

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. See 86 Ill. Adm. Code 270.115(B)(7). (This is a PLR).

April 30, 2015

Dear Xxxxx:

This letter is in response to your letter dated November 24, 2014 in which you request information. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.tax.illinois.gov to review regulations, letter rulings and other types of information relevant to your inquiry.

Review of your request disclosed that all the information described in paragraphs 1 through 8 of Section 1200.110 appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to COMPANY for the issue or issues presented in this ruling, and is subject to the provisions of subsection (e) of Section 1200.110 governing expiration of Private Letter Rulings. Issuance of this ruling is conditioned upon the understanding that neither COMPANY nor a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request. In your letter you have stated and made inquiry as follows:

COMPANY ("Taxpayer") respectfully requests a private letter ruling from the Illinois Department of Revenue ("Department") pursuant to 2 Ill. Adm. Code § 1200.110, to obtain guidance on whether it is required to collect and remit Illinois retailers' occupation tax ("ROT") and/or use tax ("Use Tax") on sales of tangible personal property shipped to customers in Illinois.

As required by 2 Ill. Adm. Code § 1200.110, Taxpayer provides the following disclosures: (1) Taxpayer is not under audit by the Department; (2) Taxpayer is not engaged in litigation with the Department; (3) to the best of the Taxpayer's knowledge, the Department has not previously ruled on the same or a similar issue for the Taxpayer or a predecessor; (4) Taxpayer has not previously submitted the same or a similar issue to the Department for a letter ruling and withdrawn the request before a letter ruling was issued; (5) this request for a Ruling describes all authorities relevant to the request. This Ruling is intended to address current and future tax periods to which the facts described below apply. Taxpayer requests the opportunity to delete any identifying information prior to public dissemination of the Ruling.

I. Background

Taxpayer is based outside of Illinois and does not have any employees or business locations in the state. Taxpayer sells tangible personal property listed on the COMPANY website to Illinois customers. The distribution, fulfillment and related services (e.g., inventory storage, packaging and shipping services) for such sales are handled by CENTERS ("CENTERS") which are leased and operated by Taxpayer's affiliate COMPANY 2 ("COMPANY 2"). Currently, all of the CENTERS are located outside of Illinois. CENTERS purchase products from various vendors and hold the inventory for resale to both related and unrelated parties. The tangible personal property at the CENTERS is *not* owned by Taxpayer. Instead, it is owned by the CENTERS. Additionally, CENTERS provide packaging, labeling, shipping and other related services to Taxpayer.

Tangible personal property sold by Taxpayer on the COMPANY website to Illinois customers is shipped via common carrier to customers from CENTERS located outside of Illinois.¹

A typical sale of tangible personal property by Taxpayer on the COMPANY website will be fulfilled as follows:

- The CENTERS will prepare and package the tangible personal property for shipment to Taxpayer's customer;
- All purchases are shipped by the CENTERS to customers via common carrier;
- When the shipment is picked up by the common carrier at the CENTER, a series of transactions occur. The property is sold from the CENTER to Taxpayer and title is immediately transferred to Taxpayer. Taxpayer then immediately transfers title to the customer who purchased the tangible personal property on the COMPANY website.

The customer maintains title to the tangible personal property while it is with the common carrier for delivery to the customer.

COMPANY 2 also operates sort centers in various locations across the country. In the future, COMPANY 2 will establish a sort center in Illinois (the "Illinois Sort Center"). After the common carrier picks up the packages at the CENTERS, certain packages are taken to a sort center to be sorted for delivery to customers. The sort centers, including the future Illinois Sort Center, are locations at which packages are organized for deep injection into the postal service. There are no changes to the title transfer process described above when a package is routed through a sort center. Title remains with the customer after the common carrier picks up the package at the CENTER and routes the package through a sort center.

¹ The CENTER sells the tangible personal property ordered by the customer to Taxpayer; the CENTER prepares the shipment and a common-carrier picks up the shipment at the CENTER. Title passes immediately from the CENTER to the Taxpayer and then to the customer when the item is placed with the common carrier for delivery.

II. Issues

- A.** Are Taxpayer's sales of tangible personal property to Illinois customers subject to the ROT or the Use Tax when they are shipped from an CENTER located outside of Illinois to Illinois customers and do not pass through the Illinois Sort Center?
- B.** Are Taxpayer's sales of tangible personal property to Illinois customers subject to the ROT or the Use Tax when they are shipped from an CENTER located outside of Illinois to Illinois customers and pass through the Illinois Sort Center before being delivered to the customer?

III. Illinois Law

Under Illinois law, persons with nexus in Illinois who are selling tangible personal property to Illinois customers are either subject to the ROT or have a Use Tax collection obligation. However, persons are not exclusively subject to the ROT or the Use Tax. Instead, the application of the specific tax applies on a sale by sale basis and the specific tax that applies depends in large part on the location of the tangible personal property at the time of sale, as described in detail below.

A. Illinois Retailers' Occupation Tax

Illinois imposes the ROT "upon persons engaged in the business of selling at retail tangible personal property[.]"² The legal incidence of the ROT is on the seller, rather than on the purchaser.³ Thus, in order to be required to collect and remit the ROT, the person⁴ must (1) be engaged in the business of selling in Illinois and (2) make sales at retail.

The "business of selling" is 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."⁵ A "sale at retail" is

² 35 ILCS § 120/2.

³ 86 IAC 130.101(d). A retailer who is "liable for Retailers' Occupation Tax on gross receipts from sales [] must collect the corresponding Use Tax incurred by the purchasers." Ill. Private Letter Ruling No. ST 12-0007-PLR (Aug. 17, 2012). Such a retailer, however, is "allowed to retain the amount of Use Tax paid to reimburse themselves for their Retailers' Occupation Tax liability incurred on those sales." Ill. Dep't of Rev. General Info. Letter No. ST 11-0040-GIL (May 26, 2011).

⁴ "Person" is broadly defined to mean "any natural individual, firm, partnership, association, joint stock company, joint adventure, public or private corporation, limited liability company, or a receiver, executor, trustee, guardian or other representative appointed by order of any court." 35 ILCS § 120/1.

⁵ *Ex-Cell-O Corp. v. McKibbin*, 384 Ill. 316, 321-22 (Ill. 1943); *see also* Ill. Private Letter Ruling No. ST 12-0007-PLR (Aug. 17, 2012) (An "Illinois Retailer" is "one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory." An "Illinois Retailer" is "liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers."); *see also Automatic Voting Machine Corp. v. Daley*, 409 Ill. 438 (Ill. 1951) (An out-of-state corporation selling voting machines to Chicago was not liable for the Retailers' Occupation Tax when its activities in Illinois were limited to promotional work, delivery of bids, transfer of title, delivery of the machines and servicing them. The submission of bids, together with the promotional work of its agents was not sufficient to subject the company to the Retailers' Occupation Tax. Mere execution of contract in Illinois was not sufficient to constitute engaging in the business of selling at retail in Illinois.).

defined as “any transfer of the ownership of or title to tangible personal property to a purchaser ... for a valuable consideration.”⁶

A seller is not subject to the ROT if the “seller is obligated, under the terms of his or her agreement with the purchaser, to make physical delivery of the goods from a point in [Illinois] to a point outside [Illinois.]”⁷ Similarly, the ROT does not apply if the “seller, by carrier ... or by mail, under the terms of his or her agreement with the purchaser, delivers the goods from a point in [Illinois] to a point outside [Illinois.]”⁸

In applying the above requirements, Illinois law provides that when tangible personal property “is located in [Illinois] at the time of its sale (or is subsequently produced in Illinois), and then delivered in Illinois to the purchaser, the seller is [subject to the ROT] if the sale is at retail.”⁹ In this circumstance, the seller is considered to be engaged in the business of selling in Illinois, and the location where “the contract of sale or contract to sell is negotiated and executed and the place at which title to the property passes to the purchaser are immaterial.”¹⁰

The Illinois Supreme Court also held that the location at which title to the property passes is immaterial in *Union Electric Co. v. Department of Revenue*.¹¹ In *Union Electric*, the court examined whether purchases of coal from Illinois companies by nonresident companies for use out of state were subject to the ROT or the Use Tax.¹² Union Electric Co. (“Union Electric”) contracted to buy coal from two Illinois coal mining operations, Old Ben Coal Company (“Old Ben”) and Inland Steel Coal Company (“Inland”). All coal purchased was for use at Union Electric’s power plant in Meramec, Missouri.¹³ As coal could only be delivered to Meramec by barge, the coal left both the Old Ben and Inland operations on the Missouri-Pacific Railroad, traveling to Cora, Illinois, where the coal was transferred from train cars to river barges to be delivered to Union Electric in Meramec.¹⁴ The Department argued that because the coal was shipped to an f.o.b. point in Illinois (Cora, Illinois) and that the purchasers contracted or paid for the carriers, that Union Electric was subject to tax in Illinois.¹⁵ The court, however, determined these facts were immaterial because the purchasers were not shown to be shippers or consignors on the shipping documents.¹⁶ The Illinois Supreme Court’s decision affirmed the decision by the Appellate Court of Illinois that the tax, as applied, was an unconstitutional infringement upon interstate commerce. Additionally, because the coal was destined for use in Missouri the sale was not subject to Illinois ROT or Use Tax.¹⁷ The lower court explained that an interruption in the shipping

⁶ 35 ILCS § 120/1.

⁷ 86 IAC 130.605(c).

⁸ 86 IAC 130.605(d).

⁹ 86 IAC 130.605(a).

¹⁰ 86 IAC 130.605(a)(3).

¹¹ 136 Ill.2d 385 (Ill. 1990).

¹² *Id.* at 400.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See *Union Electric Co. v. Department of Revenue*, 180 Ill. App. 3d 1 (Ill. App. Ct. 4th Dist. 1989), *aff’d*, 136 Ill.2d 385 (Ill. 1990).

process “may take the goods out of interstate commerce if the interruption is deemed to be for the owner’s benefit.”¹⁸ However, the court also indicated that the “temporary stoppage of transit in order to change the method of transportation does not change the interstate nature of the journey.”¹⁹

The rules applied to sales of tangible personal property that is located outside of Illinois at the time of sale are different. Generally, a seller is not considered to be engaged in the business of selling in Illinois and not subject to the ROT when tangible personal property is located outside of Illinois at the time of its sale and is delivered to an Illinois purchaser. However, as discussed in more detail below, a seller may be subject to the ROT if the majority of its primary selling activities occur in Illinois.²⁰

B. Illinois Use Tax

The Illinois Use Tax is “imposed upon the privilege of using in [Illinois] tangible personal property purchased at retail from a retailer....”²¹ The Use Tax “shall be collected from a purchaser by a retailer maintaining a place of business in [Illinois] or a retailer authorized by the Department under Section 6 of [Illinois’ Use Tax Act], and shall be remitted to the Department....”²² For purposes of the Use Tax, a retailer is considered to “maintain a place of business” in Illinois if it meets any one of nine tests. Under one test²³ a retailer is considered to be maintaining a place of business in Illinois if it:

ha[s] or maintain[s] within [Illinois], directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent or other representative operat[es] within [Illinois] under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent or other representative is located here permanently

¹⁸ *Id.* at 7.

¹⁹ *Id.* at 8 (citing *Western Oil Refining Co. v. Lipscomb*, 244 U.S. 346 (1917)).

²⁰ See 86 IAC 220.115, 270.115, 320-115, 370.115, 395.115, 630.115, 670.115, 690.115, 693.115, 695.115. In response to *Hartney* (discussed *infra*), the Department proposed the repeal the current regulations which provided that a seller was not liable for the retailers’ occupation tax when “the seller, from a point outside Illinois, makes an offer directly to the purchaser who transmits his acceptance directly to the seller outside of Illinois.” 86 IAC 130.610(d)(1)(2013). See Ill. Dep’t of Rev., Notice of Proposed Amendments to 86 Ill. Adm. Code 130.601, 130.605 and 130.610 (June 27, 2014) (the “Additional Proposed Changes”). The Additional Proposed changes were finalized on October 1, 2014.

²¹ 35 ILCS § 105/3.

²² 35 ILCS § 105/3-45. Persons who are considered to be “retailers maintaining a place of business” in Illinois “because of their Illinois activities are required to collect Use Tax on sales made to all Illinois purchasers regardless of the manner in which the orders are placed.” Ill. Dep’t of Rev. Gen. Info. Letter ST 05-0006-GIL (Jan. 11, 2005). A retailer who is considered to maintain a place of business in Illinois is required to “collect Use Tax on all his sales to Illinois purchasers, regardless of whether those sales are placed by mail order, telephone order or over the Internet.” *Id.* Out-of-State sellers who fall under the definition of a “retailer maintaining a place of business in Illinois” are required to “register to collect Illinois Use Tax from Illinois customers and remit that tax to the Department.” Ill. Dep’t of Rev. General Info. Letter No. ST 11-0040-GIL (May 26, 2011). A retailer who is liable for collecting Use Tax because it maintains a place of business in Illinois may not incur any Retailers’ Occupation Tax Liability. See Ill. Private Letter Ruling No. ST 12-0007-PLR (Aug. 17, 2012).

²³ The other eight tests are not relevant to the analysis herein.

or temporarily, or whether such retailer or subsidiary is licensed to do business in [Illinois].²⁴

A seller is generally not subject to the ROT, but may be subject to the Use Tax, if the majority of its selling activities occur outside Illinois.

On June 25, 2014, the Department submitted the final local ROT sourcing rules to the Illinois Secretary of State (the “Final Regulations”).²⁵ While the Final Regulations were drafted primarily to address sourcing of the Illinois ROT for *local* tax purposes, the Final Regulations also address whether the ROT or Use Tax applies to any given transaction.²⁶ The Final Regulations were drafted in response to the decision issued by the Illinois Supreme Court in *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130 1 (Ill. Nov. 21, 2013) which invalidated prior Illinois sourcing regulations.²⁷ On June 27, 2014, the Regional Transportation Authority filed a complaint against the Department of Revenue to prevent the Department from enforcing the Final Regulations; however, to date no decision has been issued in that case.

The Final Regulations, as set forth under 86 Ill. Adm. Code § 220.115,²⁸ address when a seller is subject to ROT as opposed to the Use Tax.²⁹ The Final Regulations focus on the location where the taxpayer’s “predominant and most important selling activities take place” (“Selling Activities”).³⁰ “Selling Activities” are defined as “those activities that comprise an occupation, the business of which is to sell tangible personal property at retail.”³¹ Selling Activities 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.”³² The Final Regulations clarify that if “a retailer engages in some Selling Activities in a jurisdiction in [Illinois], but that retailer’s predominant Selling Activities are outside

²⁴ 35 ILCS § 105/2.

²⁵ See Ill. Dep’t of Rev., Hartney Decision Regarding Sales Tax Sourcing Regulations/Emergency and Proposed Rules, available at <http://www.revenue.state.il.us/News/HartneyDecision.htm> (last visited Nov. 8, 2014).

²⁶ See Ill. Dep’t of Rev., Notice of Proposed Amendments to 86 Ill. Adm. Code 130.601, 130.605 and 130.610 (June 27, 2014).

²⁷ See Ill. Dep’t of Rev. Press Release, “New Sales Tax Allocation Rules Filed Today” (Jan. 22, 2014).

²⁸ References in this Request made to the Final Regulations cite 86 IAC 220.115 which pertains to the Home Rule County Retailers’ [sic] Occupation Tax. While there are multiple home rule local occupation taxes and each has its own regulation, each regulation contains the same sourcing language, and therefore, we refer to 86 IAC 220.115 throughout this Request.

²⁹ In the Additional Proposed Changes, the Department acknowledged that the Final Regulations also deal with the application of the retailers’ occupation tax and that, as a consequence, some older regulations are no longer necessary or need to be updated. See Notice of Proposed Amendments to 86 Ill. Adm. Code 130, Ill. Dep’t of Rev. (June 27, 2014). In the Additional Proposed Changes, the Department stated that 86 IAC 130.610 (“Sales of Property Originating in Other States”) is no longer necessary “because the regulations governing allocation of local jurisdiction Retailers’ Occupation Tax Acts provide guidance on determining when a sale properly should be sourced to a jurisdiction within Illinois and when it should be sourced outside of Illinois.” Ill. Dep’t of Rev., Notice of Proposed Amendments to 86 Ill. Adm. Code 130.601, 130.605 and 130.610 (June 27, 2014). As noted *supra*, the Additional Proposed Changes were finalized on October 1, 2014.

³⁰ 86 IAC 220.115(b)(5).

³¹ 86 IAC 220.115(a) (internal quotes omitted).

³² *Id.*

[Illinois], the retailer's obligation to collect and remit taxes on Illinois sales is governed by the Illinois Use Tax Act.³³

Most relevant for purposes of this Ruling is the portion of the Final Regulations that focuses on four different types of selling operations in which the Department has provided "short cuts" that balance the administrative difficulties presented by certain selling operations against the need for accurate tax assessment.³⁴ The four arrangements are: (1) in-state inventory/out-of-state Selling Activity, (2) sales over the Internet, (3) leases with an option to purchase and (4) sales of coal or other minerals.³⁵ With respect to sales made over the Internet, the Final Regulations state that the "Department will presume that the retailer's predominant Selling Activities take place outside of [Illinois]."³⁶ Thus, a sale made through a consumer-based retailer website to a customer in Illinois is 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 [Illinois]."³⁷ There are two examples provided in the Final Regulations of clear and convincing evidence sufficient to overcome the presumption:

- 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;
- 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.³⁸

With respect to (A) and determining if the retailer has inventory located in the state, the Final Regulations provide that the Department may, in certain instances, look to the location of an affiliate of the Retailer if the affiliate has possession of the inventory.³⁹

IV. Legal Analysis

Taxpayer has a Use Tax liability for its sales of tangible personal property to customers located in Illinois when they are either (A) shipped from an CENTER located outside of Illinois and do not pass through the Illinois Sort Center or (B) shipped from an CENTER located outside of Illinois and pass through the Illinois Sort Center because Taxpayer's predominant Selling Activities take place outside of Illinois in both situations.

³³ *Id.*

³⁴ 86 IAC 220.115(d).

³⁵ As leases with an option to purchase and sales of coal or other minerals are not applicable to Taxpayer's business, they are not discussed herein.

³⁶ 86 IAC 220.115(d)(3).

³⁷ *Id.*

³⁸ 86 IAC 220.115(d)(3).

³⁹ *See*, 86 IAC 220.115(b)(6).

A. Taxpayer is subject to Use Tax on sales of tangible personal property to Illinois customers when such sales are shipped from an CENTER located outside of Illinois and do not pass through the Illinois Sort Center

Taxpayer is subject to the Use Tax on sales shipped from an CENTER located outside Illinois that do not pass through the Illinois Sort Center because Taxpayer is not engaged in the business of selling in Illinois. Illinois imposes the ROT “upon persons engaged in the business of selling at retail tangible personal property[.]”⁴⁰ Thus, a person is not subject to the ROT unless it is “engaged in the business of selling at retail tangible personal property” in Illinois.⁴¹ The Final Regulations provide the only guidance as to what constitutes the business of selling in Illinois for purposes of determining whether Taxpayer is subject to the Use Tax or ROT. Pursuant to the Final Regulations, a retailer is only subject to the ROT when its “predominant and most important selling activities take place” in Illinois.⁴² If a retailer engages in some selling activities within Illinois, but its predominant selling activities occur outside of Illinois, the retailer’s obligation to collect and remit tax on its sales to Illinois customers is governed by the Use Tax Act.⁴³ With respect to sales made on the Internet, the Final Regulations specifically provide that the Department will presume that the retailer’s predominant selling activities occur *outside* of Illinois.⁴⁴ Taxpayer – a company who makes sales of property over the Internet from the COMPANY website – falls squarely within this presumption. Taxpayer’s property, employees, and activities are outside of Illinois. Taxpayer has no activity in Illinois other than the delivery of its products to Illinois’ customers by way of common carriers. Moreover, Taxpayer does not fit within either of the two examples in the Final Regulations which are sufficient to overcome the presumption that its predominant selling activities occur outside of Illinois.

The presumption described above may be overcome by an Internet retailer in two ways: (1) the tangible personal property being sold is in the possession of the retailer (or an affiliate of the retailer) and is located in an inventory in Illinois at the time of its sale, or (2) the customer takes possession of the tangible personal property at a place of business owned by the retailer in Illinois.⁴⁵ When the Taxpayer makes sales of property to customers located in Illinois, the property is owned by the CENTER (an affiliate of the Taxpayer) and is located in an CENTER *outside of Illinois*. Furthermore, Taxpayer’s customers cannot take possession of tangible personal property at a business location of the Taxpayer in Illinois because Taxpayer delivers all of its merchandise to customers in Illinois via common carrier and does not offer a pick-up option. Thus, Taxpayer does not fit within either of the examples provided which would overcome the presumption that Taxpayer’s predominant selling activities take place outside of Illinois.

⁴⁰ 35 ILCS § 120/2.

⁴¹ 35 ILCS § 120/2.

⁴² 86 IAC 220.115(b)(5).

⁴³ 86 IAC 220.115(a).

⁴⁴ 86 IAC 220.115(d)(3).

⁴⁵ 86 IAC 220.115(d)(3).

Because Taxpayer's predominant selling activities take place outside of Illinois, Taxpayer is not engaged in the business of selling in Illinois. Thus, Taxpayer is obligated to collect and remit Use Tax on its sales to Illinois customers when such sales are shipped from an CENTER located outside of Illinois and do not pass through the Illinois Sort Center.

B. Taxpayer is subject to Use Tax on sales of tangible personal property to Illinois customers when such sales are shipped from an CENTER located outside of Illinois and pass through the Illinois Sort Center

Taxpayer is subject to the Use Tax on sales shipped from an CENTER located outside Illinois that pass through the Illinois Sort Center because Taxpayer is not engaged in the business of selling in Illinois. As discussed above, Taxpayer is subject to the Use Tax for sales to Illinois customers that do not pass through the Illinois Sort Center and the passage of property through the Illinois Sort Center does not change this result. Taxpayer's predominant and most important selling activities take place outside of Illinois in both cases – where sales are shipped to Illinois customers and do not pass through the Illinois Sort Center and where sales are shipped to Illinois customers and do pass through the Illinois Sort Center.

As discussed above, as an Internet retailer, Taxpayer's predominant selling activities are presumed to occur outside Illinois. The presumption may be overcome by an Internet retailer if there is clear and convincing evidence that the Internet retailer's predominant and most important selling activities take place in the state.⁴⁶ The Final Regulations provide two scenarios where that presumption is overcome by clear and convincing evidence: (1) the tangible personal property being sold is in the possession of the retailer (or an affiliate of the retailer) and is located in an inventory in Illinois at the time of its sale, or (2) the customer takes possession of the tangible personal property at a place of business owned by the retailer in Illinois.⁴⁷ Taxpayer does not fall within either of the two examples when shipments pass through the Illinois Sort Center. The tangible personal property sold by the Taxpayer is not located at the Illinois Sort Center at the time of its sale (and is not subsequently produced by the Taxpayer at the Illinois Sort Center) – it is stored in an CENTER outside of Illinois. Furthermore, Taxpayer's customers cannot take possession of tangible personal property at the Illinois Sort Center – Taxpayer delivers all of its merchandise to customers in Illinois via common carrier. Therefore, Taxpayer does not fit within either of the examples provided in the Final Regulations which would overcome the presumption that Taxpayer's predominant selling activities take place outside of Illinois when sales are shipped through the Illinois Sort Center.

Thus, for the same reasons set forth under Section IV.A. above, Taxpayer is not engaged in the business of selling in Illinois merely because the shipments pass through an Illinois Sort Center in the process of being delivered to Illinois customers via common carrier. Therefore, Taxpayer's sales of tangible personal property to Illinois

⁴⁶ 86 IAC 220.115(d)(3).

⁴⁷ 86 IAC 220.115(d)(3).

customers are not subject to the ROT. Instead, as noted above, Taxpayer has a Use Tax collection obligation on such sales to Illinois customers.

V. Conclusion

Taxpayer seeks the Department's confirmation that it does not have a ROT liability, but is required to collect the Use Tax, on its sales of tangible personal property to customers located in Illinois that are shipped from an CENTER outside of Illinois when (1) the shipment does not pass through the Illinois Sort Center and (2) when the shipment does pass through the Illinois Sort Center.

Prior to the issuance of the Ruling, Taxpayer respectfully requests that the Department contact us to discuss any facts or questions that may potentially result in an adverse Ruling. COMPANY reserves the right to withdraw the request. Should you have any questions regarding this request, please contact me.

DEPARTMENT'S RESPONSE:

Based on the representations in your letter, it is the Department's understanding that COMPANY ("Company") is located outside of Illinois and does not have any employees or business locations in Illinois. The Company sells tangible personal property listed on the Company's website to Illinois customers. The distribution, fulfillment and related services are handled by fulfillment centers located outside of Illinois that are leased and operated by an affiliate of the Company. The fulfillment centers provide packaging, labeling, shipping and other related services to the Company. The fulfillment centers purchase products from suppliers and maintain the inventory for resale to both related and unrelated parties. The tangible personal property located at the fulfillment centers is owned by the fulfillment centers and not the Company. Tangible personal property sold by the Company is shipped via common carrier from the fulfillment centers to Illinois customers.

In response to the Illinois Supreme Court decision in *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, 376 Ill. Dec. 294 (2013), the Illinois Department of Revenue revised the administrative rules that govern the sourcing of local retailers' occupation taxes. See 86 Ill. Adm. Code 270.115. Section 270.115(b)(2) provides 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, paragraph 32 (citing *Ex-Cell-O Corp. v. McKibbin*, 383 Ill. 316, 321-22 (1943))."

Section 270.115(d)(3) of the Department's regulations contains a presumption that applies to Internet sales:

“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 (d)(3) 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 the sale
- “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.”

Based on a review of the activities described in your letter and an analysis of the Department's regulation (86 Ill. Adm. Code 270.115), the Department finds that the Company's predominant and most important selling activities occur outside the State. There is no evidence that the circumstances contained in Section 270.115(d)(3)(A) and (B) are applicable to the Company's Internet sales to Illinois customers. For these reasons, the Department has determined that the Company is not obligated to collect and remit Retailers' Occupation Tax on its sales to Illinois customers. See 86 Ill. Adm. Code 270.115(b)(7) and (d)(3). The Company's obligation to collect and remit taxes on Illinois sales is governed by the Use Tax Act. See 35 ILCS 105/2 (defining a “retailer maintaining a place of business in the State”).

The Company recently registered to collect Use Tax on purchases made by Illinois customers using the Company's website. Therefore, it is not necessary to determine whether the Company is a “retailer maintaining a place of business in the State.”

The Company has requested rulings on the Company's tax obligations regarding tangible personal property sold by the Company to Illinois customers using the Company's website that are shipped from a fulfillment center located outside of Illinois to Illinois customers and tangible personal property sold by the Company to Illinois customers routed through a sort center located in Illinois owned by an affiliated fulfillment center. The Department does not believe there is clear and sufficient evidence to overcome the presumption that the Company's predominant selling activities take place outside of this State. Thus, the Company's sales are subject to Use Tax when shipments to Illinois customers do not pass through the Illinois sort center and when shipments to Illinois customers do pass through the Illinois sort center.

The factual representations upon which this ruling is based are subject to review by the Department during the course of any audit, investigation, or hearing and this ruling shall bind the

Department only if the factual representations recited in this ruling are correct and complete. This Private Letter Ruling is revoked and will cease to bind the Department 10 years after the date of this letter under the provisions of 2 Ill. Adm. Code 1200.110(e) or earlier if there is a pertinent change in statutory law, case law, rules or in the factual representations recited in this ruling.

I hope this information is helpful. If you have questions concerning this Private Letter Ruling, you may contact me at (217) 782-2844. If you have further questions related to the Illinois sales tax laws, please visit our website at www.tax.illinois.gov or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Richard S. Wolters
Chairman, Private Letter Ruling Committee

RSW:kad