

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. (This is a GIL)

November 16, 2023

NAME  
COMPANY

Dear NAME:

This letter is in response to your letter dated September 28, 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](http://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:

The purpose of the letter is to request a general information letter from the Office of Legal Services of the Illinois Department of Revenue (“the Department”) pursuant to 2 Illinois administrative Code 1200.120, as a means to resolve a matter regarding the application of revenue sourcing. COMPANY (“COMPANY”) has been engaged by our Client (or “the Company”) to prepare and submit the general information letter. The relevant facts and analysis are presented below.

### **Facts**

Company A is an internet retailer headquartered out of state. Orders are received via eCommerce websites and fulfilled by local third parties. The local third parties receive the orders via a network affiliation and deliver the products to Illinois customers. Company A is currently registered as a remote seller and collects Illinois sales tax based on the customer’s ship to address.

Company B is an internet retailer currently headquartered in Location X, with a satellite office in Location Y and warehouse in Location Z, all within the state of Illinois. Similar to Company A, orders are received via eCommerce websites and fulfilled by local third parties. The local third parties receive the orders via a network affiliation and deliver the products to Illinois customers. Company B also sells products out of Location Z, but primarily on an exempt wholesale basis. Most of Company's B employees are remote, although some employees come into the office from time-to-time to meet. Company B has servers at Location X, but this location is going away at year end and the servers are being moved to co-location facilities within Illinois. There are no salespersons with permanent offices in any of these locations; all salespersons are remote. Only certain administrative, IT and other non-sales personnel have offices at Location Y. Company B is currently registered as an in-state retailer and collects Illinois sales tax based on where the order was received or fulfilled, i.e., which today is Location X.

Company A and Company B expect to merge over the next twelve (12) months, leaving Company B as the surviving legal entity. Preliminary discussions have been made regarding the Company's surviving headquarter location and the final server location(s) that has caused some uncertainty as to whether the Company would be considered an out-of-state seller or an in-state retailer and how sales should be sourced. We also note, all sales personnel are remote employees that travel to various states and are located both in and out of Illinois.

### **Applicable Statutes and Administrative Codes**

ILCS Chapter 35 §120/1 defines an out-of-state seller as a retailer who has physical presence in Illinois. Physical presence in Illinois means having or maintaining 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 operating 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 or temporarily, or whether such retailer or subsidiary is licensed to do business in Illinois. They must collect and remit state and local retailers' occupation tax at the state use rate.

An Illinois (in-state) retailer is defined as a retailer who makes sales of tangible personal property in Illinois. An Illinois retailer's inventory and headquarters are generally in Illinois. They must collect and remit state and local retailers' occupation tax at the origin rate.

Ill. Admin. Code 86 §131.155(a) states “the type of tax liability incurred by a retailer and the manner in which that liability is sourced depends upon the manner in which a retailer conducts its selling activities, as well as the type of nexus (or lack thereof) that a retailer has with the State. Retailers may incur State and local retailers’ occupation taxes based either upon the Illinois location to which the tangible personal property is shipped or delivered or at which possession is taken by the purchaser (“destination sourcing”) or upon the location in Illinois at which the selling activities occur (“origin sourcing”). Multichannel retailers may incur a combination of these liabilities.”

Ill. Admin. Code 86 §131.155(e) states “Out-of-State sellers with a physical presence in Illinois are not remote retailers. However, they are “retailers maintaining a place of business in Illinois”. As a result, they generally incur only a Use Tax collection obligation (6.25%) on sales made to Illinois purchasers from locations outside Illinois. However, if sales are made to Illinois purchasers from locations in Illinois, State and local retailers’ occupation tax is incurred at the rate in effect where the selling activities occur (“origin sourcing”) (see 86 Ill. Adm. Code 270.115(c) and (d) to determine the location at which State and local retailers’ occupation taxes are incurred). This selling frequently occurs when sales made to Illinois purchasers are filled from inventory located in Illinois.”

Per Ill. Admin. Code 86 §270.115(b), “The Home Rule Municipal Retailers’ Occupation Tax Act [65 ILCS 5/8-11-1) authorizes home rule municipalities to impose a tax on those engaged in the business of selling tangible personal property at retail within the municipality. Because the statute imposes a tax on the retail business of selling, and not on specific sales, the jurisdiction in which the sale takes place is not necessarily the jurisdiction where the local retailers’ occupation tax is due. Rather, it is the jurisdiction where the seller is engaged in the business of selling that can impose the tax.”...

“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.”...

“It is the intent of the Home Rule Municipal Retailers’ Occupation Tax that retailers will incur local retailers’ occupation tax in a jurisdiction in Illinois if

they “enjoyed the greater part of governmental [services and] protection” in that jurisdiction.”...

“A seller incurs Home Rule Municipal Retailers’ Occupation Tax in a home rule municipality if its predominant and most important selling activities take place in the municipality. Isolated or limited business activities within a jurisdiction do not constitute engaging in the business of selling in that jurisdiction when other more significant selling activities occur outside the jurisdiction, and the business predominantly takes advantage of government services provided by other jurisdictions.”...

“The Department “may look through the form of a putatively [multijurisdictional] transaction to its substance” to determine where “enough of the business of selling took place” and, thus, where the seller is subject to local retailers’ occupation tax.” ...

“For purposes of determining where a retailer is engaged in the business of selling, it does not matter whether the retailer is engaged in selling activities in taxing jurisdictions in multiple states, or in multiple jurisdictions in this State. The legal standard is the same. The retailer is engaged in the business of selling in the taxing jurisdiction where its predominant and most important selling activities take place.”...“Because it is not practicable for retailer to divide retailers occupation tax among competing jurisdictions, a retailer subject to the retailers’ occupation tax is engaged in the business of selling in only one location in Illinois for each sale.”

Ill. Admin. Code 86 §270.115(d)(3) further states “... 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 that 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; 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.”

### **Disclosures**

This issue is not under consideration by the Department in connection with an audit examination of any type, a refund request, an administrative hearing, or litigation for the Company or any affiliate or related person.

### **Response Requested**

In preparation of the upcoming merger, our Client would like to confirm the impact of each scenario below on its registration status and its sales tax collection obligations in Illinois, specifically if the Company should be sourcing its revenue based on customer location (destination) or where the order was taken (origin).

1. Company B has an out-of-state headquarters location, a Location Y Illinois satellite office with no salespersons, and servers located in Illinois at colocation facilities to be determined. Sales are received via the servers (i.e., eCommerce platform) and delivered to Illinois customers.
2. Company B has an out-of-state headquarters location, a location Y Illinois satellite office with no salespersons, and servers at a colocation outside of Illinois. Sales are received via the servers (i.e., eCommerce platform) and delivered to Illinois customers.
3. Does the response change for 1 and 2 if the warehouse, located in Illinois, also takes sales orders via the ecommerce platform?
4. Does the response change for 1 and 2 if the warehouse, located outside Illinois, also takes sales orders via the ecommerce platform?

Your prompt consideration of the letter is sincerely appreciated. Please contact me at PHONE or at E-MAIL should you have any questions regarding this request.

**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]. 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). 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.

The State and local retailers' occupation taxes impose a tax liability upon the occupation of selling at retail and not on the sale itself. See 86 Ill. Adm. Code 270.115(b)(1); see also *Standard Oil Co. v. Department of Finance*, 383 Ill. 136, (1943). 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". See 86 Ill. Adm. Code 270.115(b)(2) (quoting *Ex-Cell-O Corp. v. McKibbin*, 383 Ill. 316, 321 (1943)). The business of selling under the Home Rule County Retailers' Occupation Tax Law, the Home Rule Municipal Retailer's Occupation Tax Law, the Regional Transportation Authority Act, and all other locally imposed retailers' occupation taxes is judged under the same fact sensitive approach. See 86 Ill. Adm. Code 270.115(b)(2). The statutory intent of the local occupation taxes is to link the retailer's tax liability to where it principally enjoys the benefits of government services. See 86 Ill. Adm. Code 270.115(b)(4).

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. See 86 Ill. Adm. Code 270.115.

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, the administrative rules include guidelines which discuss "primary selling activities", "secondary selling activities" and "short cuts". The home rule municipal retailers' occupation tax administrative rule (86 Ill. Adm. Code 270.115), the substance and provisions of which applies to all locally imposed retailers' occupation taxes administered by the Department, provides these guidelines as well as examples.

The five primary selling activities which are 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.

86 Ill. Adm. Code 270.115(c)(1).

Under 86 Ill. Adm. Code 270.115(c)(2), the location where at least three of the primary selling activities are conducted is considered the proper situs for the business of selling to be taxed. An exception to 86 Ill. Adm. Code 270.115(c)(2) applies when three of the primary selling activities are conducted outside of the State, but the tangible personal property which is sold is located in Illinois at the time of its sale or delivery. In such case, the Illinois jurisdiction where such property is located is considered the proper tax situs. See 86 Ill. Adm. Code 270.115(d)(2).

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.)

In recognition that determining the appropriate tax situs can present substantial administrative difficulties for certain classes of retailers with unique, complicated or widely dispersed selling activities, the Department's rule 86 Ill. Adm. Code 270.115(d), provides administrative "short cuts" that balance the administrative difficulties presented by certain selling operations against the need for accurate tax assessment for both retailers and the Department. These short-cuts pertain to the following situations: 1) In-State inventory (previously discussed), 2) Internet sales (see below), 3) Sales to a nominal lessee, and 4) Sales of coal or other minerals.

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

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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.

Please note that the presumption for internet sales under 86 Ill. Adm. Code 270.115(d)(3) does not apply in the following situations: 1) sales made by remote retailers that meet either of the tax remittance thresholds set out at 86 Ill. Adm. Code 131.115(a), 2) sales made by marketplace facilitators on behalf of marketplace sellers, or 3) sales made by marketplace facilitators of its own tangible personal property or when the marketplace seller of the tangible personal property is not identified.

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

Very truly yours,

Tom Grudichak  
Associate Counsel

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