



Illinois Department of Revenue

Legal Services Office 5-500
101 W. Jefferson Street
Springfield, Illinois 62794

SECOND NOTICE OF PROPOSED RULEMAKING

- 1) Agency: Illinois Department of Revenue
- 2) Title and Ill. Adm. Code Citation of Proposed Rulemaking: Retailers' Occupation Tax, 86 Ill. Adm. Code 130.410, 130.415
- 3) Date, Issue, and page number of the Illinois Register in which the First Notice was published: August 25, 2015, Issue 35, 39 Ill. Reg. 11865.
- 4) Text and Location of any Changes Made to the Proposed Rulemaking During the First Notice Period: The changes made to this rulemaking include technical, grammatical and editorial at the recommendation of the Joint Committee on Administrative Rules and the Administrative Code Division. Additional changes were made, see First Notice Changes, attached.
- 5) Final Regulatory Flexibility Analysis:
 - A. Summary of the issues raised by affected small businesses during the First Notice Period: No issues were raised during First Notice period.
 - B. Description of actions taken on any alternatives to the proposed rule suggested by small businesses during the First Notice Period, including reasons for rejecting alternatives not utilized: No alternatives were suggested by small businesses.
- 6) Analysis of the Economic and Budgetary Effects of the Proposed Rulemaking: See attachment.
- 7) Response to Recommendations Made by the Administrative Code Division for Changes in the Rule to Make It Comply With the Codification Scheme: All changes requested by the Administrative Code Division have been made.
- 8) Evaluation of the comments received by the agency from interested persons during the first notice period (but not including any questions raised by the Joint Committee in a preliminary review) including:

- A. Date of any public hearing held during the first notice period. Name of the person or group requesting a hearing: No public hearing requested.
- B. The names and addresses of all individuals or groups making comments or requesting the opportunity to make comments: Comments were received from:
- 1) The Taxpayers' Federation of Illinois, Ms. Carol Portman, President; 430 East Vine Street, Suite A, Springfield, IL 62703
 - 2) The Wine and Spirits Distributors of Illinois, Ms. Karin Lijana Matura; 27 E. Monroe, Suite 1200, Chicago, IL 60603
 - 3) The Wine Institute, Mr. Steve Gross, President; 136 East 36th Street, #5D, New York, N.Y. 10016
 - 4) The Illinois Retail Merchants Association, Mr. Robb Karr, President & CEO; 216 Broadway, Springfield, IL 62701
 - 5) The Illinois Petroleum Marketers Association and Illinois Association of Convenience Stores, Mr. William J. Fleischli, Sr., Executive Vice President; Wm. R. Deutsch Bldg., 112 West Cook Street, Springfield, IL 62704
- C. A list of all specific criticisms and suggestions raised in the comments: Comments received from each group are summarized below:

All persons submitting comments expressed support for the proposed regulations, but also made several specific comments. These comments are described below:

- 1) The Taxpayers' Federation of Illinois suggested that the Department amend the proposed regulations to provide that gross receipts not include delivery charges when the retailer offers free shipping. In addition, the Federation stated that the Department should provide retailers with the option of separately calculating delivery charges on "mixed basket" (high rate/low rate or exempt/taxable) transactions, and urged it to add provisions addressing calculation of tax for situations in which free pick-up is available for some, but not all, items. Asserting that it is typically difficult for self-assessing business taxpayers to determine if a free pick-up option was available, the Federation also encouraged the Department to consider adding hold harmless or safe harbor provisions for such taxpayers. Lastly, although the Federation agreed that the regulation should apply retroactively to the date of the *Kean* decision, it urged the Department to explicitly provide that taxpayers who had complied with

the provisions of the regulation as it existed between the effective date of the *Kean* decision and the effective date of the proposed regulations would be held to have correctly remitted tax on delivery charges.

2) The Wine and Spirits Distributors of Illinois suggested that the Department amend Section 130.415 to specify that persons holding winery shippers licenses issued under Section 5-1 (r) of the Liquor Control Act are "sellers" subject to the proposed rules.

3) The Wine Institute expressed concerns about the retroactive effect of the rules similar to those voiced by the Taxpayers' Federation. It urged the Department to include provisions in the regulations clarifying that persons who had complied with the provisions of the regulation as it existed between the date of the *Kean* decision and the effective date of the proposed regulations would be held to have correctly remitted tax on delivery charges.

4) The Illinois Retail Merchants Association also expressed concern about the retroactive effect of the rules. It urged the Department to clarify that persons who had complied with the provisions of the regulation as it existed between the date of the *Kean* decision and the effective date of the proposed regulations would be held to have correctly remitted tax on delivery charges. It also asserted that the "Buy Online, Pickup Store" option is not consistently available, and that basing the taxability of delivery charges on such a factor is difficult. Retailers, it asserted, cannot program their sales systems in a manner that can make accurate determinations at the time the transaction is being processed. Similarly, it urged the Department to reconsider the method used to determine taxability in mixed transactions, asserting that a bright-line rule was preferable to one in which retailers would be required to make a percentage calculation for each mixed sale.

5) The Illinois Petroleum Marketers Association and Illinois Association of Convenience Stores objected to the retroactive application of the rulemaking. It asserted that taxpayers should be held harmless if they complied with the regulation as it existed between the *Kean* decision and the effective date of the proposed regulations.

D. The agency's evaluation of each of the specific criticisms and suggestions:

In response to concerns regarding the retroactive effect of the regulations, the Department added a safe harbor provision for persons who have

computed their tax liability in accordance with the provisions of the regulation as it existed between the date of the *Kean* decision and the effective date of the proposed regulation. As a result, persons who computed their liability either under the regulation existing until the effective date of the amended regulation, or as directed under the *Kean* decision, will be held to have correctly remitted tax on delivery charges.

The Department added provisions to the regulation specifying the persons who are governed by the new rules. The change reflects that the rules apply to persons making sales subject to Retailers' Occupation Tax; retailers required to collect Use Tax on sales to Illinois residents due to their status as a "retailer maintaining a place of business in this State" pursuant to Section 2 of the Use Tax Act; persons self-assessing Use Tax on purchases under Sections 9 and 10 of the Use Tax Act; and persons that have been issued a winery shipper's license under Section 5-1(r) of the Liquor Control Act of 1934.

In response to comments, the Department also amended the regulations to add provisions specifying that when a retailer offers a purchaser unqualified free shipping, or qualified free shipping for which a transaction is eligible (e.g., free shipping for purchases over \$150), there is no inseparable link between the selling price of the tangible personal property and the delivery charge (therefore the delivery charge is not taxable). Corresponding examples were added. Amendments further clarify that under these circumstances, if a purchaser elects a separately identified shipping option (e.g., elects to pay for expedited shipping), the delivery charge will remain nontaxable as long as the selling price of the tangible personal property neither increases nor decreases depending upon the delivery method chosen by the purchaser to obtain the merchandise. The rule clarifies that if the selling price of the tangible personal property increases or decreases, the delivery charges will be subject to tax to the extent that they exceed the actual cost of outgoing transportation and delivery.

The regulations were also amended to provide that in situations where delivery charges would be taxable for some items on an invoice and not taxable on others, retailers can itemize the delivery charges on separately listed items. If, however, a lump sum charge for delivery is made on an invoice, the delivery charge will only be nontaxable if the selling price of the items for which delivery is nontaxable is greater than the selling price of the items for which delivery is taxable. Corresponding examples were provided.

Similarly, in situations where delivery charges are taxable and the transaction involves mixed items (high/low rate items or taxable/exempt items), the regulations were amended to add an option authorizing retailers to separately list each item and its corresponding delivery charge rate on the invoice. Examples of this option were added.

- E. A statement that the agency has considered all comments received during the first notice period: All comments received were considered during the First Notice period.
- 9) An analysis of the expected effects of the proposed rulemaking, including:
- A. Impact on the public: This rulemaking provides greater guidance to the public regarding taxation of delivery charges. It incorporates the Illinois Supreme Court's holding in *Kean v. Walmart*, provides examples of different scenarios involving delivery charges, and sets out rules for determining tax due on delivery charges when the sales involve high rate/low rate/exempt items.
 - B. Changes in the agency's programs or structure resulting from implementation of the rulemaking: None.
 - C. Impact of proposed rule on small businesses. Methods used by Agency to comply with 5 ILCS 100/5-30, including reasons for rejecting any methods not utilized: This rule provides greater clarity regarding the taxation of delivery charges for small businesses, leading to enhanced compliance. Regulatory requirements remain the same with respect to the reporting and payment of taxes.
- 10) A justification and rationale for the proposed rulemaking, including:
- A. Any changes in statutory language requiring the proposed rulemaking: None.
 - B. Any changes in agency policy, procedures, or structure requiring the proposed rulemaking: None.
 - C. Relationship to other rulemaking activities of the agency including anticipated rulemaking activities: None.

- D. Relationship to any relevant federal rules, regulations, or funding requirements: None.
 - E. Court orders or rulings which are related to the rulemaking: *Kean v. Walmart*, 235 Ill.2d 351 (2009).
- 11) Does this rulemaking include an incorporation by reference pursuant to Section 5-75 of the Illinois Administrative Procedure Act? No

Agency Personnel Who Will Respond to Joint Committee Questions Regarding the Proposed Rulemaking:

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