

ILLINOIS REGISTER
DEPARTMENT OF REVENUE
NOTICE OF PROPOSED AMENDMENTS

- 1) Heading of the Part: Use Tax
- 2) Code Citation: 86 Ill. Adm. Code 150
- 3)

<u>Section Numbers:</u> 150.201 150.1101	<u>Emergency Actions:</u> Amendment Amendment
--	---
- 4) Statutory Authority: 35 ILCS 105/2; 35 ILCS 105/12; 20 ILCS 2505/2505-90
- 5) Effective Date of Emergency Amendment:
- 6) If this Emergency Amendment is to expire before the end of the 150-day period, please specify the date on which it is to expire: There is no specific date on which the Emergency Amendments will expire before the end of the 150-day period.
- 7) Date filed with the Index Department:
- 8) A copy of the emergency amendment, including any material incorporated by reference, is on file in the agency's principal office and is available for public inspection.
- 9) Reason for Emergency: The guidance provided in the emergency amendment regarding the trade-in credit limitation on the trade-in of first division motor vehicles applies to sales of motor vehicles beginning on January 1, 2020. Although the Department of Revenue published Informational Bulletin FY 2020-1 in September 2019 regarding this issue, an organization representing automobile dealers as well as the Illinois Secretary of State's Office recently had additional inquiries and it became clear that the Department could not rely on existing information about vehicle registrations to delineate which vehicles are subject to the trade-in credit limitation, but must itself provide specific guidance on what constitutes a first division motor vehicle subject to the limitation. As a result of these inquiries, the Department posted a "Frequently Asked Questions" document on its website on December 20, 2019 and is filing this emergency rulemaking in order to put in place binding guidance on this issue that both taxpayers and Department employees can rely on.
- 10) A Complete Description of the Subjects and Issues Involved: This rulemaking implements the provisions of P.A. 101-31 that, effective with sales made on or after January 1, 2020, imposes a \$10,000 limit on the credit allowed to reduce the taxable selling price when a first division motor vehicle is traded in on the purchase of another motor vehicle.
- 11) Are there any proposed rulemakings to this Part pending? No
- 12) Statement of Statewide Policy Objectives: This rulemaking neither imposes a State mandate, nor modifies an existing mandate.
- 13) Information and questions regarding this Emergency Rule shall be directed to:

Samuel J. Moore

Illinois Department of Revenue
101 West Jefferson
Springfield, Illinois 62794

(217) 782-2844

The full text of the Emergency Amendments begins on the next page:

Section 150.201 General Definitions

EMERGENCY

"Act" means the Use Tax Act [35 ILCS 105].

"Department" means the Department of Revenue.

"Person" means any natural individual, firm, partnership, association, joint stock company, joint adventure, public or private corporation, or a receiver, executor, trustee, conservator or other representative appointed by order of any court.

"Purchase at retail" means the acquisition of the ownership of, or title to, tangible personal property through a sale at retail.

"Purchaser" means anyone who, through a sale at retail, acquires the ownership of tangible personal property for a valuable consideration.

"Retailer" means and includes every person engaged in the business of selling tangible personal property for use, and not for resale in any form. Effective October 1, 1974, a person who is the recipient of a grant or contract under Title VII of the Older Americans Act of 1965 (42 USC 3001 et seq.) and serves meals to participants in the Federal Nutrition Program for the Elderly in return for contributions established in amount by the individual participant pursuant to a schedule of suggested fees as provided for in the Federal Act is not a retailer under the Use Tax Act with respect to those transactions.

Nonprofit Sellers

A person whose activities are organized and conducted primarily as a not-for-profit service enterprise, and who engages in selling tangible personal property at retail (whether to the public or merely to members and their guests), shall be deemed to be a retailer with respect to those transactions, excepting only a person organized and operated exclusively for charitable, religious or educational purposes to the extent of sales by that person to its members, students, patients or inmates of tangible personal property to be used primarily for the purposes of that person, or to the extent of sales by that person of tangible personal property that is not sold or offered for sale by persons organized for profit.

Special Order Sales

A person who holds himself or herself out as being engaged (or who habitually engages) in selling tangible personal property at retail shall be deemed to be a retailer under this definition with respect to those sales (and not primarily in a service occupation), notwithstanding the fact that the person designs and produces that tangible personal property on special order for the purchaser and in such a way as to render the property of value only to that purchaser, if the tangible personal property so produced on special order serves substantially the same

function as stock or standard items of tangible personal property that are sold at retail.

When Construction Contractor or Real Estate Developer is a Retailer

A construction contractor or real estate developer is a retailer under the Use Tax Act to the same extent to which he or she is a retailer under the Retailers' Occupation Tax Act, as described in 86 Ill. Adm. Code 130.1940.

"Retailer maintaining a place of business in this State", or any like term, shall mean and include any retailer:

Having or maintaining within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent or other representative operating within this State under the authority of the retailer or its subsidiary, irrespective of whether that place of business or agent or other representative is located here permanently or temporarily, or whether the retailer or subsidiary is licensed to do business in this State;

Beginning July 1, 2011, having a contract with a person located in this State under which:

the retailer sells the same or substantially similar line of products as the person located in this State and does so using an identical or substantially similar name, trade name, or trademark as the person located in this State; and

the retailer provides a commission or other consideration to the person located in this State based upon the sale of tangible personal property by the retailer.

The provisions of this paragraph shall apply only if the cumulative gross receipts from sales of tangible personal property by the retailer to customers in this State under all such contracts exceed \$10,000 during the preceding 4 quarterly periods ending on the last day of March, June, September, and December (Section 2 of the Act, definition of "retailer maintaining a place of business in this State", subparagraph 1.2);

Beginning January 1, 2015, having a contract with a person located in this State under which the person, for a commission or other consideration based upon the sale of tangible personal property by the retailer, directly or indirectly refers potential customers to the retailer by providing to the potential customers a promotional code or other mechanism that allows the retailer to track purchases referred by such persons. Examples of mechanisms that allow the retailer to track purchases referred by such persons include but are not limited to the use of a link on the person's Internet website, promotional codes distributed through the person's hand-delivered or mailed material, and promotional codes distributed by the person through radio or other broadcast media. The provisions of this paragraph shall apply only if the cumulative gross receipts from sales of tangible personal property by the retailer to customers who are referred to the retailer by all persons in this State under such contracts exceed \$10,000 during the preceding 4 quarterly periods ending on the last day of March, June, September, and December. Although a retailer meeting the requirements set forth in Section 2 of

the Act, definition of "retailer maintaining a place of business in this State", subparagraph 1.1, is presumed to be a retailer maintaining a place of business in Illinois, a retailer may rebut this presumption by maintaining in its records documentation that shows that persons with whom the retailer has agreements have not engaged in solicitation activities on behalf of the retailer in Illinois that are sufficient to meet the nexus standards of the United States Constitution during the preceding 4 quarterly periods. (Section 2 of the Act, definition of "retailer maintaining a place of business in this State", subparagraph 1.1) The following documentation is required in order to rebut this presumption:

Retailer Agreement. The retailer must have an agreement that prohibits persons operating under the agreement from engaging in any solicitation activities in Illinois that refer potential customers to the retailer, including, but not limited to, distributing flyers, coupons, newsletters and other printed promotional materials or electronic equivalents, verbal soliciting, initiating telephone calls, and sending e-mails or text messages. If the person in Illinois with whom the retailer has an agreement is an organization or corporation, such as a club or nonprofit group, the agreement must provide that the organization will maintain on its website information alerting its members to the prohibition against each of the solicitation activities described in this paragraph. The agreement must be maintained in the retailer's records and shall be made available to the Department for inspection or audit.

Annual Certification. The person or persons operating under the agreement in Illinois shall certify by January 1 of each year, under penalty of perjury, that they have not engaged in any prohibited solicitation activities in Illinois at any time during the previous year. If the person in Illinois with whom the retailer has an agreement is an organization or corporation, the annual certification shall also include a statement from the organization or corporation, signed by an officer of the organization or corporation, certifying that its website includes information directed at its members alerting them to the prohibition against the solicitation activities described in this paragraph. The certification should be made on forms prescribed by the Department, must be completed and provided to the retailer, must be maintained in the retailer's records, and shall be made available to the Department for inspection or audit. If the retailer accepts a properly and timely completed certification in good faith and the retailer does not know or have reason to know that the certification is false or fraudulent, that certification will be conclusive proof that the person that provided the certification was in compliance with the agreement for the year covered by the certification. If the retailer fails to obtain the certifications from all persons operating under the agreements and fails to make those records available upon the Department's request, the presumption that the retailer is maintaining a place of business in Illinois will not be rebutted.

For the purposes of this definition, "advertisement" means a written, verbal, pictorial, or graphic announcement of goods or services for sale, employing leased or purchased space or time in print or electronic media, which is intended to communicate that information to the general public. Online advertising generated as a result of generic algorithmic functions that is anonymous and passive in nature (the advertisement is not directed to a specific person or intended to incite a person or

persons to purchase tangible personal property from a specific retailer or retailers), such as ads tied to Internet search engines, banner ads, click-through ads, Cost Per Action ads, links to retailers' websites, and similar online advertising services, are advertisements and not solicitations.

For the purposes of this definition, "solicitation" means a direct or indirect communication to a specific person or persons, including emails or text messages, done in a manner that is intended and calculated to incite a person or persons to purchase tangible personal property from a specific retailer or retailers. Solicitation does not mean or include advertising.

EXAMPLE 1: Corporation X is physically located in Illinois and maintains a website. Corporation X enters into agreements with one or more hiking gear and accessories retailers under which Corporation X maintains click-through advertisements or links to each retailer's website on Corporation X's website www.corporationx.com and Corporation X's webpage at www.socialnetwork.com/corporationx in return for commissions based upon the retailers' completed sales made to customers who click-through the ads or links on Corporation X's website and webpage. Corporation X also posts reviews at www.corporationx.com of the products sold through the click-through ads and links on its website and webpage. However, Corporation X does not engage in any solicitation activities in Illinois that refer potential customers to the retailer or retailers who have click-through ads or links on its website or webpage. Therefore, the retailer may successfully rebut the presumption that the retailer is maintaining a place of business in Illinois if all other qualifications in this definition are met.

EXAMPLE 2: Assume the same facts as Example 1, except that an individual representative of Corporation X or any other individual acting on behalf of Corporation X, including, but not limited to, an employee or independent contractor of Corporation X, engages in solicitation activities, such as soliciting customers in person, soliciting customers on the telephone, handing out flyers that are solicitations, or sending emails that are solicitations, while physically present in Illinois that refer potential Illinois customers to a retailer who has a link or other promotional code on Corporation X's website or webpage pursuant to Corporation X's agreement with that retailer. Therefore, the rebuttable presumption that the retailer is maintaining a place of business in Illinois applies to Corporation X's agreement if all other criteria are met, and the retailer will be required to collect tax.

Soliciting orders for tangible personal property by means of a telecommunication or television shopping system (which utilizes toll free numbers) which is intended by the retailer to be broadcast by cable television or other means of broadcasting, to consumers located in this State.

Pursuant to a contract with a broadcaster or publisher located in this State, soliciting orders for tangible personal property by means of advertising which is disseminated primarily to consumers located in this State and only secondarily to bordering jurisdictions;

Soliciting orders for tangible personal property by mail if the solicitations are substantial and recurring and if the retailer benefits from any banking, financing,

debt collection, telecommunication, or marketing activities occurring in this State or benefits from the location in this State of authorized installation, servicing, or repair facilities;

Being owned or controlled by the same interests which own or control any retailer engaging in business in the same or similar line of business in this State;

Having a franchisee or licensee operating under its trade name if the franchisee or licensee is required to collect the tax under this Section;

Pursuant to a contract with a cable television operator located in this State, soliciting orders for tangible personal property by means of advertising which is transmitted or distributed over a cable television system in this State; or

Engaging in activities in Illinois, which activities in the state in which the retail business engaging in such activities is located would constitute maintaining a place of business in that state. (Section 2 of the Use Tax Act) For the purpose of determining the state of domicile, the Department will look to the place at which the selling activity takes place.

It does not matter that an agent may engage in business on his or her own account in other transactions, nor that the agent may act as agent for other persons in other transactions, nor that the agent is not an employee but is an independent contractor acting as agent. The term "agent" is broader than the term "employee". "Agent" includes anyone acting under the principal's authority in an agency capacity.

"Sale at retail" means any transfer of the ownership of or title to tangible personal property to a purchaser, for the purpose of use, and not for the purpose of resale in any form as tangible personal property to the extent not first subjected to a use for which it was purchased, for a valuable consideration; provided that the property purchased is deemed to be purchased for the purpose of resale, despite first being used, to the extent to which it is resold as an ingredient of an intentionally produced product or by-product of manufacturing. For this purpose, slag produced as an incident to manufacturing pig iron or steel and sold is considered to be an intentionally produced by-product of manufacturing. "Sale at retail" includes any such transfer made for resale unless made in compliance with Section 2c of the Retailers' Occupation Tax Act [35 ILCS 120], as incorporated by reference into Section 12 of the Use Tax Act [35 ILCS 105]. Transactions whereby the possession of the property is transferred but the seller retains the title as security for payment of the selling price are sales.

"Selling price" means the consideration for a sale valued in money whether received in money or otherwise, including cash, credits, property other than as provided in this definition, and services, but, prior to January 1, 2020, not including the value of or credit given for traded-in tangible personal property when the item that is traded-in is of like kind and character as that which is being sold; beginning January 1, 2020, "selling price" includes the portion of the value of or credit given for traded-in motor vehicles of the first division, as defined in Section 1-146 of the Illinois Vehicle Code, of like kind and character as that which is being sold that exceeds \$10,000. "Selling price" shall be determined without any deduction on account of the cost of the property sold, the cost of materials used, labor or service cost or any other expense whatsoever. "Selling price" does not include interest or finance charges that appear as separate items on the bill of sale or sales contract nor charges that are added to prices by sellers on account of the seller's

tax liability under the Retailers' Occupation Tax Act, or on account of the seller's duty to collect, from the purchaser, the tax that is imposed by the Use Tax Act, or except as otherwise provided with respect to any cigarette tax imposed by a home rule unit, on account of the seller's tax liability under any local occupation tax administered by the Department, or, except as otherwise provided with respect to any cigarette tax imposed by a home rule unit on account of the seller's duty to collect from the purchasers, the tax that is imposed under any local use tax administered by the Department. "Selling price" shall include charges that are added to prices by sellers on account of the seller's liability under the Cigarette Tax Act on account of the seller's duty to collect, from the purchaser, the tax imposed under the Cigarette Use Tax Act and on account of the seller's duty to collect, from the purchaser, any cigarette tax imposed by a home rule unit. The phrase "like kind and character" shall be liberally construed (including but not limited to any form of motor vehicle for any form of motor vehicle, or any kind of farm or agricultural implement for any other kind of farm or agricultural implement), while not including a kind of item which, if sold at retail by that retailer, would be exempt from Retailers' Occupation Tax and Use Tax as an isolated or occasional sale.

"Use" means the exercise by any person of any right or power over tangible personal property incident to the ownership of that property, except that it does not include the sale of the property in any form as tangible personal property in the regular course of business to the extent that the property is not first subjected to a use for which it was purchased, and does not include the use of that property by its owner for demonstration purposes; provided that the property purchased is deemed to be purchased for the purpose of resale, despite first being used, to the extent to which it is resold as an ingredient of an intentionally produced product or by-product of manufacturing. "Use" does not mean the interim use of tangible personal property by a retailer before he or she sells such tangible personal property and does not mean the physical incorporation of tangible personal property, to the extent not first subjected to a use for which it was purchased, as an ingredient or constituent, into other tangible personal property:

that is sold in the regular course of business; or

that the person incorporating the ingredient or constituent therein has undertaken at the time of purchase to cause to be transported in interstate commerce to destinations outside the State of Illinois; provided that the property purchased is deemed to be purchased for the purpose of resale, despite first being used, to the extent to which it is resold as an ingredient of an intentionally produced product or by-product of manufacturing.

(Source: Emergency amendment at 44 Ill. Reg 577, effective December 23, 2019, for a maximum of 150 days)

SUBPART J: TRADED-IN PROPERTY

Section 150.1101 General Information

EMERGENCY

- a) The "selling price", which is subject to the Use Tax when a sale at retail is made, includes the consideration for the sale valued in money whether received in money or otherwise, including cash, credits, property other than as hereinafter provided, and services, but, prior to January 1, 2020, not including the value of or credit given for traded-in tangible personal property where the item that is traded-in is of like kind and character as that which is being sold; beginning January 1, 2020, "selling price" includes the portion of the value of or credit given for traded-in motor vehicles of the first division, as defined in

Section 1-146 of the Illinois Vehicle Code, of like kind and character as that which is being sold that exceeds \$10,000. "Selling price" shall be determined without any deduction on account of the cost of the property sold, the cost of materials used, labor or service cost or any other expense whatsoever. "Selling price" does not include charges that are added to prices by sellers on account of the seller's tax liability under the Retailers' Occupation Tax Act, or on account of the seller's duty to collect, from the purchaser, the tax that is imposed by the Use Tax Act, or on account of the seller's tax liability under the Non-Home Rule Municipal Retailers' Occupation Tax, the Home Rule Municipal Retailers' Occupation Tax, the Home Rule County Retailers' Occupation Tax, Metro East Mass Transit District Retailers' Occupation Tax, County Water Commission Retailers' Occupation Tax or Regional Transportation Authority Retailers' Occupation Tax.

- b) The phrase "like kind and character" includes, but is not limited to, the trading of any kind of motor vehicle on the purchase of any kind of motor vehicle, or the trading of any kind of farm implement on the purchase of any kind of farm implement, while not including a kind of item which, if sold at retail by that retailer, would be exempt from Retailers' Occupation Tax and Use Tax as an isolated or occasional sale.
- c) A motor vehicle traded to a farm implement dealer for a farm implement would not qualify for the exemption unless such farm implement dealer is also a motor vehicle dealer because the farm implement dealer's sale of the motor vehicle would be exempt as an isolated or occasional sale. A farm implement traded to a motor vehicle dealer for a motor vehicle would not qualify for the exemption unless such dealer is also a farm implement dealer because the motor vehicle dealer's sale of the farm implement would be an exempt isolated or occasional sale. A farm implement traded for a motor vehicle, or a motor vehicle traded for a farm implement, would qualify for the exemption if the seller is engaged in business both as a motor vehicle dealer and a farm implement dealer. Agricultural produce or animals traded for a motor vehicle or for a farm implement would not qualify for the exemption.
- d) The real test is whether the retail sale of the traded-in tangible personal property by the person who accepted it in trade would be subject to Use Tax, or whether such sale would be exempt as an isolated or occasional sale. In the former event, the tangible personal property qualifies for the trade-in exemption. In the latter event, it does not.
- e) No purchase of tangible personal property at retail from a person engaged in the business of selling that kind of property shall be deemed to be exempt from the Use Tax by reason of the fact that the tangible personal property which is being purchased was acquired by the seller as a trade-in, rather than being purchased by the seller. The Use Tax applies to used tangible personal property (however acquired by the seller who is engaged in the business of selling that kind of property), as well as to new tangible personal property, as long as the sale is being made at retail by a person engaged in the business of selling that kind of property.

(Source: Emergency amendment at 44 Ill. Reg 577, effective December 23, 2019, for a maximum of 150 days)