

Report of *Ex Parte* Communication

Name of employee making report: Paul Berks

Job Title of employee making report: Deputy General Counsel

Date of communication: January 22, 2014

Title and Number of Regulation:

86 Ill. Admin. Code 220

86 Ill. Admin. Code 693

86 Ill. Admin. Code 690

86 Ill. Admin. Code 670

86 Ill. Admin. Code 630

86 Ill. Admin. Code 395

86 Ill. Admin. Code 370

86 Ill. Admin. Code 320

86 Ill. Admin. Code 270

86 Ill. Admin. Code 695

Mode of communication (e.g. in person, telephone, fax, email, mail): Telephone

Person(s) with whom communication occurred: Daniel Konieczny and Karina Zabicki  
Dehayes, Tabel Divito & Rothstein

Summary of Nature and Substance of communication:

Recommendation subsection (c)(4) of emergency regulations be reorganized and  
incorporated into subsection (d).

What action, if any, the person(s) requested: See above

Responses made to communication: Agree to consider recommendation

Other Pertinent Information: \_\_\_\_\_

Please attach written communications to this form. Include emails, faxes, or other documents that contain *ex parte* communications.

Report of *Ex Parte* Communication

Name of employee making report: Paul Berks

Job Title of employee making report: Deputy General Counsel

Date of communication: January 31, 2014

Title and Number of Regulation:

86 Ill. Admin. Code 220

86 Ill. Admin. Code 693

86 Ill. Admin. Code 690

86 Ill. Admin. Code 670

86 Ill. Admin. Code 630

86 Ill. Admin. Code 395

86 Ill. Admin. Code 370

86 Ill. Admin. Code 320

86 Ill. Admin. Code 270

86 Ill. Admin. Code 695

Mode of communication (e.g. in person, telephone, fax, email, mail): Telephone

Person(s) with whom communication occurred: Thomas Donohue, McDermott, Will & Emery

Summary of Nature and Substance of communication:

Person inquired about presence of subsection (c)(4) in emergency rule, but absence from proposed permanent rule. Person also commented that meaning of the word "sale" in subsection (c) could be construed as ambiguous.

What action, if any, the person(s) requested: None

**Responses made to communication:** Advised person that the reason the Department intends to omit subsection (c)(4) was that subsection (b)(4)(A) can easily be manipulated to allow the types of selling structures that the Illinois Supreme Court held unlawful in *Hartney*. The taxpayer in *Hartney* conducted all of its business activity in Forest View, but accepted purchase orders in Mark, and paid the tax rate on its sales in Mark. The Supreme Court disapproved this practice, holding that the statute required *Hartney* to pay the tax rate where it was "engaged in the business of selling," which was Forest View because that was where *Hartney* conducted its predominant and most important selling activities. Subsection (c)(4)(A) arguably allows a taxpayer to do the same thing *Hartney* did, so long as that taxpayer enters into a "long term or blanket contract" first. If the taxpayer has such an agreement, (c)(4)(A) permits the taxpayer to pay the tax rate in the jurisdiction where it accepts purchase orders. So that taxpayer may be able to arrange by

contract to require repeat orders, then arrange for those orders to be accepted in a remote low tax jurisdiction, contrary to the statutory intent.

Although the Department believes section (c)(4)(A) likely is bad policy because it will lead to manipulation of the taxing jurisdiction, the Department also acknowledges that this provision was in the regulation before *Hartney*, and was not expressly addressed or disapproved in *Hartney*. Consequently, the Department was concerned that certain taxpayers may have organized their selling structures in reliance on this provision and *Hartney*, alone, may not have provided sufficient notice that these selling structures were suspect. The Department concluded that taxpayers that relied on subsection (c)(4) before *Hartney* should be allowed an opportunity to either (a) defend the provision during the notice and comment period or (b) revise their selling structures to comply with the new rules, or both.

Consequently, the Department decided to leave the provision in the emergency rules, thereby preserving the status quo for the next 150 days, but remove the provision from the permanent rules to improve tax policy going forward. This allows taxpayers the opportunity to educate the department on why the “long-term contract” provision should remain, or to modify their business systems to comply with the new rules.

With respect to comment on ambiguity of sale, requested person propose language to clear up the ambiguity. \_\_\_\_\_

Other Pertinent Information: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Please attach written communications to this form. Include emails, faxes, or other documents that contain *ex parte* communications.

Report of *Ex Parte* Communication

Name of employee making report: Paul Berks

Job Title of employee making report: Deputy General Counsel

Date of communication: February 11, 2014

Title and Number of Regulation:

86 Ill. Admin. Code 220

86 Ill. Admin. Code 693

86 Ill. Admin. Code 690

86 Ill. Admin. Code 670

86 Ill. Admin. Code 630

86 Ill. Admin. Code 395

86 Ill. Admin. Code 370

86 Ill. Admin. Code 320

86 Ill. Admin. Code 270

86 Ill. Admin. Code 695

Mode of communication (e.g. in person, telephone, fax, email, mail): Telephone

Person(s) with whom communication occurred: Howard Mantel, United Parcel Service

Summary of Nature and Substance of communication:

Person inquired where to source sales under emergency rule if inventory located in Illinois.

What action, if any, the person(s) requested: None

Responses made to communication:

Advised person that "inventory rule" in emergency regulation was intended to be substantively the same as "inventory rule" in prior regulation so his client should apply the rule as it applied prior rule.

Other Pertinent Information: \_\_\_\_\_

Please attach written communications to this form. Include emails, faxes, or other documents that contain *ex parte* communications.

Report of *Ex Parte* Communication

Name of employee making report: Paul Berks

Job Title of employee making report: Deputy General Counsel

Date of communication: February 26, 2014

Title and Number of Regulation:

86 Ill. Admin. Code 220

86 Ill. Admin. Code 693

86 Ill. Admin. Code 690

86 Ill. Admin. Code 670

86 Ill. Admin. Code 630

86 Ill. Admin. Code 395

86 Ill. Admin. Code 370

86 Ill. Admin. Code 320

86 Ill. Admin. Code 270

86 Ill. Admin. Code 695

Mode of communication (e.g. in person, telephone, fax, email, mail): Telephone

Person(s) with whom communication occurred: Joe Cainkar, Attorney Village of Bridgeview

Summary of Nature and Substance of communication:

Person suggested changing method of weighing selling activities from use of primary and secondary factors to allocating a percentage value to each selling activity and sourcing sale to location with the highest number

What action, if any, the person(s) requested: N/A

Responses made to communication:

Accepted comment for consideration.

Other Pertinent Information: \_\_\_\_\_

Please attach written communications to this form. Include emails, faxes, or other documents that contain *ex parte* communications.

Report of *Ex Parte* Communication

Name of employee making report: Paul Berks

Job Title of employee making report: Deputy General Counsel

Date of communication: February 26, 2014

Title and Number of Regulation:

86 Ill. Admin. Code 220

86 Ill. Admin. Code 693

86 Ill. Admin. Code 690

86 Ill. Admin. Code 670

86 Ill. Admin. Code 630

86 Ill. Admin. Code 395

86 Ill. Admin. Code 370

86 Ill. Admin. Code 320

86 Ill. Admin. Code 270

86 Ill. Admin. Code 695

Mode of communication (e.g. in person, telephone, fax, email, mail): Telephone

Person(s) with whom communication occurred: Dean Bruno, Ernst & Young

Summary of Nature and Substance of communication:

Person inquired whether under emergency and proposed regulations, a retailer might have to allocate different sales to different locations depending on where the selling activities for each sale took place.

What action, if any, the person(s) requested: N/A

Responses made to communication:

Agreed that different sourcing determinations for different sales was feasible, and pointed out that this was the case under the old regulation as well.

Other Pertinent Information: \_\_\_\_\_

Please attach written communications to this form. Include emails, faxes, or other documents that contain *ex parte* communications.

Report of *Ex Parte* Communication

Name of employee making report: Paul Berks

Job Title of employee making report: Deputy General Counsel

Date of communication: April 16, 2014

Title and Number of Regulation:

86 Ill. Admin. Code 220

86 Ill. Admin. Code 693

86 Ill. Admin. Code 690

86 Ill. Admin. Code 670

86 Ill. Admin. Code 630

86 Ill. Admin. Code 395

86 Ill. Admin. Code 370

86 Ill. Admin. Code 320

86 Ill. Admin. Code 270

86 Ill. Admin. Code 695

Mode of communication (e.g. in person, telephone, fax, email, mail): Telephone

Person(s) with whom communication occurred: Dennis Brown, ELFA; Rob Carney, Caterpillar; Bill Choi, ELFA; Tanya Gilyard, Caterpillar; Christine Jensen, BMO Harris; Erica Kenney, GE; Megan Kueck, ELFA; Wayne Ownby, BBVA Compass; Ralph Petta, ELFA; Valerie Pfeiffer, The Tax Coefficient; Richard Sweeney, Caterpillar; Kelley Winslow, Key Equipment Finance; Dave Dorner, Vedder Price; and Julia Pierce, consultant.

Department of Revenue Employees Participating in the Communication: Paul Berks, Deputy General Counsel; Jim Nichelson, Legislative Director; Samuel Moore, Associate Counsel.

Summary of Nature and Substance of communication: The discussion centered on whether and how the proposed regulations should address leasing and finance companies that engage in conditional sales and therefore become “retailers” under Illinois’ Retailer Occupation Tax Act. Three proposals for how to source sales by finance company/retailers were discussed:

First, the participants discussed whether finance arrangements that are only nominally sales should be sourced to the location of the supplier of the goods, rather than the finance company. Objections were expressed to this suggestion on the grounds that the finance company responsible for remitting the tax would be poorly situated to understand where the supplier was engaged in selling activities.

Second, the participants discussed whether leasing companies could apply the composite of selling activities test to their operations as currently proposed, or with some modifications to incorporate the most important selling activities relevant to leasing companies. Objections were expressed on the grounds that leasing companies generally don't engage in selling activities and the activities they do engage in, such as credit checks and approvals, are done electronically or over the phone and can easily be diverted to low tax jurisdictions in response to a rule that would allocate sales tax to the place where those activities occurred.

Third, the participants discussed a proposal to allocate sales tax to the location where the equipment is located throughout the term of the lease/conditional sales agreement.

The participants recommended the Department adopt the third approach – source where the equipment is located. The participants also indicated they would provide additional comments to facilitate drafting a regulation that followed the first approach – source to the supplier's location.

What action, if any, the person(s) requested: See above  
\_\_\_\_\_

Responses made to communication:  
\_\_\_\_\_  
\_\_\_\_\_

Other Pertinent Information: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Please attach written communications to this form. Include emails, faxes, or other documents that contain *ex parte* communications.

Report of *Ex Parte* Communication

Name of employee making report: Paul Berks

Job Title of employee making report: Deputy General Counsel

Date of communication: April 30, 2014

Title and Number of Regulation:

86 Ill. Admin. Code 220

86 Ill. Admin. Code 693

86 Ill. Admin. Code 690

86 Ill. Admin. Code 670

86 Ill. Admin. Code 630

86 Ill. Admin. Code 395

86 Ill. Admin. Code 370

86 Ill. Admin. Code 320

86 Ill. Admin. Code 270

86 Ill. Admin. Code 695

Mode of communication (e.g. in person, telephone, fax, email, mail): In Person

Person(s) with whom communication occurred: Jordan Matyas, RTA; Daniel Kniecny, RTA; Judith N. Kolman, Village of Forest View; Joseph Cainkar, Village of Bridgeview; Kate Buggy, Dupage Mayor's and Manager's Caucus; Jeffery D. Schielke, City of Batavia; Brian Caputo, Aurora and Metropolitan Mayor's Caucus); Dave Bennett, Metropolitan Mayor's Caucus; Jon Batek, Village of Carol Stream; Lisa Happ, Village of Schaumburg

DOR Personnel Present for Meeting: Roger Koss, Brenda Towers, Mitch Lifson & Paul Berks.

Summary of Nature and Substance of communication:

There was a general discussion of all aspects of the proposed sourcing rules, and the various comments that the Department has received about the rules.

**Common Selling Operations:**

- Some participants in the meeting expressed opposition to the section of the regulations entitled "guidance on the application of the composite of selling activities test to common selling operations." They stated that the provisions contained in this section of the regulation were contrary to the Supreme Court's decision in *Hartney* because they created "bright line rules." They also objected on policy grounds that any "bright line rule" could be manipulated.

- Other participants in the meeting were not troubled by this section because the application of the rules to the selling operations, identified in this section were not controversial.
- A proposal was made to eliminate subsection (c)(5) on the grounds that the provision was a form of over the counter sale
- A proposal was made to eliminate or rewrite subsection (c)(7) on the grounds that it created a negative inference that certain order acceptance activities would constitute engaging in the business of selling

### **Composite of Selling Activities Test**

- The participants in the meeting discussed the subsection of the regulation entitled “application of composite of selling activities test to multi-jurisdictional retailers.”
- Opposition was expressed by some participants to the distinction between “primary” and “secondary” selling activities;
- Opposition was also expressed to limiting the list of selling activities; it was suggested that the regulation expressly permit the Department to rely on other selling activities not specifically identified;
- It was also suggested that the regulation maintain the distinction between primary and secondary activities to provide greater ease of application for retailers, with the suggestion that the primary factors be increased to five, possibly including location of the seller’s ordering, billing and other administrative functions, which is currently a secondary factor;
- It was suggested that the regulation be modified to create more certainty as to when a retailer could rely on only the primary factors and when it should also consider the secondary factors
- It was suggested that the selling factors be weighted to reflect the government services they required

### **Principles**

- Participants agreed that the “principles underlying determination of seller’s location” provisions were critical and should be retained
- Participants disagreed that these provisions give DOR too much discretion, pointing out that DOR is a neutral arbiter among local taxing jurisdictions and has no reason to exercise its discretion in the interest of any particular party

- It was suggested that the “principles” section of the regulation be reorganized and moved to the beginning, of subsection (d), rather than the end.

What action, if any, the person(s) requested: See above

---

Responses made to communication:

DOR personnel listened to all comments and participated in discussion; committed to consider further revisions to regulations based on comments received.

---

Other Pertinent Information: \_\_\_\_\_

---

---

Please attach written communications to this form. Include emails, faxes, or other documents that contain *ex parte* communications.

Report of *Ex Parte* Communication

Name of employee making report: Paul Berks

Job Title of employee making report: Deputy General Counsel

Date of communication: May 1, 2014

Title and Number of Regulation:

86 Ill. Admin. Code 220

86 Ill. Admin. Code 693

86 Ill. Admin. Code 690

86 Ill. Admin. Code 670

86 Ill. Admin. Code 630

86 Ill. Admin. Code 395

86 Ill. Admin. Code 370

86 Ill. Admin. Code 320

86 Ill. Admin. Code 270

86 Ill. Admin. Code 695

Mode of communication (e.g. in person, telephone, fax, email, mail): In Person

Person(s) with whom communication occurred: Connie Beard, Illinois Chamber of Commerce; Carol Portman, Taxpayer Federation of Illinois; Rob Karr, Illinois Retailer Merchants Association; Mark Densler, Illinois Manufacturer's Association; Department of Revenue Personnel: Paul Berks, Deputy General Counsel, Mark Dyckman, Deputy General Counsel; Dan Hall, Director of Audit; Roger Koss, Division Chief, Sales and Excise Tax Audit; Brenda Towers, Division Chief, Local Taxes; Mitch Lifson, Legislative and Policy Analyst.

Summary of Nature and Substance of communication:

The participants discussed a draft proposal currently under consideration by the Illinois Chamber of Commerce which would create a two-tier sales sourcing approach. Those businesses that have three "primary" selling activities in a single location would source to that location. The three primary selling activities identified in the draft proposals were: final contracting action, arrangement for payment and arrangement for delivery. Businesses that spread these activities to multiple locations would be subject to a more elaborate multi-factor approach.

The Department expressed concern that the primary selling activities in the draft proposal were too easily subject to manipulation and suggested including certain primary factors that are more difficult to move merely for the purpose of tax avoidance.

The participants discussed other proposals for modifying the draft regulations including special rules for the treatment of internet sales and leasing and financing transactions.

---

The participants also discussed the proposed primary and secondary factors in the Department's draft regulation, with some participants stating that the factors were duplicative.

The participants also discussed subsection (d)(4)(B), the "look through" provision and ways that concerns about that provision could be addressed.

Participants indicated they would submit additional written comments before the May 5, 2014 deadline.

---

What action, if any, the person(s) requested: \_\_\_\_\_

---

---

---

Responses made to communication:

---

---

---

Other Pertinent Information: \_\_\_\_\_

---

---

---

Please attach written communications to this form. Include emails, faxes, or other documents that contain *ex parte* communications.

