Illinois Clarifies Delivery Sales Tax

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The Illinois Department of Revenue recently released proposed amendments to the State’s Retailers’ Occupation Tax regulations that conform to a 2009 Illinois Supreme Court case involving sales tax on transportation and delivery charges. The proposed amendments, if adopted, should give Illinois businesses greater clarity regarding when to collect Illinois sales tax on transportation and delivery charges, and may even stem the flood of lawsuits that have tripped up some retailers.

Under the proposed amendments, on and after November 19, 2009—the date of the Illinois Supreme Court’s decision in Kean v. Wal-Mart Stores, Inc., 235 Ill. 2d. 351 (2009)—transportation and delivery charges are subject to Retailers’ Occupation Tax if there is an “inseparable link” between the sale of tangible personal property and the transportation and delivery of the property to the consumer in Illinois. An “inseparable link” exists when the transportation and delivery charges either are not separately stated on the invoice or purchase order or, even if separately stated, when the buyer does not have the option to receive the tangible personal property in any manner except by delivery from the seller. In either case, the transportation and delivery charges are considered part of the purchase price of the tangible personal property because the consumer cannot take possession of the property without paying the transportation and delivery charges.

Conversely, under the proposed amendments, if the seller does offer the buyer the option to pick up the property for no additional charge—even if the pick-up option is impractical—then the transportation and delivery charges that are separately stated on the invoice or purchase order will not be subject to Retailers’ Occupation Tax. Instead, the transportation and delivery will be considered a service that is separate and distinct from the sale of tangible personal property and thus not subject to Illinois sales tax.

The proposed amendments give several examples that illustrate the application of the new rules. Interestingly, the proposed amendments would respect the pick-up option, even if it is impractical. For example, where an out-of-state retailer offers an Illinois customer the option to pick up tangible personal property in San Diego, California, the proposed amendments provide that the transportation and delivery charges are not subject to Illinois sales tax.

The regulations are consistent with the Illinois Supreme Court’s decision in Kean v. Wal-Mart Stores, Inc., in which the court held that transportation and delivery charges billed to a customer who made a purchase via Wal-Mart’s website were subject to Illinois sales tax because the customer could not complete the online transaction without agreeing to a delivery charge. The court reasoned that the delivery charges were effectively a part of the purchase price of the tangible property.

For transactions entered into before November 19, 2009, the substance of the existing regulation will continue to apply. Under the existing regulation, transportation and delivery charges are not subject to Illinois sales tax so long as they are separately stated on an invoice or purchase order. The existing regulations conflict with the holding of Kean v. Wal-Mart Stores, Inc., at least in
some situations. This conflict has created something of a trap for the unwary, with some retailers reviewing the regulations and concluding, erroneously but in good faith, that they are never required to collect sales tax on transportation and delivery charges so long as the charges are separately stated. Indeed, one Illinois law firm has attempted to exploit this confusion by filing hundreds of qui tam actions under the Illinois False Claims Act, alleging that the defendant retailers have fraudulently failed to pay Illinois sales tax on delivery charges.

The proposed amendments are available on the Illinois Department of Revenue’s website here. Last visited September 11, 2015). The deadline to submit comments to the proposed regulations is October 12, 2015.

If adopted, the proposed amendments should give retailers greater certainty regarding whether and when they are required to collect Illinois Retailers’ Occupation Tax on sales to Illinois consumers.

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