

Illinois Final Local Retail Occupation Tax Sourcing Rules

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Overview

In late June 2014 the Illinois Department of Revenue (“DOR”) submitted final local Retail Occupation Tax (“ROT”) sourcing rules to the Secretary of State for publication in response to the Illinois Supreme Court’s decision in *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130 (Nov. 21, 2013).¹ The sourcing rules provide guidance for determining which local ROT applies to multi-jurisdictional retailers. In this Tax Alert we provide a brief overview of the *Hartney* decision and then summarize the final local ROT sourcing rules.

Hartney

In *Hartney* the Illinois Supreme Court invalidated the DOR’s prior local ROT sourcing rules.² The court found fault with two aspects of the rules. First, the rules did not “amply prescribe the fact-intensive inquiry contemplated by” previous case law.³ Second, the rules “impermissibly constrict[ed] the scope of” the statute by “allowing for only one potentially minor step in the business of selling to conclusively govern tax situs.”⁴

Final Sourcing Rules

The final sourcing rules have four substantive parts.

Part 1 - The first part identifies the core principles underlying the ROT:

- (1) The tax is imposed on the “retail business of selling and not on specific sales,”⁵
- (2) The determination of where the occupation of selling takes place is a “fact-specific inquiry into the composite of activities that comprise the retailer’s business.”⁶
- (3) The underlying purpose of the ROT Act is to allow local jurisdictions to impose taxes on those retailers that take advantage of the public services provided by the various jurisdictions.⁷

Part 2 - The second substantive part of the final sourcing rules provides guidance on applying the fact-specific legal standard to multi-jurisdictional intrastate retailers.⁸ Under the rules, the locations of five “primary selling activities” dictate where a multi-jurisdictional retailer is engaged in the business of selling:

- (1) The location of sales personnel with authority to solicit sales and bind the retailer,
- (2) Where the seller takes action that binds it to the sale (e.g., the location of purchase order acceptance),
- (3) Where payment is tendered and received or invoices are issued,
- (4) Where inventory is stored, and
- (5) The location of the retailer’s headquarters.⁹

If three or more of these primary selling activities are attributable to one jurisdiction for a particular sale, then the sale is considered to occur in that jurisdiction.¹⁰ If three or more of the primary selling activities do not occur in a

¹ The final sourcing rules (submitted to the Illinois Secretary of State on Jun. 25, 2014) are available on the DOR’s website at: <http://www.revenue.state.il.us/News/HartneyDecision.htm>.

² *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130 at ¶ 61-67 (Nov. 21, 2013).

³ *Id.*, at ¶ 61.

⁴ *Id.* For additional information on the *Hartney* decision, see our External Tax Alert dated Nov. 26, 2013, accessible at:

http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/Tax/us_tax_multistate_IL_112713.pdf.

⁵ 86 Ill. Admin. Code § 220.115(b)(1).

⁶ 86 Ill. Admin. Code § 220.115(b)(2).

⁷ 86 Ill. Admin. Code § 220.115(b)(3).

⁸ *Id.*

⁹ 86 Ill. Admin. Code § 220.115(c)(1).

¹⁰ 86 Ill. Admin. Code § 220.115(c)(2).

single jurisdiction, six additional “secondary selling activities” may also be considered to determine the taxing jurisdiction:

- (1) Where solicitation takes place,
- (2) Where procurement takes place,
- (3) Where prices are set,
- (4) Where contracts are received,
- (5) Where title passes, and
- (6) Where goods are displayed.¹¹

Where a retailer’s selling activities are so dispersed that the location is uncertain, the DOR will consider both the primary and secondary selling activities in the jurisdiction where the retailer “enjoyed the greater part of governmental protection.”¹² The DOR may also “look through the form of a putatively [multi-jurisdictional] 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.”¹³

Part 3 - The third substantive part of the final sourcing rules provides guidance on applying fact-specific legal standards to common selling operations, including over-the-counter sales, in-state inventory/out-of-state selling activities, and sales through vending machines.

Part 4 - The fourth substantive part provides that the same standard applies to both intrastate and interstate retailers. When determining where a retailer is engaged in the business of selling, “it does not matter whether a retailer is engaged in selling activities in taxing jurisdictions in multiple states, or in multiple jurisdictions in this State.”¹⁴ The retailer “is engaged in the business of selling in the taxing jurisdiction where its predominant and most important selling activities take place.”¹⁵

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¹¹ 86 Ill. Admin. Code § 220.115(c)(4).

¹² 86 Ill. Admin. Code § 220.115(b)(4).

¹³ 86 Ill. Admin. Code § 220.115(b)(6).

¹⁴ 86 Ill. Admin. Code § 220.115(b)(7).

¹⁵ *Id.*