meeting certain economic or transactional thresholds fell within the definition of a "retailer maintaining a place of business in this state" and were required to register with IDOR to collect and remit Illinois Use Tax on sales to Illinois purchasers.

Public Act 101-0009 determined that effective January 1, 2020, marketplace facilitators meeting certain economic or transactional thresholds fell within the definition of a "retailer maintaining a place of business in the state" and were required to register as a marketplace facilitator with IDOR to collect and remit Illinois Use Tax on sales to Illinois purchasers made through the marketplace on behalf of marketplace sellers and on its own sales.

Additionally, effective January 1, 2021, the Leveling the Playing Field for Illinois Retail Act implemented a series of structural changes to the Illinois sales tax laws that changed the liabilities of many types of retailers, including remote retailers, marketplace facilitators, and marketplace sellers.

The Leveling the Playing Field for Illinois Retail Act Flowchart and Illinois (In-State) Retailer's Sales Tax Responsibilities Flowchart provide a good overview of how to source sales made on and after January 1, 2021 in various situations. These flowcharts, along with many other resources pertaining to sales made on and after January 1, 2021 by remote retailers, marketplace facilitators, and marketplace sellers can be found on the Department's Leveling the Playing Field for Illinois Retail Act Resource Page.

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7.2.1 Statutory References

35 ILCS 105/2 – Use Tax Act
35 ILCS 110/2 – Service Use Tax Act
35 ILCS 115/2 – Service Occupation Tax Act
35 ILCS 120/1 – Retailers' Occupation Tax Act
55 ILCS 5/5-1006 – Home Rule County Retailers' Occupation Tax
55 ILCS 5/5-1007 – Home Rule County Service Occupation Tax Law
65 ILCS 5/8-11-1 – Home Rule Municipal Retailers' Occupation Tax

7.2.2 Regulations

86 Ill. Adm. Code 130.101 – Character of Tax
86 Ill. Adm. Code 130.1915 – Auctioneers and Agents
86 Ill. Adm. Code 150.201– General Definitions
86 Ill. Adm. Code 160.105 – Definitions
86 Ill. Adm. Code 150.802 – Trade Show Appearances
86 Ill. Adm. Code 150.803 – Wayfair Nexus – Nexus without Physical Presence – Provisions Controlling from October 1, 2018 through December 31, 2020
86 Ill. Adm. Code 150.804 – Marketplace Facilitators – Provisions Controlling from January 1, 2020 through December 31, 2020
86 Ill. Adm. Code 131.105 – Definitions
86 Ill. Adm. Code 131.115 – Remote Retailers – Determination of Status as a Remote Retailer
86 Ill. Adm. Code 131.135 – Marketplace Facilitators – Determination of Obligation to Remit Tax
86 Ill. Adm. Code 220.115 – Home Rule County Retailers' Occupation Tax
86 Ill. Adm. Code 270.115 – Home Rule Municipal Retailers' Occupation Tax
86 Ill. Adm. Code 230.115 – Home Rule County Service Occupation Tax
86 Ill. Adm. Code 280.115 – Home Rule Municipal Service Occupation Tax
86 Ill. Adm. Code 131.155 – Tax Sourcing Provisions
Illustration A: Leveling the Playing Field Flowchart

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Remote Retailers

Under the United States Constitution, Congress has been delegated the power to "Regulate commerce with foreign nations, and among the several states" (Article 1, Section 8, Clause 3). The Federal Constitution says nothing as to what constitutes a regulation of interstate commerce. The determination of this matter has been worked out through the years by a long series of decisions by the United States Supreme Court. Taxpayers must have nexus with Illinois to be subject to Illinois tax. "Nexus" means a "connection", "tie", or "link". The U.S. Supreme Court used the word as a shorthand term for the due-process-of-law requirement of the Fourteenth Amendment to the U.S. Constitution. There are two groups of out-of-state retailers that must collect tax on sales to Illinois purchasers:

The Supreme Court has also held that a crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales. See *Tyler Pipe Industries, Inc. v. Dept. of Revenue*, 483 U.S. 232 (1987). Thus, when considering 'attributional nexus' fact patterns, it is necessary to consider both the substantial nexus i.e., physical presence of say a representative as well as whether the presence of the representative is directed to the purpose of establishing and maintaining a market in Illinois for the sales at issue.

1) **Out-of-state retailers with a physical presence in Illinois** - Prior to October 1, 2018, out-of-state retailers must have had a physical presence in Illinois before they could be required to collect Use Tax. The types of activities constituting a physical presence are found in Section 2 of the Use Tax Act's definition of a "retailer maintaining a place of business in this State". (See 35 ILCS 105/2.) The physical presence requirement was established in a series of United States Supreme Court decisions. See, for example, Scripto v. Carson, 362 U.S. 207 (1960); National Bellas Hess v. Department of Revenue of the State of Illinois, 386 U.S. 753 (1967); Quill Corporation v. North Dakota, 504 U.S. 298 (1992). In 1996, the Illinois Supreme Court ruled that retailers need only "more than the slightest" physical presence to be required to collect Use Tax. See Brown's Furniture v. Wagner, 171 Ill. 2d 410 (1996).

2) **Remote retailers without a physical presence in Illinois** - In South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018), the U.S. Supreme Court upheld a South Dakota statute that imposed tax collection obligations on remote retailers that met specific selling thresholds but had no physical presence in the state. This decision abrogated the longstanding physical presence requirement of Quill, deeming it "unsound and incorrect". Illinois P.A. 100-587 enacted nexus standards, effective October 1, 2018, that are virtually identical to those upheld in Wayfair.

7.3.1 Use Tax

Beginning October 1, 2018, a retailer making sales of tangible personal property to purchasers in Illinois from outside of Illinois must register with the Department and collect and remit Use Tax if:

- The cumulative gross receipts from sales of tangible personal property to purchasers in Illinois are $100,000 or more, or

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- the retailer enters into 200 or more separate transactions for the sale of tangible personal property to purchasers in Illinois.

For the periods prior to January 1, 2021, retailers without a physical presence are to exclude the following transactions when determining if either of the above thresholds have been met:

1. Sales for resale.
2. Sales of tangible personal property that is required to be registered with an agency of this State, including motor vehicles, watercraft, aircraft, and trailers, that are made from locations outside Illinois-to-Illinois purchasers.
3. Occasional Sales.
4. Sales made by a remote retailer that are subject to Retailers' Occupation Tax.
5. *Beginning January 1, 2020, neither the gross receipts nor the number of separate transactions for sales of tangible personal property to purchasers in Illinois that a retailer makes through a marketplace facilitator* which are subject to Use Tax *and for which the retailer has received a certification from the marketplace facilitator.* [35 ILCS 105/2(9)]

All other sales of tangible personal property, even if they are exempt from tax, must be included for purposes of calculating the thresholds. 86 Ill. Adm. Code 150.803(e)(3)(E)

A retailer is required to determine on a quarterly basis, ending on the last day of March, June, September, and December, whether they meet either of the criteria above for the preceding 12-month period. If the retailer meets either of the criteria for a 12-month period, they are considered a retailer maintaining a place of business in Illinois and are required to collect and remit the Use Tax and file returns for one year.

A) At the end of that one-year period, the retailer is required to determine whether they met either of the criteria during the preceding 12-month period. If the retailer met either of the criteria for the preceding 12-month period, they are considered a retailer maintaining a place of business in Illinois and are required to collect and remit Use Tax and file returns for the subsequent year.

B) If, at the end of a one-year period, a retailer that was required to collect and remit the Use Tax determines that they did not meet either of the criteria during the preceding 12-month period, the retailer shall subsequently determine on a quarterly basis, ending on the last day of March, June, September, and December, whether they meet either of the criteria for the preceding 12-month period. [35 ILCS 105/2] 86 Ill. Adm. Code 150.803

Many retailers make sales through various avenues. Beginning January 1, 2020, a person that sells or offers to sell tangible personal property through a marketplace operated by an unrelated third-party marketplace facilitator is considered a marketplace seller. 86 Ill. Adm. Code 150.804(a)

A marketplace seller that makes sales to Illinois purchasers in addition to those made through a marketplace must determine if they are required to separately register and collect and remit Use Tax on those sales. 86 Ill. Adm. Code 150.804(i)(3)

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Beginning January 1, 2020, the marketplace facilitator is generally liable for sales made on behalf of marketplace sellers through the marketplace which are subject to Use Tax. See the Marketplace Facilitator section below for additional information regarding when the marketplace facilitator is liable for the sales made over the marketplace. 86 Ill. Adm. Code 150.804(B)

The marketplace seller is considered the retailer for the sales made through the marketplace that are subject to Retailers' Occupation Tax. 86 Ill. Adm. Code 150.804(i)(4)

For purposes of this part, through December 31, 2020, out-of-State retailers who are making sales through a marketplace and whose inventory is in the possession of a marketplace facilitator in Illinois and is used to fulfill sales made over a marketplace have physical presence in Illinois. This is because the out-of-State retailer is the retailer with respect to these sales. As such, they would not be considered a remote retailer. See 86 Ill. Adm. Code 150.804(i)(4) and 86 Ill. Adm. Code 150.803(e)(1)(A)

NOTE: Beginning January 1, 2021, retailers without physical presence in this State and marketplace facilitators meeting either tax remittance threshold as set out in 86 Ill. Adm. Code 131.115(a) and 131.135(a), respectively, are liable for all applicable State and locally imposed retailers' occupation taxes administered by the Department of Revenue on all sales made to Illinois purchasers and are no longer only mandatory Use Tax collectors.

7.3.2 Retailers' Occupation Tax (ROT)

Effective January 1, 2021, the Retailers' Occupation Tax Act was amended to add the definition of a "remote retailer". *"Remote Retailer" is defined as a retailer that does not maintain within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent or other representative operating within this State under the authority of the retailer or its subsidiary, irrespective of whether that place of business or agent is located in Illinois permanently or temporarily or whether the retailer or subsidiary is licensed to do business in this State.* [35 ILCS 120/1]. 86 Ill. Adm. Code 131.105. further clarifies by stating, "a retailer that fulfills any orders from its own inventory in Illinois is not a "remote retailer".

Beginning January 1, 2021, a remote retailer is a retailer engaged in the occupation of selling at retail in Illinois for purposes of the Retailers' Occupation Tax Act if either of the following thresholds is met:

- The cumulative gross receipts from sales of tangible personal property to purchasers in Illinois are $100,000 or more; or

- The remote retailer enters into 200 or more separate transactions for the sale of tangible personal property to purchasers in Illinois. [35 ILCS 120/2(b)]

Remote Retailers are to exclude the following transactions when determining if either of the above thresholds have been met for periods beginning on and after January 1, 2021:

1. Sales for resale.

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2. Neither The gross receipts from nor the number of separate transactions for sales of tangible personal property to purchasers in Illinois that a remote retailer makes through a marketplace facilitator so long as the remote retailer has received certification from the marketplace facilitator that the marketplace facilitator is legally responsible for payment of tax on such sales. [35 ILCS 120/2(b-5)]
3. Before February 1, 2022, sales of tangible personal property that is required to be titled or registered with an agency of this State, including motor vehicles, watercraft, aircraft, and trailers, that are made by remote retailers to Illinois purchasers must be excluded. Beginning February 1, 2022, sales of tangible personal property that is required to be titled or registered with an agency of this State, including motor vehicles, watercraft, aircraft and trailers, that are made by remote retailers to purchasers in Illinois must be included.
4. Occasional sales.

All other sales of tangible personal property, even if they are exempt from tax, must be included for purposes of calculating the thresholds. 86 Ill. Adm. Code 131.120(b)

Remote retailers that meet or exceed the thresholds above are liable for all applicable State and locally imposed retailers' occupation taxes administered by the Department on all retail sales to Illinois purchasers. 86 Ill. Adm. Code 131.115(a)

Beginning January 1, 2021, remote retailers are deemed to be engaged in the business of selling at the Illinois location to which the tangible personal property is shipped or delivered or at which possession is taken by the purchaser, 86 Ill. Adm. Code 131.110(b). A remote retailer's inventory at the location of a marketplace facilitator in Illinois does not create a physical presence nexus when used exclusively to fulfill orders made over the marketplace that meets a tax remittance threshold under Section 131.135(a) because the marketplace facilitator is considered the retailer with respect to sales over the marketplace. 86. Ill. Adm. Code 131.105

A remote retailer is required to determine on a quarterly basis, ending on the last day of March, June, September, and December, whether they meet either of the thresholds for the preceding 12-month period. If the remote retailer meets either of the thresholds for a 12-month period, they are considered a retailer engaged in the occupation of selling at retail in Illinois and are required to remit the retailers' occupation tax and all retailers' occupation taxes imposed by local taxing jurisdictions in Illinois, provided the local taxes are administered by the Department, and to file all applicable returns for one year. They are required to begin collecting taxes for sales beginning on the first day of the quarter immediately following the end of the 12-month lookback period.

At the end of that one-year period, during which the remote retailer was remitting taxes, the remote retailer shall determine whether either of the thresholds for the preceding 12-month period were met. If the remote retailer met the threshold for the preceding 12-month period, they are considered a retailer engaged in the occupation of selling at retail in Illinois and required to remit all applicable State and local retailers' occupation taxes and file returns for the subsequent year.

If, at the end of the one-year collection period, the remote retailer determines that sales to Illinois purchasers did not meet either of the thresholds, it must discontinue remitting State and local retailers'

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occupation taxes. If a remote retailer is no longer required to remit State and local retailers' occupation taxes, it must notify the Department. However, it may alternatively notify the Department that it wishes to change its registration status to voluntarily collect and remit use tax as a courtesy to its Illinois purchasers, since those purchasers will still incur a use tax liability that they must otherwise self-assess and remit directly to the Department. (See 86 Ill. Adm. Code 150.805 for additional information.)

If a remote retailer is no longer required to remit State and local retailers' occupation taxes, it must redetermine, on a rolling quarterly basis, whether it is obligated to begin once more remitting State and local retailers' occupation taxes. For each quarter ending on the last day of March, June, September, and December, the remote retailer must examine its sales for the immediately preceding 12-month period to determine whether it met either of the thresholds. If it met either of those thresholds during that 12-month lookback period, it must remit State and local retailers' occupation taxes for the following 12-month period. At the end of that 12-month period, it must examine its sales, as provided above, to determine if it must continue to remit tax. 86 Ill. Adm. Code 131.115 subsections (b) through (e).

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7.4.1 Use Tax

Marketplace facilitators were added to the Use Tax Act beginning January 1, 2020. A person is considered a marketplace facilitator if they, pursuant to an agreement with an unrelated third-party marketplace seller, directly or indirectly through one or more affiliates, facilitate a sale by an unrelated third-party marketplace seller by doing both of the following:

A) listing or advertising for sale by the marketplace seller, in a marketplace, tangible personal property that is subject to tax under the Act; and

B) either directly or indirectly, through agreements or arrangements with third parties, collecting payment from the customer and transmitting that payment to the marketplace seller regardless of whether the marketplace facilitator receives compensation or other consideration in exchange for its services.

A marketplace facilitator is considered the retailer for each retail sale of tangible personal property that is subject to Use Tax and made through its marketplace on behalf of marketplace sellers if either of the following is met:

- The cumulative gross receipts from sales of tangible personal property to purchasers in Illinois made through the marketplace by the marketplace facilitator and by marketplace sellers are $100,000 or more; or

- The marketplace facilitator and marketplace sellers selling through the marketplace cumulatively enter into 200 or more separate transactions through the marketplace for the sale of tangible personal property to purchasers in Illinois.

Marketplace facilitators are to exclude the following transactions when determining if either of the above thresholds have been met:

1. Sales for resale.
2. Sales of tangible personal property that is required to be registered with an agency of this State, including motor vehicles, watercraft, aircraft, and trailers, that are made from locations outside Illinois-to-Illinois purchasers.
   Taxes on these items will continue to be paid, as required by Section 10 of the Use Tax Act, by purchasers as a condition of titling or registering these items.
3. Sales made through the marketplace on behalf of a marketplace seller or by a marketplace facilitator that are subject to Retailers' Occupation Tax.

All other sales of tangible personal property, even if they are exempt from tax, must be included for purposes of calculating the thresholds. Sales which would otherwise be considered occasional sales must be included when a marketplace facilitator determines if they have met either threshold, no sales made on a marketplace are considered occasional sales.

If either threshold is met, the marketplace facilitator must register with the Department and collect and remit Use Tax on the sales made over the marketplace on behalf of a marketplace seller. A marketplace

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facilitator is only considered the retailer for those sales made on behalf of a marketplace seller which are subject to Use Tax.

A marketplace facilitator is required to determine on a quarterly basis, ending on the last day of March, June, September, and December, whether it meets either of the thresholds for the preceding 12-month period. If the marketplace facilitator meets the threshold for a 12-month period, it is considered a retailer maintaining a place of business in Illinois and is required to collect and remit the Use Tax and file returns for one year for all sales made over its platform.

If, at the end of a one-year period, a marketplace facilitator that was required to collect and remit the Use Tax determines that it did not meet the threshold during the preceding 12-month period, the marketplace facilitator shall subsequently determine, on a quarterly basis ending on the last day of March, June, September, and December, whether it meets the threshold for the preceding 12-month period.

7.4.2 Retailers' Occupation Tax (ROT)

Beginning January 1, 2021, a marketplace facilitator is considered a retailer engaged in the occupation of selling at retail in Illinois for purposes of the Retailers' Occupation Tax Act if either of the following is met:

- The cumulative gross receipts from sales of tangible personal property to purchasers in Illinois made through the marketplace by the marketplace facilitator and by marketplace sellers are $100,000 or more; or

- The marketplace facilitator and marketplace sellers selling through the marketplace cumulatively enter into 200 or more separate transactions for the sale of tangible personal property to purchasers in Illinois.

Marketplace facilitators are to exclude the following transactions when determining if either of the above thresholds have been met:

1. Sales for resale.
2. Before February 1, 2022, sales of tangible personal property to Illinois purchasers that is required to be titled or registered with an agency of this State, including motor vehicles, watercraft, aircraft, and trailers, were excluded. Beginning February 1, 2022, sales of tangible personal property required to be titled or registered with an agency of this State, including motor vehicles, watercraft, aircraft, and trailers, that are made to purchasers in Illinois over a marketplace must be included when these items are shipped or delivered to purchasers in Illinois, or when possession is taken in Illinois by a purchaser in Illinois. Transactions in which an Illinois purchaser travels to an out-of-state location to take possession of an item that is required to be titled or registered with an agency of the State of Illinois must be excluded.

All other sales of tangible personal property, even if they are exempt from tax, must be included for purposes of calculating the thresholds. Sales which would otherwise be considered occasional sales

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must be included when a marketplace facilitator determines if they have met either threshold, no sales made on a marketplace are considered occasional sales. 86 Ill. Adm. Code 131.140(b)

Marketplace facilitators that meet or exceed either of the thresholds above are liable for all applicable State and local retailers' occupation taxes administered by the Department on all retail sales to Illinois purchasers. See the "Sourcing Sales by Jurisdiction" section below for more details on sourcing the various sales that may take place over a marketplace.

Marketplace facilitators are liable for local sales taxes (such as the Home Rule Municipal Retailers' Occupation Tax, the Home Rule County Retailers' Occupation Tax, Regional Transportation Authority Retailers' Occupation Tax, or Chicago Soft Drink Tax) at the rate in effect at the location to which the goods are shipped or delivered or at which possession is taken by the retailer. And additionally, beginning 10/1/2021 marketplace facilitators also became liable for Metropolitan Pier and Exposition Authority (MPEA) tax. The MPEA Food and Beverage Tax of 1 percent is imposed only on sales made by food and beverage establishments located within MPEA boundaries (origin based). The destination of the food delivery does not affect MPEA Food and Beverage Tax. See Compliance Alert CA-2021-02-A and 70 ILCS 210 for reference.

The marketplace facilitator shall determine on a quarterly basis, ending on the last day of March, June, September, and December, whether it meets either of the thresholds for the preceding 12-month period. If the marketplace facilitator meets either threshold for a 12-month period, they are considered a retailer engaged in the occupation of selling at retail in Illinois and are required to remit the retailers' occupation tax and all retailers' occupation taxes imposed by local taxing jurisdictions in Illinois, provided those local taxes are administered by the Department, and to file all applicable returns for one year. A marketplace facilitator shall begin collecting taxes for sales beginning on the first day of the quarter immediately following the end of the 12-month lookback period.

At the end of that one-year period, the marketplace facilitator is required to determine whether it met either of the thresholds for the preceding 12-month period. If the marketplace facilitator met either threshold for the preceding 12-month period, they are considered a retailer engaged in the occupation of selling at retail in Illinois and are required to remit all applicable State and local retailers' occupation taxes and file returns for the subsequent year.

If a marketplace facilitator is no longer required to remit State and local retailers' occupation taxes, it must notify the Department and its marketplace sellers of this change. It must also provide the Department with the name, address and FEIN of all marketplace sellers making sales to Illinois purchasers during the previous one-year period. Until such notification is made, marketplace facilitators remain liable for tax.

If a marketplace facilitator is no longer required to remit State and local retailers' occupation taxes and has discontinued tax remittance, it must redetermine, on a rolling quarterly basis, whether it is obligated to begin once more remitting State and local retailers' occupation taxes. For each quarter ending on the last day of March, June, September, and December, the marketplace facilitator must examine its sales for the immediately preceding 12-month period to determine whether it met either of the thresholds. If it met either of those thresholds during that 12-month lookback period, it must remit State

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and local retailers' occupation taxes for the following 12-month period. At the end of that 12-month period, it must examine its sales to determine if it must continue to remit tax.

7.4.3 Auctioneers as Marketplace Facilitators

Review Section “Auctioneers and Agents” from Audit Manual Chapter 11 for more information on this topic.

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The Illinois Retailers' Occupation Tax Act imposes a tax upon persons engaged in this State in the business of selling tangible personal property at retail to purchasers for use or consumption. See 86 Ill. Adm. Code 130.101. In Illinois, a Use Tax is also imposed on the privilege of using, in this State, any kind of tangible personal property that is purchased anywhere at retail from a retailer, 86 Ill. Adm. Code 150.101. These taxes comprise what is commonly known as "sales" tax in Illinois.

The applicability of local and transit taxes on a sales transaction will depend upon the circumstances surrounding the sale. The Supreme Court has held that mere solicitation and receipt of sales orders within a taxing jurisdiction, (where the order is accepted, title is passed, and the goods shipped from outside the jurisdiction) did not represent sufficient activity to impose tax on the occupation of selling within that jurisdiction.

When an out-of-state seller (other than, after January 1, 2021, when the sale is made over a marketplace) makes sales to Illinois customers from inventory located in Illinois, the sale is subject to State and local retailers' occupation tax, sourced to the location of the inventory. The Department's administrative rules governing the sourcing of sales provides as follows: "[i]f a retailer's selling activities take place in taxing jurisdictions outside the 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 the sale." See, for example, 86 Ill. Adm. Code 270.115(d)(2).

Different Types of Retailers on and After January 1, 2021. Public Acts 101-0031 and 101-0604 added several new types of retailers with different tax liabilities to the State's existing sales tax structure. As a result, retailers now include the following:

- Remote retailers incurring State and local retailers' occupation tax using destination sourcing for sales made to Illinois purchasers; a marketplace seller that makes sales over a marketplace that meets either of the required tax remittance thresholds in Section 131.115(a)(1) and that also makes sales outside of that marketplace may also be considered a remote retailer for sales outside of the marketplace;

- Marketplace facilitators incurring State and local retailers' occupation tax using destination sourcing for sales made over the marketplace on behalf of marketplace sellers to Illinois purchasers;

- Marketplace facilitators incurring State and local retailers' occupation tax using origin sourcing for their own sales that are either fulfilled from inventory located in Illinois or for which selling activities otherwise occur in Illinois (the location at which the State and local retailers' occupation tax is incurred must be determined by applying the provisions of 86 Ill. Adm. Code 270.115 (c) and (d)); and incurring State and local retailers' occupation tax using destination sourcing for all other sales of its own;

- Out-of-State sellers with a physical presence in Illinois incurring a Use Tax collection obligation for sales they make outside Illinois and ship or deliver to Illinois purchasers; such sellers

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however, incur State and local retailers' occupation taxes using origin sourcing for sales for which their selling activities occur in Illinois (see, e.g., 86 Ill. Adm. Code 270.115 (c) and (d)); if such sellers also make sales over a marketplace, they are considered marketplace sellers and the marketplace facilitator will incur State and local retailers' occupation tax liability based on destination sourcing for these sales;

- Illinois retailers, including brick and mortar retailers, incurring no State or local retailers' occupation taxes for sales made over a marketplace (the marketplace facilitator will now incur State and local retailers' occupation tax liability based on destination sourcing for these sales); and

- Illinois retailers, including brick and mortar retailers, incurring State and local retailers' occupation taxes based on origin sourcing for sales made in Illinois.

- Illinois retailers, including brick and mortar retailers, incurring a Use Tax collection obligation for sales fulfilled from out-of-state inventory and for which selling activities occur out of state.

Generally, if tangible personal property is maintained as inventory in Illinois, whether eligible for the demonstration use exemption or not, the sale of the property will result in State and local retailers' occupation tax liability due to the maintenance of inventory at an Illinois location, subject to credit for use tax properly due and paid, if any. For example, if a company ships items of tangible personal property that it owns to a customer in Illinois pursuant to a subscription so that the customer may try the property before making a decision whether to purchase or return the property, and the customer decides to purchase the item, then the sale is subject to both State and local retailers' occupation tax at the customer's location because the company's inventory is at that location at the time of the sale.

For taxpayers with sales activities in multiple jurisdictions, the auditor will use the Composite of Selling Activities test. This test uses the location of five primary selling activities to evaluate the appropriate jurisdiction of the sale. The five primary selling locations include:

1) Location of sales personnel able to solicit sales and bind the seller to the sale

2) Location where the seller is bound to a sale such as the location where they accept purchase orders

3) Location where payment is tendered or received or from which invoices are issued

4) The location of inventory

5) The location of the retailer's headquarters

(See 86 Ill. Adm. Code 220.115(c)(1) for more information on each of these.)

If a retailer engages in three or more primary selling activities at a single location in Illinois, the state and local retailers' occupation taxes are due in that location. If a retailer engages in three or more primary selling activities outside the state, they are subject to Use Tax and not Retailers' Occupation

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Tax unless the property sold is in the inventory of the retailer in an Illinois location or is subsequently produced in an Illinois location. In those two cases, the state and local retailers' occupation taxes apply where those activities occur.

If the five primary selling activities occur in multiple jurisdictions but none of those jurisdictions has more than two primary selling activities, the auditor will use the location of secondary selling activities to establish the tax jurisdiction. The six secondary selling locations include:

1) Location where marketing and solicitation occurs

2) Location where the seller engages in activities necessary to procure goods for sale

3) Location of officers or employees with authority to set prices and sales terms

4) Location where purchase orders or other contractual documents are received

5) Location where title passes

6) Location where the retailer displays goods such as in a showroom.

(See 86 Ill. Adm. Code 220.115(c)(4) for more information on each of these.)

7.5.1 Four Specific Rules

The Department also identified specific rules for four different situations:

• In-state inventory with out of state selling activities

If a retailer's selling activities take place in taxing jurisdictions outside the State, but the tangible personal property that is sold is from inventory, in 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), and the item is then delivered to the purchaser in Illinois, 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.

• 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 includes, but is not limited to, the following circumstances:

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- 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;

- 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.

• Leases with an Option to Purchase for a nominal amount (conditional sale)

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.

• 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.

1. 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.

2. A mineral that is 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 to sales made 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 an Illinois jurisdiction and transports it over its own line to an out-of-state destination.

3. 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.

7.5.2 Marketplace Facilitators

After January 1, 2021, Illinois retailers engaged in the occupation of making sales of tangible personal property in Illinois and those sales are made over a marketplace, different tax sourcing rules may apply.

Taxes for sales made by a marketplace facilitator on behalf of a marketplace seller are incurred at the tax rate in effect at the purchaser’s location (destination rate). This applies to all sales made through a

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marketplace on behalf of a marketplace seller; including both Illinois retailers and Out-of-state retailers (both those with and without physical presence).

Sales made by a marketplace facilitator itself are taxed as follows:

- For sales that are fulfilled from inventory located in Illinois and for which selling activities do not otherwise occur in Illinois (see, e.g., 86 Ill. Adm. Code 270.115), state and local retailers' occupation taxes are incurred at the tax rate in effect at the location of the Illinois inventory;
- For sales for which selling activities otherwise occur in Illinois (see, e.g., 86 Ill. Adm. Code 270.115), state and local retailers' occupation taxes are incurred at the tax rate in effect at the location of the selling activities;
- For sales that are not fulfilled from inventory located in Illinois and for which selling activities do not otherwise occur in Illinois (see, e.g., 86 Ill. Adm. Code 270.115), state and local retailers' occupation taxes are incurred at the tax rate in effect at the purchaser's location (destination rate).

Affiliates of a marketplace facilitator are not considered "marketplace sellers" when they make sales on an affiliated marketplace. If a marketplace facilitator holds more than 5% ownership in a business and that business sells over the marketplace, they would be acting as an affiliate.

7.5.3 Service Occupation Tax (SOT)

For Service Occupation Tax, the local tax is due in the jurisdiction where the taxpayer maintains their place of business if the order is accepted in Illinois. For instance, a mobile windshield repair company located in Bloomington, IL owes tax at the Bloomington rate even if they perform their service in Normal, IL.

If a service order is accepted outside Illinois but the property transferred incident to the sale is in the inventory of a seller located in Illinois (or is subsequently produced in Illinois), the appropriate jurisdiction is the location where the property is stored or subsequently produced in Illinois.

As with Retailers' Occupation Tax, if the property is delivered outside Illinois with no intention to bring it back to Illinois, it is exempt from Illinois state and local taxes due to the Interstate Commerce Exemption.

Since the local tax only applies to servicemen who pay Service Occupation Tax, de minimis serviceman who are not registered or required to be registered do not pay local Service Occupation Tax to the Department.

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The trend of judicial decisions has been to recognize that sales and use taxes are not discriminatory against interstate commerce and to permit their imposition where there is some minimum connection or link with the taxing state.

- South Dakota v. Wayfair, Inc., No. 17-494 (U.S. JUNE 21, 2018)
- Hartney Fuel Oil Co. V. Hamer, 2013 IL 115130
- Town Crier, Inc. V. Ken Zehnder, 315 Ill. App. 3d 286 (1st. Dist. 2000)
- Brown's Furniture, Inc. V. Raymond Wagner, 655 NE2d 795 (1996)
- Quill Corp. V. North Dakota 112 S. CT. 1904 (1992),
- Chemed Corp., Inc. V. Dept. of Revenue, 186 Ill. App. 3d 402 (1989)
- John Fabick Tractor Co. V. Department of Revenue, Circuit Court of Sangamon County No. 86-MR-104 (1986)
- Complete Auto Transit, Inc. V. Brady, (1977) 430 U.S. 274
- National Geographic Society V. California Board of Equalization (1977), 430 U.S. 551
- Reader's Digest Nssn., NC. V. Mahin, (1970), 44 Ill. 2d 354
- National Bellas Hess, inc. V. Department of Revenue (1967), 386 U.S. 753
- Miller Brothers Co. V. State of Maryland (1954), 347 U.S. 340
- General Trading Co. V. State Tax Commission (1944), 322 U.S. 335, Nelson v. Sears, Roebuck & Co. (1941), 312 U.S. 359, and Nelson V. Montgomery Ward & Co. (1941), 312 U.S. 373

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