

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 GIL.)

September 9, 2021

Dear NAME:

This letter is in response to your letter dated March 30, 2021, in which you requested 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.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

Re: Request for Written Advice Regarding Application and Sourcing of Illinois Sales and Use Tax

To Whom It May Concern:

Please accept this memorandum as a request for a General Information Letter regarding the application of Illinois Retailers' Occupation Tax ("ROT") and Use Tax to the below described fact pattern.

I. BACKGROUND

Taxpayer is a retailer headquartered outside of Illinois that makes sales of tangible personal property to Illinois customers through its website. A wholly owned subsidiary of Taxpayer operates brick and mortar retail locations in Illinois. Taxpayer does not own a warehouse or E-Fulfillment Center ("EFC") in Illinois but does own some inventory located in third-party warehouses in Illinois. For Illinois sales and use tax purposes, Taxpayer is considered an out-of-state retailer with physical presence in Illinois.

Taxpayer's e-commerce selling activities, including order acceptance and payment processing, are conducted at Taxpayer's headquarters location outside of Illinois. Taxpayer's online sales to Illinois customers may be fulfilled using the following types of inventory:

1. Taxpayer-owned inventory located in Taxpayer's EFCs outside of Illinois (this represents the majority of transactions);
2. Taxpayer-owned inventory located in third-party warehouse locations inside and outside of Illinois;
3. Taxpayer's subsidiary-owned inventory located in one of the subsidiary's brick and mortar retail store locations inside and outside of Illinois; or
4. Unrelated third party-owned inventory located at unrelated third-party locations inside and outside of Illinois.

All fulfillment determinations are made after the order is accepted and the purchaser's form of payment is authorized by Taxpayer. In all fulfillment scenarios, goods are delivered to the purchaser's location using a common carrier and title passes to the purchaser upon delivery at the purchaser's location. If an order is fulfilled using subsidiary store inventory or unrelated third-party inventory, the goods are shipped directly from the subsidiary's store or the third-party location to the customer.

Accordingly, Taxpayer's online sales may be subject to either the Illinois Use Tax or Illinois ROT based on the fulfillment model for each sale.

II. ISSUE

1. Are Taxpayer's online sales fulfilled from its subsidiary's store inventory located in Illinois subject to Illinois Retailers' Occupation Taxes or Use Tax?
2. Are Taxpayer's online sales fulfilled from unrelated third-party inventory located in Illinois subject to Illinois Retailers' Occupation Taxes or Use Tax?

III. POSITION

1. Taxpayer's online sales fulfilled from its subsidiary's store inventory located in Illinois are subject to Illinois Use Tax.

2. Taxpayer's online sales fulfilled from unrelated third-party inventory located in Illinois are subject to Illinois Use Tax.

IV. DISCUSSION

Illinois imposes state and local ROT "upon persons engaged in this State in the business of selling at retail tangible personal property."¹ Sale at retail means "any transfer of the ownership of or title to tangible personal property to a purchaser, for the purpose of use or consumption."²

Illinois also imposes Use Tax "upon the privilege of using in this State tangible personal property purchased at retail from a retailer."³ Retailer means and includes "every person engaged in the business of making sales at retail."⁴ A retailer has the obligation to collect Use Tax from the purchaser if the seller maintains a place of business in Illinois.⁵ However, retailers that owe ROT on the same transaction are not required to remit to the state the Use Tax collected from their customers.⁶

The Retailers' Occupation Tax Act (the "Act") provides specific guidance on determining where a retailer is deemed to be engaged in the business of selling for Illinois sales and use tax purposes. However, sales made via the Internet and delivered to a purchaser's location in Illinois is not one of the scenarios contemplated in the Act.⁷ For selling scenarios not contemplated in the Act, the Illinois Department of Revenue (the "Department") has provided administrative guidance to assist taxpayers in determining where they are deemed to be engaged in the business of selling for local ROT purposes.⁸ This administrative guidance is drawn from and closely mirrors historical case law in Illinois.

Because ROT is imposed on the retail business of selling, the jurisdiction where local tax is due is "the jurisdiction where the seller is engaged in the business of selling."⁹ "The occupation of selling is comprised of "the composite of many activities.""¹⁰ Thus, establishing

¹ 35 ILCS 120/2(a); 86 Ill. Admin. Code 130.101.

² 35ILCS 120/1.

³ 35 ILCS 105/3; 86 Ill. Admin. Code 150.101(a).

⁴ 35 ILCS 105/2; 86 Ill. Admin. Code 150.201.

⁵ 35 ILCS 105/3-45; 86 Ill. Admin. Code 150.401(a).

⁶ 35 ILCS 105/8.

⁷ 35 ILCS 120/2-12.

⁸ 86 Ill. Admin. Code 220.115.

⁹ 86 Ill. Admin. Code 220.115(b)(1); *Automatic Voting Marchs. V. Daley*, 409 Ill. 438, 447 (1951)

¹⁰ 86 Ill. Admin. Code 220.115(b)(2); *Ex-Cell-O Corp. v. McKibbin*, 383 Ill. 316, 321 (1943).

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."¹¹

To aid in this inquiry, the Department has identified various primary and secondary selling activities, as well as administrative shortcuts for specific selling scenarios.¹² Two of these administrative shortcuts are applicable to Taxpayer's business and both suggest the same sourcing determination.

The first relates to retailers with out-of-state selling activities, but in-state inventory. If a retailer's selling activity occurs outside of Illinois, except that the goods sold are "in an inventory in the possession of the retailer located within a jurisdiction in Illinois at the time of [their] sales (or [are] subsequently produced by the retailer in the jurisdiction)," the retailer will be deemed to be engaged in business where the inventory is located at the time of sale or when it is subsequently produced by the retailer.¹³

The second administrative shortcut relates to sales made via the Internet. Regarding these sales, the retailer's selling activity will be presumed to take place outside of Illinois and such sales will be subject only to Use Tax.¹⁴ However, this presumption will be overcome if the goods sold are "in an inventory in the possession of the retailer located within a jurisdiction in Illinois at the time of [their] sale (or [are] subsequently produced by the retailer in the jurisdiction)."¹⁵

Importantly, both scenarios use inventory in the possession of the retailer at the time of sale – or subsequently produced by the retailer - as the sole determinant of where the retailer is deemed to be engaged in selling activity. Illinois defines retailer to include every person engaged in the business of making sales at retail.¹⁶ Person means and includes any firm, partnership, association, joint stock company, joint adventure, or public or private corporation.¹⁷ Illinois treats individual entities, even related parties, as separate persons for sales and use tax purposes.¹⁸ As such, a plain reading of the Department's administrative guidance in the context of general sales and use tax treatment provides that inventory in the ownership and

¹¹ 86 Ill. Admin. Code 220.115(b)(2); *Hartney Fuel Oil Co. v. Hamer*, 2013 IL115130, paragraph 32 (citing *Ex-Cell-O Corp.* at 321-22).

¹² 86 Ill. Admin. Code 220.115(c).

¹³ 86 Ill. Admin. Code 220.115(d)(2).

¹⁴ 86 Ill. Admin. Code 220.115(d)(3).

¹⁵ 86 Ill. Admin. Code 220/115(d)(3)(A).

¹⁶ 35 ILCS 105/2; 86 Ill. Admin. Code 150.201.

¹⁷ 35 ILCS 105/2; 86 Ill. Admin. Code 150.201.

¹⁸ *See* Illinois Private Letter Ruling No. ST 92-0038-PLR (1992).

possession of a separate entity - either a related or unrelated party- will not be deemed to be inventory in the possession of the retailer at the time of sale.

Goods that are not in the possession of the retailer in Illinois at the time of sale may still be subject to ROT if the goods are subsequently produced by the retailer in Illinois.¹⁹ "Produce" is not defined by statute or Illinois administrative guidance. In such cases, terms are given their ordinary and popularly understood meaning, considering regulation's purpose.²⁰ According to Merriam-Webster.com, "produce" means "to cause to have existence or to happen" or "to give being, form, or shape to". "Manufacture" is cited as a synonym.²¹ Further, the Department's sourcing guidance uses the location where a seller takes action to procure the goods sold as a secondary selling activity.²² The specific use of the term "procure" in the same regulation strongly suggests that the Department intends its use of the term "produce" to mean manufacturing and/or something other than procurement. Because the goods sold by Taxpayer are in existence at the time of sale, they cannot be subsequently produced by Taxpayer.

Taken in full, a plain reading of the Department's administrative guidance provides that Taxpayer's sales fulfilled by subsidiary store owned inventory and unrelated third-party owned inventory located in Illinois at the time of the sale are subject to Use Tax. Because Taxpayer's selling activity occurs outside of Illinois and Taxpayer does not possess the inventory in Illinois at the time of sale or subsequently produce the goods in Illinois, these sales are not subject to ROT.

V. CONCLUSION

Taxpayer's sales fulfilled using inventory owned and possessed by its subsidiary or unrelated third parties in Illinois at the time of sale are not subject to ROT. The goods sold to purchasers are not in Taxpayer's possession at the time of sale nor are they subsequently produced by Taxpayer. Pursuant to the Department's administrative guidance, Taxpayer's sales are subject only to Illinois Use Tax.

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¹⁹ 86 Ill. Admin. Code 220.115(d).

²⁰ *E.g.*, *Chemed Corp., Inc. v. State*, 186 Ill.App.3d 402, 411 (1989).

²¹ Merriam-Webster. (n.d.) Produce. In Merriam-Webster.com dictionary. Retrieved March 19, 2021, from <https://www.merriam-webster.com/dictionary/produce>

²² 86 Ill. Admin. Code 220.115(c)(4)(B).

We appreciate your consideration of this matter. Please let us know if you have any questions or require any additional information in order to issue a General Information Letter.

Sincerely,

DEPARTMENT'S RESPONSE:

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, for example, 86 Ill. Adm. Code 270.115. The rules provide 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)).

86 Ill. Adm. Code 270.115(b)(2). This legal standard applies whether the retailer is engaged in selling activities in taxing jurisdictions in multiple states, or in multiple jurisdictions in this State. 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).

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.

For sales and excise tax purposes, the Department generally treats a parent company and its subsidiaries and affiliates as separate and distinct companies. The rule requires that there be clear and convincing evidence sufficient to overcome the presumption provided for in Section 270.115(d)(3). Such evidence includes, *but is not limited to*, when 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. The examples provided in paragraphs (A) and (B) are not exclusive. Nor does the rule require that the taxpayer own the inventory that is used to fulfill an order.

The taxpayer's online sales to Illinois customers may be fulfilled by the taxpayer using inventory from four different inventories. The taxpayer does not specify or explain the arrangements it has with its subsidiary and third parties that permit the taxpayer to fulfill its orders using their inventory located in Illinois. However, without more information and documentation, the Department cannot say without reservation that the taxpayer does not have possession of the inventory in subsidiary or third-party inventories if the taxpayer is free to fulfill orders from these warehouses. The information and documentation may provide clear and convincing evidence to overcome the presumption provided in Section 270.115(d)(3).

I hope this information is helpful. If you require additional information, please visit our website at www.tax.illinois.gov or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Alexis K. Overstreet

COMPANY/NAME

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Associate Counsel

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