IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

The REGIONAL TRANSPORTATION AUTHORITY, an Illinois special purpose unit of government and municipal corporation,	)	2014CH10754 CALENDAR/ROOM 02 TIME 00:00 Declaratory Jdgmt
Plaintiff,	)	
v.	)	
BRIAN A. HAMER, in his official capacity as Director of Revenue for the Illinois Department of Revenue,	)	
Defendant.	)	

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, the Regional Transportation Authority (the "RTA"), for its Verified Complaint against Defendant Brian A. Hamer in his official capacity as Director of Revenue for the Illinois Department of Revenue (the "Department"), states and alleges as follows:

INTRODUCTION

1. This is an action to prevent the Department from enforcing new rules that exceed the Department's statutory authority to regulate and that will leave the RTA and numerous other local governments without an adequate remedy at law to recover millions of dollars of tax revenues to which they are entitled. The RTA seeks a declaration that the rules are invalid based on long-standing Illinois law, including most recently the Illinois Supreme Court's opinion in *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, a true and correct copy of which is attached as Exhibit A. It also seeks preliminary and permanent injunctive relief to stop the Department from enforcing the new rules. Many millions of dollars of tax revenue are likely to be irretrievably lost unless this Court declares the new rules to be invalid and prevents the Department from enforcing them.

2. Under well-established Illinois law, "[a]dministrative rules and regulations must be authorized by statute," and "a statute may not be altered or added to by the exercise of a power to make rules and regulations thereunder." *N. Ill. Auto. Wreckers & Rebuilders Ass'n v. Dixon*, 75 Ill. 2d 53, 60 (1979); *see also Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 372 (2009) ("the Department's regulations . . . must be consistent with ROTA, the statute under which they are promulgated"); *Ex-Cell-O Corp. v. McKibbin*, 383 Ill. 316, 320-22 (1943) ("the rules of the Department can neither limit nor extend the scope of the statute"). As the supreme court held in *Hartney*, "a regulation cannot narrow or broaden the scope of intended taxation under a taxing statute," and "[a] regulation that does so must be held invalid." *Hartney*, at ¶ 61.

3. The Department's new rules relate to the enforcement of local retailers' occupation taxes that the RTA and other local governments are authorized by statute to impose on retailers doing business within their geographic boundaries. A retailers' occupation tax is a component of what is commonly referred to in Illinois as a "sales tax," although in fact it is a tax on retailers who are "engaged in the business of selling tangible personal property at retail," not a tax on the sales themselves. *See, e.g.*, 70 ILCS 3615/4.03(e). The RTA and other local governments rely upon revenues generated by local retailers' occupation taxes to provide governmental services within their jurisdictions. Approximately half of the RTA's operating budget is funded by the Regional Transportation Authority Retailers' Occupation Tax (the "RTA Tax"), which is assessed on retailers engaged in the business of selling tangible property at retail within the RTA's six-county metropolitan region. *See id.*

4. Specifically, the new rules seek to provide guidance regarding whether a retailer is engaged in the business of selling in a given local tax jurisdiction, and thus whether a given local retailers' occupation tax applies. The Department promulgated the new rules in response to the Illinois Supreme Court's November 21, 2013 opinion in *Hartney*, in which the supreme court

held that the Department's previous rules were invalid. *Hartney*, at ¶ 64. In *Hartney*, the supreme court held that the scope of local retailers' occupation taxes is defined by statute to encompass all retailers "engaged in the business of selling" in a given jurisdiction. *Id.* at ¶ 33. Under Illinois law, "the business of selling is a composite of many activities," and determining whether a retailer is within the statutory scope of a retailers' occupation tax "requires a fact-intensive inquiry." *Id.* at ¶ 58. The Department's previous rules were invalid because they limited the scope of local taxes based not on a "fact-intensive inquiry" but rather on "only one, potentially minor step in the business of selling"—the location where purchase orders were accepted. *Id.* at ¶ 61. The supreme court held that the previous rules could be interpreted to allow a retailer to avoid local taxes by relocating an insignificant part of its selling activity outside of the local jurisdiction—an outcome that led the court to conclude that "this regulation impermissibly constricts the scope of intended taxation" under the authorizing statutes. *Id.*

5. In Hartney, although the supreme court invalidated the Department's previous rules based on well-established Illinois law dating back to the 1940s, it found that the Department had a duty based on the Taxpayer Bill of Rights Act, 20 ILCS 2520/4(c), to abate the taxes that the retailer did not pay based on claimed reliance on the invalid rule. *Hartney*, at ¶¶ 67-68. Thus, as a consequence of the Department's invalid rule, the RTA and other local governments were not able to recover over $20 million in back taxes and penalties that were properly due from the retailer under Illinois law.

6. As with the previous rules, the Department's new rules again exceed the Department's authority to regulate based on the authorizing statutes, and they again impermissibly limit the scope of intended taxation under the statutes. The new rules are invalid for several reasons:

7. *First*, section (c) of the rules sets forth a "Primary Selling Activities" test that conclusively determines tax jurisdiction based on three potentially minor steps in the business of selling, one of which is the location of purchase order acceptance, the step that the supreme court rejected as inadequate in *Hartney*. Two of the three steps do not even require a human being—they could be performed by a computer in a remote location.

8. *Second*, section (d)(3) of the rules sets forth a "Sales over the Internet" test under which orders placed on the Internet are presumed to be out-of-state transactions that are not subject to *any* local tax. This Sales-over-the-Internet test is not authorized by any statute and unjustifiably limits the scope of the RTA Tax and other local retailers' occupation taxes.

9. *Third*, by their own terms, the new rules do not comply with mandatory holdings of Illinois courts. While the Department correctly recites the holdings of *Hartney* and other relevant cases in the first two sections of the new rules, the actual tests to determine tax situs set forth in the remainder of the new rules conflict with those holdings. For example, the Department concedes principles of well-established Illinois law in the first two sections of the new rules, including the following:

- *"[T]he Regional Transportation Authority Act links the retailer's tax liability to where it principally enjoys the benefits of government services."*
- "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."
- "[E]stablishing 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.*"
- *[I]t is not possible to prescribe by definition* which of the many activities must take place in a jurisdiction to constitute [a retailer's business] an occupation conducted in that jurisdiction. *It is necessary to determine each case according to the facts which reveal the method by which the business was conducted.*"

(*See* 86 Ill. Adm. Code 320.115(b)(2)-(4), (6), attached hereto as Exh. F; emphasis added, internal quotations and citations omitted.) But the tests in the new rules do not comply with these principles, contrary to the Illinois law cited in the first two sections of the rules themselves.

10. In sum, as in *Hartney*, the Department's new rules can be interpreted to allow a retailer to avoid local taxes by relocating a potentially insignificant part of its selling activities outside the local jurisdiction or to the Internet. The plain language of the new rules again "impermissibly constricts the scope of intended taxation" under the authorizing statutes. The new rules therefore are invalid.

11. The RTA brings this action to avoid a repeat of the protracted and costly disputes that culminated in the *Hartney* opinion and the irrevocable loss of over $20 million in local tax revenues from a single retailer by the RTA and other local governments. The new rules exceed the Department's authority because they are inconsistent with the authorizing statutes and long-standing Illinois law, including *Hartney*. Unless this Court declares the new rules to be invalid and enjoins their enforcement, it is inevitable that the RTA and other local governments will be deprived of millions of dollars of proper and needed local tax revenue—some or all of which could be permanently lost due to the Department's inability to collect it based on retailers' claims of reliance on the invalid regulations, as evidenced by the *Hartney* decision.

12. For all of the foregoing reasons, and for the reasons further stated below, the RTA respectfully requests that this Court declare the new rules invalid as exceeding the Department's authority to regulate under the authorizing statute and that the Court enjoin the Department from enforcing the new rules.

THE PARTIES

13. The RTA is a special purpose unit of local government and a municipal corporation organized and existing under Illinois law. It is the third-largest public transportation

system in North America, providing more than two million rides a day throughout a six-county region that currently has a population of approximately eight million people.

14. Brian A. Hamer is the Director of Revenue for the Illinois Department of Revenue. The Department has the power and obligation to collect local retailers' occupation taxes authorized by statute, including the RTA Tax.

JURISDICTION AND VENUE

15. Jurisdiction over this matter exists under 735 ILCS 5/2-209 because Hamer is a resident of the State of Illinois.

16. Venue is proper in the circuit court of Cook County pursuant to 735 ILCS 5/2-101 because it is a county in which transactions occur out of which the cause of action arises.

FACTS

A. The RTA has a protectable right in the RTA Tax and in the Department's proper enforcement of the RTA Tax.

17. The RTA has the statutory right to impose a local retailers' occupation tax to generate the funds that it needs to operate. Specifically, under section 4.03(e) of the Regional Transportation Authority Act (the "RTA Act"), 70 ILCS 3615/4.03(e), the RTA has the statutory right to impose the RTA Tax. A true and correct copy of the statute authorizing the RTA to impose the RTA Tax is attached as Exhibit B. The RTA is authorized to impose the tax on all persons "engaged in the business of selling tangible personal property at retail" within the RTA's six-county service area. *See id.*

18. The RTA has exercised its authority to impose the RTA Tax. The rate of the RTA Tax is set by statute at 1% in Cook County and .75% in DuPage, Kane, Lake, McHenry, and Will Counties. *See* 70 ILCS 3615/4.03(e). It is imposed in addition to the statewide retailers' occupation tax and other applicable local retailers' occupation taxes.

19. The Department is authorized to issue regulations relating to the statute that authorizes the RTA Tax. *See* 70 ILCS 3615/4.03(e). Such regulations, however, may not broaden or narrow a statute's intended scope of taxation. *See Hartney,* at ¶ 38.

B. Under well-established Illinois law, the RTA Tax applies to all retailers "engaged in the business of selling" within the RTA's region, and it cannot be avoided by relocating potentially insignificant activities elsewhere.

20. Because several units of local government are authorized to impose their own local retailers' occupation taxes to varying degrees, the combined sales tax rate in Illinois varies from region to region. For example, a retailer doing business entirely outside of the RTA's region does not pay the RTA Tax, but it may pay other local retailers' occupation taxes that are imposed in the region where the retailer does business. That is consistent with the legislative intent of such taxes, which is "to relieve some tax burden that might otherwise be placed on property, in favor of placing it on retailers enjoying governmental services." *Hartney*, at ¶ 35.

21. Some retailers have sought to manipulate their business structure to take advantage of the variation in sales tax rates by purporting to relocate insignificant sales activities to a remote region with a lower tax rate, while in fact they continue to conduct the majority of their selling activities in a region with higher taxes. For example, in *Hartney*, a retailer made arrangements with another business in a remote, low-taxing jurisdiction to provide personnel to accept the retailer's purchase orders by telephone or facsimile. *Hartney*, at ¶ 62. The retailer then claimed the lower tax rate of the remote jurisdiction despite the fact that it "carried out all of its marketing efforts, maintained inventory, set prices, and cultivated sales relationships" in another, higher-taxing jurisdiction. *Id.* Such tax avoidance practices are contrary to the legislative intent of local retailers' occupation taxes, because retailers do not pay local taxes in the region where they take advantage of local government services. *Id.*

22. Recognizing the diversity of ways in which a retailer can conduct business and the potential for abuse, Illinois courts have long held that where a retailer is "engaged in the business of selling" must be determined based on a fact-intensive inquiry:

> An occupation, the business of which is to sell tangible personal property at retail, 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.* It is obvious that such activities are as varied as the methods which men select to carry on retail business and it is therefore not possible to prescribe by definition which of the many activities must take place in Illinois to constitute it an occupation conducted in this State. Except for a general classification that might be made of the many retail occupations, *it is necessary to determine each case according to the facts which reveal the method by which the business is conducted.*

Ex-Cell-O Corp. v. McKibbin, 383 Ill. 316, 321-22 (1943) (emphasis added). In *Hartney*, the Illinois Supreme Court held that "the 'business of selling' under the local ROT Acts [including the RTA Act] is a fact-intensive 'composite of many activities' consonant with our holding in *Ex-Cell-O*." *Hartney*, at ¶ 36.

23. Because the business of selling is a fact-intensive composite of many activities, it is well established that relocating potentially insignificant selling activities, such as the place of acceptance in *Hartney*, does not alter where a retailer is "engaged in the business of selling" for purposes of imposing a retailers' occupation tax, including the RTA Tax. *See Hartney,* at ¶ 62; *see also Marshall & Huschart Mach. Co. v. Dep't of Revenue*, 18 Ill. 2d 496, 501 (1960); *Int'l-Stanley Corp. v. Dep't of Revenue*, 40 Ill. App. 3d 397, 406-07 (1st Dist. 1976).

C. As the Illinois Supreme Court held in *Hartney*, a regulation that can be interpreted to limit the scope of the RTA Tax based on a narrow, easy to manipulate test exceeds the Department's statutory authority to regulate and therefore is invalid.

24. Prior to the Illinois Supreme Court's decision in *Hartney*, the Department had issued regulations concerning the application of local retailers' occupation taxes to retailers

claiming to be engaged in selling activities in more than one jurisdiction. A true and correct copy of the Department's regulations with respect to the RTA Tax in effect prior to *Hartney* is attached as Exhibit C.

25. Section (b)(1) of the Department's regulations was titled "Seller's Acceptance of Order," and it stated as follows (emphasis added):

> Without attempting to anticipate every kind of fact situation that may arise in this connection, it is the Department's opinion, in general, that the seller's acceptance of the purchase order or other contracting action in the making of the sales contract is the most important single factor in the occupation of selling. *If the purchase order is accepted at the seller's place of business within the metropolitan region* or by someone who is working out of such place of business and who does not conduct the business of selling elsewhere within the meaning of subsections (f) and (g) of this Section, *or if a purchase order which is an acceptance of the seller's complete and unconditional offer to sell is received by the seller's place of business within the metropolitan region* or by someone working out of such place of business, *the seller incurs Regional Transportation Authority Retailers' Occupation Tax liability in the metropolitan region if the sale is at retail and the purchaser receives the physical possession of the property in Illinois.*

26. The retailer in *Hartney* argued that the second sentence of section (b)(1) established a test for determining where a retailer is engaged in the business of selling based solely on where the retailer accepts purchase orders. *Hartney*, at ¶¶ 48-49.

27. The Department disagreed with the retailer's interpretation of the regulations in *Hartney*. The Department's position was that, when read in light of the statutory intent and in context with the remainder of the regulations, the relevant test was a fact-intensive inquiry consistent with the supreme court's ruling in *Ex-Cell-O*. *Hartney*, at ¶¶ 40-47.

28. The Illinois Supreme Court rejected the Department's interpretation of the regulations, holding that the "Seller's Acceptance of Order" section "does define situs for retail[ers'] occupation tax where purchase order acceptance occurs at the seller's place of

business ..., with sale at retail and the purchaser taking delivery within the state." *Hartney*, at ¶ 56.

29. Having interpreted the regulations to not require an inquiry beyond purchase order acceptance at a retailer's place of business, the supreme court then found the regulations to be invalid because they impermissibly narrowed the scope of intended taxation under the statutes that authorized the taxes, which exceeded the Department's rulemaking authority. *Hartney*, at ¶¶ 58-64. The supreme court stated as follows:

> We are persuaded that this regulation impermissibly narrows the local ROT Acts, contrary to the legislature's intention to allow local governments to collect taxes from retailers in their jurisdictions. First, it does not amply prescribe the fact-intensive inquiry contemplated by this court in *Ex-Cell-O*. Second, by allowing for only one, potentially minor step in the business of selling to conclusively govern tax situs, this regulation impermissibly constricts the scope of intended taxation.

Id. at ¶ 61.

D. Following *Hartney*, the Department proposed new regulations concerning the RTA Tax and other local retailers' occupation taxes and ultimately adopted a series of tests that do not follow *Hartney* or other relevant Illinois law.

30. The Illinois Supreme Court held the Department's rules invalid on November 21, 2013. For two months thereafter, there was no valid regulation on the subject of determining the proper jurisdiction for local retailers' occupation taxes.

31. On January 22, 2014, the Department issued "emergency rules" and announced similar proposed permanent rules to replace the regulations that the supreme court held invalid in its *Hartney* opinion. A true and correct copy of the Department's January 22, 2014 Notice of Proposed Amendment relating to the RTA Tax is attached hereto as Exhibit D. The rules listed several "primary" and "secondary" factors to consider when determining the proper tax jurisdiction and stated that the Department would evaluate them in keeping with the principles in

Hartney and other relevant Illinois cases. For example, section (c)(4) of the January 22, 2014 proposed rules stated as follows:

> 4) Principles Underlying Determination of Seller's Location
>
> A) When a retailer's selling activities are spread through multiple Illinois jurisdictions, and where the retailer is engaged in the business of selling presents a close question, the Department will evaluate the factors in subsections (c)(2) and (c)(3) of this Section in keeping with the principle that the retailer incurs local retailers' occupation taxes in the jurisdiction where it "enjoyed the greater part of governmental protection [and] benefitted by being conducted under that protection." *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, ¶ 34 (quoting *Svithiod Singing Club v. McKibbin*, 381 Ill. 194, 197 (1942)).
>
> B) 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. *Marshall & Huschart Mach. Co. v. Dep't of Revenue*, 18 Ill. 2d 496, 501 (1960); *Fed. Bryant Mach. Co. v. Dep't of Revenue*, 41 Ill. 2d 64, 67 (1968); *Int'l-Stanley Corp. v. Dep't of Revenue*, 40 Ill. App. 3d 397, 406 (1st Dist. 1976); *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, ¶ 31. For example, the Department will not look to the location of a party that is owned by or has common ownership with a supplier or a purchaser if that party does not, in substance, conduct the selling activities identified in subsections (c)(2) and (c)(3).

32. On May 29, 2014, after a period of public comment, the Department announced revised proposed permanent rules. A true and correct copy of the Department's Second Notice of Proposed Amendment relating to the RTA Tax is attached hereto as Exhibit E.

33. On June 25, 2014, the Department forwarded the rules in final form to the Illinois Secretary of State. A true and correct copy of the rule applicable to the RTA Tax as submitted to the Illinois Secretary of State is attached hereto as Exhibit F.

34. The Joint Committee on Administrative Rules allowed the rules to pass to the Illinois Secretary of State, but it also recommended that the Department "continue to work with

the affected taxpayers and local governments in an attempt to mitigate remaining concerns with the proposed language." A true and correct copy of the statement is attached hereto as Exhibit G. Under Illinois law "[f]ailure of the Joint Committee to object to any proposed rule ... shall not be construed as implying direct or indirect approval of the rule or proposed rule ... by the Joint Committee or the General Assembly." 5 ILCS 100/5-100(f).

35. The May 29, 2014 proposed rules and the final rules state general principles of law that were similar to those found in the January 22, 2014 proposed rules. (*See* sections (a) and (b) of the May 30, 2014 proposed rules and the final rules.) Unlike the January 22, 2014 proposed rules, however, the May 29, 2014 proposed rules and the final rules describe a series of tests for conclusively determining tax jurisdiction that do not incorporate the principles stated at the beginning of the rules, as described further below.

36. The first test set forth in the new rules is based on five specified "Primary Selling Activities." (*See* Exh. F, § (c)(1) and (c)(2).) There are two subparts to the Primary Selling Activities test. First, if any three of five listed primary selling activities take place in the same location *in Illinois*, then the tax situs is conclusively determined to be at that location. Second, if any three of the five listed primary selling activities occur *outside of Illinois* (but not necessarily at the same location), then the tax situs is conclusively determined to be outside of Illinois and therefore no local retailers' occupation tax applies.

37. The five primary selling activities are set forth in section (c)(1) of the new rules:

> 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) The 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) The 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.

38. The second test set forth in the new rules is based on six additional listed "Secondary Selling Activities." (*See* Exh. F, §§ (c)(4)-(5).) Under the Secondary Selling Activities test, the tax situs is either the location of the retailer's headquarters or location of its inventory, depending on how many of the listed primary and secondary selling activities occur at each of those locations. In the event of a tie, the tax situs is presumed to be the location of the retailer's headquarters "absent clear and convincing evidence to the contrary." (*See id.*, § (c)(6).)

39. The third test set forth in the new rules consists of a series of five "presumptions" that override the outcome of the second subpart of the Primary Selling Activities test and the entirety of the Secondary Selling Activities test. (*See* Exh. F, § (d).) Among the presumptions is the "Sales over the Internet" presumption, which states that the Department will presume that the tax situs for such sales is outside the State—and therefore that no local tax applies—"unless there is clear and convincing evidence the retailer's predominant and most important Selling Activities take place in this State." (*See id.*, § (d)(3).) The Sales-over-the-Internet presumption identifies two examples of such clear and convincing evidence: (A) if the property sold is in the retailer's inventory in Illinois and (B) if the customer takes possession of the property at a place of business owned or leased by the retailer in Illinois. If either of the two exceptions applies, the

tax situs is conclusively determined to be the location of inventory in Illinois or the location of the place of business where the customer takes possession of the property.

40. Taken together, the three tests in the new rules define a closed system that conclusively determines tax situs to be either out-of-state or at one of three locations in Illinois: (1) where three of the five primary selling activities take place, (2) where inventory is held, or (3) where the retailers' headquarters is located. If the tax situs is determined to be outside the State based on any of the tests, then no local tax applies.

41. At no point during the tests is there an opportunity for the Department to conduct a "fact-intensive inquiry into the composite of activities that comprise the retailer's business" or to take into consideration the principles set forth in sections (a) and (b) of the new rules.

E. Like the previous rules, the Department's new rules exceed the Department's authority to regulate and therefore are invalid.

42. The new rules exceed the Department's rulemaking authority and are contrary to *Hartney* and well-established Illinois law in several respects:

1. The Department's new rules set forth a test based on "Primary Selling Activities" that, like the Department's previous rules, is inconsistent with the statute authorizing the RTA Tax and Illinois law.

43. The Primary Selling Activities test set forth in the new rules exceeds the Department's rulemaking authority because, like the "Seller's Acceptance of Order" section in the Department's prior rules, it does not require the fact-intensive inquiry required by *Hartney* and *Ex-Cell-O*. Rather than considering "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*, 383 Ill. at 321) a retailer need only consider three of the five listed factors. As indicated below, many businesses are

likely to source their sales to a lower taxing body by relying on sections (c)(1)(A), (B), and (C), each of which is easily manipulated.

44. Each of the first three of the factors listed in section (c)(1) can be interpreted to apply to a "potentially minor step in the business of selling," which the *Hartney* court rejected as a substitute for the "fact-intensive inquiry" mandated by Illinois law. The first factor, for example, can be interpreted to apply to any location where sales personnel exercise "discretion and authority to solicit customers on behalf of a seller and to bind the seller to the sale," even if:

- The location is temporary or transient;
- The location is not a place of business of the retailer;
- The permitted "discretion" of the sales personnel is nominal or perfunctory in nature; or
- The permitted "solicitation" is nominal or duplicative of other solicitation performed by the retailer from another location.

45. The second factor applies to the location of "acceptance of purchase orders," which the Illinois Supreme Court in *Hartney* held was a "potentially minor step in the business of selling" and was insufficient to support the conclusion that the retailer was engaged in the business of selling at that location. *Hartney*, at ¶ 61. Unlike the prior rule invalided in *Hartney*, the second factor in the new rules can be interpreted to apply even if "acceptance of purchase orders" does not occur at a retailer's place of business. This factor could be satisfied by establishing a mailbox or a computer in a remote location.

46. The second factor can also be satisfied by the retailer's "submission of offers subject to unilateral acceptance by the buyer." If a retailer solicits customers by making such offers, then the same potentially minor step in the retailer's business of selling could satisfy both the first and second factors.

47. The third factor applies to the location from which the invoice for the sale is issued or where payment is tendered and received, even if:

- The location was not where the invoice was generated;
- The location is not the retailers' place of business;
- The invoice was not issued by the retailers' personnel; or
- The invoice was issued or the payment was processed electronically without any human being involved.

48. In sum, the first three factors of the Primary Selling Activities test could be interpreted to allow retailers to manipulate tax situs to be some place other than where a retailer "carried out all of its marketing efforts, maintained inventory, set prices, and cultivated sales relationships." *Hartney*, at ¶ 62. The only difference between the first three factors of the new rules and the "Seller's Acceptance of Order" section in the prior invalid rules is that there must be three potentially insignificant sales activities rather than one.

49. A retailer never needs to reach the last two listed factors, which are more difficult to manipulate, because satisfying three out of the five factors is sufficient. Likewise, a retailer never needs to reach the Secondary Factor Test if it manipulates the first three Primary Selling Activities to achieve its desired tax situs.

50. The holding of *Hartney* is not so limited as to allow for regulations that determine taxing jurisdiction based solely on acceptance plus two other potentially insignificant activities. Such an interpretation directly conflicts with the *Hartney* opinion, in which the supreme court held that the business of selling is a "composite of many activities" and "requires a fact-intensive inquiry" to determine its location:

> As noted previously, the legislative intent of the local ROT Acts is to permit home rule municipalities and counties, along with the RTA, to enact retail occupation taxes in order to place some of the burden of paying for local government services on the retailers

> who enjoy them. The retail occupation tax is laid upon the business of selling and not upon sales themselves. Under our precedent, the business of selling is a composite of many activities. Determining that enough of the business of selling is taking place in a given jurisdiction requires a fact-intensive inquiry.

Hartney, at ¶ 58 (citations omitted).

51. For all of the foregoing reasons, the Primary Selling Activities test in section (c)(1) and (c)(2) renders the Department's new rules invalid as exceeding the Department's rulemaking authority.

2. The Department's new rules include a bright-line test regarding sales over the Internet that cannot be reconciled with the statute authorizing the RTA Tax or Illinois law.

52. Section (d)(3) of the Department's new rules sets forth a series of presumptions and special tests for "Sales over the Internet," stating as follows:

> 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 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.

53. There is no basis in the statute authorizing the RTA Tax or in any other Illinois law for a presumption that sales over the Internet take place outside of the State, and thus are not subject to RTA Tax or any other local retailers' occupation tax. As stated above, "[a]dministrative rules and regulations must be authorized by statute," and "a statute may not be altered or added to by the exercise of a power to make rules and regulations thereunder." *N. Ill. Auto. Wreckers & Rebuilders Ass'n*, 75 Ill. 2d at 60. Moreover, "the rules of the Department can neither limit nor extend the scope of the statute." *Ex-Cell-O Corp.*, 383 Ill. at 320; *see also Kean*, 235 Ill. 2d at 372. "[A]n agency's powers are limited to those granted by statute, and acts of an agency beyond its statutory powers are void." *Hartney*, at ¶ 66. It is well established that an agency requires clear authorization from the legislature before it can issue regulations that have widespread economic consequences. *See, e.g., Utility Air Regulatory Group v. Environmental Protection Agency*, No. 12-1146, slip op. at 19 (U.S. June 23, 2014) ("When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.") (internal quotations and citations omitted).

54. In effect, section (d)(3) creates a single-factor test for determining the location of Internet sales activities for the purposes of retailers' occupation tax, with exceptions that apply only if they are justified by "clear and convincing evidence." Such a test is inconsistent with the holding in *Hartney*, is not warranted by any Illinois statute, and impermissibly limits the application of the RTA Tax.

55. The test in section (d)(3) also yields arbitrary results that are inconsistent with the remainder of the rules, based solely on the technology used in connection with the sale. For example, a retailer with its headquarters in Illinois and inventory outside the State can be assessed retailers' occupation tax at the location of its in-state headquarters based on sections (c)(5) or (c)(6) if the sale does not occur over the Internet, but the same retailer would be free from retailers' occupation tax under section (d)(3) for an Internet sale, absent unspecified "clear and convincing evidence" to the contrary. Again, there is no statutory basis for excluding a sale from retailers' occupation tax based solely on the technology used for the sale.

56. For the foregoing reasons, section (d)(3) also renders the new rules invalid as exceeding the Department's authority to issue regulations under the authorizing statute.

3. The tests in the Department's new rules are inconsistent with the Illinois law cited in the opening sections of the new rules.

57. The new rules are in conflict with the holdings of *Hartney* and other Illinois case law on the subject of tax situs, despite that the Department concedes in sections (a) and (b) of the new rules that those holdings are directly on point.

58. For example, in section (b)(4), the Department admits that a retailer's tax liability is linked by statute to where the retailer principally enjoys the benefits of government services, stating as follows:

> By allowing the Regional Transportation Authority to impose tax on retailers who conduct business in the Metropolitan Region, the Regional Transportation Authority Act links the retailer's tax liability to where it principally enjoys the benefits of government services.

59. Despite the fact that the Department acknowledges the connection between tax liability and the enjoyment of the benefits of government services, the tests in the new rules do not allow the Department to consider where a particular retailer actually enjoys those benefits.

60. As another example, in section (b)(6), the Department states that it "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." (*See* Exh. F, § (b)(6); citations and internal quotations omitted).

61. Despite the fact that the Department acknowledges that it may look to substance over form to determine tax situs, the tests set forth in the new rules can be interpreted to prevent the Department from doing so when faced with a retailer who re-locates insignificant factors of its business to lower tax jurisdictions in an attempt to avoid paying taxes where its most significant business activities continue to occur.

62. The Department also concedes that "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*" and that "*it is not possible* to prescribe by definition which of the many activities must take place in a jurisdiction to constitute it an occupation conducted in that jurisdiction." (*See* Exh. F, §§ (b)(2)-(3), emphasis added.) As explained in *Ex-Cell-O*, such an inquiry seeks "the facts which reveal the method by which the business is conducted" in each case. *Ex-Cell-O Corp.*, 383 Ill. at 322. In contrast, the Department's new rules describe a series of tests based on the number of various activities taking place in a limited number of locations, without regard for the significance of each activity to the method in which a particular retailer conducts its business. In sum, the Department sets forth tests that yield a conclusive result without a "fact-specific inquiry into the composite of activities that comprise the retailer's business" and that attempt to "prescribe by definition" isolated elements of the business of selling as sufficient to determine tax jurisdiction, contrary to Illinois law.

63. For these additional reasons, the Department's new rules are invalid.

F. If enforced, the Department's new rules will cause irreparable harm to the RTA and other local governments and leave them without an adequate remedy at law.

64. In its *Hartney* opinion, the Illinois Supreme Court found the retailer's approach to tax liability to be contrary to the statutes that authorized the local retailers' occupation taxes and contrary to the court's precedent. *Hartney*, at ¶ 67. Nevertheless, the court held that the Department "[had] a duty under the Taxpayers' Bill of Rights Act to abate Hartney's penalties and retail[ers'] occupation tax liability of Forest View, Cook County, and the Regional Transportation Authority for the audit period." *Id.* at ¶ 68.

65. As a consequence of the supreme court's holding in *Hartney*, the RTA and other local governments were not able to recover more than $20 million in back taxes and penalties, notwithstanding that the Illinois Supreme Court found the taxes to be due under Illinois law.

66. Here, as in *Hartney*, the Department has issued invalid regulations that, if enforced, will potentially deprive the RTA and other local governments of millions of dollars of tax revenue. Moreover, if retailers again can avail themselves of the Taxpayers' Bill of Rights Act under these circumstances then, as in *Hartney*, the Department will not be able to collect those taxes even if it is established that the taxes should have been paid under Illinois law. The enforcement of the Department's new rules thus will irreparably harm the RTA, and the RTA likely will not have an adequate remedy at law to recover all of its losses.

COUNT I
CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF

67. The RTA incorporates the allegations in paragraphs 1 through 66 of the Complaint as if fully set forth herein.

68. An actual controversy exists between the RTA and the Department over whether the Department's new rules are valid regulations or are invalid because they exceed the Department's authority to enact rules pursuant to the statute authorizing the RTA Tax.

69. The dispute between the RTA and the Department is definite and concrete, and it relates directly to the RTA's legal right to receive tax revenue from the RTA Tax as authorized by statute. The RTA has communicated its objections to the new rules to the Department, and the Department has determined to promulgate the new rules over the RTA's objections.

70. The RTA disputes the validity of the Department's new rules on the grounds that they violate well-established Illinois law as set forth in the *Hartney* decision. The Department contends that the new rules are consistent with *Hartney*. Judicial resolution of the validity of the Department's regulations will resolve the actual controversy between the parties.

71. If enforced, the Department's new rules will impermissibly limit the scope of intended taxation under the RTA Tax, depriving the RTA of potentially millions of dollars of uncollected tax revenues.

72. The Illinois Supreme Court has held that the Department has a duty to abate tax due to invalid regulations under certain circumstances. Under such circumstances, the RTA likely will not have an adequate remedy at law to recover all of its losses, and thus will be irreparably harmed unless this Court preliminarily and permanently enjoins the Department from enforcing its new rules.

WHEREFORE, the RTA respectfully requests that the Court (1) enter judgment in its favor and against the Department; (2) declare that the Department's rules relating to local retailers' occupation taxes promulgated on June 25, 2014 are invalid and void as exceeding the authority of the Department to regulate based on the statute authorizing the RTA tax; (3) preliminarily and permanently enjoin the Department from enforcing the new rules; and (4) grant all further relief appropriate under the circumstances.

Dated: June 27, 2014

Respectfully submitted,

The REGIONAL TRANSPORTATION AUTHORITY, an Illinois special purpose unit of government and municipal corporation.

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VERIFICATION OF COMPLAINT

The undersigned has read and made this Verified Complaint and attests that those facts stated of its own knowledge are true and those matters stated of which they have been informed they believe to be true after reasonable inquiry.

The Regional Transportation Authority
By: Jordan Matyas, Chief of Staff

Exhibit A

2013 IL 115130
Supreme Court of Illinois.

HARTNEY FUEL OIL COMPANY et al., Appellees,
v.
Brian A. HAMER, Director of the Illinois Department of Revenue, et al., Appellants.

Docket Nos. 115130, 115131 cons. | Nov. 21, 2013.

Synopsis

Background: Corporate taxpayer, village, and county sought declaratory and injunctive relief under Protest Monies Act regarding assessment and collection of retail occupation taxes (ROT). The Circuit Court, Putnam County, Scott A. Shore, J., entered judgment in favor of plaintiffs. Department of Revenue (DOR) appealed. The Appellate Court, 2012 IL App (3d) 110144, 364 Ill.Dec. 404, 976 N.E.2d 682, affirmed. DOR sought petition for leave to appeal.

Holdings: The Supreme Court, Garman, C.J., held that:

[1] "jurisdictional questions" regulations for Home Rule County Retailers' Occupation Tax Law, Home Rule Municipal Retailer's Occupation Tax Act, and retail occupation tax provisions of Regional Transportation Authority Act (local ROT acts), which define situs for ROT where purchase order acceptance occurs, with sale at retail and the purchaser taking delivery within the state, were invalid, and

[2] DOR had a duty under Taxpayers' Bill of Rights Act to abate penalties and ROT liability it had imposed on taxpayer.

Appellate court judgment affirmed in part and reversed in part.

West Headnotes (32)

[1] **Appeal and Error**
Cases Triable in Appellate Court

Interpretation of statutes and regulations are questions of law that the Supreme Court reviews de novo.

Cases that cite this headnote

[2] **Administrative Law and Procedure**
Administrative construction

Administrative Law and Procedure
Deference to agency in general

Even where Supreme Court's review is de novo, an administrative agency's interpretation of its regulations and enabling statute are entitled to substantial weight and deference, given that agencies make informed judgments on the issues based upon their experience and expertise and serve as an informed source for ascertaining the legislature's intent.

Cases that cite this headnote

[3] **Appeal and Error**
Manifest weight

Factual determinations of a trial court are reviewed under the manifest weight of the evidence standard and will be reversed only where the opposite conclusion is clearly evident or the finding is arbitrary, unreasonable, or not based in evidence.

Cases that cite this headnote

[4] **Taxation**
Actions

A taxpayer willing to pay an assessment under protest may pay assessed taxes and file suit for a refund in circuit court, thereby avoiding the requirement under the Administrative Review Law to exhaust all administrative remedies before seeking judicial review. S.H.A. 30 ILCS 230/1 et seq.; 735 ILCS 5/3–101 et seq.

Cases that cite this headnote

[5] **Statutes**
Language and intent, will, purpose, or policy

Statutes
Plain Language; Plain, Ordinary, or Common Meaning

When interpreting a statute, the primary objective is to give effect to the legislature's intent, which is best indicated by the plain and ordinary language of the statute itself.

4 Cases that cite this headnote

[6] **Statutes**
Natural, obvious, or accepted meaning

Words in a statute should be given their plain and obvious meaning unless the legislative act changes that meaning.

1 Cases that cite this headnote

[7] **Statutes**
Superfluousness

In giving meaning to the words and clauses of a statute, no part should be rendered superfluous.

Cases that cite this headnote

[8] **Statutes**
Construing together; harmony

Statutory provisions should be read in concert and harmonized.

Cases that cite this headnote

[9] **Statutes**
Prior or existing law in general

Where a statute is enacted after a judicial opinion is published, it is presumed the legislature acted with knowledge of the case law.

2 Cases that cite this headnote

[10] **Statutes**
Similar or Related Statutes

If further construction of a statute is necessary, a court may consider similar and related enactments.

Cases that cite this headnote

[11] **Statutes**
Purpose and intent

Courts weighing legislative intent consider the object to be attained, or the evil to be remedied by the act.

Cases that cite this headnote

[12] **Taxation**
Statutory Provisions and Ordinances

A retail occupation tax (RTO) must be given a practical and commonsense construction.

Cases that cite this headnote

[13] **Statutes**
Plain Language; Plain, Ordinary, or Common Meaning

To interpret a statute, the Supreme Court first looks to the plain language of that statute.

1 Cases that cite this headnote

[14] **Statutes**
Similar or Related Statutes

Similar and related enactments provide guidance to the meaning of a potentially unclear term.

Cases that cite this headnote

[15] **Taxation**
Retail sales; sales not for resale

A determination as to whether a person is engaged in the "business of selling" tangible personal property personal property, as required to impose liability on him to pay retail occupation taxes (ROT) under the Home Rule County Retailers' Occupation Tax Law, the Home Rule Municipal Retailer's Occupation Tax Law, and the Regional Transportation Authority Act requires a fact-intensive inquiry. S.H.A. 55 ILCS 5/5–1006; 65 ILCS 5/8–11–1; 70 ILCS 3615/4.03.

Cases that cite this headnote

[16] **Taxation**

Purpose of acts and ordinances

The legislative intent of the Home Rule County Retailers' Occupation Tax Law, the Home Rule Municipal Retailer's Occupation Tax Act, and the retail occupation tax provisions of the Regional Transportation Authority Act is to allow local governments to impose a tax on "persons engaged in the business of selling tangible personal property" at retail within their jurisdictions, in order to relieve some tax burden that might otherwise be placed on property, in favor of placing it on retailers enjoying governmental services. S.H.A. 55 ILCS 5/5–1006; 65 ILCS 5/8–11–1; 70 ILCS 3615/4.03(e).

Cases that cite this headnote

[17] **Taxation**

Nature of Taxes

The Home Rule County Retailers' Occupation Tax Law, the Home Rule Municipal Retailer's Occupation Tax Act, and the retail occupation tax provisions of the Regional Transportation Authority Act were enacted to allow local jurisdictions to tax the composite of selling activities taking place within their jurisdictions, collecting taxes in relation to services enjoyed by the retailer. S.H.A. 55 ILCS 5/5–1006; 65 ILCS 5/8–11–1; 70 ILCS 3615/4.03(e).

Cases that cite this headnote

[18] **Administrative Law and Procedure**

Construction

Administrative Law and Procedure

Force of law

Administrative regulations have the force and effect of law and are interpreted with the same canons as statutes.

1 Cases that cite this headnote

[19] **Administrative Law and Procedure**

Power to Make

Administrative Law and Procedure

Determination of validity; presumptions

Administrative agencies enjoy wide latitude in adopting regulations reasonably necessary to perform the agency's statutory duty, and such regulations carry a presumption of validity.

Cases that cite this headnote

[20] **Taxation**

Administrative agencies and regulation

Administrative regulations may not broaden or narrow a statute's intended scope of taxation.

Cases that cite this headnote

[21] **Administrative Law and Procedure**

Validity

Administrative regulations that are inconsistent with the statute under which they are adopted will be held invalid.

2 Cases that cite this headnote

[22] **Administrative Law and Procedure**

Construction

Regulatory provisions, like statutory provisions, must be read in concert and harmonized.

Cases that cite this headnote

[23] **Taxation**

Administrative agencies and regulation

The "jurisdictional questions" regulations for the Home Rule County Retailers' Occupation Tax Law, the Home Rule Municipal Retailer's Occupation Tax Act, and the retail occupation tax provisions of the Regional Transportation Authority Act (local ROT acts), which define situs for retail occupation tax (ROT) where purchase order acceptance occurs, with sale at retail and the purchaser taking delivery within the state impermissibly narrowed the local ROT Acts, contrary to legislature's intention to allow local governments to collect taxes from retailers in their jurisdictions, and, thus, the regulations were invalid; regulations did not amply prescribe the fact-intensive inquiry contemplated by the Supreme Court, and by allowing for only one, potentially minor step in the business of

selling to conclusively govern tax situs, the regulations impermissibly constricted the scope of intended taxation. 86 Ill.Admin. 220.115, 270.115, 320.115.

Cases that cite this headnote

[24] **Taxation**
Nature of Taxes

The retail occupation tax (RTO) is laid upon the business of selling and not upon sales themselves pursuant to the Home Rule County Retailers' Occupation Tax Law, the Home Rule Municipal Retailer's Occupation Tax Act. S.H.A. 55 ILCS 5/5–1006; 65 ILCS 5/8–11–1; 70 ILCS 3615/4.03.

Cases that cite this headnote

[25] **Administrative Law and Procedure**
Determination of validity; presumptions

Administrative agencies have deference in enacting regulations, and regulations are presumed valid.

Cases that cite this headnote

[26] **Administrative Law and Procedure**
Validity

Agencies' broad latitude in enacting regulations to enforce their statutes may include presumptions or other shortcuts in administrative decision making, and the Supreme Court does not strike regulations down simply because they are unwise or bad policy.

Cases that cite this headnote

[27] **Taxation**
Administrative agencies and regulation

A regulation cannot narrow or broaden the scope of intended taxation under a taxing statute; a regulation that does so must be held invalid.

2 Cases that cite this headnote

[28] **Taxation**
Refunding Taxes Paid
Taxation
Penalties and forfeitures

Department of Revenue (DOR) had a duty under Taxpayers' Bill of Rights Act to abate penalties and retail occupation tax (ROT) liability it had imposed on corporate taxpayer under the Home Rule County Retailers' Occupation Tax Law, the Home Rule Municipal Retailer's Occupation Tax Act, and the retail occupation tax provisions of the Regional Transportation Authority Act (local ROT Acts), as the invalid "jurisdictional questions" regulations for the local ROT Acts, erroneously sited tax based solely on purchase order acceptance, and taxpayer had structured its affairs in accordance with these regulations by relocating its order-receiving function to a lower tax jurisdiction, and this arrangement was not without economic substance or effect to taxpayer. S.H.A. 20 ILCS 2520/4(c); 86 Ill.Admin. 220.115, 270.115, 320.115.

Cases that cite this headnote

[29] **Administrative Law and Procedure**
Statutory basis and limitation

An administrative agency's powers are limited to those granted by statute, and acts of an agency beyond its statutory powers are void.

Cases that cite this headnote

[30] **Estoppel**
State government, officers, and agencies in general

Where the public revenues are involved, public policy ordinarily forbids the application of estoppel to the state.

Cases that cite this headnote

[31] **Taxation**
Nature of transaction in general

Analyzing a sham transaction for taxation purposes requires assessment of the multiple steps of a transaction, with each being considered relevant, to determine whether economic reality accords with the formal arrangement.

Cases that cite this headnote

[32] **Taxation**

⇐ Nature of transaction in general

The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted.

Cases that cite this headnote

West Codenotes

Held Invalid

86 Ill.Admin. 220.115, 270.115, 320.115.

Attorneys and Law Firms

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Mark P. Rotatori, Brian J. Murray and Meghan E. Sweeney, of Jones Day, of Chicago, for *amici curiae* Taxpayers' Federation of Illinois and Illinois Retail Merchants Association.

Opinion

OPINION

Chief Justice GARMAN delivered the judgment of the court, with opinion.

****298** {¶ 1} This case concerns the proper situs for tax liability under retail occupation taxes arising under three Illinois statutes: the Home Rule County Retailers' Occupation Tax Law, the Home Rule Municipal Retailers' Occupation Tax Act, and the Regional Transportation Authority Act. The Illinois Department of Revenue determined through audit that plaintiff Hartney Fuel Oil Company's sales at retail were attributable to the company's Forest View office, rather than the Village of Mark location reported by the company. The change in location made Hartney subject to retail occupation taxes imposed by the Village of Forest View, Cook County, and the Regional Transportation Authority. The Department issued a notice of tax liability, which Hartney paid under protest. Hartney then filed for relief in the circuit court of Putnam County.

¶ 2 The circuit court of Putnam County consolidated with this case a declaratory judgment action by the board of commissioners of Putnam County and board of trustees of the Village of Mark, in which those local governments sought to be declared the proper situs of taxation. The circuit court also allowed the board of trustees of the Village of Forest View, the County of Cook, and the Regional Transportation Authority to intervene as defendants. The circuit court, interpreting the Department of Revenue's regulations for the

three taxes, found for the plaintiffs. The appellate court affirmed that decision. 2012 IL App (3d) 110144, 364 Ill.Dec. 404, 976 N.E.2d 682.

¶ 3 We granted defendants' petitions for leave to appeal pursuant to Supreme Court Rule 315 (eff. Feb. 26, 2010). Pursuant to Supreme Court Rule 345 (eff. Sept. 20, 2010), we have permitted the Taxpayers' Federation of Illinois and the Illinois Retail Merchants Association to file a brief *amicus curiae* on behalf of the plaintiffs. We have also permitted the Village of Schaumburg, the City of Chicago, the City of Peoria, the Town of Normal, and the County of Peoria to file a brief *amicus curiae* on behalf of the defendants.

¶ 4 BACKGROUND

¶ 5 Hartney Fuel Oil Company is a retailer of fuel oil, and during all times relevant to this litigation its home office was in Forest View, Illinois. From its Forest View office, Hartney would set fuel prices, cultivate customer relationships, and handle administrative tasks like billing and accounting. Each night, Hartney staff there would communicate fuel prices for the following day to prospective customers. The Forest View home office also contained a jointly owned but separately incorporated transportation company, Energy Transport, Inc. Energy Transport **299 *1232 served as a common carrier, filling many of Hartney's fuel orders.

¶ 6 In addition to its Forest View office, Hartney had a "sales" office, located elsewhere in the state for tax planning purposes. The sales office had no direct employee of Hartney; Hartney would contract with a local business for a clerk to take fuel orders. Hartney established its first separate sales office in Elmhurst, later moving it to Burr Ridge, then to Peru, and then to Mark, due to prevailing local tax conditions. The local business would provide the services of one of its own employees to receive Hartney's orders via phone; Hartney would pay the local business a flat rate. During the relevant time period, Hartney paid Putnam County Painting, a commercial painting business, $1,000 per month for a nonexclusive lease of 200 square feet and the services of a clerk.

¶ 7 Hartney had two varieties of fuel contracts, long-term requirements contracts and daily orders. Customers would call the Mark office to place their daily orders. Any customer who called the Forest View office to place an order was directed to call the Mark office. The clerk in Mark would check a list of customers with approval to order on credit. Orders from those who were not credit-approved would be rejected. For customers who were preapproved, the clerk would call Energy Transport at the Forest View office, and Energy Transport would deliver the fuel. No confirmation of the order by Hartney's Forest View office was required. Testimony at trial and the conclusion of the circuit court were that the clerk's word was binding on Hartney.

¶ 8 Long-term requirements contracts were negotiated by Hartney's president, who would instruct the customer to sign the contract and return it by mail to the Mark office. If Hartney's president had not yet signed the contract, he would travel to the Mark office to sign it. The executed contracts were stored at the Mark office, with copies sent to the customer and Hartney's Forest View office. These contracts were generally on a "keep full" basis. Energy Transport or another common carrier would monitor and keep full the customer's tanks, notifying Hartney to invoice the long-term contract customer for any fuel delivered. The keep-full arrangements did not require any intervention by the Mark office.

¶ 9 By structuring its sales in this way, Hartney hoped to avoid liability for retail occupation taxes of Cook County, the Village of Forest View, and the Regional Transportation Authority. Such taxes are imposed pursuant to the Home Rule County Retailers' Occupation Tax Law (55 ILCS 5/5–1006 (West 2012)), the Home Rule Municipal Retailers' Occupation Tax Act (65 ILCS 5/8–11–1 (West 2012)), and the Regional Transportation Authority Act (70 ILCS 3615/4.03 (West 2012)). Hartney's interpretation of the law was that the relevant regulations set a bright-line test: where the purchase order is accepted for a sale at retail in Illinois, and the purchaser takes delivery in Illinois, the sale has its situs where the seller accepts the purchase order. This view of the situs of sale also meant that Putnam County and the Village of Mark received the portions of the Illinois Retailers' Occupation Tax funds designated for county and local government. [1] 35 ILCS 120/3 (West 2012).

1 Neither Putnam County nor the Village of Mark imposed its own retail occupation taxes, and each gave Hartney a partial rebate of state retail occupation tax funds received, giving Hartney an even lower effective tax rate for sales with situs there.

¶ 10 The Department of Revenue audited Hartney's selling activity from January **300 *1233 1, 2005, to June 30, 2007, finding the proper situs of selling activity to be

Hartney's office in Forest View. The Department calculated retail occupational taxes of Cook County, Forest View, and the Regional Transportation Authority, and sent Hartney a notice of tax liability on September 5, 2008. With interest and penalties, Hartney owed $23,111,939. 11.

¶ 11 Hartney paid the assessment and sued for a refund under the State Officers and Employees Money Disposition Act (Protest Monies Act) (30 ILCS 230/1 *et seq.* (West 2008)) in Putnam County circuit court. Putnam County and the Village of Mark joined Hartney in seeking declaratory and injunctive relief to find Mark to be the proper situs of sale, to release the state occupation tax money to Mark and Putnam County, and to release to Hartney the money it paid under protest. Forest View, Cook County, and the Regional Transportation Authority (Local Governments) intervened as defendants.

¶ 12 The circuit court concluded that Hartney had accepted both its long-term sales and daily order sales in the Village of Mark, and that the regulations relevant to each section established a bright-line test for situs of sale: where purchase orders are accepted, tax liability is incurred. The appellate court affirmed.

¶ 13 ANALYSIS

¶ 14 The issues presented by this appeal are (1) the legislative intent of the retail occupation tax statutes, and (2) interpretation of the administrative regulations implementing the retail occupation taxes.

¶ 15 Hartney argues, and the courts below found, that the plain language of the regulation establishes a bright-line test for the situs of retail occupation tax liability. The Department argues that such an interpretation is at odds with this court's decisions on the business of selling under the retail occupation tax and with the legislative intent of the Home Rule County Retailers' Occupation Tax Law (55 ILCS 5/5–1006 (West 2012)), the Home Rule Municipal Retailers' Occupation Tax Act (65 ILCS 5/8–11–1 (West 2012)), and the Regional Transportation Authority Act (70 ILCS 3615/4.03 (West 2012)).

[1] [2] ¶ 16 This appeal concerns interpretation of statutes and regulations, both questions of law which we review *de novo. People ex rel. Madigan v. Illinois Commerce Comm'n,* 231 Ill.2d 370, 380, 326 Ill.Dec. 10, 899 N.E.2d 227 (2008). Yet even where review is *de novo,* an agency's interpretation of its regulations and enabling statute are "entitled to substantial weight and deference," given that "agencies make informed judgments on the issues based upon their experience and expertise and serve as an informed source for ascertaining the legislature's intent." *Provena Covenant Medical Center v. Department of Revenue,* 236 Ill.2d 368, 387 n. 9, 339 Ill.Dec. 10, 925 N.E.2d 1131 (2010).

[3] ¶ 17 Factual determinations of a trial court are reviewed under the manifest weight of the evidence standard and will be reversed only where the "opposite conclusion is clearly evident or the finding is arbitrary, unreasonable, or not based in evidence." *Samour, Inc. v. Board of Election Commissioners,* 224 Ill.2d 530, 544, 310 Ill.Dec. 326, 866 N.E.2d 137 (2007). The parties disagree about the legal significance of a number of facts in issue but do not dispute the facts themselves.

[4] ¶ 18 This dispute arises under the Protest Monies Act (30 ILCS 230/1 (West 2008)). A taxpayer willing to pay an assessment under protest may pay assessed taxes and file suit for a refund in circuit court, thereby avoiding the requirement under the Administrative Review Law (735 ILCS 5/3–101 *et seq.* (West 2008)) to exhaust ****301** ***1234** all administrative remedies before seeking judicial review.[2]

2 The appellate court noted that this court has not yet identified the standards to apply to a specific claim under the Protest Monies Act. 2012 IL App (3d) 110144, ¶ 32. However, the parties are in apparent agreement that the circuit court's standard was appropriate, and no party has briefed or argued the issue for this court's review. We do not define a standard at this time.

¶ 19 The Local Retail Occupation Tax Acts

¶ 20 The three statutes at issue (the local ROT Acts) allow home rule county and municipal governments and the Regional Transportation Authority (RTA) to impose a retail occupation tax "upon all persons engaged in the business of selling tangible personal property" at retail within the county, municipality, or metropolitan region. 55 ILCS 5/5–1006 (West 2012); 65 ILCS 5/8–11–1 (West 2012); 70 ILCS 3615/4.03(e) (West 2012). The Village of Forest View is within Cook County and within the metropolitan region of the RTA. Each of the Local Governments has imposed its own retail occupation tax.

¶ 21 The local ROT Acts give information about the tax rate to be imposed and types of products subject to the tax, but—with the exception of coal and other mineral extraction—they do not offer substantial guidance on the proper situs of taxation. See, *e.g.*, 55 ILCS 5/5–1106 (West 2012). For guidance on the proper situs of retail occupation tax under the local ROT Acts, one must turn to the regulations. The "Jurisdictional Questions" regulations for the county, municipality, and RTA retail occupation taxes are largely identical, with only minor differences in layout. See 86 Ill. Adm.Code 220.115 (2000); 86 Ill. Adm.Code 270.115 (2000); 86 Ill. Adm.Code 320.115 (2000). For simplicity, we refer to the Home Rule County Retailers' Occupation Tax Law regulations (86 Ill. Adm.Code 220.115 (2000)).

¶ 22 The circuit court and appellate court both found the regulations to establish a bright-line test: "If the purchase order is accepted at the seller's place of business within the county, municipality and/or metropolitan region; ROT liability is fixed in that respective county, municipality and/or metropolitan region." 2012 IL App (3d) 110144, ¶ 53, 364 Ill.Dec. 404, 976 N.E.2d 682. The Department and Local Governments argue that the regulations instead present a fact-intensive inquiry, looking to the totality of the circumstances. They argue that only a totality-of-the-circumstances view accords with the legislative intent of the local ROT Acts and this court's prior interpretation of the "business of selling" under the local ROT Acts. See, *e.g.*, *Ex–Cell–O Corp. v. McKibbin,* 383 Ill. 316, 50 N.E.2d 505 (1943).

¶ 23 We look first to interpretation of the statutes, beginning with plain language.

¶ 24 Interpretation of the Statutes

[5] [6] [7] [8] [9] [10] [11] [12] ¶ 25 When interpreting a statute, the primary objective is to give effect to the legislature's intent, which is best indicated by the plain and ordinary language of the statute itself. *Citizens Opposing Pollution v. ExxonMobil Coal U.S.A.*, 2012 IL 111286, ¶ 23, 357 Ill.Dec. 55, 962 N.E.2d 956. Words should be given their plain and obvious meaning unless the legislative act changes that meaning. *Svithiod Singing Club v. McKibbin,* 381 Ill. 194, 197, 44 N.E.2d 904 (1942). In giving meaning to the words and clauses of a statute, no part should be rendered superfluous. **302 *1235 *Standard Mutual Insurance Co. v. Lay,* 2013 IL 114617, ¶ 26, 371 Ill.Dec 1, 989 N.E.2d 591. Statutory provisions should be read in concert and harmonized. *People v. Rinehart,* 2012 IL 111719, ¶ 26, 356 Ill.Dec. 759, 962 N.E.2d 444. Where a statute is enacted after a judicial opinion is published, we presume the legislature acted with knowledge of the case law. *In re Marriage of Mathis,* 2012 IL 113496, ¶ 25, 369 Ill.Dec. 503, 986 N.E.2d 1139. If further construction of a statute is necessary, a court may consider similar and related enactments. *In re Shelby R.*, 2013 IL 114994, ¶ 39, 374 Ill.Dec. 493, 995 N.E.2d 990. Courts weighing legislative intent also consider the "object to be attained, or the evil to be remedied by the act." *Svithiod Singing Club,* 381 Ill. at 198, 44 N.E.2d 904. A retail occupation tax must be given a "practical and common-sense construction." *Automatic Voting Machine Corp. v. Daley,* 409 Ill. 438, 447, 100 N.E.2d 591 (1951).

[13] ¶ 26 The principal question in this appeal is determination of the proper situs for the "business of selling" to be taxed. To interpret a statute, we first look to the plain language of that statute. Neither party has briefed or argued the plain language of the local ROT Acts, aside from pointing to this court's prior decisions on the meaning of the "business of selling."

¶ 27 The Home Rule County Retailers' Tax Law permits home rule counties to impose "a tax upon all persons engaged in the business of selling tangible personal property * * * at retail in the county." 55 ILCS 5/5–1006 (West 2012). The tax is to be imposed in 1/4% increments, and may only be imposed at the same rate as a service occupation tax imposed by the county. A number of different types of products are exempted from home rule county taxation. Sellers are permitted to recover the cost of such taxes by stating the tax in a separate charge, along with other sales taxes. The Department of Revenue is charged with collection and enforcement. Apart from the words "at retail in the county," the statute contains little guidance on how a sale is properly located for tax purposes. The only prescription for situs of sale in the statute governs sales of coal and other minerals: "For the purpose of determining the local governmental unit whose tax is applicable, a retail sale by a producer of coal or other mineral mined in Illinois is a sale at retail at the place where the coal or other mineral mined in Illinois is extracted from the earth." *Id.* The Home Rule Municipal Retailers' Occupation Tax Act is identical in these provisions. 65 ILCS 5/8–11–1 (West 2012). Neither Act contains an explicit statement of legislative purpose.

¶ 28 The "Taxes" section of the Regional Transportation Authority Act allows the Board of Directors to impose a retail occupation tax upon "all persons engaged in the business of

selling tangible personal property at retail in the metropolitan region." 70 ILCS 3615/4.03(e) (West 2012). The "Taxes" section prescribes applicable tax rates for certain products in Cook County and prescribes a separate tax rate for Du Page, Kane, Lake, McHenry, and Will Counties. Similarly to the home rule county and municipal ROT Acts, the "Taxes" section of the RTA Act requires the Board to enact a parallel service occupation tax and title tax if it enacts a retail occupation tax. Sellers under the RTA Act are likewise permitted to recover the cost of such taxes from buyers by stating the tax separately. The RTA Act similarly lacks any definition for situs of sale aside from sales of coal and other minerals. That provision is virtually identical to the one contained in the home rule county and municipal ROT Acts. The RTA Act does contain statements of legislative purpose, describing public transportation as an "essential **303 *1236 public purpose." 70 ILCS 3615/1.02(a)(i) (West 2012).

> "There is an urgent need to reform and continue a unit of local government to assure the proper management of public transportation and to receive and distribute State or federal operating assistance and to raise and distribute revenues for local operating assistance. System generated revenues are not adequate for such service and a public need exists to provide for, aid and assist public transportation in the northeastern area of the State, consisting of Cook, DuPage, Kane, Lake, McHenry and Will Counties." *Id.*

¶ 29 Thus, the plain meaning of these statutes is to allow home rule counties, home rule municipalities, and the Regional Transportation Authority to impose retail occupation taxes on persons engaged in the business of selling. In the context of the Regional Transportation Authority Act, such taxes are to be collected in part because the revenues generated by public transportation are insufficient to support that "essential public purpose" in Cook, Du Page, Kane, Lake, McHenry, and Will Counties. However, the plain language of the statutes is sparse in definition for where the "business of selling" takes place. This court's prior interpretations of the "business of selling" in a closely related tax are instructive.

¶ 30 We have interpreted the plain meaning of a tax on the business of selling under the Retailers' Occupation Tax Act (35 ILCS 120/1 *et seq.* (West 2012)), to be a tax on the occupation of retail selling, and not sales themselves. *Standard Oil Co. v. Department of Finance,* 383 Ill. 136, 142, 48 N.E.2d 514 (1943). Thus, the location of the business of selling inside or outside the state controls, and not the location of transfer of title. *Id.* The business of selling itself 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. It is obvious that such activities are as varied as the methods which men select to carry on retail business and it is therefore not possible to prescribe by definition which of the many activities must take place in Illinois to constitute it an occupation conducted in this State. Except for a general classification that might be made of the many retail occupations, it is necessary to determine each case according to the facts which reveal the method by which the business is conducted." *Ex–Cell–O Corp.,* 383 Ill. at 321–22, 50 N.E.2d 505.

Under this "composite of many activities" view, a sales agent, limited to soliciting orders and unable to bind the selling company in any way, did not constitute a person engaged in the business of selling within the state. *Id.* at 322–23, 48 N.E.2d 514.

¶ 31 The business of selling is distinct from the business of mere solicitation, as the Retailers' Occupation Tax Act did not authorize a tax on mere solicitation. *Allis–Chalmers Manufacturing Co. v. Wright,* 383 Ill. 363, 366, 50 N.E.2d 508 (1943). In parsing the many activities making up the business of selling, some combinations of activities within the state are insufficient for the retail occupation tax to apply. *Automatic Voting Machine Corp.,* 409 Ill. at 447, 100 N.E.2d 591 (describing imposition of the ROT as a question in which "each case, of necessity, rests completely and entirely on the foundation of its own facts"). For example, "promotional work, delivery of bids, transfer of title, delivery of machines and servicing" within the state have been held insufficient **304 *1237 where bid preparation, contract execution, manufacturing, and accounting took place outside the state. *Id.* at 451–52, 100 N.E.2d 591. In determining whether the business of selling has taken place in the state, courts may look through the form of a putatively interstate transaction to its substance, in determining whether enough of the business of selling took place within the state to subject it to the retail occupation tax. *Marshall & Huschart Machinery Co. v. Department of Revenue,* 18 Ill.2d 496, 501, 165 N.E.2d 305 (1960).

¶ 32 In sum, there is a wealth of precedent that, under the Retailers' Occupation Tax Act, whether the taxable "business

of selling" is being carried on requires a fact-intensive inquiry, to determine "each case according to the facts." See *Ex–Cell–O,* 383 Ill. at 321–22, 50 N.E.2d 505. We next examine whether the legislature intended the "business of selling" under the Home Rule County Retailers' Occupation Tax Law, the Home Rule Municipal Retailer's Occupation Tax Law, and the Regional Transportation Authority Act to be judged under the same fact-sensitive approach.

[14] [15] ¶ 33 The local ROT Acts do not, by their terms, contain any explicit link to or distinction from the Retailers' Occupation Tax Act. Nonetheless, similar and related enactments provide guidance to the meaning of a potentially unclear term. *In re Shelby R.,* 2013 IL 114994, ¶ 39, 374 Ill.Dec. 493, 995 N.E.2d 990. The Retailers' Occupation Tax Act and the local ROT Acts at issue use near-identical language to describe the target of taxation: "persons engaged in the business of selling at retail tangible personal property" (35 ILCS 120/2 (West 2012) (Retailers' Occupation Tax Act)); and "all persons engaged in the business of selling tangible personal property * * * at retail" (55 ILCS 5/5–1006 (West 2012) (Home Rule County Retailers' Occupation Tax Law)). We conclude the General Assembly did not create this parallelism casually or accidentally. The 1943 *Ex–Cell–O* decision predates the local ROT Acts and made clear this court's interpretation of "the business of selling at retail." The legislature's decision to use this equivalent language—and retain it through many subsequent statutory amendments—signals its embrace of the *Ex–Cell–O* "composite of many activities" exposition. We conclude it applies to the business of selling in the local ROT Acts.

¶ 34 Having concluded the plain language of the "business of selling" requires a fact-intensive inquiry under the local ROT Acts, we find the plain language of the statute does not fully reveal legislative intent as to the situs of taxation. Accordingly, we turn to other tools of construction. This court has previously considered the legislative intent of the Retailers' Occupation Tax Act (35 ILCS 120/1 *et seq.* (West 2012)), finding the General Assembly "sought to tax the business of selling at retail, to arrive at some method of relieving property from direct taxation and to place the burden upon that class of business which not only enjoyed the greater part of governmental protection but which benefited by being conducted under that protection." *Svithiod Singing Club,* 381 Ill. at 199, 44 N.E.2d 904. We again stated the statutory intent to link retailer consumption of government services to retail occupation taxation under the Retailers' Occupation Tax Act in *Valier Coal Co. v. Department of Revenue,* 11 Ill.2d 402, 406–07, 143 N.E.2d 35 (1957).

[16] ¶ 35 Moving from the state to local level, this court applied the same rationale to predecessors of the municipal and county retail occupation taxes in *Gilligan v. Korzen,* 56 Ill.2d 387, 391–92, 308 N.E.2d 613 (1974) (stating the General Assembly enacted prior versions of the municipal **305 *1238 and county ROT Acts to account for government services provided). Accordingly, we again find the legislative intent of the Home Rule County Retailers' Occupation Tax Law, the Home Rule Municipal Retailer's Occupation Tax Act, and the retail occupation tax provisions of the Regional Transportation Authority Act is to allow local governments to impose a tax on "persons engaged in the business of selling tangible personal property" at retail within their jurisdictions, in order to relieve some tax burden that might otherwise be placed on property, in favor of placing it on retailers enjoying governmental services. 55 ILCS 5/5–1006 (West 2012); 65 ILCS 5/8–11–1 (West 2012); 70 ILCS 3615/4.03(e) (West 2012).

[17] ¶ 36 Taking these two conclusions about the plain meaning of the business of selling and legislative intent together, then, the local ROT Acts were enacted to allow local jurisdictions to tax the composite of selling activities taking place within their jurisdictions, collecting taxes in relation to services enjoyed by the retailer. Having concluded the "business of selling" under the local ROT Acts is a fact-intensive "composite of many activities" consonant with our holding in *Ex–Cell–O,* we now consider whether the Department's regulations are consistent with the statute.

¶ 37 Interpretation of the Regulations

[18] [19] [20] [21] ¶ 38 Administrative regulations have the force and effect of law and are interpreted with the same canons as statutes. *People ex rel. Madigan v. Illinois Commerce Comm'n,* 231 Ill.2d 370, 380, 326 Ill.Dec. 10, 899 N.E.2d 227 (2008). Additionally, administrative agencies enjoy wide latitude in adopting regulations reasonably necessary to perform the agency's statutory duty. *Julie Q. v. Department of Children & Family Services,* 2013 IL 113783, ¶ 28, 374 Ill.Dec. 480, 995 N.E.2d 977. Such regulations carry a presumption of validity. *People v. Molnar,* 222 Ill.2d 495, 508, 306 Ill.Dec. 116, 857 N.E.2d 209 (2006). However, regulations may not broaden or narrow a statute's intended scope of taxation. *Ex–Cell–O,* 383 Ill. at 320, 50 N.E.2d 505.

Regulations that are inconsistent with the statute under which they are adopted will be held invalid. *Kean v. Wal–Mart Stores, Inc.*, 235 Ill.2d 351, 366, 336 Ill.Dec. 1, 919 N.E.2d 926 (2009).

¶ 39 The regulations governing situs of taxation for the local ROT Acts each appear under the heading "Jurisdictional Questions" and are virtually identical. See 86 Ill. Adm.Code 220.115 (home rule counties); 86 Ill. Adm.Code 270.115 (home rule municipalities); 86 Ill. Adm.Code 320.115 (RTA). For simplicity, we focus on the Home Rule County Retailers' Occupation Tax Law regulations (86 Ill. Adm.Code 220.115).

¶ 40 The Department argues the local ROT Act regulation defining the situs of tax must be read in light of the statutory intent. Read in this light, it argues, the regulation sets up a totality-of-the-circumstances inquiry. Hartney argues that the regulation is instead written to address numerous possible fact scenarios in an uncertain field—speaking with certainty in scenarios where the outcome is known and providing guidance as to a likely outcome in other scenarios. The interpretive dispute begins in 86 Ill. Adm.Code 220.115(b):

> "b) Mere Solicitation of Orders Not Doing Business
>
> 1) For a seller to incur Home Rule County Retailers' Occupation Tax liability in a given county, the sale must be made in the course of the seller's engaging in the retail business within that county. In other words, enough of the selling activity must occur within the home rule county to justify concluding **306 *1239 that the seller is engaged in business within the home rule county with respect to that sale.
>
> 2) For example, the Supreme Court has held the mere solicitation and receipt of orders within a taxing jurisdiction (the State), where the orders were subject to acceptance outside the taxing jurisdiction and title passed outside the jurisdiction, with the goods being shipped from outside the jurisdiction to the purchaser in the jurisdiction, did not constitute engaging in the business of selling within the jurisdiction. This conclusion was reached independently of any question of interstate commerce and so would apply to a home rule county as the taxing jurisdiction as much as to the State as the taxing jurisdiction." 86 Ill. Adm.Code 220.115(b).

¶ 41 The Department argues that subsection (b) incorporates our holdings on the meaning of the "business of selling" through its reference to "the seller's engaging in the retail business within that county." The Department further argues that subsection (b)(1)'s requirement that "enough of the selling activity must occur" within the taxing jurisdiction invokes this court's view of sales under retail occupation taxes as the composite of many activities. The appellate court found, and Hartney argues, that subsections (b)(1) and (b)(2) instead set up a threshold inquiry, analyzing whether enough of the sales activity takes place in the taxing jurisdiction that it might be made subject to the retail occupation tax there. In Hartney's view, this first inquiry would narrow the field from various jurisdictions having some contact with the sale to those with "enough" sales activity; subsequent sections either define or provide guidance as to which of them will enjoy tax revenues from the retailer.[3] Specifically, Hartney argues that subsection (c)(1) conclusively establishes its tax situs at the location of purchase order acceptance. Subsection (c)(1) states:

> "c) Seller's Acceptance of Order
>
> 1) Without attempting to anticipate every kind of fact situation that may arise in this connection, it is the Department's opinion, in general, that the seller's acceptance of the purchase order or other contracting action in the making of the sales contract is the most important single factor in the occupation of selling. If the purchase order is accepted at the seller's place of business within the county or by someone who is working out of that place of business and who does not conduct the business of selling elsewhere within the meaning of subsections (g) and (h) of this Section, or if a purchase order that is an acceptance of the seller's complete and unconditional offer to sell is received by the seller's place of business within the home rule county or by someone working out of that place of business, the seller incurs Home Rule County Retailers' Occupation Tax liability in that home rule county if the sale is at retail and the purchaser receives the physical possession of the property in Illinois. The Department will assume that the seller has accepted the purchase order at the place of business at which the seller receives the purchase order from the purchaser in the absence of clear proof to the contrary." 86 Ill. Adm.Code 220.115(c)(1).

3 No party has argued, and we do not consider, any claim that the Department might impose the same tax in more than one location for one sale.

The Department argues that Hartney's interpretation renders subsection (b)(1) meaningless, as there would be no reason for a threshold finding of which jurisdictions **307 *1240 may be able to tax the seller if another subsection conclusively establishes *which* jurisdiction will tax the seller. For the reasons stated below, we agree with the appellate court's and Hartney's view.

¶ 42 The Department is correct in looking to *Ex–Cell–O* to interpret subsection (b), as it references the inquiry contemplated in that case. In *Ex–Cell–O,* we said:

"An occupation, the business of which is to sell tangible personal property at retail, 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. It is obvious that such activities are as varied as the methods which men select to carry on retail business and it is therefore not possible to prescribe by definition which of the many activities must take place in Illinois to constitute it an occupation conducted in this State. Except for a general classification that might be made of the many retail occupations, it is necessary to determine each case according to the facts which reveal the method by which the business is conducted." *Ex–Cell–O,* 383 Ill. at 321–22, 50 N.E.2d 505.

We are persuaded that subsection (b)(1) makes reference to "the composite of many activities" in *Ex–Cell–O,* and subsection (b)(2) references that case and its progeny directly. But one key *Ex–Cell–O* concept is notably absent from the regulation: any explicit requirement to "determine each case according to the facts which reveal the method by which the business is conducted." *Id.* at 322, 50 N.E.2d 505.

¶ 43 This absence is significant because we now confront a question not present in *Ex–Cell–O.* There, the question before the court was whether a retailer's activity carried on within the state was sufficient to constitute the business of selling under the Retailers' Occupation Tax Act. *Id.* At no point did the *Ex–Cell–O* court weigh which state had the majority of the business of selling incident to the sales. Unlike the case at bar, there were no competing claims between taxing jurisdictions for the enjoyment of tax funds. In short, the local ROT Acts present a question of allocation not present in *Ex–Cell–O.* It is true that, under subsection (b) as well as in *Ex–Cell–O,* enough of the selling activity must take place within the taxing jurisdiction to constitute the business of selling there. After that threshold inquiry, however, the Department must further determine *which* of the jurisdictions satisfying this test will be deemed the situs of taxation and will enjoy the tax revenues.

¶ 44 The Department argues that this threshold inquiry is meaningless if a subsequent section affirmatively defines tax situs.[4] This is not so, for reasons we outline in discussing subsection (c). Subsection (b), standing alone, does not establish a fact-intensive test for the question of tax situs. For the regulation to mandate a fact-intensive test, such test must originate in a subsequent subsection or be clear from subsections read together.

4 The Department also argues that the appellate court erroneously considered subsections (b)(1) and (b)(2) to make up a jurisdictional provision. In fact, the appellate court said this inquiry was "analogous" to minimum contacts in personal jurisdiction. 2012 IL App (3d) 110144, ¶¶ 43–44, 364 Ill.Dec. 404, 976 N.E.2d 682.

¶ 45 Subsection (c), however, does much to undermine the Department's view that the regulation embodies a totality-of-the-circumstances inquiry. It begins:

"c) Seller's Acceptance of Order

*1241 **308 1) Without attempting to anticipate every kind of fact situation that may arise in this connection, it is the Department's opinion, in general, that the seller's acceptance of the purchase order or other contracting action in the making of the sales contract is the most important single factor in the occupation of selling. If the purchase order is accepted at the seller's place of business within the county or by someone who is working out of that place of business and who does not conduct the business of selling elsewhere within the meaning of subsections (g) and (h) of this Section, or if a purchase order that is an acceptance of the seller's complete and unconditional offer to sell is received by the seller's place of business within the home rule county or by someone working out of that place of business, the seller incurs Home Rule County Retailers' Occupation Tax liability in that home rule county if the sale is at retail and the purchaser receives the physical possession of the property in Illinois. The Department will assume that the seller has accepted the purchase order at the place of business at which the seller receives the purchase order from the purchaser in the absence of clear proof to the contrary." 86 Ill. Adm.Code 220.115(c)(1).

Subsection (c)(1) has three sentences, and the meaning of each of these sentences must be considered in light of the

others. The first sentence states the Department's opinion that the seller's acceptance of purchase order is the "most important single factor in the occupation of selling." For the purpose of discussion, we refer to this as the "opinion" sentence. The next sentence outlines four occurrences of purchase order acceptance and two conditions, under which the seller incurs tax liability. For the purpose of discussion, we refer to this as the "seller incurs" sentence. Subsection (c)(1) concludes with a presumption about the location of purchase order acceptance.

¶ 46 The "opinion" sentence, standing alone, could be viewed to contemplate a totality-of-the-circumstances test. "Without attempting to anticipate every kind of fact situation that may arise in this connection, it is the Department's opinion, in general, that the seller's acceptance of the purchase order or other contracting action in the making of the sales contract is the most important single factor in the occupation of selling." *Id.* The phrase "[w]ithout attempting to anticipate every kind of fact situation that may arise" suggests a nuanced inquiry. "[I]t is the Department's opinion, in general," additionally suggests that other facts may control. These two phrases significantly temper the impact of "the seller's acceptance of the purchase order or other contracting action in the making of the sales contract is the most important single factor in the occupation of selling." That purchase order acceptance is the "most important *single* factor" (emphasis added) likewise implies that other factors might be considered. Once more, however, the regulation has used language that might suggest a totality-of-the-circumstances test, but stops short of establishing one.

¶ 47 On its own, the "opinion" sentence communicates less than it initially appears. First, it communicates that the Department does not try to anticipate every fact scenario that might arise in determining situs of retail occupation taxes, suggesting there may be difficulty in writing a rule that fits every situation. Next, the seller's acceptance of the purchase order is, in general, the most important single factor to locating the business of selling. This sentence might help to establish a totality-of-the-circumstances test, depending on what follows.

***1242 **309** ¶ 48 But, as counsel for Hartney argues, what follows is not a list of factors that are considered important, or even guidance as to when the acceptance of purchase order might be overcome by other facts. Instead, subsection (c)(1) continues with the certain and definitive "seller incurs" sentence:

> "If the purchase order is accepted at the seller's place of business within the county or by someone who is working out of that place of business and who does not conduct the business of selling elsewhere within the meaning of subsections (g) and (h) of this Section, or if a purchase order that is an acceptance of the seller's complete and unconditional offer to sell is received by the seller's place of business within the home rule county or by someone working out of that place of business, *the seller incurs Home Rule County Retailers' Occupation Tax liability in that home rule county* if the sale is at retail and the purchaser receives the physical possession of the property in Illinois." (Emphasis added.) *Id.*

¶ 49 This sentence begins by stating four mutually exclusive scenarios for the receipt of a purchase order within the jurisdiction: (1) acceptance of a purchase order at the seller's place of business in the county; or (2) acceptance of same by someone working out of that place of business who is not placed elsewhere by the rules for coal or selling from a truck; or (3) receipt at the seller's in-county place of business of a purchase order that is itself acceptance of the seller's complete, unconditional offer to sell; or (4) receipt of same by someone working out of that place of business. The "seller incurs" sentence concludes with two conditions: (1) sale is at retail, and (2) the purchaser receives physical possession within the state. When one of the purchase order scenarios occurs and the two conditions are met, "the seller incurs Home Rule County Retailers' Occupation Tax liability in that home rule county." *Id.* The "seller incurs" sentence contains none of the nuance or hedging present in the "opinion" sentence. It states that when one of these scenarios occurs, and two conditions are satisfied, "seller incurs * * * liability in that home rule county." *Id.*

[22] ¶ 50 Regulatory provisions, like statutory provisions, must be read in concert and harmonized. See *People v. Rinehart,* 2012 IL 111719, ¶ 26, 356 Ill.Dec. 759, 962 N.E.2d 444. The "opinion" sentence does not diminish the certainty of the "seller incurs" sentence. Rather, taking the two together renders a meaning that, although it is difficult to craft a rule that properly defines the situs of every sales arrangement, the place of purchase order acceptance is so important that it will conclusively govern when these conditions are met.

¶ 51 The final sentence, establishing a presumption as to where "the seller has accepted the purchase order," does not provide support for the Department's view that this regulation, in its entirety, creates a totality-of-the-

circumstances approach. First, the final sentence does not establish a presumption on tax situs; it establishes a presumption to determine where the purchase order was accepted. Second, because it creates a presumption as to the location of purchase order acceptance, it only bolsters the interpretation that subsection (c)(1) is establishing purchase order as the controlling test where the two conditions are met. Third, it makes clear that the "seller incurs" sentence is not simply a presumption under any totality-of-the-circumstances test contemplated by the "opinion" sentence. In drafting the regulation, the Department knew how to write a presumption, and this presumption **310 *1243 as to the location of purchase order acceptance is the only one present in subsection (c)(1).

¶ 52 The following subsection, (c)(2), accords with the view that subsection (c)(1) conclusively establishes purchase order acceptance as the sole factor under certain circumstances, as it conclusively sets tax situs for certain situations when the purchase order is accepted outside the state. Subsection (c) thus contains not one but two definitive situs-setting provisions.

> "(2) If a purchase order is accepted outside this State, but the tangible personal property that is sold is in an inventory of the retailer located within a county at the time of its sale (or is subsequently produced in the county), then delivered in Illinois to the purchaser, the place where the property is located at the time of the sale (or subsequent production in the county) will determine where the seller is engaged in business for Home Rule County Retailers' Occupation Tax purposes with respect to that sale." 86 Ill. Adm.Code 220.115(c)(2).

Like the "seller incurs" sentence in subsection (c)(1), this sentence starts with a scenario: the purchase order being accepted outside the state. It continues by listing two conditions for imposition of the retail occupation tax: (1) that the personal property be in the inventory of the retailer within the county; and (2) that the personal property be delivered in Illinois to the purchaser. Where this scenario occurs under these two conditions, "where the property is located at the time of the sale * * * will determine where the seller is engaged in business" for purposes of the retail occupation tax. *Id.*

¶ 53 This subsection also makes clear why subsection (b)(1) must frame a threshold inquiry as to whether enough sales activity is taking place within the jurisdiction to constitute the business of selling under the local ROT Acts. The Department argues that interpreting subsection (b)(1) as a threshold inquiry effectively strips that subsection of meaning, as there would be no reason to determine which jurisdictions may potentially subject the taxpayer to liability, "when the place where the purchase order is accepted will conclusively determine where the taxpayer must pay." Subsection (c)(2), by imposing liability even where a purchase order is accepted outside the state, makes clear that the purchase order does not "conclusively determine where the taxpayer must pay" under every provision of the regulation.[5] The regulation contemplates that certain sales activities will take place outside the state, and others will take place within the state, but there might still be enough activity within the county to constitute the "business of selling" there. Subsection (c)(2) describes one arrangement that will bring about tax liability within the county by carrying on the business of selling there. If subsection (b)(1) instead framed an overall totality-of-the-circumstances test, subsection (c)(2) would not be written as an affirmative situs-setting rule, but rather as a simple example of one cross-border situation that would still qualify for retail occupation tax liability within the county. Instead, the regulation reads much as the appellate court interpreted it: subsection (b)(1) establishes a threshold inquiry into whether enough sales activity takes place in the local jurisdiction; subsections like (c)(1) and (c)(2) then settle **311 *1244 the question of allocation among jurisdictions within the state.

5 Additionally, subsections (f), (g), and (h) govern situations in which a purchase order may not be involved at all. Subsection (c)(1)'s limited statement that the place of purchase order controls under these limited circumstances does not obviate the need for the (b)(1) threshold inquiry.

¶ 54 Returning to our conclusion that subsections (c)(1) and (c)(2) contain two statements affirmatively setting a location for tax situs, reading the remainder of the regulation supports this view. Three additional provisions define "the seller's place of business" or "where the seller is engaged in business" (86 Ill. Adm.Code 220.115(c)(1)-(2)) and one defines "the local governmental unit whose tax is applicable" (86 Ill. Adm.Code 220.115(h); 86 Ill. Adm.Code 220.115(e) (long-term and blanket contracts); 86 Ill. Adm.Code 220.115(f) (sales through vending machines); 86 Ill. Adm.Code 220.115(g) (sales from a truck as portable place of business); 86 Ill. Adm.Code 220.115(h) (sales of coal and other minerals)). Each speaks definitively to the object of the inquiry: where is the business of selling being carried on, such that tax is imposed? None is stated as a presumption. None is stated as an example of a likely

allocation under a totality-of-the-circumstances test. The regulation thus contains six provisions that affirmatively set the situs of taxation under different scenarios, so long as conditions are met. In sum, the overall structure of the regulation militates against the Department's claim of an overall totality-of-the-circumstances test.

¶ 55 In interpreting the regulation, we turn finally to the Department's argument that because subsection (d) lists other factors like the location of delivery and location where title passes, those "may play a role in determining where a retailer is located." The Department argues that the presence of these factors supports its argument that the regulation crafts a totality-of-the-circumstances test, or there would be no occasion to consider these factors at all. We note, first, that these factors are described in the regulation as being "not necessary" and "not a decisive consideration." 86 Ill. Adm.Code 220.115(d)(1)-(2). Indeed, none of the factors listed in subsection (d) are deemed important in the regulation; the subsection is titled "Some Considerations That Are Not Controlling." *Id.* It is plausible this subsection means to rule out certain types of challenges to liability by taxpayers. It is plausible this subsection means to present factors to deciding situations that fit none of the fact scenarios definitively addressed in subsections (c)(1)-(2), (e), (f), (g), and (h), but which do meet the threshold requirements of subsection (b) so that tax liability may still be incurred. Having concluded that this subsection does not support the Department's view, we need not and do not decide that question.

¶ 56 Even granting the Department considerable deference in interpreting its regulations, we cannot find that its reading of the regulation is correct. We conclude that the regulation, in subsection (c)(1), does define situs for retail occupation tax where purchase order acceptance occurs at the seller's place of business within the county, with sale at retail and the purchaser taking delivery within the state. We now turn to whether the regulation constitutes a valid implementation of the statutes.

¶ 57 Reconciling the Regulation with the Statute

[23] [24] ¶ 58 As noted previously, the legislative intent of the local ROT Acts is to permit home rule municipalities and counties, along with the RTA, to enact retail occupation taxes in order to place some of the burden of paying for local government services on the retailers who enjoy them. See *Svithiod Singing Club,* 381 Ill. at 199, 44 N.E.2d 904. The retail occupation tax is laid upon the business of selling and not upon sales themselves. **312 *1245 *Standard Oil Co.,* 383 Ill. at 142, 48 N.E.2d 514. Under our precedent, the business of selling is a composite of many activities. *Ex–Cell–O Corp.,* 383 Ill. at 321–22, 50 N.E.2d 505. Determining that enough of the business of selling is taking place in a given jurisdiction requires a fact-intensive inquiry. *Id.*

[25] [26] ¶ 59 Administrative agencies have deference in enacting regulations, and regulations are presumed valid. *Julie Q. v. Department of Children & Family Services,* 2013 IL 113783, ¶ 28, 374 Ill.Dec. 480, 995 N.E.2d 977; *People v. Molnar,* 222 Ill.2d 495, 508, 306 Ill.Dec. 116, 857 N.E.2d 209 (2006). Administrative agencies likewise are entitled to deference in interpreting the statutes they enforce. *Provena Covenant Medical Center v. Department of Revenue,* 236 Ill.2d 368, 387 n. 9, 339 Ill.Dec. 10, 925 N.E.2d 1131 (2010). Agencies' broad latitude in enacting regulations to enforce their statutes may include presumptions or other shortcuts in administrative decision making. We do not strike regulations down simply because they are unwise or bad policy. *Oak Liquors, Inc. v. Zagel,* 90 Ill.App.3d 379, 45 Ill.Dec. 723, 413 N.E.2d 56 (1980). Thus, our review is not whether the regulation is the best possible implementation, but rather whether it is a permissible interpretation of the statute.

¶ 60 As noted above, the question of determining tax situs for a tax on the business of selling presents a complicated inquiry. One line of reasoning would persuade us to find the regulation constitutes a reasonable compromise between the administrative difficulty of determining appropriate tax situs in every situation and the need for accurate tax assessment. A regulation might call for a "shortcut" in decisionmaking without effecting a prohibited expansion or contraction of the taxing statute it implements.

[27] ¶ 61 On the other hand, a regulation cannot narrow or broaden the scope of intended taxation under a taxing statute. *Kean v. Wal–Mart Stores, Inc.,* 235 Ill.2d 351, 372, 336 Ill.Dec. 1, 919 N.E.2d 926 (2009). A regulation that does so must be held invalid. *Id.* We are persuaded that this regulation impermissibly narrows the local ROT Acts, contrary to the legislature's intention to allow local governments to collect taxes from retailers in their jurisdictions. First, it does not amply prescribe the fact-intensive inquiry contemplated by this court in *Ex–Cell–O.* Second, by allowing for only one, potentially minor step in the business of selling to

conclusively govern tax situs, this regulation impermissibly constricts the scope of intended taxation.

¶ 62 In the case at hand, Hartney conducted the bulk of its selling activity in Forest View. It carried out all of its marketing efforts, maintained inventory, set prices, and cultivated sales relationships there. Hartney began routing its purchase orders through a separate sales office exclusively for the purpose of tax planning. While the clerk in Mark could bind Hartney, the clerk participated in no other aspect of the business of selling. This shift from Forest View to Mark removed Hartney from the retail occupation tax rolls of Forest View, Cook County, and the RTA. This effected more than a shift in tax allocation; it effected a full removal from tax liability. It did not, however, remove Hartney from the enjoyment of services offered by the Local Governments.

¶ 63 *Amici* Taxpayer's Federation of Illinois and Illinois Retail Merchants Association argue that certainty is a high priority for retailers, pointing to numerous states employing bright-line tests in determining tax situs. These are arguments well suited for the General Assembly. Should the legislature decide that tax certainty warrants **313 *1246 a single-factor determination of retail occupation tax situs, it can draft such a test. However, by consistently employing the "business of selling" language that we have interpreted to require a fact-intensive inquiry to find the proper situs of a composite of many activities, the legislature has effectively invoked this court's precedent on the Retailers' Occupation Tax Law. It is not incumbent upon this court to decide the best tax policy; the court is to decide the tax policy the legislature has chosen and communicated through the statute.

¶ 64 The "Jurisdictional Questions" regulations embodied in 86 Ill. Adm.Code 220.115, 270.115, and 320.115 are too inconsistent with the statutes and case law to stand, and they are held invalid.

¶ 65 Abatement

[28] [29] [30] ¶ 66 Regulations carry the force and effect of law. *People ex rel. Madigan v. Illinois Commerce Comm'n,* 231 Ill.2d 370, 380, 326 Ill.Dec. 10, 899 N.E.2d 227 (2008). However, an agency's powers are limited to those granted by statute, and acts of an agency beyond its statutory powers are void. *Julie Q. v. Department of Children & Family Services,* 2013 IL 113783, ¶ 24, 374 Ill.Dec. 480, 995 N.E.2d 977. Likewise, "where the public revenues are involved, public policy ordinarily forbids the application of estoppel to the State." *Austin Liquor Mart, Inc. v. Department of Revenue,* 51 Ill.2d 1, 4, 280 N.E.2d 437 (1972). Were these the only governing principles, the Department might still collect the tax despite its invalid regulation. In the absence of the void regulation, Hartney would be taxed under the general principles of the statute, left only with its argument for estoppel by erroneous information letters and other publications of the Department.

[31] [32] ¶ 67 Yet the legislature has provided for a taxing agency to become bound to its own flawed interpretation of the law in effect at that time. See, *e.g., McLean v. Department of Revenue,* 184 Ill.2d 341, 363, 235 Ill.Dec. 3, 704 N.E.2d 352 (1998) (holding that an erroneous interpretive release precluded the Department from levying tax during that time period). The Taxpayers' Bill of Rights Act imposes upon the Department a duty to "abate taxes and penalties assessed based upon erroneous written information or advice given by the Department." 20 ILCS 2520/4(c) (West 2008). The Department's own written regulations provide guidance to taxpayers as to their liability. While we do not find Hartney's approach to retail occupation tax liability consistent with the statute or this court's precedent, the company did act consistently with the Department's regulation published at the time.[6] It has been six years since the most recent of these sales were completed. Hartney's ability to recover such amounts from its customers, or to plan for such tax liabilities in advance, has long since passed.

6 The Local Governments have additionally argued that Hartney's arrangement should be disregarded as a sham transaction. Analyzing a sham transaction requires assessment of the multiple steps of a transaction, with each being considered relevant, to determine whether economic reality accords with the formal arrangement. *Commissioner v. Court Holding Co.,* 324 U.S. 331, 334, 65 S.Ct. 707, 89 L.Ed. 981 (1945). Because we conclude the regulation erroneously sited tax based solely on purchase order acceptance in the case at bar, the sham transaction doctrine is unavailing. Hartney structured its affairs in accordance with the regulation, by relocating its order-receiving function to a lower tax jurisdiction. Hartney's arrangement was not without economic substance or economic effect. "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted." *Gregory v. Helvering,* 293 U.S. 465, 469, 55 S.Ct. 266, 79 L.Ed. 596 (1935).

*1247 **314 ¶ 68 We do not disturb the findings by the trial and appellate courts that, under the regulations, Hartney accepted its purchase orders and long-term contracts in Mark. Because of the Department's erroneous regulations, the Department has a duty under the Taxpayers' Bill of Rights Act to abate Hartney's penalties and retail occupation tax liability of Forest View, Cook County, and the Regional Transportation Authority for the audit period.

¶ 69 For the reasons stated, the judgment of the appellate court is affirmed in part and reversed in part.

¶ 70 Appellate court judgment affirmed in part and reversed in part.

Justices FREEMAN, THOMAS, KILBRIDE, KARMEIER, BURKE, and THEIS concurred in the judgment and opinion.

Parallel Citations

2013 IL 115130, 998 N.E.2d 1227

End of Document

Exhibit B

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 70. Special Districts
Transit
Act 3615. Regional Transportation Authority Act (Refs & Annos)
Article IV. Finances

70 ILCS 3615/4.03
Formerly cited as IL ST CH 111 2/3 ¶704.03

3615/4.03. Taxes

Effective: July 13, 2012
Currentness

§ 4.03. Taxes.

(a) In order to carry out any of the powers or purposes of the Authority, the Board may by ordinance adopted with the concurrence of 12 of the then Directors, impose throughout the metropolitan region any or all of the taxes provided in this Section. Except as otherwise provided in this Act, taxes imposed under this Section and civil penalties imposed incident thereto shall be collected and enforced by the State Department of Revenue. The Department shall have the power to administer and enforce the taxes and to determine all rights for refunds for erroneous payments of the taxes. Nothing in this amendatory Act of the 95th General Assembly is intended to invalidate any taxes currently imposed by the Authority. The increased vote requirements to impose a tax shall only apply to actions taken after the effective date of this amendatory Act of the 95th General Assembly.

(b) The Board may impose a public transportation tax upon all persons engaged in the metropolitan region in the business of selling at retail motor fuel for operation of motor vehicles upon public highways. The tax shall be at a rate not to exceed 5% of the gross receipts from the sales of motor fuel in the course of the business. As used in this Act, the term "motor fuel" shall have the same meaning as in the Motor Fuel Tax Law. [1] The Board may provide for details of the tax. The provisions of any tax shall conform, as closely as may be practicable, to the provisions of the Municipal Retailers Occupation Tax Act, [2] including without limitation, conformity to penalties with respect to the tax imposed and as to the powers of the State Department of Revenue to promulgate and enforce rules and regulations relating to the administration and enforcement of the provisions of the tax imposed, except that reference in the Act to any municipality shall refer to the Authority and the tax shall be imposed only with regard to receipts from sales of motor fuel in the metropolitan region, at rates as limited by this Section.

(c) In connection with the tax imposed under paragraph (b) of this Section the Board may impose a tax upon the privilege of using in the metropolitan region motor fuel for the operation of a motor vehicle upon public highways, the tax to be at a rate not in excess of the rate of tax imposed under paragraph (b) of this Section. The Board may provide for details of the tax.

(d) The Board may impose a motor vehicle parking tax upon the privilege of parking motor vehicles at off-street parking facilities in the metropolitan region at which a fee is charged, and may provide for reasonable classifications in and exemptions to the tax, for administration and enforcement thereof and for civil penalties and refunds thereunder and may provide criminal penalties thereunder, the maximum penalties not to exceed the maximum criminal penalties provided in the Retailers' Occupation Tax Act. [3] The Authority may collect and enforce the tax itself or by contract with any unit of local government. The State Department of Revenue shall have no responsibility for the collection and enforcement unless the Department agrees with the Authority to undertake the collection and enforcement. As used in this paragraph, the term "parking facility" means a parking

area or structure having parking spaces for more than 2 vehicles at which motor vehicles are permitted to park in return for an hourly, daily, or other periodic fee, whether publicly or privately owned, but does not include parking spaces on a public street, the use of which is regulated by parking meters.

(e) The Board may impose a Regional Transportation Authority Retailers' Occupation Tax upon all persons engaged in the business of selling tangible personal property at retail in the metropolitan region. In Cook County the tax rate shall be 1.25% of the gross receipts from sales of food for human consumption that is to be consumed off the premises where it is sold (other than alcoholic beverages, soft drinks and food that has been prepared for immediate consumption) and prescription and nonprescription medicines, drugs, medical appliances and insulin, urine testing materials, syringes and needles used by diabetics, and 1% of the gross receipts from other taxable sales made in the course of that business. In DuPage, Kane, Lake, McHenry, and Will Counties, the tax rate shall be 0.75% of the gross receipts from all taxable sales made in the course of that business. The tax imposed under this Section and all civil penalties that may be assessed as an incident thereof shall be collected and enforced by the State Department of Revenue. The Department shall have full power to administer and enforce this Section; to collect all taxes and penalties so collected in the manner hereinafter provided; and to determine all rights to credit memoranda arising on account of the erroneous payment of tax or penalty hereunder. In the administration of, and compliance with this Section, the Department and persons who are subject to this Section shall have the same rights, remedies, privileges, immunities, powers and duties, and be subject to the same conditions, restrictions, limitations, penalties, exclusions, exemptions and definitions of terms, and employ the same modes of procedure, as are prescribed in Sections 1, 1a, 1a-1, 1c, 1d, 1e, 1f, 1i, 1j, 2 through 2-65 [4] (in respect to all provisions therein other than the State rate of tax), 2c, 3 [5] (except as to the disposition of taxes and penalties collected), 4, 5, 5a, 5b, 5c, 5d, 5e, 5f, 5g, 5h, 5i, 5j, 5k, 5*l*, 6, 6a, 6b, 6c, 7, 8, 9, 10, 11, 12 and 13 of the Retailers' Occupation Tax Act [6] and Section 3-7 of the Uniform Penalty and Interest Act, [7] as fully as if those provisions were set forth herein.

Persons subject to any tax imposed under the authority granted in this Section may reimburse themselves for their seller's tax liability hereunder by separately stating the tax as an additional charge, which charge may be stated in combination in a single amount with State taxes that sellers are required to collect under the Use Tax Act, [8] under any bracket schedules the Department may prescribe.

Whenever the Department determines that a refund should be made under this Section to a claimant instead of issuing a credit memorandum, the Department shall notify the State Comptroller, who shall cause the warrant to be drawn for the amount specified, and to the person named, in the notification from the Department. The refund shall be paid by the State Treasurer out of the Regional Transportation Authority tax fund established under paragraph (n) of this Section.

If a tax is imposed under this subsection (e), a tax shall also be imposed under subsections (f) and (g) of this Section.

For the purpose of determining whether a tax authorized under this Section is applicable, a retail sale by a producer of coal or other mineral mined in Illinois, is a sale at retail at the place where the coal or other mineral mined in Illinois is extracted from the earth. This paragraph does not apply to coal or other mineral when it is delivered or shipped by the seller to the purchaser at a point outside Illinois so that the sale is exempt under the Federal Constitution as a sale in interstate or foreign commerce.

No tax shall be imposed or collected under this subsection on the sale of a motor vehicle in this State to a resident of another state if that motor vehicle will not be titled in this State.

Nothing in this Section shall be construed to authorize the Regional Transportation Authority to impose a tax upon the privilege of engaging in any business that under the Constitution of the United States may not be made the subject of taxation by this State.

(f) If a tax has been imposed under paragraph (e), a Regional Transportation Authority Service Occupation Tax shall also be imposed upon all persons engaged, in the metropolitan region in the business of making sales of service, who as an incident to making the sales of service, transfer tangible personal property within the metropolitan region, either in the form of tangible personal property or in the form of real estate as an incident to a sale of service. In Cook County, the tax rate shall be: (1) 1.25% of the serviceman's cost price of food prepared for immediate consumption and transferred incident to a sale of service subject to the service occupation tax by an entity licensed under the Hospital Licensing Act,[9] the Nursing Home Care Act,[10] the Specialized Mental Health Rehabilitation Act, or the ID/DD Community Care Act that is located in the metropolitan region; (2) 1.25% of the selling price of food for human consumption that is to be consumed off the premises where it is sold (other than alcoholic beverages, soft drinks and food that has been prepared for immediate consumption) and prescription and nonprescription medicines, drugs, medical appliances and insulin, urine testing materials, syringes and needles used by diabetics; and (3) 1% of the selling price from other taxable sales of tangible personal property transferred. In DuPage, Kane, Lake, McHenry and Will Counties the rate shall be 0.75% of the selling price of all tangible personal property transferred.

The tax imposed under this paragraph and all civil penalties that may be assessed as an incident thereof shall be collected and enforced by the State Department of Revenue. The Department shall have full power to administer and enforce this paragraph; to collect all taxes and penalties due hereunder; to dispose of taxes and penalties collected in the manner hereinafter provided; and to determine all rights to credit memoranda arising on account of the erroneous payment of tax or penalty hereunder. In the administration of and compliance with this paragraph, the Department and persons who are subject to this paragraph shall have the same rights, remedies, privileges, immunities, powers and duties, and be subject to the same conditions, restrictions, limitations, penalties, exclusions, exemptions and definitions of terms, and employ the same modes of procedure, as are prescribed in Sections 1a-1, 2, 2a, 3 through 3-50[11] (in respect to all provisions therein other than the State rate of tax), 4[12] (except that the reference to the State shall be to the Authority), 5, 7, 8[13] (except that the jurisdiction to which the tax shall be a debt to the extent indicated in that Section 8 shall be the Authority), 9[14] (except as to the disposition of taxes and penalties collected, and except that the returned merchandise credit for this tax may not be taken against any State tax), 10, 11, 12[15] (except the reference therein to Section 2b of the Retailers' Occupation Tax Act[16]), 13[17] (except that any reference to the State shall mean the Authority), the first paragraph of Section 15, 16, 17, 18, 19 and 20 of the Service Occupation Tax Act[18] and Section 3-7 of the Uniform Penalty and Interest Act, as fully as if those provisions were set forth herein.

Persons subject to any tax imposed under the authority granted in this paragraph may reimburse themselves for their serviceman's tax liability hereunder by separately stating the tax as an additional charge, that charge may be stated in combination in a single amount with State tax that servicemen are authorized to collect under the Service Use Tax Act,[19] under any bracket schedules the Department may prescribe.

Whenever the Department determines that a refund should be made under this paragraph to a claimant instead of issuing a credit memorandum, the Department shall notify the State Comptroller, who shall cause the warrant to be drawn for the amount specified, and to the person named in the notification from the Department. The refund shall be paid by the State Treasurer out of the Regional Transportation Authority tax fund established under paragraph (n) of this Section.

Nothing in this paragraph shall be construed to authorize the Authority to impose a tax upon the privilege of engaging in any business that under the Constitution of the United States may not be made the subject of taxation by the State.

(g) If a tax has been imposed under paragraph (e), a tax shall also be imposed upon the privilege of using in the metropolitan region, any item of tangible personal property that is purchased outside the metropolitan region at retail from a retailer, and that is titled or registered with an agency of this State's government. In Cook County the tax rate shall be 1% of the selling price of the tangible personal property, as "selling price" is defined in the Use Tax Act. In DuPage, Kane, Lake, McHenry and Will counties the tax rate shall be 0.75% of the selling price of the tangible personal property, as "selling price" is defined in

the Use Tax Act. The tax shall be collected from persons whose Illinois address for titling or registration purposes is given as being in the metropolitan region. The tax shall be collected by the Department of Revenue for the Regional Transportation Authority. The tax must be paid to the State, or an exemption determination must be obtained from the Department of Revenue, before the title or certificate of registration for the property may be issued. The tax or proof of exemption may be transmitted to the Department by way of the State agency with which, or the State officer with whom, the tangible personal property must be titled or registered if the Department and the State agency or State officer determine that this procedure will expedite the processing of applications for title or registration.

The Department shall have full power to administer and enforce this paragraph; to collect all taxes, penalties and interest due hereunder; to dispose of taxes, penalties and interest collected in the manner hereinafter provided; and to determine all rights to credit memoranda or refunds arising on account of the erroneous payment of tax, penalty or interest hereunder. In the administration of and compliance with this paragraph, the Department and persons who are subject to this paragraph shall have the same rights, remedies, privileges, immunities, powers and duties, and be subject to the same conditions, restrictions, limitations, penalties, exclusions, exemptions and definitions of terms and employ the same modes of procedure, as are prescribed in Sections 2 [20] (except the definition of "retailer maintaining a place of business in this State"), 3 through 3-80 [21] (except provisions pertaining to the State rate of tax, and except provisions concerning collection or refunding of the tax by retailers), 4, 11, 12, 12a, 14, 15, 19 [22] (except the portions pertaining to claims by retailers and except the last paragraph concerning refunds), 20, 21 and 22 of the Use Tax Act, [23] and are not inconsistent with this paragraph, as fully as if those provisions were set forth herein.

Whenever the Department determines that a refund should be made under this paragraph to a claimant instead of issuing a credit memorandum, the Department shall notify the State Comptroller, who shall cause the order to be drawn for the amount specified, and to the person named in the notification from the Department. The refund shall be paid by the State Treasurer out of the Regional Transportation Authority tax fund established under paragraph (n) of this Section.

(h) The Authority may impose a replacement vehicle tax of $50 on any passenger car as defined in Section 1-157 of the Illinois Vehicle Code [24] purchased within the metropolitan region by or on behalf of an insurance company to replace a passenger car of an insured person in settlement of a total loss claim. The tax imposed may not become effective before the first day of the month following the passage of the ordinance imposing the tax and receipt of a certified copy of the ordinance by the Department of Revenue. The Department of Revenue shall collect the tax for the Authority in accordance with Sections 3-2002 and 3-2003 of the Illinois Vehicle Code. [25]

The Department shall immediately pay over to the State Treasurer, ex officio, as trustee, all taxes collected hereunder.

As soon as possible after the first day of each month, beginning January 1, 2011, upon certification of the Department of Revenue, the Comptroller shall order transferred, and the Treasurer shall transfer, to the STAR Bonds Revenue Fund the local sales tax increment, as defined in the Innovation Development and Economy Act, collected under this Section during the second preceding calendar month for sales within a STAR bond district.

After the monthly transfer to the STAR Bonds Revenue Fund, on or before the 25th day of each calendar month, the Department shall prepare and certify to the Comptroller the disbursement of stated sums of money to the Authority. The amount to be paid to the Authority shall be the amount collected hereunder during the second preceding calendar month by the Department, less any amount determined by the Department to be necessary for the payment of refunds, and less any amounts that are transferred to the STAR Bonds Revenue Fund. Within 10 days after receipt by the Comptroller of the disbursement certification to the Authority provided for in this Section to be given to the Comptroller by the Department, the Comptroller shall cause the orders to be drawn for that amount in accordance with the directions contained in the certification.

(i) The Board may not impose any other taxes except as it may from time to time be authorized by law to impose.

(j) A certificate of registration issued by the State Department of Revenue to a retailer under the Retailers' Occupation Tax Act or under the Service Occupation Tax Act[26] shall permit the registrant to engage in a business that is taxed under the tax imposed under paragraphs (b), (e), (f) or (g) of this Section and no additional registration shall be required under the tax. A certificate issued under the Use Tax Act or the Service Use Tax Act shall be applicable with regard to any tax imposed under paragraph (c) of this Section.

(k) The provisions of any tax imposed under paragraph (c) of this Section shall conform as closely as may be practicable to the provisions of the Use Tax Act, including without limitation conformity as to penalties with respect to the tax imposed and as to the powers of the State Department of Revenue to promulgate and enforce rules and regulations relating to the administration and enforcement of the provisions of the tax imposed. The taxes shall be imposed only on use within the metropolitan region and at rates as provided in the paragraph.

(l) The Board in imposing any tax as provided in paragraphs (b) and (c) of this Section, shall, after seeking the advice of the State Department of Revenue, provide means for retailers, users or purchasers of motor fuel for purposes other than those with regard to which the taxes may be imposed as provided in those paragraphs to receive refunds of taxes improperly paid, which provisions may be at variance with the refund provisions as applicable under the Municipal Retailers Occupation Tax Act. The State Department of Revenue may provide for certificates of registration for users or purchasers of motor fuel for purposes other than those with regard to which taxes may be imposed as provided in paragraphs (b) and (c) of this Section to facilitate the reporting and nontaxability of the exempt sales or uses.

(m) Any ordinance imposing or discontinuing any tax under this Section shall be adopted and a certified copy thereof filed with the Department on or before June 1, whereupon the Department of Revenue shall proceed to administer and enforce this Section on behalf of the Regional Transportation Authority as of September 1 next following such adoption and filing. Beginning January 1, 1992, an ordinance or resolution imposing or discontinuing the tax hereunder shall be adopted and a certified copy thereof filed with the Department on or before the first day of July, whereupon the Department shall proceed to administer and enforce this Section as of the first day of October next following such adoption and filing. Beginning January 1, 1993, an ordinance or resolution imposing, increasing, decreasing, or discontinuing the tax hereunder shall be adopted and a certified copy thereof filed with the Department, whereupon the Department shall proceed to administer and enforce this Section as of the first day of the first month to occur not less than 60 days following such adoption and filing. Any ordinance or resolution of the Authority imposing a tax under this Section and in effect on August 1, 2007 shall remain in full force and effect and shall be administered by the Department of Revenue under the terms and conditions and rates of tax established by such ordinance or resolution until the Department begins administering and enforcing an increased tax under this Section as authorized by this amendatory Act of the 95th General Assembly. The tax rates authorized by this amendatory Act of the 95th General Assembly are effective only if imposed by ordinance of the Authority.

(n) The State Department of Revenue shall, upon collecting any taxes as provided in this Section, pay the taxes over to the State Treasurer as trustee for the Authority. The taxes shall be held in a trust fund outside the State Treasury. On or before the 25th day of each calendar month, the State Department of Revenue shall prepare and certify to the Comptroller of the State of Illinois and to the Authority (i) the amount of taxes collected in each County other than Cook County in the metropolitan region, (ii) the amount of taxes collected within the City of Chicago, and (iii) the amount collected in that portion of Cook County outside of Chicago, each amount less the amount necessary for the payment of refunds to taxpayers located in those areas described in items (i), (ii), and (iii). Within 10 days after receipt by the Comptroller of the certification of the amounts, the Comptroller shall cause an order to be drawn for the payment of two-thirds of the amounts certified in item (i) of this subsection to the Authority

and one-third of the amounts certified in item (i) of this subsection to the respective counties other than Cook County and the amount certified in items (ii) and (iii) of this subsection to the Authority.

In addition to the disbursement required by the preceding paragraph, an allocation shall be made in July 1991 and each year thereafter to the Regional Transportation Authority. The allocation shall be made in an amount equal to the average monthly distribution during the preceding calendar year (excluding the 2 months of lowest receipts) and the allocation shall include the amount of average monthly distribution from the Regional Transportation Authority Occupation and Use Tax Replacement Fund. The distribution made in July 1992 and each year thereafter under this paragraph and the preceding paragraph shall be reduced by the amount allocated and disbursed under this paragraph in the preceding calendar year. The Department of Revenue shall prepare and certify to the Comptroller for disbursement the allocations made in accordance with this paragraph.

(o) Failure to adopt a budget ordinance or otherwise to comply with Section 4.01 of this Act or to adopt a Five-year Capital Program or otherwise to comply with paragraph (b) of Section 2.01 of this Act shall not affect the validity of any tax imposed by the Authority otherwise in conformity with law.

(p) At no time shall a public transportation tax or motor vehicle parking tax authorized under paragraphs (b), (c) and (d) of this Section be in effect at the same time as any retailers' occupation, use or service occupation tax authorized under paragraphs (e), (f) and (g) of this Section is in effect.

Any taxes imposed under the authority provided in paragraphs (b), (c) and (d) shall remain in effect only until the time as any tax authorized by paragraphs (e), (f) or (g) of this Section are imposed and becomes effective. Once any tax authorized by paragraphs (e), (f) or (g) is imposed the Board may not reimpose taxes as authorized in paragraphs (b), (c) and (d) of the Section unless any tax authorized by paragraphs (e), (f) or (g) of this Section becomes ineffective by means other than an ordinance of the Board.

(q) Any existing rights, remedies and obligations (including enforcement by the Regional Transportation Authority) arising under any tax imposed under paragraphs (b), (c) or (d) of this Section shall not be affected by the imposition of a tax under paragraphs (e), (f) or (g) of this Section.

Credits

P.A. 78-5, 3rd Sp.Sess., Part I, art. IV, § 4.03, eff. Dec. 12, 1973. Amended by P.A. 78-1177, § 1, eff. Aug. 29, 1974; P.A. 78-1267, § 1, eff. Dec. 30, 1974; P.A. 79-1454, § 53, eff. Aug. 31, 1976; P.A. 81-3, 2nd Sp.Sess., § 11, eff. Sept. 19, 1979; P.A. 81-1379, § 7, eff. Aug. 12, 1980; P.A. 82-683, § 7, eff. Nov. 12, 1981; P.A. 82-1013, § 8, eff. Sept. 17, 1982; P.A. 83-114, § 7, eff. Aug. 19, 1983; P.A. 83-886, § 1, eff. Nov. 9, 1983; P.A. 83-1353, § 5, eff. Sept. 8, 1984; P.A. 83-1362, Art. II, § 127, eff. Sept. 11, 1984; P.A. 85-1135, Art. II, § 6, eff. Jan. 1, 1990; P.A. 86-928, Art. 3, § 5, eff. Jan. 1, 1990; P.A. 86-1475, Art. 5, § 5-11, eff. Jan. 10, 1991; P.A. 86-1481, Art. 10, § 1, eff. Jan. 14, 1991; P.A. 87-205, Art. 2, § 2-7, eff. July 1, 1992; P.A. 87-205, Art. 4, § 4-6, eff. Jan. 1, 1994; P.A. 87-435, Art. 2, § 2-27, eff. Sept. 10, 1991; P.A. 87-876, § 2, eff. Jan. 1, 1993; P.A. 87-895, Art. 2, § 2-64, eff. Aug. 14, 1992. Re-enacted by P.A. 91-51, § 160, eff. June 30, 1999. Amended by P.A. 92-221, § 910, eff. Aug. 2, 2001; P.A. 92-651, § 36, eff. July 11, 2002; P.A. 93-1068, § 20, eff. Jan. 15, 2005; P.A. 95-708, § 20, eff. Jan. 18, 2008; P.A. 96-339, § 90-70, eff. July 1, 2010; P.A. 96-939, § 100, eff. June 24, 2010; P.A. 97-38, § 90-75, eff. June 28, 2011; P.A. 97-227, § 56, eff. Jan. 1, 2012; P.A. 97-813, § 225, eff. July 13, 2012.

Formerly Ill.Rev.Stat.1991, ch. 111 #, ¶ 704.03.

Notes of Decisions (22)

Footnotes

1 35 ILCS 505/1 et seq.

2 65 ILCS 5/8-11-1 et seq.

3 35 ILCS 120/1 et seq.

4 35 ILCS 120/1, 120/1a, 120/1a-1, 120/1c, 120/1f, 120/1i, 120/1j, 120/2 to 120/2-65.

5 35 ILCS 120/2c, 120/3.

6 35 ILCS 120/4, 120/5, 120/5a, 120/5b, 120/5c, 120/5d, 120/5e, 120/5f, 120/5g, 120/5h, 120/5i, 120/5j, 120/5k, 120/5*l*, 120/6, 120/6a, 120/6b, 120/6c, 120/7, 120/8, 120/9, 120/10, 120/11, 120/12, and 120/13.

7 35 ILCS 735/3-7.

8 35 ILCS 105/1 et seq.

9 210 ILCS 85/1 et seq.

10 210 ILCS 45/1-101 et seq.

11 35 ILCS 120/1a-1, 120/2, 120/2a, and 120/3 to 120/3-50.

12 35 ILCS 120/4.

13 35 ILCS 120/5, 120/7, 120/8.

14 35 ILCS 120/9.

15 35 ILCS 120/10, 120/11, 120/12.

16 35 ILCS 120/2b.

17 35 ILCS 115/13.

18 35 ILCS 115/15, 115/17, 115/18, 115/19, and 115/20.

19 35 ILCS 110/1 et seq.

20 35 ILCS 105/2.

21 35 ILCS 105/3 to 105/3-80.

22 35 ILCS 105/4, 105/11, 105/12, 105/12a, 105/14, 105/15, 105/19.

23 35 ILCS 105/20, 105/20, 105/21 and 105/22.

24 625 ILCS 5/1-157.

25 625 ILCS 5/3-2002 and 5/3-2003.

26 35 ILCS 115/1 et seq.

70 I.L.C.S. 3615/4.03, IL ST CH 70 § 3615/4.03

Current through P.A. 97-1146 of the 2012 Reg. Sess.

End of Document

Exhibit C

Joint Committee on Administrative Rules

ADMINISTRATIVE CODE

TITLE 86: REVENUE
CHAPTER I: DEPARTMENT OF REVENUE
PART 320 REGIONAL TRANSPORTATION AUTHORITY RETAILERS' OCCUPATION TAX
SECTION 320.115 JURISDICTIONAL QUESTIONS

Section 320.115 Jurisdictional Questions

a) Mere Solicitation of Orders not Doing Business

1) For a seller to incur Regional Transportation Authority Retailers' Occupation Tax liability in the metropolitan region, the sale must be made in the course of such seller's engaging in the retail business within the metropolitan region. In other words, enough of the selling activity must occur within the metropolitan region to justify concluding that the seller is engaged in business within the metropolitan region with respect to that sale. The same principles are applicable as to determining in which county of the metropolitan region a sale is made.

2) For example, the Supreme Court has held the mere solicitation and receipt of orders within a taxing jurisdiction (the State), where such orders were subject to acceptance outside the taxing jurisdiction and title passed outside such jurisdiction, with the goods being shipped from outside such jurisdiction to the purchaser in such jurisdiction, did not constitute engaging in the business of selling within such jurisdiction. This conclusion was reached independently of any question of interstate commerce and so would apply to a county as the taxing jurisdiction as much as to the State as the taxing jurisdiction.

b) Seller's Acceptance of Order

1) Without attempting to anticipate every kind of fact situation that may arise in this connection, it is the Department's opinion, in general, that the seller's acceptance of the purchase order or other contracting action in the making of the sales contract is the most important single factor in the occupation of selling. If the purchase order is accepted at the seller's place of business within the metropolitan region or by someone who is working out of such place of business and who does not conduct the business of selling elsewhere within the meaning of subsections (f) and (g) of this Section, or if

a purchase order which is an acceptance of the seller's complete and unconditional offer to sell is received by the seller's place of business within the metropolitan region or by someone working out of such place of business, the seller incurs Regional Transportation Authority Retailers' Occupation Tax liability in the metropolitan region if the sale is at retail and the purchaser receives the physical possession of the property in Illinois.

2) The Department will assume that the seller has accepted the purchase order at the place of business at which the seller receives such purchase order from the purchaser in the absence of clear proof to the contrary.

3) If a purchase order is accepted outside this State, but the tangible personal property which is sold is in an inventory of the retailer located within the metropolitan region at the time of its sale (or is subsequently produced in the region), then delivered in Illinois to the purchaser, the seller will be considered to be engaged in business in the metropolitan region for Regional Transportation Authority Retailers' Occupation Tax purposes with respect to such sale. The county in the region where the property is located at the time of sale (or subsequent production in a county in the metropolitan region) is determinative of the applicable Regional Transportation Authority Retailers' Occupation Tax rate.

c) Some Considerations Which Are Not Controlling

1) Delivery of the property within the metropolitan region to the purchaser is not necessary for the seller to incur Regional Transportation Authority Retailers' Occupation Tax liability. It is sufficient that the purchaser receives the physical possession of the property somewhere in Illinois as far as the question of delivery is concerned. This is true because there is no exemption for intercity commerce comparable to the exemption arising from interstate commerce, and it is not necessary for delivery to be completed within the metropolitan region for the seller to be regarded as being engaged in the business of selling within the metropolitan region with respect to that sale.

2) The point at which the tangible personal property will be used or consumed and the place at which the purchaser resides are also immaterial in determining whether or not the seller incurs Regional Transportation Authority Retailers' Occupation Tax liability. Furthermore, the place at which the technical sale occurs (i.e., the place at which title passes) is not a decisive consideration since the phrase "in the metropolitan region" in Section 4.03(e) of the Regional Transportation Authority Act [70 ILCS 3615/4.03(e)] refers only to the location of the occupation of selling that is being taxed and not to the place where sales may be made. (See Standard Oil Company v. Department of Finance, et al., 383 Ill. 136 (1934), for a similar problem under the Illinois Retailers' Occupation Tax Act.)

d) Place of Business where Long Term or Blanket Contracts are Involved
Under a long term blanket or master contract which (though definite as to price and quantity) must be implemented by the purchaser's placing of specific orders when goods are wanted, the seller's place of business with which such subsequent specific orders are placed (rather than the place where the seller signed the master contract) will determine where the seller is engaged in business for Regional Transportation Authority Retailers' Occupation Tax purposes with respect to such orders.

e) Sales Through Vending Machines
The seller's place of engaging in business when making sales through a vending machine is the place where the vending machine is located when such sales are made.

f) Sales from Vehicles Carrying Uncommitted Stock of Goods
The seller's place of engaging in business when making sales and deliveries (not just deliveries pursuant to previously accepted orders, but actual sales and deliveries) from a vehicle in which a stock of goods is being carried for sale is the place at which such sales and deliveries happen to be made – the vehicle carrying such stock of goods for sale being regarded as a portable place of business.

g) Sales of Coal or other Minerals

1) For the purpose of determining whether the Regional Transportation Authority Retailers' Occupation Tax is applicable for a retail sale by a producer of coal or other mineral mined in Illinois, the sale is a sale at retail at the place where the coal or other mineral mined in Illinois is extracted from the earth.

2) 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. For purposes of this Section, "extracted from the earth" means the location at which the coal or other mineral is extracted from the mouth of the mine.

3) A mineral mined 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, however, to sales 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 the metropolitan region and transports it over its own line to an out-of-State destination.

4) 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 the Regional

Transportation Authority Retailers' Occupation Tax on that sale will be applicable if the retailer is located in the metropolitan region.

(Source: Amended at 24 Ill. Reg. 18370, effective December 1, 2000)

Exhibit D

DEPARTMENT OF REVENUE

NOTICE OF PROPOSED AMENDMENT

1) Heading of the Part: Regional Transportation Authority Retailers' Occupation Tax

2) Code Citation: 86 Ill. Adm. Code 320

3)

Section Numbers:	Proposed Action:
320.115	Amendment

4) Statutory Authority: 70 ILCS 3615/4.03

5) A Complete Description of the Subjects and Issues Involved: These proposed regulations provide guidance for retailers to determine what local taxes they incur based on the location where they are "engaged in the business of selling tangible personal property." The Department's current regulation governing local jurisdictional issues was invalidated by the Illinois Supreme Court in *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130. The proposed rule contains three basic parts. In subsection (a), the rule sets out three core principles underlying determinations for local occupation tax sourcing. As the court in *Hartney* emphasized, a fact-intensive inquiry into the composite of activities that comprise a retailer's business must be analyzed. Subsection (b) applies these principles to commonly occurring types of retail transactions, thereby providing guidance to the vast majority of retailers operating in Illinois. Subsection (c) then applies these principles to retailers that engage in selling activities in multiple jurisdictions. This subsection establishes several primary factors to be used in determining local occupation tax sourcing, as well as several secondary factors to be used when the primary factors, alone, are not dispositive. It also sets out guidance to be used when a determination is very close, due to the fact that a retailer's activities are spread throughout so many jurisdictions. In this case, the rule provides that the Department will evaluate all the factors in keeping with the principle articulated in *Hartney* that a retailer incurs tax in the jurisdiction where it "enjoyed the greater part of governmental protection [and] benefitted by being conducted under that protection." The regulation reiterates *Hartney's* emphasis on the Department's ability to look through the form of a putatively multijurisdictional transaction to its substance in determining where enough of the business of selling takes place to subject it to local occupation taxes. Please note that this rulemaking differs from the emergency rules currently in effect in one important way. This rulemaking does not contain the subsection, currently found in the emergency rules, entitled, "Long Term or Blanket Contracts." In other respects, the rules are substantively identical.

6) Published studies or reports, and sources of underlying data, used to compose this rulemaking: None

7) Will this rulemaking replace any emergency rulemaking currently in effect: Yes

8) Does this rulemaking contain an automatic repeal date? No

9) Does this rulemaking contain incorporations by reference? No

10) Are there any other proposed rulemakings pending on this Part? No

11) Statement of Statewide Policy Objective: This rulemaking does not create a State mandate, nor does it modify any existing State mandates.

12) Time, Place and Manner in which interested persons may comment on this proposed rulemaking: Persons who wish to submit comments on this proposed rulemaking may submit them in writing by no later than 45 days after publication of this Notice to:

Paul Berks
Deputy General Counsel
Illinois Department of Revenue
100 W. Randolph St. 7th Floor
Chicago, IL 60601

(312) 814-4680 (ph)
(312) 814-4344 (fax)

13) Initial Regulatory Flexibility Analysis:

A) Types of small businesses, small municipalities and not for profit corporations affected: Retailers; jurisdictions that receive tax revenue under this Part.

B) Reporting, bookkeeping or other procedures required for compliance: Bookkeeping.

C) Types of professional skills necessary for compliance: Bookkeeping.

14) Regulatory Agenda on which this rulemaking was summarized: January 2014.

The full text of the Proposed Amendment begins on the next page:

Section 320.115 Jurisdictional Questions

a) Retailer's Selling Activities Determine Taxing Jurisdiction

1) The Regional Transportation Authority Act [70 ILCS 3615/4.03] authorizes the Authority to impose a tax on those engaged in the business of selling tangible personal property at retail in the metropolitan region. 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 Regional Transportation Authority Retailers' Occupation Tax is owed. Rather, it is the jurisdiction where the seller is engaged in the business of selling that can impose the tax. Automatic Voting Machs. v. Daley, 409 Ill. 438, 447 (1951) ("In short, the tax is imposed on the 'occupation' of the retailer and not upon the 'sales' as such.") (citing Mahon v. Nudelman, 377 Ill. 331 (1941) and Standard Oil Co. v. Dep't of Finance, 383 Ill. 136 (1943)); see also Young v. Hulman, 39 Ill. 2d 219, 225 (1968) ("the retailers occupational tax . . . imposes liability upon the occupation of Selling at retail and not on the Sale itself"). By allowing the Authority to impose tax on retailers who conduct business in the metropolitan region, the Regional Transportation Authority Act links the retailer's tax liability to where it principally enjoys the benefits of government services. Svithiod Singing Club v. McKibbin, 381 Ill. 194, 199 (1942).

2) Illinois Supreme Court – Fact-specific Inquiry. The Illinois Supreme Court has held 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)).

3) Determination of Taxing Jurisdiction. Applying the provisions in subsections (a)(1) and (a)(2) of this Section, a seller incurs Regional Transportation Authority Retailers' Occupation Tax in the metropolitan region if its predominant and most important selling activities take place in the metropolitan region. 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. Ex-Cell-O Corp. v. McKibbin, 383 Ill. 316, 322-23 (1943); Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130, paragraphs 30 through 35.

b) Guidance on the Application of the Composite of Selling Activities Test to Common Selling Operations

1) In General. For most retailers, the jurisdiction in which they are engaged in the business of selling is not open to reasonable dispute because it is obvious where the most significant selling activities take place. Retailers engaged in common selling operations, with a clear location of predominant selling activities, constitute the vast majority of retailers in the State. Subsections (b)(2) through (b)(7) of this Section provide guidance on applying the fact-specific "composite of selling activities" test to common and longstanding selling operations.

2) Over-the-counter Sales. When a person makes an over-the-counter sale of tangible personal property within a jurisdiction and the purchaser takes possession of the property immediately; or the seller ships the property to the purchaser from the location where the sale was made, then the seller is engaged in the business of selling with respect to that sale in the jurisdiction where the over-the-counter sale occurred.

3) In-state Inventory/Out-of-state Selling Activity. If a retailer's selling activity takes place outside this State, but the tangible personal property that is sold is in an inventory of the retailer located within a jurisdiction in Illinois at the time of its sale (or is subsequently produced 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 will determine where the seller is engaged in business with respect to that sale. Chemed Corp., Inc. v. Department of Revenue, 186 Ill. App. 3d 402 (4th Dist. 1989).

4) Sales Through Vending Machines. The seller's place of engaging in business when making sales through a vending machine is the place where the vending machine is located when the sales are made.

5) Sales From Vehicles Carrying Uncommitted Stock of Goods. The seller's place of engaging in business when making sales and deliveries (not just deliveries pursuant to previously completed sales, but actual sales and deliveries) from a vehicle in which a stock of goods is being carried for sale is the place at which the sales and deliveries happen to be made – the vehicle carrying the stock of goods for sale being regarded as a portable place of business.

6) 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 within the jurisdiction where the coal or other mineral mined in Illinois is extracted from the earth. For purposes of this Section,

"extracted from the earth" means the location at which the coal or other mineral is extracted from the mouth of the mine.

A) 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.

B) A mineral 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, however, to sales 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 within the jurisdiction and transports it over its own line to an out-of-State destination.

C) 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 as provided in this Section.

7) Order Acceptance Not Doing Business in the Jurisdiction of the Authority

A) Except as otherwise provided in subsections (b)(2) through (b)(6), acceptance of purchase orders for the sale of tangible personal property in a jurisdiction does not constitute engaging in the business of selling in the jurisdiction in which orders are accepted if the following conditions are met:

i) the seller has no other selling activity within the jurisdiction except receipt and acceptance of purchase orders;

ii) all orders for the purchase of tangible personal property are submitted to the seller within the jurisdiction by means of telephone or Internet; and

iii) the seller's employees or agents who accept purchase orders record information relayed by the customer (such as purchaser's name and address; price, type and quantity of items; and method of payment and delivery), but do not negotiate or exercise discretion on behalf of the seller.

B) The place of engaging in the business of selling for retailers who accept purchase orders within a jurisdiction and who meet the criteria set forth in subsection (b)(7)(A) shall be determined based on the composite of selling activities engaged in outside the jurisdiction in which purchase orders are accepted, in accordance with subsections (c)(2) through (c)(4).

c) Application of Composite of Selling Activities Test to Multi-Jurisdictional Intrastate Retailers

1) In General. Some sellers are engaged in retail operations with selling activities in multiple jurisdictions in Illinois that do not fall within any of the categories identified in subsection (b) of this Section. The selling activities that comprise these businesses "are as varied as the methods which men select to carry on retail businesses." Ex-Cell-O Corp. v. McKibbin, 383 Ill. 316, 321 (1943). Consequently, "it is . . . not possible to prescribe by definition which of the many activities must take place in [a jurisdiction] to constitute it an occupation conducted in [that jurisdiction]. . . . [I]t is necessary to determine each case according to the facts which reveal the method by which the business was conducted." Ex-Cell-O Corp. v. McKibbin, 383 Ill. 316, 321-22 (1943); see also Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130, paragraph 36. The location of the selling activities most important to each retailer's business of selling dictates the jurisdiction where it is engaged in the business of selling.

2) Primary Factors. Without attempting to anticipate every kind of fact situation that may arise, taxpayers that divide selling activities among personnel located in multiple jurisdictions should consider the following selling activities to determine where they are engaged in the business of selling and, therefore, the correct taxing jurisdiction:

A) Location of officers, executives and employees with discretion to negotiate on behalf of, and to bind, the seller, Automatic Voting Machs. v. Daley, 409 Ill. 438, 440 (1951); Marshall & Huschart Mach. Co. v. Dep't of Revenue, 18 Ill. 2d 496, 501 (1960); Int'l-Stanley Corp. v. Dep't of Revenue, 40 Ill. App. 3d 397, 406 (1st Dist. 1976); Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130, paragraph 62;

B) Location where offers are prepared and made, Automatic Voting Machs. v. Daley, 409 Ill. 438, 441, 452 (1951);

C) Location where purchase orders are accepted or other contracting actions that bind the seller to the sale are completed, Ex-Cell-O Corp. v. McKibbin, 383 Ill. 316 (1943); Automatic Voting Machs. v. Daley, 409 Ill. 438, 452 (1951); and

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, Int'l-Stanley Corp. v. Dep't of Revenue, 40 Ill. App. 3d 397, 401, 406 (1st Dist. 1976); Chemed Corp., Inc. v. State, 186 Ill. App. 3d 402, 421-22 (4th Dist. 1989).

3) Secondary Factors. If, after consideration of the factors listed in subsection (c)(2) of this Section, the jurisdiction in which the seller is engaged in the business of selling is unclear, the following additional factors should be considered to resolve the issue:

A) Location where marketing and solicitation occur, Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130, paragraph 62;

B) 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;

C) Location of the delivery of the property to the purchaser, Ex-Cell-O Corp. v. McKibbin, 383 Ill. 316, 323 (1943);

D) Location where title passes, Int'l-Stanley Corp. v. Dep't of Revenue, 40 Ill. App. 3d 397, 406 (1st Dist. 1976); and

E) Location of the retailer's ordering, billing, accounts receivable and other administrative functions, Federal Bryant Mach. Co. v. Dep't of Revenue, 41 Ill. 2d 64, 68 (1968); Automatic Voting Machs. v. Daley, 409 Ill. 438, 452 (1951); Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130, paragraph 62.

4) Principles Underlying Determination of Seller's Location

A) When a retailer's selling activities are spread through multiple Illinois jurisdictions, and where the retailer is engaged in the business of selling presents a close question, the Department will evaluate the factors in subsections (c)(2) and (c)(3) of this Section in keeping with the principle that the retailer incurs local retailers' occupation taxes in the jurisdiction where it "enjoyed the greater part of governmental protection [and] benefitted by being conducted under that protection." Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130, paragraph 34 (quoting Svithiod Singing Club v. McKibbin, 381 Ill. 194, 197 (1942)).

B) 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. Marshall & Huschart Mach. Co. v. Dep't of Revenue, 18 Ill. 2d 496, 501 (1960); Fed. Bryant Mach. Co. v. Dep't of Revenue, 41 Ill. 2d 64, 67 (1968); Int'l-Stanley Corp. v. Dep't of Revenue, 40 Ill. App. 3d 397, 406 (1st Dist. 1976); Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130, paragraph 31. For example, the Department will not look to the location of a party that is owned by or has common ownership with a supplier or a purchaser if that party does not, in substance, conduct the selling activities identified in subsections (c)(2) and (c)(3).

~~a) Mere Solicitation of Orders not Doing Business~~

~~1) For a seller to incur Regional Transportation Authority Retailers' Occupation Tax liability in the metropolitan region, the sale must be made in the course of such seller's engaging in the retail business within the metropolitan region. In other words, enough of the selling activity must occur within the metropolitan region to justify concluding that the seller is engaged in business within the metropolitan region with respect to that sale. The same principles are applicable as to determining in which county of the metropolitan region a sale is made.~~

~~2) For example, the Supreme Court has held the mere solicitation and receipt of orders within a taxing jurisdiction (the State), where such orders were subject to acceptance outside the taxing jurisdiction and title passed outside such jurisdiction, with the goods being shipped from outside such jurisdiction to the purchaser in such jurisdiction, did not constitute engaging in the business of selling within such jurisdiction. This conclusion was reached independently of any question of interstate commerce and so would apply to a county as the taxing jurisdiction as much as to the State as the taxing jurisdiction.~~

~~b) Seller's Acceptance of Order~~

~~1) Without attempting to anticipate every kind of fact situation that may arise in this connection, it is the Department's opinion, in general, that the seller's acceptance of the purchase order or other contracting action in the making of the sales contract is the most important single factor in the occupation of selling. If the purchase order is accepted at the seller's place of business within the metropolitan region or by someone who is working out of such place of business and who does not conduct the business of selling elsewhere within the meaning of subsections (f) and (g) of this Section, or if a purchase order which is an acceptance of the seller's complete and unconditional offer to sell is received by the seller's place of business within the metropolitan region or by someone working out of such place of business, the seller incurs Regional Transportation~~

~~Authority Retailers' Occupation Tax liability in the metropolitan region if the sale is at retail and the purchaser receives the physical possession of the property in Illinois.~~

~~2) The Department will assume that the seller has accepted the purchase order at the place of business at which the seller receives such purchase order from the purchaser in the absence of clear proof to the contrary.~~

~~3) If a purchase order is accepted outside this State, but the tangible personal property which is sold is in an inventory of the retailer located within the metropolitan region at the time of its sale (or is subsequently produced in the region), then delivered in Illinois to the purchaser, the seller will be considered to be engaged in business in the metropolitan region for Regional Transportation Authority Retailers' Occupation Tax purposes with respect to such sale. The county in the region where the property is located at the time of sale (or subsequent production in a county in the metropolitan region) is determinative of the applicable Regional Transportation Authority Retailers' Occupation Tax rate.~~

~~c) Some Considerations Which Are Not Controlling~~

~~1) Delivery of the property within the metropolitan region to the purchaser is not necessary for the seller to incur Regional Transportation Authority Retailers' Occupation Tax liability. It is sufficient that the purchaser receives the physical possession of the property somewhere in Illinois as far as the question of delivery is concerned. This is true because there is no exemption for intercity commerce comparable to the exemption arising from interstate commerce, and it is not necessary for delivery to be completed within the metropolitan region for the seller to be regarded as being engaged in the business of selling within the metropolitan region with respect to that sale.~~

~~2) The point at which the tangible personal property will be used or consumed and the place at which the purchaser resides are also immaterial in determining whether or not the seller incurs Regional Transportation Authority Retailers' Occupation Tax liability. Furthermore, the place at which the technical sale occurs (i.e., the place at which title passes) is not a decisive consideration since the phrase "in the metropolitan region" in Section 4.03(e) of the Regional Transportation Authority Act [70 ILCS 3615/4.03(e)] refers only to the location of the occupation of selling that is being taxed and not to the place where sales may be made. (See Standard Oil Company vs. Department of Finance, et al., 383 Ill. 136 (1934), for a similar problem under the Illinois Retailers' Occupation Tax Act.)~~

~~d) Place of Business where Long Term or Blanket Contracts are Involved~~

~~Under a long term blanket or master contract which (though definite as to price and quantity) must be implemented by the purchaser's placing of specific orders when goods are wanted, the seller's place of business with which such subsequent specific orders are placed (rather than the place where the seller signed the master contract) will determine where the seller is engaged in business for Regional Transportation Authority Retailers' Occupation Tax purposes with respect to such orders.~~

~~e) Sales Through Vending Machines~~

~~The seller's place of engaging in business when making sales through a vending machine is the place where the vending machine is located when such sales are made.~~

~~f) Sales from Vehicles Carrying Uncommitted Stock of Goods~~

~~The seller's place of engaging in business when making sales and deliveries (not just deliveries pursuant to previously accepted orders, but actual sales and deliveries) from a vehicle in which a stock of goods is being carried for sale is the place at which such sales and deliveries happen to be made -- the vehicle carrying such stock of goods for sale being regarded as a portable place of business.~~

~~g) Sales of Coal or other Minerals~~

~~1) For the purpose of determining whether the Regional Transportation Authority Retailers' Occupation Tax is applicable for a retail sale by a producer of coal or other mineral mined in Illinois, the sale is a sale at retail at the place where the coal or other mineral mined in Illinois is extracted from the earth.~~

~~2) 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. For purposes of this Section, "extracted from the earth" means the location at which the coal or other mineral is extracted from the mouth of the mine.~~

~~3) A mineral mined 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, however, to sales 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 the metropolitan region and transports it over its own line to an out-of-State destination.~~

~~4) 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 the Regional Transportation Authority Retailers' Occupation Tax on that sale will be applicable if the retailer is located in the metropolitan region.~~

(Source: Amended at 38 Ill. Reg. _____, effective _____)

Exhibit E

DEPARTMENT OF REVENUE

NOTICE OF PROPOSED AMENDMENT

TITLE 86: REVENUE
CHAPTER I: DEPARTMENT OF REVENUE

PART 320
REGIONAL TRANSPORTATION AUTHORITY RETAILERS' OCCUPATION TAX

Section

AUTHORITY: Authorized by and implementing Section 4.03 of the Regional Transportation Authority Act [70 ILCS 3615/4.03].

SOURCE: Adopted at 4 Ill. Reg. 28, p. 542, effective July 1, 1980; codified at 6 Ill. Reg. 9681; amended at 15 Ill. Reg. 6316, effective April 11, 1991; amended at 24 Ill. Reg. 18370, effective December 1, 2000; amended at 34 Ill. Reg. 11444, effective July 26, 2010, effective July 26, 2010; emergency amendment at 38 Ill. Reg.4073, effective January 22, 2014, for a maximum of 150 days; amended at 38 Ill. Reg. _____, effective _____.

Section 320.115 Jurisdictional Questions

a) Definitions:

When used in this Part, "Metropolitan Region" means all territory included within the territory of the Regional Transportation Authority as provided in the Regional Transportation Authority Act, and such territory as may be annexed to the Regional Transportation Authority.

When used in this Part, "Selling Activities" refer to those activities that comprise "an occupation, the business of which is to sell tangible personal property at retail." Ex-Cell-O Corp. v. McKibbin, 383 Ill. 316, 321 (1943). "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." *Id.*

b) Retailer's Selling Activities Determine Taxing Jurisdiction

1) Occupation of Selling. The Regional Transportation Authority Act [70 ILCS 3615/4.03] authorizes the Regional Transportation Authority to impose a tax on those engaged in the business of selling tangible personal property at retail within the Metropolitan Region. 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 retailers' occupation tax is owed. Rather, it is the jurisdiction where the seller is engaged in the business of selling that can impose the tax. Automatic Voting Machs. v. Daley, 409 Ill. 438, 447 (1951) ("In short, the tax is imposed on the 'occupation' of the retailer and not upon the 'sales' as such.") (citing Mahon v. Nudelman, 377 Ill. 331 (1941) and Standard Oil Co. v. Dep't of Finance, 383 Ill. 136 (1943)); see also Young v. Hulman, 39 Ill. 2d 219, 225 (1968) ("the retailers occupational tax . . . imposes liability upon the occupation of Selling at retail and not on the Sale itself").

2) Composite of Selling Activities. 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)).

3) Multijurisdictional Retailers. Some retailers are engaged in retail operations with Selling Activities in multiple jurisdictions within the State, or in jurisdictions located in more than one State. The Selling Activities that comprise these businesses "are as varied as the methods which men select to carry on retail businesses." Ex-Cell-O Corp. v. McKibbin, 383 Ill. 316, 321

(1943). Consequently, "it is . . . not possible to prescribe by definition which of the many activities must take place in [a jurisdiction] to constitute it an occupation conducted in [that jurisdiction]. . . . [I]t is necessary to determine each case according to the facts which reveal the method by which the business was conducted." Ex-Cell-O Corp. v. McKibbin, 383 Ill. 316, 321-22 (1943); see also Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130, paragraph 36.

4) Statutory Intent. It is the intent of the Regional Transportation Authority Retailers' Occupation Tax that retailers will incur local retailer's occupation tax in a jurisdiction in Illinois if they "enjoyed the greater part of governmental [services and] protection" in that jurisdiction. Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130, paragraph 34 (quoting Svithiod Singing Club v. McKibbin, 381 Ill. 194, 197 (1942)). By allowing the Regional Transportation Authority to impose tax on retailers who conduct business **in the Metropolitan Region**, the Regional Transportation Authority Act links the retailer's tax liability to where it principally enjoys the benefits of government services. Svithiod Singing Club v. McKibbin, 381 Ill. 194, 199 (1942).

5) Determination of Taxing Jurisdiction. Applying the provisions in subsections (b)(1) and (b)(4) of this Section, a seller incurs Regional Transportation Authority Retailers' Occupation Tax in a **particular jurisdiction within the Metropolitan Region** if its predominant and most important Selling Activities take place in **that jurisdiction**. 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. Ex-Cell-O Corp. v. McKibbin, 383 Ill. 316, 322-23 (1943); Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130, paragraphs 30-35.

6) Substance over Form. 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. Marshall & Huschart Mach. Co. v. Dep't of Revenue, 18 Ill. 2d 496, 501 (1960); Fed. Bryant Mach. Co. v. Dep't of Revenue, 41 Ill. 2d 64, 67 (1968); Int'l-Stanley Corp. v. Dep't of Revenue, 40

Ill. App. 3d 397, 406 (1st Dist. 1976); Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130, paragraph 31. For example, the Department will not look to the location of a party that is owned by or has common ownership with a supplier or a purchaser if that party does not, in substance, conduct the selling activities related to the sales.

7) Same Standard Applies to Intrastate and Interstate Retailers. 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. Ex-Cell-O Corp. v. McKibbin, 383 Ill. 316 (1943); Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130 paragraph 30 ("[T]he location of the business of selling inside or outside the state controls . . .[.]"). 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. 35 ILCS 105/2 (defining "retailer maintaining a place of business in the State"); Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130 paragraph 31 ("some combination of activities within the state are insufficient for the retail occupation tax to apply") (citing Automatic Voting Machs. v. Daley, 409 Ill. 438, 447 (1951)).

8) Because it is not practicable for retailers to divide retailer's 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.

c) Application of Composite of Selling Activities Test to Retailers Conducting Selling Activities in Multiple Taxing Jurisdictions.

Every retailer maintaining a place of business in this State shall determine the taxing jurisdictions in which it is engaged in the business of selling with respect to each of its sales by applying the standards set forth below, except where a retailer is engaged in particular selling activities identified by a statute that specifies the

taxing jurisdiction where retailers engaged in such activities shall remit retailer's occupation tax. Such retailers shall remit retailer's occupation tax as directed by statute notwithstanding anything in these rules to the contrary.

1) Primary Selling Activities. Without attempting to anticipate every kind of fact situation that may arise, taxpayers that divide Selling Activities among personnel located in multiple jurisdictions shall consider the following Selling Activities to determine where they are engaged in the business of selling:

A) Location of sales personnel exercising discretion and authority to solicit customers on behalf of, and to bind the seller to a 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 the sale;

C) The location where payment is tendered and received, or from which invoices are issued;

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) The 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. Where executive authority is located in multiple jurisdictions, the place of daily operational decision making is the headquarters.

2) A retailer engaging in three or more Primary Selling Activities in one location in the State shall remit the Retailers' Occupation Tax imposed by the taxing bodies with authority to impose Retailers' Occupation Tax on those engaged in the business of selling in that location. A retailer engaging in three or more Primary Selling Activities outside the State shall collect and remit tax to the State to the extent required by the Illinois Use Tax Act, except as provided in subsection (d).

3) Application of Primary Selling Activities to Common Selling Operations. Retailers engaged in selling operations with a single location where the Primary Selling Activities predominate constitute the vast majority of retailers in the State. Subsections (c)(3)(A) through (c)(3)(D) of this Section apply the Primary Selling Activities to certain common selling operations and identify the location where the Department will presume the seller is engaged in the business of selling with respect to each sale.

A) If a purchaser is present at a place of business owned or leased by a retailer and there enters into an agreement with the retailer's sales personnel to purchase tangible personal property, and makes payment for that property at the same place of business, then the retailer's occupation tax for that sale is incurred at the retailer's place of business where the sale occurred regardless of whether the purchaser takes immediate possession of the tangible personal property, or the retailer delivers or arranges for the property to be delivered to the purchaser.

B) Sales Through Vending Machines. A retailer is engaged in the business of selling food, beverages or other tangible personal property through a vending machine at the location where the vending machine is located when the sale is made if (1) the vending machine is a device operated by coin, currency, credit card, token, coupon or similar device that dispenses food, beverage or other tangible personal property; (2) the food, beverage or other tangible personal property is contained within the vending machine and dispensed from the vending machine; and (3) the purchaser takes possession of the purchased food, beverage or other tangible personal property immediately.

C) Sales From Vehicles Carrying Uncommitted Stock of Goods. The seller's place of engaging in business when making sales and deliveries (not just deliveries pursuant to previously completed sales, but actual sales and deliveries) from a vehicle in which a stock of goods is being carried for sale is the place at which the sales and deliveries actually are made. The vehicle carrying the stock of goods for sale is regarded as a portable place of business.

4) Secondary Selling Activities. If the Primary Selling Activities listed in subsection (c)(1) of this Section occur in multiple jurisdictions, but no

individual jurisdiction has more than two Primary Selling Activities, the following additional Selling Activities shall 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 (c)(2)(A), above;

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.

5) Except as provided in subsection (d), a retailer that is not engaged in the business of selling in a jurisdiction under (c)(2) is engaged in the business of selling in the jurisdiction where its inventory is located under (c)(1)(D), or where its headquarters is located under (c)(1)(E), whichever jurisdiction is the location where more Selling Activities occur, considering both Primary and Secondary Selling Activities.

6) A retailer that is not engaged in the business of selling in a jurisdiction under (c)(2) or under (c)(5), is presumed to be engaged in the business of selling at the location of its headquarters absent clear and convincing evidence to the contrary.

d) Presumptions Applying to Certain Selling Operations:

1) For certain classes of retailers with unique, complicated, or widely dispersed Selling Activities, determining appropriate tax situs in every situation presents substantial administrative difficulties for both retailers and tax enforcement personnel. Subsections (d)(2)-(d)(5) provide administrative "short cuts" that balance the administrative difficulties presented by certain selling operations against the need for accurate tax assessment.

2) In-state Inventory/Out-of-state Selling Activity. If a retailer's Selling Activities take place in taxing jurisdictions outside this 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 that sale. Chemed Corp., Inc. v. Department of Revenue, 186 Ill. App. 3d 402 (4th Dist. 1989).

3) 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 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 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.

4) Leases with an option to purchase. A lease with a dollar or other nominal option to purchase is considered to be a conditional sale subject to Retailers' Occupation Tax. 86 Ill. Adm. Code 130.2010(a). 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.

5) 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. For purposes of this Section, "extracted from the earth" means the location at which the coal or other mineral is extracted from the mouth of the mine.

A) 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.

B) A mineral 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, however, to sales 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 the jurisdiction and transports it over its own line to an out-of-State destination.

C) 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 as provided in this Section.

Exhibit F

TITLE 86: REVENUE
CHAPTER I: DEPARTMENT OF REVENUE

PART 320
REGIONAL TRANSPORTATION AUTHORITY RETAILERS' OCCUPATION TAX

Section

AUTHORITY: Authorized by and implementing Section 4.03 of the Regional Transportation Authority Act [70 ILCS 3615/4.03].

SOURCE: Adopted at 4 Ill. Reg. 28, p. 542, effective July 1, 1980; codified at 6 Ill. Reg. 9681; amended at 15 Ill. Reg. 6316, effective April 11, 1991; amended at 24 Ill. Reg. 18370, effective December 1, 2000; amended at 34 Ill. Reg. 11444, effective July 26, 2010; emergency amendment at 38 Ill. Reg. 4073, effective January 22, 2014, for a maximum of 150 days; emergency expired June 20, 2014; amended at 38 Ill. Reg. _____, effective _____.

Section 320.115 Jurisdictional Questions

a) Definitions

When used in this Part, "Metropolitan Region" means all territory included within the Regional Transportation Authority as provided in the Regional Transportation Authority Act, and such territory as may be annexed to the Regional Transportation Authority.

When used in this Part, "Selling Activities" refers to those activities that comprise "an occupation, the business of which is to sell tangible personal property at retail". "Selling Activities" includes "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).

b) Retailer's Selling Activities Determine Taxing Jurisdiction

1) Occupation of Selling. The Regional Transportation Authority Act [70 ILCS 3615] authorizes the Authority to impose a tax on those engaged in the business of selling tangible personal property at retail in the metropolitan region. 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 Regional Transportation Authority Retailers' Occupation Tax is owed. Rather, it is the jurisdiction where the seller is engaged in the business of selling that can impose the tax. Automatic Voting Machs. v. Daley, 409 Ill. 438, 447 (1951) ("In short, the tax is imposed on the "occupation" of the retailer and not upon the "sales" as such.") (citing Mahon v. Nudelman, 377 Ill. 331 (1941) and Standard Oil Co. v. Dep't of Finance, 383 Ill. 136 (1943)); see also Young v. Hulman, 39 Ill. 2d 219, 225 (1968) ("the retailers occupational tax . . . imposes liability upon the occupation of selling at retail and not on the sale itself").

2) Composite of Selling Activities. 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)).

3) Multijurisdictional Retailers. Some retailers are engaged in retail operations with selling activities in multiple jurisdictions within the State, or in jurisdictions located in more than one state. The selling activities that comprise these businesses "are as varied as the methods which men select to carry on retail business". Ex-Cell-O Corp. v. McKibbin, 383 Ill. 316, 321 (1943). Consequently, "it is...not possible to prescribe by definition which of the many activities must take place in [a jurisdiction] to constitute it an occupation conducted in [that jurisdiction]....[I]t is necessary to determine each case according to the facts which reveal the method by which the business was conducted". Ex-Cell-O Corp. v. McKibbin, 383 Ill. 316, 321-22 (1943); see also Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130, paragraph 36.

4) Statutory Intent. It is the intent of Regional Transportation Authority 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. Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130, paragraph 34 (quoting Svithiod Singing Club v. McKibbin, 381 Ill. 194, 197 (1942)). By allowing the Regional Transportation Authority to impose tax on retailers who conduct business in the Metropolitan Region, the Regional Transportation Authority Act links the retailer's tax liability to where it principally enjoys the benefits of government services. Svithiod Singing Club v. McKibbin, 381 Ill. 194, 199 (1942).

5) Determination of Taxing Jurisdiction. Applying the provisions in subsections (b)(1) and (b)(4), the seller incurs Regional Transportation Authority Retailers' Occupation Tax in a particular jurisdiction within the Metropolitan Region if its predominant and most important selling activities take place in that jurisdiction. 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. Ex-Cell-O Corp. v. McKibbin, 383 Ill. 316, 322-23 (1943); Harney Fuel Oil Co. v. Hamer, 2013 IL 115130, paragraphs 30-35.

6) Substance over Form. 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. Marshall & Huschart Mach. Co. v. Dep't of Revenue, 18 Ill. 2d 496, 501 (1960); Fed. Bryant Mach. Co. v. Dep't of Revenue, 41 Ill. 2d 64, 67 (1968); Int'l-Stanley Corp. v. Dep't of Revenue, 40 Ill. App. 3d 397, 406 (1st Dist. 1976); Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130, paragraph 31. For example, the Department will not look to the location of a party that is owned by or has common ownership with a supplier or a purchaser if that party does not, in substance, conduct the selling activities related to the sales.

7) Same Standard Applies to Intrastate and Interstate Retailers. 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. Ex-Cell-O Corp. v. McKibbin, 383 Ill. 316 (1943); Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130, paragraph 30 ("the location of the business of selling inside or outside the [S]tate controls..."). 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 [35 ILCS 105/2] (defining "retailer maintaining a place of business in the State"); Hartney Fuel Oil Co. v. Hamer, 2013 IL 115130, paragraph 31 ("some combination of activities within the [S]tate are insufficient for the retail occupation tax to apply") (citing Automatic Voting Machs. v. Daley, 409 Ill. 438, 447 (1951)).

8) Because it is not practicable for retailers 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.

c) Application of Composite of Selling Activities Test to Retailers Conducting Selling Activities in Multiple Taxing Jurisdictions

Every retailer maintaining a place of business in this State shall determine the taxing jurisdictions in which it is engaged in the business of selling with respect to each of its sales by applying the standards set forth in this subsection (c), except when a retailer is engaged in particular selling activities identified by a statute that specifies the taxing jurisdiction where retailers engaged in those activities shall remit retailers' occupation tax. These retailers shall remit retailers' occupation tax as directed by statute, notwithstanding anything in this Part to the contrary.

1) Primary Selling Activities. Without attempting to anticipate every kind of fact situation that may arise, taxpayers that divide selling activities among personnel located in multiple jurisdictions shall consider the following selling activities to determine where they are engaged in the business of selling with respect to each sale. A retailer is engaged in the business of selling in only one location for each sale, but may be engaged in the business of selling in different locations for different sales:

A) Location of sales personal 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) The 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) The 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.

2) A retailer engaging in three or more primary selling activities in one location in the State for a particular sale shall remit the retailers' occupation tax imposed by the taxing bodies with authority to impose retailers' occupation tax on those engaged in the business of selling in that location for that sale. A retailer engaging in three or more primary selling activities for a particular sale outside the State shall collect and remit tax to the State to the extent required by the Illinois Use Tax Act [35 ILCS 105] for that sale, except as provided in subsection (d).

3) Application of Primary Selling Activities to Common Selling Operations. Retailers engaged in selling operations with a single location where the primary selling activities predominate constitute the vast majority of

retailers in the State. Subsections (c)(3)(A) through (c)(3)(C) apply the primary selling activities to certain common selling operations and identify the location where the Department will presume the seller is engaged in the business of selling with respect to each sale.

A) Over the Counter Sales. If a purchaser is present at a place of business owned or leased by a retailer and there enters into an agreement with the retailer's sales personnel to purchase tangible personal property, and makes payment for that property at the same place of business, then the retailer's occupation tax for that sale is incurred at the retailer's place of business where the sale occurred regardless of whether the purchaser takes immediate possession of the tangible personal property, or the retailer delivers or arranges for the property to be delivered to the purchaser.

B) Sales through Vending Machines. A retailer is engaged in the business of selling food, beverages or other tangible personal property through a vending machine at the location where the vending machine is located when the sale is made if:

i) the vending machine is a device operated by coin, currency, credit card, token, coupon or similar device that dispenses food, beverage or other tangible personal property;

ii) the food, beverage or other tangible personal property is contained within the vending machine and dispensed from the vending machine; and

iii) the purchaser takes possession of the purchased food, beverage or other tangible personal property immediately.

C) Sales from Vehicles Carrying Uncommitted Stock of Goods. The seller's place of engaging in business when making sales and deliveries (not just deliveries pursuant to previously completed sales, but actual sales and deliveries) from a vehicle in which a stock of goods is being carried for sale is the place at which the sales and deliveries actually are made. The vehicle carrying the stock of goods for sale is regarded as a portable place of business.

4) Secondary Selling Activities. If the primary selling activities listed in subsection (c)(1) occur in multiple jurisdictions, but no individual jurisdiction has more than two primary selling activities, the following

additional selling activities shall 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.

5) Except as provided in subsection (d), a retailer that is not engaged in the business of selling in a jurisdiction under subsection (c)(2) is engaged in the business of selling in the jurisdiction where its inventory is located under subsection (c)(1)(D), or where its headquarters is located under subsection (c)(1)(E), whichever jurisdiction is the location where more selling activities occur, considering both primary and secondary selling activities.

6) A retailer that is not engaged in the business of selling in a jurisdiction under subsection (c)(2) or (c)(5) is presumed to be engaged in the business of selling at the location of its headquarters absent clear and convincing evidence to the contrary.

d) Presumption Applying to Certain Selling Operations

1) For certain classes of retailers with unique, complicated or widely dispersed selling activities, determining appropriate tax situs in every situation presents substantial administrative difficulties for both retailers and tax enforcement personnel. Subsections (d)(2) through (d)(5) provide administrative "short cuts" that balance the administrative difficulties presented by certain selling operations against the need for accurate tax

assessment.

2) In-State Inventory/Out of State Selling Activity. If a retailer's selling activities take place in taxing jurisdictions outside this 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 that sale. Chemed Corp., Inc. v. Department of Revenue, 186 Ill. App. 3d 402 (4th Dist. 1989).

3) 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 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.

4) Leases with an Option to Purchase. A lease with a dollar or other nominal option to purchase is considered to be a conditional sale subject to retailers' occupation tax. (See 86 Ill. Adm. Code 130.2010(a)). 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.

5) 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. For purposes of this subsection (d)(5), "extracted from the earth" means the location at which the coal or other mineral is extracted from the mouth of the mine.

A) 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.

B) A mineral 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, however, to sales 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 the jurisdiction and transports it over its own line to an out-of-state destination.

C) 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, as provided in this subsection (d)(5).

(Source: Amended at 38 Ill. Reg. _____, effective _____)

Exhibit G

The Flinn Report

Illinois Regulation

Elaine Spencer, Editor | Joint Committee on Administrative Rules, Illinois General Assembly | 700 Stratton Office Bldg., Springfield IL 62706, 217/785-2254, ilga.gov/commission/jcar

VOL. 38 | June 20, 2014 | Issue 25

Illinois Regulation is a summary of the weekly regulatory decisions of State agencies published in the Illinois Register and action taken by the Illinois General Assembly's Joint Committee on Administrative Rules. Illinois Regulation is designed to inform and involve the public in changes taking place in agency administration.

New Regulations

PERCH FISHING

The DEPARTMENT OF NATURAL RESOURCES adopted emergency amendments to "Sport Fishing Regulations for the Waters of Illinois" (17 Ill Adm Code 810; 38 Ill Reg 13022), effective 6/9/14, for a maximum of 150 days. The rulemaking opens fishing for Lake Michigan perch prior to 5/1 and after 6/15 each summer. Previously the fishing season was completely closed during the month of July except for youth under the age of 16. This change to the fishing season is a result of an agreement between the states bordering Lake Michigan.

Questions/requests for copies: Nick San Diego, DNR, One Natural Resources Way, Springfield IL 62702-1271, 217/782-1809.

INSURANCE

The DEPARTMENT OF INSURANCE adopted amendments to the Part titled "The Minimum Mortality Standard for Valuation of Annuity and Pure Endowment Contracts" (50 Ill Adm Code 935; 37 Ill Reg 13094) effective 1/1/15 to update an annuity mortality table not revised since 1999. The revisions will include the 2012 Individual Annuity Reserving Table which was adopted by the American Academy of Actuaries and the Society of Actuaries. The new table will be used for determining the minimum standard of valuation for any individual annuity or pure endowment contract issued after 1/1/15. Another 1983 table currently in use is to be employed solely when a contract is based on life contingencies and is issued to fund periodic benefits arising from settlements of various claims pertaining to court settlements or out of court settlements; settlements involving similar actions, such as workers' compensation claims; or settlements of long term disability claims where a temporary or life annuity has been used in lieu of continuing disability payments. Appendices to this Part include the new table, as well as a formula for its use. Since 1st Notice, the effective date of the new table was changed from 1/1/14 to 1/1/15.

Questions/requests for copies: Susan Christy, DOI, 320 W. Washington St., Springfield IL 62767-001, 217/782-1759.

(cont'd next page)

Proposed Regulations

☞AVIATION SAFETY

The DEPARTMENT OF TRANSPORTATION proposed amendments to "Aviation Safety" (92 Ill Adm Code 14; 38 Ill Reg 12836) removing approximate time frames from the FAA on the determination of favorable airspace. Also, two new illustrations depicting Ultralight/STOL restricted landing area minimum dimensional standards and separation and gradient standards were added. Pilots and airports may be interested in this rulemaking.

Questions/requests for copies/comments rulemaking through 8/4/14: Linda Schumm, DOT, 1 Langhorne Bond Dr., Spfld, IL 62707, 217/785-4215.

DRIVER'S LICENSES

The SECRETARY OF STATE proposed amendments to the Part titled "Illinois Safety Responsibility Law" (92 Ill Adm Code 1070; 38 Ill Reg 12826) clarifying that a court order may be issued to certify a request for suspending the driver's license of a person more than 90 days in arrears of child support. If the obligor's driver's license number or social security number is not on the

(cont'd page 3)

NEW REGULATIONS: Rules adopted by agencies this week.
PROPOSED REGULATIONS: Rules proposed by agencies this week, commencing a 45-day First Notice period. Public comments must be accepted by the agency for the period of time indicated.
☞: Symbol designating rules of special interest to small businesses, small municipalities, and not-for-profit corporations. Agencies are required to consider comments from these groups and minimize the regulatory burden on them.
QUESTIONS/COMMENTS/RULE TEXT: Direct mail or phone calls to the agency personnel listed below each summary. Providing volume and issue number of The Flinn Report or the Illinois Register will expedite the process. Some agencies charge copying fees. However, copy requests do not have to be made under the Freedom of Information Act.

Second Notices

The following rulemakings were moved to Second Notice this week by the agencies listed below, commencing the JCAR review period. The DHFS rulemakings were considered at JCAR's June 17, 2014 meeting; all other rulemakings will be considered at JCAR's July 15, 2014 meeting.

DEPT OF HEALTHCARE AND FAMILY SERVICES

"Specialized Health Care Delivery Systems" (89 Ill Adm Code 146) proposed 3/21/14 (38 Ill Reg 6499)

"Specialized Health Care Delivery Systems" (89 Ill Adm Code 146) proposed 2/21/14 (38 Ill Reg 4628)

"Diagnosis Related Grouping (DRG) Prospective Payment System (PPS)" (89 Ill Adm Code 149) proposed 2/21/14 (38 Ill Reg 4932)

"Hospital Reimbursement Changes" (89 Ill Adm Code 152) proposed 2/21/14 (38 Ill Reg 4977)

"Medical Payment" (89 Ill Adm Code 140) proposed 2/21/14 (38 Ill Reg 4559)

"Hospital Services" (89 Ill Adm Code 148) proposed 3/21/14 (38 Ill Reg 6505)

"Hospital Services" (89 Ill Adm Code 148) proposed 2/21/14 (38 Ill Reg 4640)

DEPT OF REVENUE

"Retailers' Occupation Tax" (89 Ill Adm 130) proposed 4/4/14 (38 Ill Reg 7555)

DEPT OF CENTRAL MANAGEMENT SERVICES

"Pay Plan" (80 Ill Adm 310) proposed 4/25/14 (38 Ill Reg 4640)

DEPT OF INSURANCE

"License, Documents Necessary to Engage in Activities and Examinations" (50 Ill Adm. Code 752) proposed 3/28/14 (38 Ill Reg 7715)

DEPT OF HUMAN SERVICES

"Child Care" (89 Ill Adm Code 50) proposed 3/28/14 (38 Ill Reg 7018)

JCAR Meeting Action

JCAR MEETING ACTION

At its 6/17/14 meeting, the Joint Committee on Administrative Rules voted to issue a Filing Prohibition against two proposed rulemakings and to issue Recommendations concerning 10 other proposed rulemakings. The Committee and the Department of Human Services also agreed to extend the Second Notice period an additional 45 days for the rulemaking titled "Rules of Conduct, Discipline, Suspension and Discharge Procedures" (89 Ill Adm Code 827; 38 Ill Reg 4292).

DEPARTMENT OF HUMAN SERVICES

JCAR objects to and prohibits the filing of the DHS rulemaking titled "Partner Abuse Intervention" (89 Ill Adm Code 501; 37 Ill Reg 19457) and the accompanying repeal of the existing Part with the same title (89 Ill Adm Code 501; 37 Ill Reg 19437) because the rulemakings contain language that makes assumptions and generalizations that may be unfounded and thus would not be appropriate for State administrative law. JCAR believes the proposed language is not in the public interest.

DEPARTMENT OF REVENUE

With respect to the DOR rulemakings titled "Home Rule County Retailers' Occupation Tax" (86 Ill Adm Code 220, 38 Ill Reg 6549); "Home Rule Municipal Retailers' Occupation Tax" (86 Ill Adm Code 270; 38 Ill Reg 6562); "Regional Transportation Authority Retailers' Occupation Tax" (86 Ill Adm Code 320; 38 Ill Reg 6575); "Metro East Mass Transit District Retailers' Occupation Tax" (86 Ill Adm Code 370; 38 Ill Reg 6588); "Metro-East Park and Recreation District Retailers' Occupation Tax" (86 Ill Adm Code 395; 38 Ill Reg 6601); "County Water Commission Retailers' Occupation Tax" (86 Ill Adm Code 630; 38 Ill Reg 6614); "Special County Retailers' Occupation Tax for Public Safety" (86 Ill Adm Code 670; 38 Ill Reg 6627); "Salem Civic Center Retailers' Occupation Tax" (86 Ill Adm Code 690; 38 Ill Reg 6640);"Non-Home Rule Municipal Retailers' Occupation Tax" (86 Ill Adm Code 693; 38 Ill Reg 6653); and "County Motor Fuel Tax" (86 Ill Adm Code 695; 38 Ill Reg 6666), JCAR recommends that DOR continue to work with the affected taxpayers and local governments in an attempt to mitigate remaining concerns with the proposed language. The rulemakings implement an Illinois Supreme Court decision (Hartney Fuel Oil Co. v. Hamer) concerning the location of sales for purposes of determining local sales tax.