

ILLINOIS REGISTER

DEPARTMENT OF REVENUE

NOTICE OF PROPOSED AMENDMENTS

- 1) Heading of the Part: Income Tax
- 2) Code Citation: 86 Ill. Adm. Code 100
- 3)

| | |
|-------------------------|--------------------------|
| <u>Section Numbers:</u> | <u>Proposed Actions:</u> |
| 100.3220 | Amendment |
| 100.3370 | Amendment |
| 100.7030 | Amendment |
| 100.7036 | New Section |
- 4) Statutory Authority: 35 ILCS 5/303, 5/304, and 5/710.
- 5) A Complete Description of the Subjects and Issues Involved: This rulemaking implements the amendments P.A. 101-0031 made to Sections 303, 304 and 710 of the Illinois Income Tax Act, 35 ILCS 5/303, 5/304 and 5/710. Section 303, 35 ILCS 5/303, is amended as follows. For tax years ending on or after December 31, 2019, all horse racing and casino winnings under the Illinois Horse Racing Act of 1975 and the Illinois Gambling Act (formerly the Illinois Riverboat Gambling Act) are allocable to Illinois. Section 304, 35 ILCS 5/304, is amended as follows. For tax years ending on or after December 31, 2019, all gross receipts from winnings from pari-mutuel wagering conducted at a wagering facility licensed under the Illinois Horse Racing Act of 1975 [230 ILCS 5] or from winnings from gambling games conducted on a riverboat or in a casino or organization gaming facility licensed under the Illinois Gambling Act [230 ILCS 10] are in this State. Section 710, 35 ILCS 5/710, is amended to require withholding for residents and nonresidents for payments for winnings at a pari-mutuel wagering facility or from gambling games conducted on a riverboat or in a casino or organization gaming facility provided that the person making the payment is required to withhold under Section 3402(q) of the Internal Revenue Code.
- 6) Published studies or reports, and sources of underlying data, used to compose this rulemaking: None
- 7) Will this proposed rulemaking replace an emergency rule currently in effect? Yes
- 8) Does this rulemaking contain an automatic repeal date? No
- 9) Does this proposed rulemaking contain incorporations by reference? No
- 10) Are there any other proposed rulemakings pending on this Part? Yes

| <u>Section Numbers</u> | <u>Proposed Actions</u> | <u>Illinois Register Citations</u> |
|------------------------|-------------------------|-------------------------------------|
| 100.2430 | Amendment | 44 Ill. Reg. 1785; January 24, 2020 |
| 100.7390 | New Section | 44 Ill. Reg. 4544; March 20, 2020 |

ILLINOIS REGISTER

DEPARTMENT OF REVENUE

NOTICE OF PROPOSED AMENDMENTS

- 11) Statement of Statewide Policy Objectives: These rules do not create or enlarge a mandate as described in Section 3(b) of the State Mandates Act.
- 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:
- Michael D. Mankowski
Illinois Department of Revenue
Legal Services Office
101 West Jefferson
Springfield, Illinois 62794
- (217) 782-2844
- 13) Initial Regulatory Flexibility Analysis:
- A) Types of small businesses, small municipalities and not for profit corporations affected: None
- B) Reporting, bookkeeping or other procedures required for compliance: Ability to track and report amounts withheld from gambling winnings.
- C) Types of professional skills necessary for compliance: None
- 14) Small Business Impact Analysis: No significant impact.
- 15) This rulemaking was not included on either of the 2 most recent agendas because: The proposed rules implement a recent statutory change and were inadvertently omitted from the most recent regulatory agenda.

The full text of the Proposed amendments is identical to that of the text of the Emergency amendments for this Part, and will appear in this issue of the Illinois Register on page:

Section 100.3220 Allocation of Certain Items of Nonbusiness Income by Persons Other Than Residents (IITA Section 303)

EMERGENCY

- a) In General. IITA Section 303 provides rules for the allocation by any person other than a resident of Illinois of any item of capital gain or loss, and any item of income from rents or royalties from real or tangible personal property, interest, dividends, and patent or copyright royalties, together with any item of deduction directly allocable thereto, to the extent the item constitutes nonbusiness income. For the tests as to whether any item

ILLINOIS REGISTER

DEPARTMENT OF REVENUE

NOTICE OF PROPOSED AMENDMENTS

constitutes business or nonbusiness income, see Section 100.3010.

b) *Capital Gains and Losses*

- 1) *Real Property. Capital gains and losses from sales or exchanges of real property are allocated to Illinois if the property is located in Illinois. (IITA Section 303(b)(1))* Economic interests in minerals in place, such as oil or gas, are real property under IITA Section 303. Examples of these interests are royalties, overriding royalties, participating interests, production payments and working interests.
- 2) *Tangible Personal Property. Capital gains and losses from sales or exchanges of tangible personal property are allocated to Illinois, if at the time of the sale or exchange:*
 - A) *the property has its situs in Illinois; or*
 - B) *the taxpayer has its commercial domicile in Illinois and is not taxable in the state in which the property has its situs. (IITA Section 303(b)(2))* For the tests of taxability in another state and commercial domicile, see Sections 100.3200 and 100.3210.
- 3) *Intangible Personal Property. Capital gains and losses from sales or exchanges of intangible personal property are allocated to Illinois if the taxpayer has its commercial domicile in Illinois at the time of the sale or exchange. (IITA Section 303(b)(3))* For the tests of commercial domicile, see Section 100.3210.

c) *Rents and Royalties*

- 1) *Real Property. Rents and royalties from real property are allocated to Illinois if the property is located in Illinois. (IITA Section 303(c)(1))* Economic interests in minerals in place, such as oil or gas, are real property under IITA Section 303. Examples of these interests are royalties, overriding royalties, participating interests, production payments and working interests.
- 2) *Tangible Personal Property. Rents and royalties from tangible personal property are allocated to Illinois:*
 - A) *if and to the extent that the property is utilized in Illinois; or*
 - B) *in their entirety if, at the time rents or royalties are paid or accrued, the taxpayer has its commercial domicile in Illinois and was not organized under the laws of, or is not taxable with respect to the rents or royalties in, the state in which the property is utilized. (IITA Section 303(c)(2))* For the tests

ILLINOIS REGISTER

DEPARTMENT OF REVENUE

NOTICE OF PROPOSED AMENDMENTS

of taxability in another state and commercial domicile, see Sections 100.3200 and 100.3210. The extent of utilization of tangible personal property in a state is determined by multiplying the rents or royalties derived from the property by a fraction, the numerator of which is the number of days of physical location of the property in the state during the rental or royalty period in the taxable year and the denominator of which is the number of days of physical location of the property everywhere during all rental or royalty periods in the taxable year. If the physical location of the property during the rental or royalty period is unknown or unascertainable by the taxpayer, tangible personal property is utilized in the state in which the property is located at the time the rental or royalty payor obtains possession.

- 3) Examples. Section 100.3220(c) may be illustrated by the following examples:
- A) EXAMPLE A. A is a resident of Missouri. A purchases an interest in oil royalty under an oil and gas lease in Illinois. During 1970, A receives \$2,000 in royalty payments. Under Section 100.3010(c)(3)(B), the royalty income is presumed to be nonbusiness income. As such it is allocated to Illinois, being derived from real property located in Illinois.
 - B) EXAMPLE B. B is a resident of Iowa, with a summer home in Illinois. B owns a sailboat that he keeps in Iowa during the winter months and tows to Illinois by trailer for use in the summer. During 1970, B is unable to visit his summer home, and rents his sailboat for the months of July through September to C, the owner of the adjoining property in Illinois. Under Section 100.3010(c)(3)(B), the rent is presumed to be nonbusiness income. C takes the boat from Iowa to Illinois and returns it to B in Iowa on October 1, 1970. Although the boat is physically located in Iowa during the months of January through June and October through December, the rental period is only the months of July through September. During the rental period, the boat is located in Illinois. Hence, it is utilized in Illinois and, accordingly, the rental income is allocated to Illinois.
 - C) EXAMPLE C. The facts are the same as in Example B, except that B rents the boat through a want ad and does not know C, nor where he uses the boat during the months of July through September. In this case, since C takes possession of the boat in Iowa, it is utilized in Iowa and, accordingly, the rental income is not allocated to Illinois.

d) *Patent and Copyright Royalties*

- 1) *Allocation. Patent and copyright royalties are allocated to Illinois:*

ILLINOIS REGISTER

DEPARTMENT OF REVENUE

NOTICE OF PROPOSED AMENDMENTS

- A) *if and to the extent that the patent or copyright is utilized by the payor of the royalties in Illinois; or*
 - B) *if and to the extent that the patent or copyright is utilized by the payor of the royalties in a state in which the taxpayer is not taxable with respect to the royalties and, at the time the royalties are paid or accrued, the taxpayer has its commercial domicile in Illinois. (IITA Section 303(d)(1)) For the tests of taxability in another state and commercial domicile, see Sections 100.3200 and 100.3210.*
- 2) *Utilization*
- A) *Patents. A patent is utilized in a state to the extent that it is employed in production, fabrication, manufacturing or other processing in the state or to the extent that a patented product is produced in the state. If the basis of receipts from patent royalties does not permit allocation to states or if the accounting procedures of the royalty payor do not reflect states of utilization, the patent is utilized in Illinois if the taxpayer has its commercial domicile in Illinois. (IITA Section 303(d)(2)(A))*
 - B) *Copyrights. A copyright is utilized in a state to the extent that printing or other publication originates in that state. If the basis of receipts from copyright royalties does not permit allocation to states or if the accounting procedures of the royalty payor do not reflect states of utilization, the copyright is utilized in Illinois if the taxpayer has its commercial domicile in Illinois. (IITA Section 303(d)(2)(B))*
- 3) Example. A, a resident of New York, is not in the business of being an inventor, but owns a patent on a single invention, which he licenses to a manufacturer of automatic garage door openers. Royalties are a percentage of the manufacturer's sales. The manufacturer has plants situated in Missouri, Illinois and Indiana. Under Section 100.3050(c)(2)(B), the royalty income is presumed to be nonbusiness income. If A's royalties can be allocated to Missouri, Illinois and Indiana on the basis of sales from the manufacturer's plants in each of those states, those royalties attributable to sales from the Illinois plant are allocated to Illinois. If, however, the manufacturer's accounting procedures do not reflect sales from the specific plants, but royalties are paid on the basis of total sales not broken down by plant, then, since A is not a resident of Illinois, the patent is not utilized in Illinois and none of the royalties are allocated to Illinois.
- e) Taxability in another state. For the test of taxability in another state, see Section 100.3200.

ILLINOIS REGISTER

DEPARTMENT OF REVENUE

NOTICE OF PROPOSED AMENDMENTS

- f) Interest and dividends. For allocation of interest and dividends, see Section 100.3300(b)(2).
- g) *Illinois Lottery Prizes. Prizes awarded under the Illinois Lottery Law [20 ILCS 1605] are allocable to this State. Payments received in taxable years ending on or after December 31, 2013, from the assignment of a prize under Section 13.1 of the Illinois Lottery Law, are allocable to this State. (IITA Section 303(e))*
- h) *Wagering and Gambling Winnings. Payments received in taxable years ending on or after December 31, 2019 of winnings from pari-mutuel wagering conducted at a wagering facility licensed under the Illinois Horse Racing Act of 1975 [230 ILCS 5] and from gambling games conducted on a riverboat or in a casino or organization gaming facility licensed under the Illinois Gambling Act [230 ILCS 10] are allocable to this State. (IITA Section 303(e-1))*
- i) Unemployment Compensation. Unemployment compensation paid by this State is allocated to this State. (See IITA Section 303(e-5).)

(Source: Amended by emergency rulemaking at 44 Ill. Reg.11208, effective July 6, 2020, for a maximum of 150 days; amended at 44 Ill. Reg 11132, effective July 6, 2020.)

SUBPART M: BUSINESS INCOME OF PERSONS OTHER THAN RESIDENTS

Section 100.3370 Sales Factor (IITA Section 304)

EMERGENCY

- a) In General
 - 1) IITA Section 1501(a)(21) defines the term "sales" to mean all gross receipts of the person not allocated under IITA Sections 301, 302 and 303. Thus, for the purposes of the sales factor of the apportionment formula for each trade or business of the person, the term "sales" means all gross receipts derived by the person from transactions and activity in the regular course of his or her trade or business. The following are rules for determining "sales" in various situations, except in instances in which an alternative method of determining the sales factor is prescribed in Section 100.3380. If the determination prescribed by this Section does not clearly reflect the taxpayer's business activities in Illinois (for taxable years ending before December 31, 2008) or the market for the taxpayer's goods, services or other sources of income in Illinois (for taxable years ending on or after December 31, 2008), the taxpayer may request the use of an alternative method of apportionment under Section 100.3390.
 - A) In the case of a person engaged in manufacturing and selling or purchasing

ILLINOIS REGISTER

DEPARTMENT OF REVENUE

NOTICE OF PROPOSED AMENDMENTS

and reselling goods or products, "sales" includes all gross receipts from the sales of those goods or products (or other property of a kind that would properly be included in the inventory of the person if on hand at the close of the tax period) held by the person primarily for sale to customers in the ordinary course of its trade or business. Gross receipts for this purpose means gross sales less returns and allowances, and includes all interest income, service charges, carrying charges, or time-price differential charges attendant to those sales. Federal and State excise taxes (including sales taxes) shall be included as part of the receipts if the taxes are passed on to the buyer or included as part of the selling price of the product.

- B) In the case of cost plus fixed fee contracts, such as the operation of a government-owned plant for a fee, "sales" includes the entire reimbursed cost, plus the fee.
 - C) In the case of a person engaged in providing services, such as the operation of an advertising agency, or the performance of equipment service contracts, or research and development contracts, "sales" includes the gross receipts from the performance of those services, including fees, commissions and similar items.
 - D) In the case of a person engaged in renting real or tangible property, "sales" includes the gross receipts from the rental, lease or licensing of the use of the property.
 - E) In the case of a person engaged in the sale, assignment or licensing of intangible personal property such as patents and copyrights, "sales" includes the gross receipts therefrom.
 - F) If a person derives receipts from the sale of equipment used in its business, those receipts constitute "sales". For example, a truck express company owns a fleet of trucks and sells its trucks under a regular replacement program. The gross receipts from the sales of the trucks shall be included in the sales factor.
- 2) The following gross receipts are not included in the sales factor:
- A) For taxable years ending on or after December 31, 1995, *dividends; amounts included under IRC section 78; and Subpart F income* are excluded from the sales factor under IITA Section 304(a)(3)(D).
 - B) Gross receipts that are excluded from or deducted in the computation of federal taxable income or federal adjusted gross income, and that are not

ILLINOIS REGISTER

DEPARTMENT OF REVENUE

NOTICE OF PROPOSED AMENDMENTS

added back in the computation of base income. For example, in years ending prior to December 31, 1995, dividends received from a domestic corporation are excluded from the sales factor to the extent the taxpayer is allowed a deduction under IRC section 243 with respect to those dividends.

- C) Gross receipts that are subtracted from federal taxable income or federal adjusted gross income in the computation of base income or that are eliminated in the computation of taxable income in the case of a unitary business group under Section 100.5270(b)(1). Examples of gross receipts excluded from the sales factor under this provision include:
 - i) Interest on federal obligations subtracted under IITA Section 203(a)(2)(N), (b)(2)(J), (c)(2)(K) or (d)(2)(G).
 - ii) For taxable years ending prior to December 31, 1995, dividends included in federal taxable income or federal adjusted gross income are excluded from the sales factor if eliminated in combination or to the extent subtracted under IITA Section 203(a)(2)(J), (a)(2)(K), (b)(2)(K), (b)(2)(L), (b)(2)(O), (c)(2)(M), (c)(2)(O), (d)(2)(K) or (d)(2)(M).

- D) Gross receipts that are excluded from or deducted in the computation of federal taxable income or federal adjusted gross income, but are added back in the computation of base income, are included in the sales factor unless subtracted or eliminated in combination. For example:
 - i) Interest on State obligations excluded from federal taxable income or adjusted gross income under IRC section 103 and added back in the computation of base income under IITA Section 203(a)(2)(A), (b)(2)(A), (c)(2)(A) or (d)(2)(A) shall be included in the sales factor except in the case of interest on certain Illinois obligations that is exempt from Illinois Income Tax. (See 86 Ill. Adm. Code 100.2470(f).)
 - ii) Gross receipts from intercompany transactions between two corporate members of a federal consolidated group, the taxable income on which is deferred under 26 CFR 1.1502-13, shall be included in the sales factor of the recipient unless subtracted under a provision of IITA Section 203 or eliminated in combination of the two corporations as members of a unitary business group.

- E) In some cases, certain gross receipts should be disregarded in determining the sales factor in order that the apportionment formula will operate fairly to

ILLINOIS REGISTER

DEPARTMENT OF REVENUE

NOTICE OF PROPOSED AMENDMENTS

apportion to this State the income of the person's trade or business. (See 86 Ill. Adm. Code 100.3380(c).)

- F) For taxable years ending on or after December 31, 1999, *gross receipts from the licensing, sale, or other disposition of a patent, copyright, trademark, or similar item of intangible personal property may be included in the sales factor only if gross receipts from licenses, sales, or other dispositions of these items comprise more than 50% of the taxpayer's total gross receipts included in gross income during the tax year and during each of the 2 immediately preceding tax years; provided that, when a taxpayer is a member of a unitary business group, the determination shall be made on the basis of the gross receipts of the entire unitary business group.* (IITA Section 304(a)(3)(B-2)) For purposes of this Section:
- i) "Gross receipts from the licensing, sale, or other disposition of a patent, copyright, trademark, or similar item of intangible personal property" includes amounts received as damages or settlements from claims of infringement.
 - ii) "Gross receipts from the licensing, sale, or other disposition of a patent" includes only amounts received from a person using the patent in the production, fabrication, manufacturing, or other processing of a product or from a person producing, fabricating or manufacturing a product subject to the patent.
 - iii) "Gross receipts from the licensing, sale, or other disposition of a copyright" includes only amounts received by the taxpayer from a person engaged in printing or other publication of the material protected by the copyright, which are governed by Section 100.3373. The term does not include gross receipts from broadcasting within the meaning of IITA Section 304(a)(3)(B-7) or from publishing or advertising within the meaning of IITA Section 304(a)(3)(C-5)(iv).
 - iv) If a taxpayer has been in existence less than three taxable years, its gross receipts from the licensing, sale, or other disposition of patents, copyrights, trademarks or similar items of intangible personal property shall be included in its sales factor if those gross receipts comprise more than 50% of its total gross receipts during each taxable year of its existence.
 - v) "Patent" means a patent issued under 35 USC 151.

ILLINOIS REGISTER

DEPARTMENT OF REVENUE

NOTICE OF PROPOSED AMENDMENTS

- vi) "Copyright" means a copyright registered or eligible for registration under 17 USC 408.
 - vii) "Trademark" means a trademark registered or eligible for registration under 15 USC 1051.
 - viii) A "similar item" means an item of intellectual property that is registered or otherwise enforceable under a law equivalent to 35 USC 151, 17 USC 408 or 15 USC 1051 or that is otherwise recognized in the country under whose law the sale or license agreement would be enforced, or under which an infringement claim would be brought.
 - ix) In the case of a unitary business group, the "total gross receipts and gross receipts from the licensing, sale or other disposition of a patent, copyright, trademark or similar item of intangible personal property in the two years immediately preceding the tax year" includes the gross receipts and gross receipts from the licensing, sale or other disposition of a patent, copyright, trademark or similar item of intangible personal property of all persons who are members of the unitary business group at some time during the taxable year, whether or not those persons were also members of the unitary business group in a preceding tax year, and only of those persons.
- 3) In filing returns with this State, if the person departs from or modifies the basis for excluding or including gross receipts in the sales factor used in returns for prior years, the person shall disclose in the return for the current year the nature and extent of the modification. If the returns or reports filed by the person with all states to which the person reports under Article IV of the Multistate Tax Compact or the Uniform Division of Income for Tax Purposes Act are not uniform in the inclusion or exclusion of gross receipts, the person shall disclose in its return to this State the nature and extent of the variance.
- 4) For taxable years ending prior to December 31, 2008, sales of electricity are sales other than sales of tangible personal property sourced under IITA Section 304(a)(3)(C). For taxable years ending on or after December 31, 2008 and prior to July 16, 2009, sales of electricity are sales of service sourced under IITA Section 304(a)(3)(C-5)(iv). For taxable years ending after July 15, 2009, sales of electricity are sales of tangible personal property sourced under IITA Section 304(a)(3)(B). (See *Exelon Corp. v. Department of Revenue*, 234 Ill 2d 266 (2009).)
- b) Denominator. The denominator of the sales factor shall include the total gross receipts derived by the person from transactions and activity in the regular course of its trade or

ILLINOIS REGISTER

DEPARTMENT OF REVENUE

NOTICE OF PROPOSED AMENDMENTS

business, except receipts excluded under 86 Ill. Adm. Code 100.3380(c).

- c) Numerator. The numerator of the sales factor shall include the gross receipts attributable to this State and derived by the person from transactions and activity in the regular course of its trade or business. All interest income, service charges, carrying charges, or time-price differential charges incidental to those gross receipts shall be included regardless of the place where the accounting records are maintained or the location of the contract or other evidence of indebtedness.

1) Sales of Tangible Personal Property in this State

- A) Gross receipts from the sales of tangible personal property (except sales to the United States Government) (see subsection (c)(2)) are in this State:

- i) if the property is delivered or shipped to a purchaser within this State regardless of the f.o.b. (free on board) point or other conditions of sale; or
- ii) if the property is shipped from an office, store, warehouse, factory or other place of storage in this State and the taxpayer is not taxable in the state of the purchaser. However, premises owned or leased by a person who has independently contracted with the taxpayer for the printing of newspapers, periodicals or books shall not be deemed to be an office, store, warehouse, factory or other place of storage.

- B) Property shall be deemed to be delivered or shipped to a purchaser within this State if the recipient is located in this State, even though the property is ordered from outside this State.

EXAMPLE: A corporation, with inventory in State A, sold \$100,000 of its products to a purchaser having branch stores in several states including this State. The order for the purchase was placed by the purchaser's central purchasing department located in State B. \$25,000 of the purchase order was shipped directly to purchaser's branch store in this State. The branch store in this State is the "purchaser within this State" with respect to \$25,000 of the corporation's sales.

- C) Property is delivered or shipped to a purchaser within this State if the shipment terminates in this State, even though the property is subsequently transferred by the purchaser to another state.

EXAMPLE: A corporation makes a sale to a purchaser who maintains a central warehouse in this State at which all merchandise purchases are

ILLINOIS REGISTER

DEPARTMENT OF REVENUE

NOTICE OF PROPOSED AMENDMENTS

received. The purchaser reships the goods to its branch stores in other states for sale. All of the corporation's products shipped to the purchaser's warehouse in this State is property "delivered or shipped to a purchaser within this State".

- D) The term "purchaser within this State" shall include the ultimate recipient of the property if the person in this State, at the designation of the purchaser, delivers to or has the property shipped to the ultimate recipient within this State.

EXAMPLE: A corporation in this State sold merchandise to a purchaser in State A. The corporation directed the manufacturer or supplier of the merchandise in State B to ship the merchandise to the purchaser's customer in this State pursuant to purchaser's instructions. The sale by the corporation is "in this State".

- E) When property being shipped by a seller from the state of origin to a consignee in another state is diverted while en route to a purchaser in this State, the sales are in this State.

EXAMPLE: Corporation X, a produce grower in State A, begins shipment of perishable produce to the purchaser's place of business in State B. While en route the produce is diverted to the purchaser's place of business in this State in which state Corporation X is subject to tax. The sale by the corporation is attributed to this State.

- F) If the person is not taxable in the state of the purchaser, the sale is attributed to this State if the property is shipped from an office, store, warehouse, factory, or other place of storage in this State (subject to the exception noted in (c)(1)(A)(ii)).

EXAMPLE: A corporation has its head office and factory in State A. It maintains a branch office and inventory in this State. The corporation's only activity in State B is the solicitation of orders by a resident salesman. All orders by the State B salesman are sent to the branch office in this State for approval and are filled by shipment from the inventory in this State. Since the corporation is immune under Public Law 86-272 from tax in State B, all sales of merchandise to purchasers in State B are attributed to this State, the state from which the merchandise was shipped.

- 2) Sales of tangible personal property to the United States Government in this State. Gross receipts from the sales of tangible personal property to the United States Government are in this State if the property is shipped from an office, store,

ILLINOIS REGISTER

DEPARTMENT OF REVENUE

NOTICE OF PROPOSED AMENDMENTS

warehouse, factory, or other place of storage in this State. For the purposes of this regulation, only sales for which the United States Government makes direct payment to the seller pursuant to the terms of the contract constitute sales to the United States Government. Thus, as a general rule, sales by a subcontractor to the prime contractor, the party to the contract with the United States Government, do not constitute sales to the United States Government.

EXAMPLE A: A corporation contracts with General Services Administration to deliver X number of trucks that were paid for by the United States Government. The sale is a sale to the United States Government.

EXAMPLE B: A corporation as a subcontractor to a prime contractor with the National Aeronautics and Space Administration contracts to build a component of a rocket for \$1,000,000. The sale by the subcontractor to the prime contractor is not a sale to the United States Government.

- 3) For taxable years ending on or after December 31, 1999, *gross receipts from the licensing, sale, or other disposition of a patent, copyright, trademark, or similar item of intangible personal property* that are not excluded from the sales factor under subsection (a)(2)(F) are included in the numerator of the sales factor *to the extent the item is utilized in this State during the year the gross receipts are included in gross income.* (IITA Section 304(a)(3)(B-1)) For purposes of this subsection (c)(3):
- A) *A patent is utilized in a state to the extent that it is employed in production, fabrication, manufacturing, or other processing in the state or to the extent that a patented product is produced in the state. If a patent is utilized in more than one state, the extent to which it is utilized in any one state shall be a fraction equal to the gross receipts of the licensee or purchaser from sales or leases of items produced, fabricated, manufactured, or processed within that state using the patent and of patented items produced within that state, divided by the total of the gross receipts for all states in which the patent is utilized.* (IITA Section 304(a)(3)(B-1)(ii)(I))
 - B) *A copyright is utilized in a state to the extent that printing or other publication originates in the state. Printing or other publication originates at the place at which the licensee of the copyright incorporates the copyrighted material into the physical medium by which it will be delivered to the purchaser of the material or, if the copyrighted material is delivered to the purchaser without use of a physical medium, the place at which delivery of the copyrighted material to the person purchasing the material from the licensee originates. If a copyright is utilized in more than one state, the extent to which it is utilized in any one state shall be a fraction equal to the gross receipts from sales or licenses of materials printed or published in that state*

ILLINOIS REGISTER

DEPARTMENT OF REVENUE

NOTICE OF PROPOSED AMENDMENTS

divided by the total of the gross receipts for all states in which the copyright is utilized. (IITA Section 304(a)(3)(B-1)(ii)(II))

- C) *Trademarks and other items of intangible personal property governed by this subsection (c)(3) are utilized in the state in which the commercial domicile of the licensee or purchaser is located. (IITA Section 304(a)(3)(B-1)(ii)(III))*
- D) *If the place of utilization of an item of property under subsection (c)(3)(A), (B) or (C) cannot be determined from the taxpayer's books and records or from the books and records of any person related to the taxpayer within the meaning of IRC section 267(b), the gross receipts attributable to that item shall be excluded from both the numerator and the denominator of the sales factor. (IITA Section 304(a)(3)(B-1)(iii))*
- 4) *For taxable years ending on or after December 31, 2013, gross receipts from winnings under the Illinois Lottery Law [20 ILCS 1605] and from the assignment of a prize under Section 13-1 of the Illinois Lottery Law are received in this State. (IITA Section 304(a)(3)(B-8))*
- 5) *For taxable years ending on or after December 31, 2019, gross receipts from winnings from pari-mutuel wagering conducted at a wagering facility licensed under the Illinois Horse Racing Act of 1975 [230 ILCS 5] or from winnings from gambling games conducted on a riverboat or in a casino or organization gaming facility licensed under the Illinois Gambling Act [230 ILCS 10] are in this State. (IITA Section 304(a)(3)(B-9))*
- 6) For taxable years ending prior to December 31, 2008, gross receipts from transactions not governed by the provisions of subsection (c)(1), (2), (3) or (4) and, for taxable years ending on or after December 31, 2008, from transactions involving intangible personal property when the taxpayer is not a dealer with respect to the intangible personal property, are attributed to this State if the income producing activity that gave rise to the receipts is performed wholly within this State. Also, gross receipts are attributed to this State if, with respect to a particular item of income, the income producing activity is performed in this State, based on costs of performance.
 - A) **Income Producing Activity Defined.** The term "income producing activity" applies to each separate item of income and means the transactions and activity directly engaged in by the person in the regular course of its trade or business for the ultimate purpose of obtaining gains or profit. Income producing activity does not include transactions and activities performed on behalf of a person, such as those conducted on its behalf by an independent

ILLINOIS REGISTER

DEPARTMENT OF REVENUE

NOTICE OF PROPOSED AMENDMENTS

contractor. The mere holding of intangible personal property is not, of itself, an income producing activity. Accordingly, the income producing activity includes but is not limited to the following:

- i) The rendering of personal services by employees or the utilization of tangible and intangible property by the person in performing a service.
 - ii) The sale, rental, leasing, licensing or other use of real property.
 - iii) The rental, leasing, licensing or other use of tangible personal property.
 - iv) The sale, licensing or other use of intangible personal property.
- B) Costs of Performance Defined. The term "costs of performance" means direct costs determined in a manner consistent with generally accepted accounting principles and in accordance with accepted conditions or practices in the trade or business of the person.
- C) Application. Receipts sourced under this subsection (c)(6) in respect to a particular income producing activity are in this State if:
- i) the income producing activity is performed wholly within this State; or
 - ii) the income producing activity is performed both in and outside this State and, based on costs of performance, a greater proportion of the income producing activity is performed in this State than without this State (for taxable years ending prior to December 31, 2008) or a greater proportion of the income-producing activity of the taxpayer is performed within this State than in any other state (for taxable years ending on or after December 31, 2008).
- D) Special Rules. The following are special rules for determining when receipts from the income producing activities described in this subsection (c)(6)(D) are in this State.
- i) Gross receipts from the sale, lease, rental or licensing of real property are in this State if the real property is located in this State.
 - ii) Gross receipts from the rental, lease, or licensing of tangible personal property are in this State if the property is located in this

ILLINOIS REGISTER

DEPARTMENT OF REVENUE

NOTICE OF PROPOSED AMENDMENTS

State. The principal cost of performance in a rental, leasing or licensing transaction is the depreciation or amortization of the tangible personal property, and the depreciation or amortization expense is incurred in the state in which the tangible personal property is located. The rental, lease, licensing or other use of tangible personal property in this State is a separate income producing activity from the rental, lease, licensing or other use of the same property while located in another state; consequently, if property is within and without this State during the rental, lease or licensing period, gross receipts attributable to this State shall be measured by the ratio which the time the property was physically present or was used in this State bears to the total time or use of the property everywhere during that period.

EXAMPLE: Corporation X is the owner of 10 railroad cars. During the year, the total of the days each railroad car was present in this State was 50 days for a total of 500 days. The receipts attributable to the use of each of the railroad cars in this State are a separate item of income. Total receipts attributable to this State shall be determined as follows:

$$(10 \times 50) / 3650 \times \text{Total Receipts}$$

- iii) Gross receipts for the performance of personal services are attributable to this State to the extent those services are performed partly within and partly outside this State. The gross receipts for the performance of those services shall be attributable to this State only if a greater portion of the services were performed in this State, based on costs of performance. When services are performed partly within and partly outside this State and the services performed in each state constitute a separate income producing activity, the gross receipts for the performance of services attributable to this State shall be measured by the ratio that the time spent in performing the services in this State bears to the total time spent in performing the services everywhere. Time spent in performing services includes the amount of time expended in the performance of a contract or other obligation that gives rise to the gross receipts. Personal service not directly connected with the performance of the contract or other obligation, as for example, time expended in negotiating the contract, is excluded from the computations.

EXAMPLE 1: Corporation X, a road show, gave theatrical performances at various locations in State X and in this State during

ILLINOIS REGISTER

DEPARTMENT OF REVENUE

NOTICE OF PROPOSED AMENDMENTS

the tax period. All gross receipts from performances given in this State are attributed to this State.

EXAMPLE 2: A public opinion survey corporation conducted a poll by its employees in State X and in this State for the sum of \$9,000. The project required 600 man hours to obtain the basic data and prepare the survey report. Two hundred of the 600 man hours were expended in this State. The receipts attributable to this State are \$3,000, calculated as follows:

$$200/600 \times \$9,000$$

- 7) For taxable years ending on or after December 31, 2008, gross receipts from transactions not governed by the provisions of subsection (c)(1), (2), (3), (4), (5) or (6) *are in this State if any of the following criteria are met:*
- A) *Sales from the sale or lease of real property are in this State if the property is located in this State. (IITA Section 304(a)(3)(C-5)(i))*
 - B) *Sales from the lease or rental of tangible personal property are in this State if the property is located in this State during the rental period. Sales from the lease or rental of tangible personal property that is characteristically moving property, including, but not limited to, motor vehicles, rolling stock, aircraft, vessels, or mobile equipment, are in this State to the extent that the property is used in this State. (IITA Section 304(a)(3)(C-5)(ii))*
 - C) *In the case of interest, net gains (but not less than zero) and other items of income from intangible personal property, the sale is in this State if:*
 - i) *in the case of a taxpayer who:*
 - *is a dealer in the item of intangible personal property within the meaning of IRC section 475, the income or gain is received from a customer in this State. A taxpayer is a dealer with respect to an item of intangible personal property if the taxpayer is a dealer with respect to the item under IRC section 475(c)(1), or would be a dealer with respect to the item under IRC section 475(c)(1) if the item were a security as defined under IRC section 475(c)(2). For purposes of this subsection (c)(7)(C)(i), a customer is in this State if the customer is an individual, trust or estate who is a resident of this State and, for all other customers, if the customer's commercial domicile is in this State. Unless the dealer has actual knowledge of the*

ILLINOIS REGISTER

DEPARTMENT OF REVENUE

NOTICE OF PROPOSED AMENDMENTS

residence or commercial domicile of a customer during a taxable year, the customer shall be deemed to be a customer in this State if the billing address of the customer, as shown in the records of the dealer, is in this State. (IITA Section 304(a)(3)(C-5)(iii)(a)) A dealer shall treat the person with whom it engages in a transaction as the customer, even when that person is acting on behalf of a third party, unless the dealer has actual knowledge of the party on whose behalf the person is acting. If a taxpayer is a dealer with respect to an item of intangible personal property and recognizes gain or loss with respect to that item other than in connection with a transaction with a customer (for example, unrealized gain or loss from marking the item to market under IRC section 475), that gain or loss shall be excluded from the numerator and denominator of the sales factor; or

- *is not a dealer with respect to the item of intangible personal property, if the income-producing activity of the taxpayer is performed in this State or, if the income-producing activity of the taxpayer is performed both within and without this State, if a greater proportion of the income-producing activity of the taxpayer is performed within this State than in any other state, based on performance costs. (IITA Section 304(a)(3)(C-5)(iii)(b)) (See subsection (c)(6) of this Section.)*
- ii) For purposes of this subsection (c)(7)(C), an item of "intangible personal property" includes only an item that can ordinarily be resold or otherwise reconveyed by the person acquiring the item from the taxpayer, and does not include any obligation of the taxpayer to make any payment, perform any act, or otherwise provide anything of value to another person.

EXAMPLE 1: A ticket to attend a sporting event would not be an item of intangible personal property for the owner of the stadium who issues the ticket and is obliged to grant admission to the holder of the ticket. Rather, the sale of the ticket is a prepayment for a service to be provided. However, the ticket would be an item of intangible personal property in the hands of the original purchaser or any subsequent purchaser of the ticket, and a ticket broker engaged in the business of buying and reselling tickets would be a dealer with respect to the ticket.

ILLINOIS REGISTER

DEPARTMENT OF REVENUE

NOTICE OF PROPOSED AMENDMENTS

EXAMPLE 2: A taxpayer selling canned computer software is selling intangible personal property. (First National Bank of Springfield v. Dept. of Revenue, 85 Ill.2d 84 (1981)) If the taxpayer sells software to customers in the ordinary course of its business, it is a dealer with respect to those sales. In contrast, a taxpayer providing programming or maintenance services to its customers is selling services rather than intangible personal property.

EXAMPLE 3: A taxpayer administers a "rewards program" for a group of unrelated businesses. Under the program, a customer of one business can earn discounts or rebates on products and services provided by any of the businesses. As each customer earns rewards, measured in "units", from one of the businesses, that business pays a specified amount per unit to the taxpayer. When a customer uses units earned in the program to purchase products or services at a discount from a participating business, the taxpayer pays that business a specified amount per unit used by the customer. Rebates may be paid to the customer directly by the taxpayer or by one of the businesses, which is then reimbursed by the taxpayer. To the extent payments made to the taxpayer by businesses awarding units exceed the payments the taxpayer must make for discounts and rebates, the excess is payment for operating the program. The units awarded are obligations of the taxpayer to make payments to the business providing products or services at a discount or to pay rebates. Accordingly, payments received by the taxpayer from the participating businesses for units awarded are not income from sales of intangible personal property by the taxpayer.

- D) *Sales of services are in this State if the services are received in this State.*
(IITA Section 304(a)(3)(C-5)(iv))
- i) General Rule. Gross receipts from services are assigned to the numerator of the sales factor to the extent that the receipts may be attributed to services received in Illinois.
 - ii) A contract that involves the provision of a service by the taxpayer and the use of property of the taxpayer by the service recipient shall be treated as a sale of service unless the contract is properly treated as a lease of property under IRC section 7701(e)(1), taking into account all relevant factors, including whether:
 - the service recipient is in physical possession of the property;

ILLINOIS REGISTER

DEPARTMENT OF REVENUE

NOTICE OF PROPOSED AMENDMENTS

- the service recipient controls the property;
- the service recipient has a significant economic or possessory interest in the property;
- the service provider does not bear any risk of substantially diminished receipts or substantially increased expenditures if there is nonperformance under the contract;
- the service provider does not use the property concurrently to provide significant services to entities unrelated to the service recipient; and
- the total contract price does not substantially exceed the rental value of the property for the contract period.

EXAMPLE: A taxpayer selling access to an online database or applications software, and who is required to perform regular update services to the database or software, retains control over the contents of the database or software, and provides access to the same database or software to multiple customers is not selling or licensing an item of intangible personal property to its customers, but rather is providing a service.

iii) Services received in this State include, but are not limited to:

- When the subject matter of the service is an item of tangible personal property, the service is received in this State if possession of the property is restored to the recipient of the service under the principles in subsection (c)(1) for determining whether a sale of that property is in this State.

EXAMPLE 1: A customer returns a computer to the manufacturer for repair. The manufacturer performs the repairs in Indiana and ships the computer to the customer's Illinois address. The service is received in this State.

EXAMPLE 2: Individual purchases clothing from Merchant at a store in this State, using a credit card issued by Bank A pursuant to a licensing agreement with Credit Card Company. Credit Card Company is not a financial organization required to apportion its business income under Section 100.3405. Bank A remits the purchase price to Credit Card Company,

ILLINOIS REGISTER

DEPARTMENT OF REVENUE

NOTICE OF PROPOSED AMENDMENTS

which deposits the purchase price with Merchant's bank, minus a fee or discount. All fees and discounts earned by Credit Card Company in connection with this purchase are for services received in this State.

When the subject matter of the service is an item of real property, the service is received in the state in which the real property is located.

EXAMPLE 3: Individual purchases a parcel of land in Illinois and constructs a house on the parcel. Services performed at an architect's office in Wisconsin regarding the design and construction of the house are received in this State.

- When the service is performed on or with respect to the person of an individual (for example, medical treatment services), the service is received in the state in which the individual is located at the time the service is performed.
- Services performed by a taxpayer that are directly connected to or in support of services received in this State are also services received in this State.

EXAMPLE 4: Individual purchases automobile repair services from Automobile Dealership at its facility located in this State, using a credit card issued by Bank A pursuant to a licensing agreement with Credit Card Company. Bank A remits the purchase price to Credit Card Company, which deposits the purchase price with Automobile Dealership's bank, minus a fee or discount. All fees and discounts earned by Credit Card Company in connection with this purchase are for services received in this State.

EXAMPLE 5: Services performed by an investment fund on behalf of an investor are received in this State if the investor resides in this State (in the case of an individual) or has its ordering or billing address in this State (for other investors). In the case of services provided by Taxpayer to or on behalf of the investment fund that are directly connected with services provided separately to the investors, such as preparation of communications and statements to investors, and allocations of earnings and distributions to investors, the service is also received in this State to the extent the investors reside (or

ILLINOIS REGISTER

DEPARTMENT OF REVENUE

NOTICE OF PROPOSED AMENDMENTS

have their ordering or billing address) in this State. Accordingly, receipts of Taxpayer for these services are allocated to this State on the basis of the ratio of: the average of the outstanding shares in the fund owned by shareholders, partners or other investors residing (or having their ordering or billing address) within this State at the beginning and end of each taxable year of the taxpayer; and the average of the total number of outstanding shares in the fund at the beginning and end of each year. Residence or ordering or billing address of the shareholder, partner or other investor is determined by the mailing address in the records of the investment fund or the taxpayer. Services provided to an investment fund that are not directly connected to or in support of services provided separately to investors, such as brokerage services or investment advising, are not received by the customer at the location of its investors.

iv) Special Rules

- Under IITA Section 304(a)(3)(C-5)(iv), *if the state where the services are received is not readily determinable, the services shall be deemed to be received at the location of the office of the customer from which the services were ordered in the regular course of the customer's trade or business, or, if the ordering office cannot be determined, at the office of the customer to which the services are billed.* If the service is provided to an individual who provides a residential address as the place from which the services are ordered or to which the services are billed, rather than an office address, the residential address shall be used. For purposes of this provision, the state where services are received is not readily determinable if the facts necessary to make the determination are not contained in the books and records of the taxpayer or any person related to the taxpayer within the meaning of IRC section 267(b) or if the available facts would allow reasonable persons to reach different determinations of the state in which the services were received.
- Under IITA Section 304(a)(3)(C-5)(iv), *if the services are provided to a corporation, partnership, or trust and the services are received in a state in which the corporation, partnership, or trust does not maintain a fixed place of business (as defined in Section 100.3405(b)(1)), the services*

ILLINOIS REGISTER

DEPARTMENT OF REVENUE

NOTICE OF PROPOSED AMENDMENTS

shall be deemed to be received at the location of the office of the customer from which the services were ordered in the regular course of the customer's trade or business, or, if the ordering office cannot be determined, at the office of the customer to which the services are billed. For purposes of this provision, in the case of services performed by the taxpayer as a subcontractor or as an agent acting on behalf of a principal, if either the contractor or principal has a fixed place of business in the state in which the services are received or the customer of the contractor or principal either is an individual or has a fixed place of business in the state in which the services are received, the service shall be treated as received in a state in which the customer of the taxpayer has a fixed place of business.

- Under IITA Section 304(a)(3)(C-5)(iv), *if the taxpayer is not taxable in the state in which the services are received or deemed to be received, the gross receipts attributed to those services must be excluded from both the numerator and denominator of the sales factor.* (See Section 100.3200 for guidance on determining when a taxpayer is taxable in another state.)

(Source: Amended by emergency rulemaking at 44 Ill. Reg.11208, effective July 6, 2020, for a maximum of 150 days; amended at 44 Ill. Reg 11132, effective July 6, 2020.)

SUBPART S: REQUIREMENT AND AMOUNT OF WITHHOLDING

Section 100.7030 Payments to Residents (IITA Section 701)

EMERGENCY

a) In General

- 1) Any payment to an Illinois resident as an employee or otherwise by any payer maintaining an office or transacting business in this State shall be subject to withholding of Illinois income tax if those payments are subject to withholding of federal income tax. Any payer maintaining an office or transacting business in this State making these payments shall be considered an "employer" for purposes of IITA Article 7 and these regulations and, accordingly, will be subject to the same rules and procedures governing employers withholding tax on compensation paid in Illinois. For example, these payers will be required to register as withholding agents, and shall be subject to the reporting (and payment) requirements of IITA Sections 703 and 704. Also, these payers will be subject to the penalties

ILLINOIS REGISTER

DEPARTMENT OF REVENUE

NOTICE OF PROPOSED AMENDMENTS

prescribed in Article 10 of the Act.

- 2) Payments to an Illinois resident by a payer transacting business or maintaining an office in Illinois on which federal withholding is required shall be considered "compensation paid in Illinois" for purposes of IITA Article 7 and this Part. Illinois residents receiving these payments shall be considered "employees" for purposes of IITA Article 7 and this Part. Thus, for example, the computation of the amount of tax to be deducted and withheld shall be made pursuant to Section 100.7050 and the payee shall be entitled to a withholding exemption pursuant to Section 100.7100.
 - 3) Withholding shall be required on the first payment on which withholding of federal income tax is required and shall continue to be required in respect of all these payments until withholding of federal income tax on the payments terminates pursuant to the Internal Revenue Code and the regulations thereunder.
- b) **Payments Subject to Federal Withholding**
Withholding of Illinois income tax is required on all payments to Illinois residents on which withholding of tax is required under the Internal Revenue Code. This applies not only to compensation but to any other type of payment on which federal withholding of income tax is required. Withholding shall be considered required under the Internal Revenue Code if the payee is authorized either by the Internal Revenue Code or the regulations thereunder to request withholding of federal income tax on a particular type of payment and the payee and payer have entered into an agreement for withholding. No authorization from the payee for Illinois withholding is necessary in this situation; the requirement of federal withholding even though voluntarily elected shall automatically impose Illinois withholding.
- c) **Exceptions**
- 1) Withholding will not be required under this Section on any payment to the extent the payment is not includable in the recipient's base income. Thus, if a payment consists partially of a return of capital, only that part of the payment that is not a return of capital and, hence, is income would be subject to withholding. Also annuity payments from qualified employee benefit plans, which are not includable in Illinois base income under IITA Section 203(a)(2)(E), would not be subject to withholding under this Section notwithstanding an agreement between the payor and the payee for the withholding of federal income tax on those payments. Similarly, if a payment consists of an amount that is exempt from taxation by this State either by reason of its Constitution or by reason of the Constitution, treaties or statutes of the United States (i.e., interest on obligations of the United States), the payment would not be subject to withholding under this Section.

ILLINOIS REGISTER

DEPARTMENT OF REVENUE

NOTICE OF PROPOSED AMENDMENTS

- 2) Withholding will not be required on any payment under this Section, except "compensation paid in Illinois", as defined in Section 100.7010(a), to the extent that the payment is subjected to withholding by another state. A signed declaration by the payee to the effect that another state is withholding income tax on a payment shall relieve the payer of the requirement to withhold Illinois tax on the payment.

(Source: Amended by emergency rulemaking at 44 Ill. Reg.11208, effective July 6, 2020, for a maximum of 150 days; amended at 44 Ill. Reg 11132, effective July 6, 2020.)

**Section 100.7036 Withholding of Lottery and Gambling Winnings (IITA Section 710)
EMERGENCY**

a) In General

- 1) *Any person making a payment to a resident or nonresident of winnings under the Illinois Lottery Law and not required to withhold Illinois income tax from the payment under IITA Section 701(b) because those winnings are not subject to federal income tax withholding must withhold Illinois income tax from that payment at a rate equal to the percentage tax rate for individuals provided in IITA Section 201(b), provided that withhold is not required if the payment of winnings is less than \$1,000. (IITA Section 710(a)(1))*
- 2) *In the case of an assignment of a lottery prize under Section 13.1 of the Illinois Lottery Law [20 ILCS 1605], any person making a payment of the purchase price after December 31, 2013 shall withhold from the amount of each payment at a rate equal to the percentage tax rate for individuals provided in IITA Section 201(b). (IITA Section 710(a)(2))*
- 3) *Any person making a payment after December 31, 2019 to a resident or nonresident of winnings from pari-mutual wagering conducted at a wagering facility licensed under the Illinois Horse Racing Act of 1975 [230 ILCS 5] or from gambling games conducted on a riverboat or in a casino or organization gaming facility licensed under the Illinois Gambling Act [230 ILCS 10] must withhold Illinois income tax from the payment at a rate equal to the percentage tax rate for individuals provided in IITA Section 201(b), provided that the person making the payment is required to withhold under 26 USC 3402(q). (IITA Section 710(a)(3))*
For more specific information, and precise details regarding actual federal withholding requirements, see 26 USC 3402(q) and the instructions for U.S. Form 5754 available from the Internal Revenue Service.

(Source: Amended by emergency rulemaking at 44 Ill. Reg.11208, effective July 6, 2020, for a maximum of 150 days; amended at 44 Ill. Reg 11132, effective July 6, 2020.)