

ST 24-0002-GIL 01/29/2024 LOCAL TAXES

The occupation of selling is comprised of the composite of many activities extending, and establishing where “the taxable business of selling is being carried on” requires a fact-specific inquiry into the composite of selling activities that comprise the retailer’s business. 86 Ill. Adm. Code 270.115. For purposes of jurisdictional questions for the County Motor Fuel Tax Law and the Municipal Motor Fuel Tax Law, the provisions of 86 Ill. Adm. Code 270.115, which are not incompatible, shall apply. See 86 Ill. Adm. Code 695.115; 86 Ill. Adm. Code 696.115. (This is a GIL)

January 29, 2024

NAME
TAXPAYER REPRESENTATIVE
ADDRESS

Dear NAME:

This letter is in response to your letter dated November 14, 2023, 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:

We are looking for a timely definitive answer as to whether a company who runs their sales (in Illinois the sale of fuel to an Illinois customer) out of state needs to charge and collect county motor fuel tax as well as appropriate city sales tax. I have attached the Flowchart for the Illinois Level the Playing field Act to refer to as we believe that a company picking up and selling fuel in Illinois or even buying the product in Indiana and delivering it to Illinois customers should have to charge and remit local sales tax and county motor fuel tax. There are at least two fuel companies who run their sales out of Pennsylvania and Indiana. The companies have trucks in Illinois and pick up fuel products in Illinois and deliver it to Illinois customers. These customers are in counties that require a county motor fuel tax such as Kane, Lake, McHenry, Will and Dupage, however, they are not charging the tax. One of the companies has a facility in Illinois where they run their operations even though they run their sales out of Pennsylvania. These companies are only charging sales tax of 6.25% and not charging or collecting county motor fuel tax which makes it nearly impossible for us to compete against them

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as we have to charge anywhere from 4-8 cents per gallon and an additional 1.75% local sales tax.

We are looking for a definitive ruling because if a company can run "sales" out of another state, charge a lower sales tax rate and not charge county motor fuel tax, there is no benefit for us to keep our sales office in Illinois. We cannot stay competitive in the state.

DEPARTMENT'S RESPONSE:

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. [35 ILCS 120/2]. The use tax which complements the retailers' occupation tax is imposed on the privilege of using, in this State, any kind of tangible personal property that is purchased anywhere at retail from a retailer. 35 ILCS 105/3. These taxes comprise what is commonly known as "sales tax" in Illinois. Likewise, Illinois law allows for the imposition of a local retailers' occupation tax by certain county and municipal governments and transit authorities upon all persons engaged in the business of selling tangible personal property at retail within such regions. For an example of such local taxes, see 55 ILCS 5/5-1006; 65 ILCS 5/8-11-1; 70 ILCS 3615/4.03(e). Similarly, Illinois law allows for the imposition of a local motor fuel tax by certain county and municipal governments at 55 ILCS 5/5-1035.1 and 65 ILCS 5/8-11-2.3, respectively.

The county boards of the counties of DuPage, Kane, Lake, Will, and McHenry may impose a County Motor Fuel Tax by ordinance or resolution. See 55 ILCS 5/5-1035.1. The County Motor Fuel Tax is imposed upon all persons engaged in the county in the business of selling motor fuel at retail for the operation of motor vehicles upon public highways or for the operation of recreational watercraft upon waterways.

A principal consideration for retailers with selling activities in multiple jurisdictions within Illinois or in jurisdictions located in more than one state is a determination of the proper situs for the business of selling to be taxed. The limited description provided in your ruling request regarding the business activities performed in Illinois as well as out-of-State does not allow for specific answers to your questions. Generally, a determination of this nature cannot be addressed in the context of a GIL. We hope the following information regarding the relevant administrative rules which govern the sourcing of local retailers' occupation taxes will provide you with the guidance you seek.

In response to the Illinois Supreme Court decision in *Hartney Fuel Oil Co. v. Hamer*, 376 Ill. Dec. 294 (2013), the Department of Revenue revised the administrative rules that govern the sourcing of local retailers' occupation taxes. See the Home Rule Municipal Retailers' Occupation Tax administrative rule (86 Ill. Adm. Code 270.115), the substance and provisions of which apply to all locally imposed retailers' occupation taxes. 86 Ill. Adm. Code 270.115 provides:

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).

Please note that for purposes of jurisdictional questions for the County Motor Fuel Tax Law and the Municipal Motor Fuel Tax Law, the provisions of 86 Ill. Adm. Code 270.115, which are not incompatible, shall apply. See 86 Ill. Adm. Code 695.115; 86 Ill. Adm. Code 696.115. Thus, the discussion regarding the sourcing rules for local retailers' occupation taxes under 86 Ill. Adm. Code 270.115, in this GIL will apply as well to the county and municipal motor fuel taxes.

Because of the variation of selling activities a retailer may use, it is impossible to cover in a sourcing rule the tax consequences of every possible scenario. To assist taxpayers in determining the proper jurisdiction for local tax liability, 86 Ill. Adm. Code 270.115 includes guidelines which discuss in part, "primary selling activities", "secondary selling activities" and "short cuts". The administrative rule provides that a retailer engaging in three or more primary selling activities in one location in the State or outside of the State for a particular sale shall remit either the retailers' occupation tax imposed at that in-State location or use tax for sales sourced outside of the State. See 86 Ill. Adm. Code 270.115(c)(2).

An exception to 86 Ill. Adm. Code 270.115(c)(2) applies when three or more of the primary selling activities are conducted outside of the State, but "the tangible personal property which 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". See 86 Ill. Adm. Code 270.115(d)(2). In such case, the Illinois jurisdiction where the property is located or is subsequently produced is considered the proper tax situs.

Under 86 Ill. Adm. Code 270.115(c)(1), the five primary selling activities used to determine the location at which a retailer is engaged in the business of selling are:

- A) Location of sales personnel exercising discretion and authority to solicit customers on behalf of a seller and to bind the seller to the sale;
- B) Location where the seller takes action that binds it to the sale, which may be acceptance of purchase orders, submission of offers subject to unilateral acceptance by the buyer, or other actions that bind the seller to that sale;
- C) Location where payment is tendered and received, or from which invoices are issued with respect to each sale;
- D) Location of inventory if tangible personal property that is sold is in the retailer's inventory at the time of its sale or delivery; and
- E) Location of the retailer's headquarters, which is the principal place from which the business of selling tangible personal property is directed or managed. In general, this is the place at which the offices of the principal executives are located. When executive authority is located in multiple jurisdictions, the place of daily operational decision making is the headquarters.

If no individual jurisdiction has more than two primary selling activities, 86 Ill. Adm. Code 270.115(c)(4) requires the following additional selling activities be considered to determine the jurisdiction in which the retailer is engaged in the business of selling.

- A) Location where marketing and solicitation occur;
- B) Location where the seller engages in activities necessary to procure goods for sale;
- C) Location of the retailer's officers, executives or employees with authority to set prices or determine other terms of sale if determinations are made in a location different than that identified in subsection (c)(1)(A);
- D) Location where purchase orders or other contractual documents are received when purchase orders are accepted, processed, or fulfilled in a location or locations different from where they are received;
- E) Location where title passes; and
- F) Location where the retailer displays goods to prospective customers, such as a showroom.

For situations which require the consideration of both primary and secondary selling activities, the proper jurisdiction for taxation is where the retailer's inventory is located under subsection (c)(1)(D), or where its headquarters is located under subsection (c)(1)(E), whichever location is where more selling activities occur, considering both primary and secondary selling activities. 86 Ill. Adm. Code 270.115(c)(5.)

With respect to internet sales when the retailer ships the property to the customer in this State, 86 Ill. Adm. Code 270.115(d)(3) creates a presumption that the retailer's predominant selling activities take place outside of Illinois. In such case, the sale would be subject to the Illinois Use Tax Act. There is an exception to this presumption when there is clear and convincing evidence that the retailer's predominant and most important selling activities take place in Illinois. Examples of such clear and convincing evidence sufficient to overcome the presumption include when:

- 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; or
- 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.

The Leveling the Playing Field for Illinois Retail Act Flowchart which was referenced in, and included with your letter, was prepared by the Department in response to Public Acts 101-31_and

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101-604 which amended the retailers' occupation tax to require remote retailers who meet a tax remittance threshold to remit State and local retailers' occupation taxes beginning January 1, 2021. The changes made by these Acts are intended to "level the playing field" between Illinois-based retailers and remote retailers by imposing State and local retailers' occupation taxes on Illinois retailers and remote retailers alike. A remote retailer is a retailer with no physical presence in Illinois. This would not appear to be the case of the retailer mentioned in your letter. However, the flowchart does show that a retailer with a presence in Illinois could owe State and local retailers' occupation tax or use tax depending on where the retailer's selling activities occur, as discussed above.

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,

Tom Grudichak
Associate Counsel

TG:sc