

RECENT ILLINOIS INCOME, FRANCHISE AND SALES TAX LEGISLATION, COURT DECISIONS, REGULATIONS AND ISSUES TO MONITOR

Presented by the ISBA State and Local Tax Section

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LEGISLATION

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Public Act 99-0641 (HB 5527), effective January 1, 2017

- Creates the State Tax Preparer Oversight Act. The statutory change provides that for taxable years beginning on or after January 1, 2017, the Illinois Department of Revenue (“Department”) shall require any income tax return preparer to include his or her PTIN on any tax return (including refunds) prepared by the preparer and filed under the Illinois Income Tax Act. The statute also provides that the Department shall develop a program using the PTIN as an oversight mechanism to assess returns, to identify high error rates, patterns of suspected fraud and unsubstantiated basis for tax positions by income tax return preparers. The statute further provides that the Department may bar or suspend an income tax return preparer for good cause, and contains certain provisions concerning penalties and enforcement.

Public Act 99-0855 (SB 2746), effective August 19, 2016

- Amends the Use Tax Act, the Service Use Tax Act, the Service Occupation Tax Act and the Retailers’ Occupation Tax Act. The statute provides that beginning January 1, 2017 menstrual pads, tampons and menstrual cups are exempt from Illinois sales and use taxes.

Public Act 99-0858 (SB 3047), effective August 19, 2016

- Amends the Use Tax Act, the Service Use Tax Act, the Service Occupation Tax Act and the Retailers' Occupation tax Act. The statute provides that the reduced sales and use tax rate of 1% applies to products classified as Class III medical devices by the U.S. Food and Drug Administration that are used for cancer treatment pursuant to a prescription, as well as any accessories and components related to those devices.

Public Act 99-0733 (SB 0321), effective January 1, 2017

- Amends the River Edge Redevelopment Zone Act. Changes the repeal date from July 29, 2017 seven years after the effective date of Public Act 96-1404) to August 1, 2020 for the recovery and sharing of costs that a public utility incurs for utility facilities located within a River Edge Redevelopment Zone.

COURT / TRIBUNAL DECISIONS

***Citibank, N.A. v. Ill. Dep't of Rev.*, 2016 IL App (1st) 133650, No. 1-13-3650 (1st Dist. 2016); *Chrysler Financial Serv. v. Ill. Dep't of Rev.*, No. 1-15-0812 (1st Dist. 2016)**

- In *Citibank*, the Illinois appellate court considered whether Citibank was entitled to a refund of Illinois sales tax paid on customer accounts determined to be uncollectible. Citibank purchased customer accounts from retailers that had allowed their customers to finance their purchases, including all applicable sales and use taxes. In addition to acquiring the right to collect on the accounts, Citibank also acquired the retailers' rights to claim refunds of taxes previously paid on the accounts.
- The Department argued (in part) that Citibank did not have standing because (1) it did not remit the tax to the Department (the retailer did), and (2) the retailer could not assign its refund rights to Citibank.

continued

***Citibank, N.A. v. Ill. Dep't of Rev.*, 2016 IL App (1st) 133650, No. 1-13-3650 (1st Dist. 2016); *Chrysler Financial Serv. v. Ill. Dep't of Rev.*, No. 1-15-0812 (1st Dist. 2016)**

- The appellate court disagreed, holding that there was nothing within the relevant tax laws prohibiting such assignments, that Citibank's refund claims were limited to taxes paid on receipts that had not been collected from the retailers' customers, and that the parties had stipulated to the amount of refunds due to Citibank.
- In *Chrysler*, the appellate court dismissed Chrysler's appeal since the appeal was not timely filed. It appears that Chrysler did not receive notice of the circuit court's decision until more than six months after the decision had been entered, which was after the time required to file an appeal. In reaching its decision, the court noted that it was Chrysler's responsibility to monitor the status of its case.

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***Airris Aviation & Marine, Inc. v. Constance Beard, et al.*, 2016 IL App (1st) 152834-U (1st Dist. 2016)**

- In *Airris*, a Delaware corporation headquartered in Florida had purchased a Ford Flex in Illinois without payment of Illinois use tax under the state's nonresident drive away exemption. The Department audited the transaction, as there was reason to believe that the car was in fact being used in Illinois (e.g., the Delaware title to the vehicle was delivered to an Illinois address and the car's CARFAX history reports showed that the vehicle had been serviced in Illinois). After receiving a *proposed* deficiency notice, the taxpayer filed a cause of action in circuit court for declaratory judgment and injunctive relief claiming that it did not have sufficient nexus with Illinois to be subject to Illinois tax laws, including the Department's audit authority.

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continued

Airris Aviation & Marine, Inc. v. Constance Beard, et al.,
2016 IL App (1st) 152834-U (1st Dist. 2016)

- While the circuit court matter was pending, the Department finalized its audit and issued an appealable tax deficiency notice to the taxpayer, which the taxpayer protested to the Department's Office of Administrative Hearings. Shortly thereafter, the Department moved to dismiss the circuit court matter because taxpayer had not yet exhausted its administrative remedies.
- The taxpayer moved for summary judgment in circuit court, and the circuit court entered judgment in favor of the taxpayer.

continued

Airris Aviation & Marine, Inc. v. Constance Beard, et al.,
2016 IL App (1st) 152834-U (1st Dist. 2016)

- In a Rule 23 decision, the appellate court reversed the circuit court and held that the taxpayer was required to exhaust its administrative remedies before seeking review in circuit court, and that declaratory relief is not available since there was an adequate remedy at law. The appellate court also held that the Department has the statutory authority to investigate whether use tax may be due on the purchase of a motor vehicle in Illinois.
- It is interesting to note that the circuit court distinguished the circuit court and administrative matters, by finding that the circuit matter concerned whether the Department had jurisdiction to assess a use tax on the taxpayer, while the hearings matter concerned whether the use tax was actually due. It is also interesting to note that the amount at stake was only \$3,280.

State of Ill. ex rel. Schad, Diamond and Shedden, P.C. v. Nat'l Business Furniture, LLC, 2016 IL App (1st) 150526 (1st Dist. 2016)

- In a *qui tam* action regarding collection of Illinois use tax on shipping and handling charges, the appellate court held that the taxpayer/defendant was not liable for a so-called “reverse false claim,” as there was no evidence that the taxpayer acted with the required scienter (i.e., actual knowledge, reckless disregard or deliberate ignorance) to be subject to a claim under the Illinois False Claims Act. In reaching its decision, the appellate court noted that something more than a mistake or ordinary negligence was required to prove a false claim violation and here there was no evidence that the taxpayer acted with the required “gross negligence-plus.”

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State of Ill. ex rel. Schad, Diamond and Shedden, P.C. v. Nat'l Business Furniture, LLC, 2016 IL App (1st) 150526 (1st Dist. 2016)

- There were a few favorable facts, including that the taxpayer had undergone a prior Illinois sales and use tax audit, the company had a pickup option (although not readily apparent at checkout) and the taxpayer had made a determination (right or wrong) that no tax was required to be collected on its shipping charges.

***The People ex rel. Beeler, Schad and Diamond, P.C. v. Relax the Back Corp.*, 2016 IL App (1st) 151580 (1st Dist. 2016)**

- In another *qui tam* action regarding Illinois use tax on shipping and handling charges, the circuit court had held that the taxpayer was liable under the Illinois False Claims Act for its catalog sales but not its Internet sales. The appellate court affirmed the circuit court's decision regarding Internet sales and reversed the court's decision with respect to the taxpayer's catalog sales. In reaching its decision, the appellate court determined that the taxpayer did not act with "reckless disregard" since it had conducted an honest investigation of its Illinois tax responsibilities, even if its interpretation of Illinois law was mistaken.

***Jenner v. Dep't of Commerce and Economic Opportunity*, 2016 IL App (4th) 4150522 (4th Dist. 8/2/2016)**

- In *Jenner*, a group of Illinois taxpayers filed a cause of action in circuit court for declaratory and injunctive relief against the defendant, the Illinois Department of Commerce and Economic Opportunity, alleging that the defendant had promulgated a regulation allowing tax credits greater than those permitted by statute. As claimed by the taxpayers, instead of limiting the tax credit to the amount of income tax withheld from new employees' paychecks, as section 5-15(d) of the Economic Development for a Growing Economy Tax Credit Act provides, the defendant's regulation allowed a credit up to the amount of income tax withheld from paychecks for new employees *and* retained employees who work on a qualifying project.

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***Jenner v. Dep't of Commerce and Economic Opportunity*, 2016 IL App (4th) 4150522 (4th Dist. 8/2/2016)**

- The state moved to dismiss the complaint based on standing, which was granted by the circuit court. The appellate court reversed the circuit court and held that the taxpayers had standing to challenge the regulation because the defendant's use of tax dollars to administer an illegal regulation constitutes an injury to the taxpayers, as a misuse of public funds.

***Edward Karpowicz v. Papa Murphy's International, LLC, et al.*, 2016 IL App (5th) 10532-U, No. 5-15-0320 (5th Dist. 2016)**

- In *Papa Murphy's*, the plaintiff brought an Illinois Consumer Fraud and Deceptive Business Practices Act ("Consumer Fraud Act") action against the defendant, Papa Murphy's International, LLC, alleging that the defendant routinely overcharged the "high rate" of tax (6.25%) on take-and-bake pizzas purchased at Papa Murphy's franchise locations in Illinois, when the plaintiff should have been charging the "low rate" of tax (1%) for foods items sold not for immediate consumption.

continued

Edward Karpowicz v. Papa Murphy's International, LLC, et al., 2016 IL App (5th) 10532-U, No. 5-15-0320 (5th Dist. 2016)

- The appellate court affirmed the circuit court's order granting the defendant's motion to dismiss, on the basis that the plaintiff's claims were barred by the voluntary payment doctrine, since the tax collected had been remitted to the State of Illinois by the defendant (i.e., no unjust enrichment), and the tax was not paid under duress since pizza is not a necessity. The appellate court also noted that the plaintiff had failed to properly plead a violation of the Consumer Fraud Act, since merely charging the wrong amount of tax does not demonstrate a deceptive intent or an actionable wrong.

Illinois Bell Tele. v. Ill. Dep't of Rev., Case No. 2015 L 50313, 7/1/2016 (Cir. Ct. Cook County)

- In *Illinois Bell Tele.*, the taxpayer mistakenly remitted to the Department, on a monthly basis and over an extended period of time, City of Chicago Telecommunications Excise Taxes ("TET") and Infrastructure Maintenance Fees ("IMF"). The payment of Chicago's taxes and fees to the State of Illinois was not discovered until years later when the City of Chicago conducted a TET/IMF audit of the taxpayer.
- Prior to Chicago's audit, the Department audited the taxpayer for TET/IMF and determined the taxpayer had underpaid TET and IMF to the state. The Department's auditor did not discover the taxpayer's erroneous payment of Chicago taxes to the State of Illinois. The taxpayer paid the Department's assessment under the state's 2003 amnesty program.

continued

Illinois Bell Tele. v. Ill. Dep't of Rev., Case No. 2015 L 50313, 7/1/2016 (Cir. Ct. Cook County)

- The taxpayer subsequently filed a refund claim with the Department to claim a refund of the Chicago taxes it had mistakenly paid to the State of Illinois. The Department denied the taxpayer's refund claim because (1) the refund claim had not been filed within three years of payment and (2) the taxpayer paid the audit liability under the state's amnesty program, which did not allow for refunds, except for very limited circumstances not applicable to the taxpayer.
- The taxpayer contested the claim denial, arguing that the taxpayer had three years from the date it made its amnesty payment, since the amnesty payment was erroneous because the Department did not offset its assessment with taxpayer's overpayments of Chicago taxes paid to the State of Illinois. The taxpayer also argued that the Department's audit manual allows a taxpayer to file refund claims within three years of an audit payment.

continued

Illinois Bell Tele. v. Ill. Dep't of Rev., Case No. 2015 L 50313, 7/1/2016 (Cir. Ct. Cook County)

- The circuit court affirmed the administrative law judge's decision, agreeing that the statute of limitation runs from the date the monthly TET/IMF payments were mistakenly made to the Department, and that the Department's audit manual cannot expand the statute of limitations. The court also noted that the taxpayer's claim was barred by the terms of the state's amnesty program, which generally does not allow refund claims.

***Security Life of Denver Ins. Co. v. Ill. Dep't of Rev.*, 14 TT 89, 6/26/2016 (Ill. Indep. Tax Trib.)**

- In *Security Life*, the taxpayer filed a petition claiming (in part) a reduction of interest and abatement of penalties. The taxpayer's claim for a reduction of interest was denied in summary judgment because there was no legal basis to allow an adjustment to statutory interest under Illinois law. However, the administrative law judge abated the assessed penalties for reasonable cause, because the law with respect to allocating a holding company's income (or loss) between unitary business groups was unsettled at the time the taxpayer's returns were prepared and filed.

***Waste Mgt. of Ill. v. Ill. Dep't of Rev.*, 15 TT 130, 10/3/2016 (Ill. Indep. Tax Trib.)**

- In *Waste Management*, the issue before the tribunal was whether compressed natural gas ("CNG") is "motor fuel" subject to Illinois motor fuel tax. The taxpayer argued that since CNG is a gas and not a liquid, it does not meet the definition of a "motor fuel" under the Illinois Motor Fuel Tax Law ("MFTL") and is therefore not taxable. The taxpayer further argued that the Department did not have the authority to include gaseous substances or otherwise include CNG within the definition of motor fuel subject to taxation under the MFTL.

continued

***Waste Mgt. of Ill. v. Ill. Dep't of Rev., 15 TT 130,
10/3/2016 (Ill. Indep. Tax Trib.)***

- The chief administrative law judge denied the taxpayer's motion for summary judgment and entered judgment in favor of the Department, finding that the meaning of "motor fuel" under the MFTL is expansive enough to include fuel existing in a gaseous state, such as CNG, and that in different parts of the MFTL there are references to gaseous fuels and to CNG itself, further indicating legislative intent to include gaseous fuels (and CNG) within the MFTL.

REGULATIONS

ADOPTED

- **Transportation and Delivery Charges—86 Ill. Admin. Code 130.410; 130.415; 40 Ill. Reg. 6130 (April 8, 2016) (adopted)**
 - Effective April 1, 2016, the Department has amended its “shipping and handling” regulations to conform to the Illinois Supreme Court’s decision in *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351 (2009), and to clarify its prior shipping and handling regulations.
 - Applicability of the Amended Regulation: The Department has incorporated a “safe harbor” into the amended regulation for tax periods falling between November 19, 2009 (the date of the *Kean* decision) and April 1, 2016, for those taxpayers that have computed their Illinois sales tax on shipping fees in conformity with either the Department’s prior regulation or the newly amended regulation. Taxpayers complying with either version of the regulation during this period shall be considered to have properly charged Illinois sales tax on shipping fees they receive.

continued

ADOPTED

- Further, the new rules on taxation of shipping fees are to apply equally to retailers subject to sales tax, retailers collecting use tax on behalf of their customers and to persons self-assessing use tax.
- Taxability of Shipping and Handling Charges: The amended regulations make it clear that shipping fees are subject to sales tax if there is an “inseparable link” between the sale and the shipping incurred by the customer. An inseparable link exists (1) if the shipping fees are not separately stated from the cost of the goods purchased or (2) if the shipping fees are separately stated, but the seller either (a) does not offer the customer the option of picking up the goods or (b) does not offer the customer a free shipping option.

continued

ADOPTED

- If the cost of shipping is separately stated and if the customer is offered the option of pick up or free shipping, then the shipping charges are not subject to Illinois sales tax. The retailer's store identified for pick up does not have to be in Illinois.
- Mixed Transactions: The amended regulations also clarify the taxation of shipping fees on "mixed transactions," i.e., sales that include both taxable and nontaxable sales and/or sales that are taxed at different tax rates. In general, if the shipping fees are taxable but separately stated for each item purchased, then the tax on shipping may be calculated separately for each listed item on the customer's invoice. Using this method, the tax rate for delivery charges will be separately calculated at the high rate on high-rate items, the low rate on low-rate items and as exempt on items that are exempt from sales tax.

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ADOPTED

- When an invoice contains a lump sum shipping fee for separately listed items, taxpayers are to apply the Department's "lump sum rule" to determine the appropriate tax for the shipping fees. Under the lump sum rule, the selling price of the items dictate whether the shipping fee is taxable or not taxable or, if taxable, if taxed at the high or low tax rate. For example, if the selling price of the items exempt from sales tax is greater than the selling price of the items which are taxable, then the lump sum shipping fee for all items purchased will be exempt from sales tax.
- The Department has provided a number of examples illustrating taxation of shipping fees and mixed transactions.

continued

ADOPTED

- **Medical Cannabis Privilege Tax Law—86 Ill. Admin. Code 429.110; 40 Ill. Reg. 3173 (February 19, 2016) (proposed); 40 Ill. Reg. 3305 (emergency) (February 19, 2016); 40 Ill. Reg. 9222 (July 8, 2016) (adopted)**
 - This regulatory amendment provides guidance for cultivators to determine the Medical Cannabis Cultivator Privilege Tax on medical cannabis infused products and concentrates.

continued

ADOPTED

- **Payment of Taxes By Electronic Funds Transfer—86 Ill. Admin. Code 750.300; 40 Ill. Reg. 1660 (January 22, 2016) (Proposed); 40 Ill. Reg. 6862 (April 29, 2016) (JCAR Statement of Recommendations); 40 Ill. Reg. 9229 (July 8, 2016) (adopted)**
 - The regulation governing payments required to be paid by electronic funds transfer is being amended to reflect changes made to section 2505-210 of the Civil Administrative Code of Illinois (Department of Revenue Law) (20 ILCS 2505/2505-210) by P.A. 96-1027. Beginning October 1, 2010, a taxpayer (other than an individual taxpayer) who has an annual tax liability of \$20,000 or more and an individual taxpayer who has an annual tax liability of \$200,000 or more shall make all payments of tax to the Department by electronic funds transfer. A taxpayer who has an annual tax liability of \$1,000 or more under the Telecommunications Excise Tax must continue to make all payments of tax to the Department by electronic funds transfer. A new subsection (j) has been added to address electronic payments of taxes imposed by the Motor Fuel Tax Law and payments of the fee imposed by the Environmental Impact Fee Law. A new subsection (k) has been added to address electronic payments of the tax imposed by the Medical Cannabis Cultivation Privilege Tax Act.

continued

ADOPTED

- **Income Tax—86 Ill. Admin. Code 100.9320; 100.9410; 40 Ill. Reg. 5174 (April 8, 2016) (proposed); 40 Ill. Reg. 10925 (August 12, 2016) (adopted)**
 - This rulemaking amends the sections that provide guidance on income tax statutes of limitation for the Department to issue notices of deficiency and for taxpayers to file refund claims to reflect legislation and case law arising since the sections were last amended.

continued

ADOPTED

- **Tobacco Products Tax Act of 1995—86 Ill. Admin. Code 660; 40 Ill. Reg. 10954 (August 12, 2016) (adopted)**
 - This regulatory section is being amended in response to changes made to the Tobacco Products Tax Act of 1995 by Public Acts 97-688, 98-273 and 98-1055, and to incorporate some existing statutory provisions. Amendments include (in part): (1) adding a definition of “moist snuff” and reflect the change in the manner moist snuff is taxed—from a percentage basis to a weight-based approach—made by P.A. 97-688; (2) language reflecting the increase in the rate of the tax on other tobacco products from 18% of the wholesale price to 36%; (3) language noting that beginning July 1, 2013, little cigars in packages containing 20 or 25 little cigars are taxed in the same manner and at the same rate as cigarettes; (4) adding definitions for “contraband cigarettes,” “little cigars,” “stamps,” “stamping distributor” and several existing statutory definitions; and (5) requiring retailers of tobacco products to obtain retailer’s licenses.

continued

ADOPTED

- **Income Tax—86 Ill. Admin. Code 100.5020; 40 Ill. Reg. 6676 (April 22, 2016) (proposed); 40 Ill. Reg. 13432 (September 23, 2016) (adopted)**
 - This rulemaking amends the regulatory section that provides automatic extensions of time for filing Illinois income tax returns. The Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 (Public Law 114-41) (the “Act”) changed the due dates for filing federal income tax returns of corporations from the 15th day of the third month after the end of the taxable year (March 15th for a calendar-year taxpayer) to the 15th day of the fourth month after the end of the taxable year (April 15th for a calendar-year taxpayer). This change in the due date automatically changes the due date for Illinois income tax returns under IITA section 505(a)(1), which provides that the due date for corporate income tax returns is the 15th day of the third month after the end of the taxable year “unless the income or loss of a taxpayer is

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ADOPTED

reported for federal purposes on a return with a due date later than the 15th day of the third month following the close of the taxable year, in which case the same due date shall apply to the corresponding Illinois return.” The Act also changes the due date for partnership returns from the 15th day of the fourth month after the end of the taxable year (April 15th for a calendar-year taxpayer) to the 15th day of the third month after the end of the taxable year (March 15th for a calendar-year taxpayer). This change does not affect the due date for Illinois partnership returns. The language of the automatic extension provisions in section 100.5020 allows all taxpayers a six-month extension to file returns, except corporations are allowed a seven-month extension. Under this language, as it applied before the Act, calendar-year taxpayers all had an extended due date of October 15 for filing their Illinois returns. After the Act, a calendar-year corporation will have until November 15 to file its Illinois return. Also, should the General Assembly amend the IITA so that Illinois partnership returns

continued

ADOPTED

will be due on the same date as their federal income tax returns, calendar year partnerships would have only until September 15 to file their returns. This rulemaking amends the extension language to grant a six-month extension for returns otherwise due on the 15th day of the fourth month after the end of the taxable year and a seven-month extension for returns otherwise due on the 15th day of the third month after the end of the taxable year, so that the extended due dates for calendar year filers will again be October 15th.

continued

ADOPTED

- **Retailers' Occupation Tax—86 Ill. Admin. Code 130.330; 40 Ill. Reg. 5174 (April 8, 2016) (proposed); 40 Ill. Reg. 13448 (September 23, 2016) (adopted)**
 - This rulemaking amends section 130.330 to implement changes to the manufacturing machinery and equipment exemption pursuant to the decision in *Nokomis Quarry Co. v. Department of Revenue*, 295 Ill. App. 3d 264, 692 N.E.2d 855 (5th Dist. 1998). *Nokomis* held that extractive activities such as blasting may constitute manufacturing in some cases. When blasting is deliberately and systematically performed with specific desired results, and the process results in a new article of tangible personal property with a different form, with new qualities or combinations, the manufacturing machinery and equipment exemption may apply. *Nokomis* invalidated a portion of 130.330(b)(4). The rule currently states that the extractive process of quarrying does not constitute manufacturing. This rulemaking removes that provision from the rule and incorporates the *Nokomis* court's holding that the extractive process of quarrying may constitute manufacturing in some cases.

continued

ADOPTED

- This rulemaking further amends section 130.330 to reflect changes to the law made by P.A. 98-58, which provides that the manufacturing machinery and equipment exemption does not include equipment used to generate electricity or to generate or treat natural or artificial gas or water for sale that is delivered to customers through pipes, pipelines or mains. Though electricity is considered tangible personal property, this rulemaking reflects the Department's policy that it is not taxable under the sales tax laws, and that the machinery and equipment used to generate electricity does not qualify for the manufacturing machinery and equipment exemption.

continued

ADOPTED

- **Use Tax—86 Ill. Admin. Code 150.201; 40 Ill. Reg. 5174 (April 8, 2016) (proposed); 40 Ill. Reg. 13471 (September 23, 2016) (adopted).**
 - A new click thru nexus provision was added by P.A. 98-1089. This new provision changed the earlier law, in part, by adding a rebuttable presumption that nexus is created if the retailer engages in the statutorily specified activities. This rulemaking includes the rebuttable presumption and details the process that the Department will require in order to rebut the presumption of nexus.

continued

ADOPTED

- **Income Tax—86 Ill. Admin. Code 100.2465; 40 Ill. Reg. 7522 (May 20, 2016) (proposed); 40 Ill. Reg. 14762 (October 28, 2016) (adopted)**
 - This rulemaking adds section 100.2465, which provides guidance on the subtraction modification allowed to taxpayers who were allowed a federal income tax itemized deduction (or a federal income tax credit in lieu of a deduction) as the result of repaying an amount that had been included in taxable income in a previous year under the “claim of right” doctrine.

continued

ADOPTED

- **Income Tax—86 Ill. Admin. Code 100.5060; 100.5100; 100.5130; 100.5215; 100.7035; 100.8010; 100.9400; 40 Ill. Reg. 5174 (March 25, 2016) (proposed); 40 Ill. Reg. 6540 (April 15, 2016) (proposed); 40 Ill. Reg. 7297 (May 13, 2016) (proposed); 40 Ill. Reg. 15575 (November 18, 2016) (adopted)**
 - This rulemaking amends section 100.5215 regarding the filing of unitary returns by taxpayers who are not permitted to join with other members of their unitary business group in the filing of a single combined return, to provide examples for partnership computations. This rulemaking also amends the sections that provide guidance on the filing of composite returns by partnerships and S corporations to implement the provisions of P.A. 98-478. Prior to P.A. 98-478, partnerships and S corporations were allowed to file composite returns, reporting and paying Illinois income tax on behalf of some nonresident partners and shareholders, and were required to withhold Illinois income tax from

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ADOPTED

nonresidents who were not included on composite returns. P.A. 98-478 repealed the general authority to file composite returns, so that partnerships and S corporations now withhold from nonresident partners and shareholders rather than comply with two different methods of reporting and paying tax for nonresident members/shareholders. P.A. 98-478 also amended the provisions for computing the required withholding to allow credits earned by the partnership or S corporation and passed through to the nonresident partners and shareholders to reduce the amount of required withholding. Finally, this rulemaking implements the provisions of P.A. 98-925, which amended IITA section 909 to require the Department to adopt regulations allowing a taxpayer to elect to apply overpayments of Illinois income tax reported on any return or amended return against the taxpayer's Illinois income tax obligation for a subsequent taxable year. Under existing regulations, this election could only be made on a timely filed original return.

PROPOSED

- **Retailers' Occupation Tax—86 Ill. Admin. Code 130.340; 40 Ill. Reg. 10083 (July 29, 2016) (proposed)**
 - This rulemaking updates and restructures the rolling stock exemption rule to: (1) set forth the elements of the exemption in a logical order and delete obsolete and dated provisions; (2) implement P.A. 98-584, which sets forth the test for whether an aircraft or watercraft meets the requirements to qualify as "rolling stock" exempt from sales and use tax; (3) replace references to the Interstate Commerce Commission with the Federal Motor Carrier Safety Administration; and (4) add examples of what types of intrastate movements do and do not qualify as interstate trips or miles.

continued

PROPOSED

- **Coin-Operated Amusement Device and Redemption Machine Tax—86 Ill. Admin. Code 460.101; 460.105; 40 Ill. Reg. 15669 (November 28, 2016) (proposed)**
 - Section 460.101 is amended to implement a statutory change to the definition of “coin-operated amusement device” contained in section 1 of the Coin-Operated Amusement Device and Redemption Machine Tax Act (the “Act”). The statutory change expanded the definition of “coin-operated amusement device” to include any device operated or operable by insertion of coins, tokens, chips or similar objects. The Department is also updating the definition of a coin-operated amusement device to include a device that is operated by the use of a debit or prepaid card or mobile device. Additional amendments are made to section 460.101 to notify taxpayers that they may file claims pursuant to section 2 of the Act for tax, penalty and interest paid in error. Section 460.105 is also amended to implement statutory

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PROPOSED

changes to the definition of “redemption machine” contained in section 28-2(a)(4) of the Illinois Criminal Code. The definition redemption machine is also amended to reflect changes in technology, such as games that use computer-generated graphics and electrical displays to simulate the throwing, rolling, bowling, shooting, placing or propelling of a ball or object. Other changes have been made to the definition to explain the limitation on awards that may be awarded by a redemption machine.

continued

PROPOSED

- **Income Tax—86 Ill. Admin. Code 100.3380; 100.3390; 40 Ill. Reg. 15878 (December 2, 2016) (proposed)**
 - This rulemaking amends sections 100.3380 and 100.3390 pursuant to P.A. 98-478 to provide that an alternative formula for apportioning business income to Illinois could be allowed or required if the statutory formula does not fairly represent the “market” for the taxpayer’s goods and services in Illinois (rather than the extent of the taxpayer’s business activities in Illinois under prior law) and to reflect current Department policies.

continued

PROPOSED

- **Income Tax—86 Ill. Admin. Code 100.7310; 100.7325; 40 Ill. Reg. 16181 (December 27, 2016) (proposed)**
 - This rulemaking amends sections 100.7310 and 100.7325 to terminate the programs allowing annual filing of withholding returns and annual payment of taxes withheld, because too many employers were confused by the programs and made incorrect filings and payments.
- **Income Tax—86 Ill. Admin. Code 100.3370; 40 Ill. Reg. 16711 (December 30, 2016) (proposed)**
 - This rulemaking amends section 100.3370 to reflect certain amendments to the Illinois Income Tax Act with respect to the sourcing of income for purposes of the sales factor of the state’s apportionment formula.

ISSUES TO MONITOR

- Illinois Budget – Potential tax increases?
- Illinois Tax Credits that expired:
 - Research & Development Credit – Expired 1/1/16
 - Sales Tax Temporary Storage Exemption – Expired 6/30/16
 - Income Tax EDGE Credit – Expired 12/31/16
- IDOR Developments

CIRCULAR 230 DISCLOSURE: To comply with Treasury Department regulations, we inform you that, unless otherwise expressly indicated, any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (1) avoiding penalties that may be imposed under the Internal Revenue Code or any other applicable tax law, or (2) promoting, marketing or recommending to another party any transaction, arrangement or other matter.

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COURT DECISIONS, REGULATIONS AND ISSUES TO MONITOR**

Presented by the ISBA State and Local Tax Section

January 27, 2017

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I. LEGISLATION

A. Public Act 99-0641 (HB 5527), effective January 1, 2017

Creates the State Tax Preparer Oversight Act. The statutory change provides that for taxable years beginning on or after January 1, 2017, the Illinois Department of Revenue (“Department”) shall require any income tax return preparer to include his or her PTIN on any tax return (including refunds) prepared by the preparer and filed under the Illinois Income Tax Act. The statute also provides that the Department shall develop a program using the PTIN as an oversight mechanism to assess returns, to identify high error rates, patterns of suspected fraud and unsubstantiated basis for tax positions by income tax return preparers. The statute further provides that the Department may bar or suspend an income tax return preparer for good cause, and contains certain provisions concerning penalties and enforcement.

B. Public Act 99-0855 (SB 2746), effective August 19, 2016

Amends the Use Tax Act, the Service Use Tax Act, the Service Occupation Tax Act and the Retailers’ Occupation Tax Act. The statute provides that beginning January 1, 2017 menstrual pads, tampons and menstrual cups are exempt from Illinois sales and use taxes.

C. Public Act 99-0858 (SB 3047), effective August 19, 2016

Amends the Use Tax Act, the Service Use Tax Act, the Service Occupation Tax Act and the Retailers’ Occupation tax Act. The statute provides that the reduced sales and use tax rate of 1% applies to products classified as Class III medical devices by the U.S. Food and Drug Administration that are used for cancer treatment pursuant to a prescription, as well as any accessories and components related to those devices.

D. Public Act 99-0733 (SB 0321), effective January 1, 2017

Amends the River Edge Redevelopment Zone Act. Changes the repeal date from July 29, 2017 seven years after the effective date of Public Act 96-1404) to August 1, 2020 for the recovery and sharing of costs that a public utility incurs for utility facilities located within a River Edge Redevelopment Zone.

II. COURT / TRIBUNAL DECISIONS

A. *Citibank, N.A. v. Ill. Dep't of Rev.*, 2016 IL App (1st) 133650, No. 1-13-3650 (1st Dist. 2016); *Chrysler Financial Serv. v. Ill. Dep't of Rev.*, No. 1-15-0812 (1st Dist. 2016)

In *Citibank*, the Illinois appellate court considered whether Citibank was entitled to a refund of Illinois sales tax paid on customer accounts determined to be uncollectible. Citibank purchased customer accounts from retailers that had allowed their customers to finance their purchases, including all applicable sales and use taxes. In addition to acquiring the right to collect on the accounts, Citibank also acquired the retailers' rights to claim refunds of taxes previously paid on the accounts.

The Department argued (in part) that Citibank did not have standing because (1) it did not remit the tax to the Department (the retailer did), and (2) the retailer could not assign its refund rights to Citibank.

The appellate court disagreed, holding that there was nothing within the relevant tax laws prohibiting such assignments, that Citibank's refund claims were limited to taxes paid on receipts that had not been collected from the retailers' customers, and that the parties had stipulated to the amount of refunds due to Citibank.

In *Chrysler*, the appellate court dismissed Chrysler's appeal since the appeal was not timely filed. It appears that Chrysler did not receive notice of the circuit court's decision until more than six months after the decision had been entered, which was after the time required to file an appeal. In reaching its decision, the court noted that it was Chrysler's responsibility to monitor the status of its case.

B. *Airris Aviation & Marine, Inc. v. Constance Beard, et al.*, 2016 IL App (1st) 152834-U (1st Dist. 2016)

In *Airris*, a Delaware corporation headquartered in Florida had purchased a Ford Flex in Illinois without payment of Illinois use tax under the state's nonresident drive away exemption. The Department audited the transaction, as there was reason to believe that the car was in fact being used in Illinois (e.g., the Delaware title to the vehicle was delivered to an Illinois address and the car's CARFAX history reports showed that the vehicle had been serviced in Illinois). After receiving a *proposed* deficiency notice, the taxpayer filed a cause of action in circuit court for declaratory judgment and injunctive relief claiming that it did not have sufficient nexus with Illinois to be subject to Illinois tax laws, including the Department's audit authority.

While the circuit court matter was pending, the Department finalized its audit and issued an appealable tax deficiency notice to the taxpayer, which the taxpayer protested to the Department's Office of Administrative Hearings. Shortly thereafter, the Department moved to dismiss the circuit court matter because taxpayer had not yet exhausted its administrative remedies.

The taxpayer moved for summary judgment in circuit court, and the circuit court entered judgment in favor of the taxpayer.

In a Rule 23 decision, the appellate court reversed the circuit court and held that the taxpayer was required to exhaust its administrative remedies before seeking review in circuit court, and that declaratory relief is not available since there was an adequate remedy at law. The appellate court also held that the Department has the statutory authority to investigate whether use tax may be due on the purchase of a motor vehicle in Illinois.

It is interesting to note that the circuit court distinguished the circuit court and administrative matters, by finding that the circuit matter concerned whether the Department had jurisdiction to assess a use tax on the taxpayer, while the hearings matter concerned whether the use tax was actually due. It is also interesting to note that the amount at stake was only \$3,280.

C. *State of Ill. ex rel. Schad, Diamond and Shedden, P.C. v. Nat'l Business Furniture, LLC*, 2016 IL App (1st) 150526 (1st Dist. 2016)

In a *qui tam* action regarding collection of Illinois use tax on shipping and handling charges, the appellate court held that the taxpayer/defendant was not liable for a so-called “reverse false claim,” as there was no evidence that the taxpayer acted with the required scienter (i.e., actual knowledge, reckless disregard or deliberate ignorance) to be subject to a claim under the Illinois False Claims Act. In reaching its decision, the appellate court noted that something more than a mistake or ordinary negligence was required to prove a false claim violation and here there was no evidence that the taxpayer acted with the required “gross negligence-plus.”

There were a few favorable facts, including that the taxpayer had undergone a prior Illinois sales and use tax audit, the company had a pickup option (although not readily apparent at checkout) and the taxpayer had made a determination (right or wrong) that no tax was required to be collected on its shipping charges.

D. *The People ex rel. Beeler, Schad and Diamond, P.C. v. Relax the Back Corp.*, 2016 IL App (1st) 151580 (1st Dist. 2016)

In another *qui tam* action regarding Illinois use tax on shipping and handling charges, the circuit court had held that the taxpayer was liable under the Illinois False Claims Act for its catalog sales but not its Internet sales. The appellate court affirmed the circuit court’s decision regarding Internet sales and reversed the court’s decision with respect to the taxpayer’s catalog sales. In reaching its decision, the appellate court determined that the taxpayer did not act with “reckless disregard” since it had conducted an honest investigation of its Illinois tax responsibilities, even if its interpretation of Illinois law was mistaken.

E. *Jenner v. Dep’t of Commerce and Economic Opportunity*, 2016 IL App (4th) 4150522 (4th Dist. 8/2/2016)

In *Jenner*, a group of Illinois taxpayers filed a cause of action in circuit court for declaratory and injunctive relief against the defendant, the Illinois Department of Commerce and Economic Opportunity, alleging that the defendant had promulgated a regulation allowing tax credits greater than those permitted by statute. As claimed by the taxpayers, instead of limiting the tax credit to the amount of income tax withheld from new employees’ paychecks, as section 5-15(d) of the Economic Development for a Growing Economy Tax Credit Act provides, the defendant’s

regulation allowed a credit up to the amount of income tax withheld from paychecks for new employees *and* retained employees who work on a qualifying project.

The state moved to dismiss the complaint based on standing, which was granted by the circuit court. The appellate court reversed the circuit court and held that the taxpayers had standing to challenge the regulation because the defendant's use of tax dollars to administer an illegal regulation constitutes an injury to the taxpayers, as a misuse of public funds.

F. *Edward Karpowicz v. Papa Murphy's International, LLC, et al.*, 2016 IL App (5th) 10532-U, No. 5-15-0320 (5th Dist. 2016)

In *Papa Murphy's*, the plaintiff brought an Illinois Consumer Fraud and Deceptive Business Practices Act ("Consumer Fraud Act") action against the defendant, Papa Murphy's International, LLC, alleging that the defendant routinely overcharged the "high rate" of tax (6.25%) on take-and-bake pizzas purchased at Papa Murphy's franchise locations in Illinois, when the plaintiff should have been charging the "low rate" of tax (1%) for foods items sold not for immediate consumption.

The appellate court affirmed the circuit court's order granting the defendant's motion to dismiss, on the basis that the plaintiff's claims were barred by the voluntary payment doctrine, since the tax collected had been remitted to the State of Illinois by the defendant (i.e., no unjust enrichment), and the tax was not paid under duress since pizza is not a necessity. The appellate court also noted that the plaintiff had failed to properly plead a violation of the Consumer Fraud Act, since merely charging the wrong amount of tax does not demonstrate a deceptive intent or an actionable wrong.

G. *Illinois Bell Tele. v. Ill. Dep't of Rev.*, Case No. 2015 L 50313, 7/1/2016 (Cir. Ct. Cook County)

In *Illinois Bell Tele.*, the taxpayer mistakenly remitted to the Department, on a monthly basis and over an extended period of time, City of Chicago Telecommunications Excise Taxes ("TET") and Infrastructure Maintenance Fees ("IMF"). The payment of Chicago's taxes and fees to the State of Illinois was not discovered until years later when the City of Chicago conducted a TET/IMF audit of the taxpayer.

Prior to Chicago's audit, the Department audited the taxpayer for TET/IMF and determined the taxpayer had underpaid TET and IMF to the state. The Department's auditor did not discover the taxpayer's erroneous payment of Chicago taxes to the State of Illinois. The taxpayer paid the Department's assessment under the state's 2003 amnesty program.

The taxpayer subsequently filed a refund claim with the Department to claim a refund of the Chicago taxes it had mistakenly paid to the State of Illinois. The Department denied the taxpayer's refund claim because (1) the refund claim had not been filed within three years of payment and (2) the taxpayer paid the audit liability under the state's amnesty program, which did not allow for refunds, except for very limited circumstances not applicable to the taxpayer.

The taxpayer contested the claim denial, arguing that the taxpayer had three years from the date it made its amnesty payment, since the amnesty payment was erroneous because the Department

did not offset its assessment with taxpayer's overpayments of Chicago taxes paid to the State of Illinois. The taxpayer also argued that the Department's audit manual allows a taxpayer to file refund claims within three years of an audit payment.

The circuit court affirmed the administrative law judge's decision, agreeing that the statute of limitation runs from the date the monthly TET/IMF payments were mistakenly made to the Department, and that the Department's audit manual cannot expand the statute of limitations. The court also noted that the taxpayer's claim was barred by the terms of the state's amnesty program, which generally does not allow refund claims.

H. *Security Life of Denver Ins. Co. v. Ill. Dep't of Rev.*, 14 TT 89, 6/26/2016 (Ill. Indep. Tax Trib.)

In *Security Life*, the taxpayer filed a petition claiming (in part) a reduction of interest and abatement of penalties. The taxpayer's claim for a reduction of interest was denied in summary judgment because there was no legal basis to allow an adjustment to statutory interest under Illinois law. However, the administrative law judge abated the assessed penalties for reasonable cause, because the law with respect to allocating a holding company's income (or loss) between unitary business groups was unsettled at the time the taxpayer's returns were prepared and filed.

I. *Waste Mgt. of Ill. v. Ill. Dep't of Rev.*, 15 TT 130, 10/3/2016 (Ill. Indep. Tax Trib.)

In *Waste Management*, the issue before the tribunal was whether compressed natural gas ("CNG") is "motor fuel" subject to Illinois motor fuel tax. The taxpayer argued that since CNG is a gas and not a liquid, it does not meet the definition of a "motor fuel" under the Illinois Motor Fuel Tax Law ("MFTL") and is therefore not taxable. The taxpayer further argued that the Department did not have the authority to include gaseous substances or otherwise include CNG within the definition of motor fuel subject to taxation under the MFTL.

The chief administrative law judge denied the taxpayer's motion for summary judgment and entered judgment in favor of the Department, finding that the meaning of "motor fuel" under the MFTL is expansive enough to include fuel existing in a gaseous state, such as CNG, and that in different parts of the MFTL there are references to gaseous fuels and to CNG itself, further indicating legislative intent to include gaseous fuels (and CNG) within the MFTL.

III. REGULATIONS

A. ADOPTED

1. *Transportation and Delivery Charges—86 Ill. Admin. Code 130.410; 130.415; 40 Ill. Reg. 6130 (April 8, 2016) (adopted)*

Effective April 1, 2016, the Department has amended its "shipping and handling" regulations to conform to the Illinois Supreme Court's decision in *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351 (2009), and to clarify its prior shipping and handling regulations.

Applicability of the Amended Regulation: The Department has incorporated a “safe harbor” into the amended regulation for tax periods falling between November 19, 2009 (the date of the *Kean* decision) and April 1, 2016, for those taxpayers that have computed their Illinois sales tax on shipping fees in conformity with either the Department’s prior regulation or the newly amended regulation. Taxpayers complying with either version of the regulation during this period shall be considered to have properly charged Illinois sales tax on shipping fees they receive.

Further, the new rules on taxation of shipping fees are to apply equally to retailers subject to sales tax, retailers collecting use tax on behalf of their customers and to persons self-assessing use tax.

Taxability of Shipping and Handling Charges: The amended regulations make it clear that shipping fees are subject to sales tax if there is an “inseparable link” between the sale and the shipping incurred by the customer. An inseparable link exists (1) if the shipping fees are not separately stated from the cost of the goods purchased or (2) if the shipping fees are separately stated, but the seller either (a) does not offer the customer the option of picking up the goods or (b) does not offer the customer a free shipping option.

If the cost of shipping is separately stated and if the customer is offered the option of pick up or free shipping, then the shipping charges are not subject to Illinois sales tax. The retailer’s store identified for pick up does not have to be in Illinois.

Mixed Transactions: The amended regulations also clarify the taxation of shipping fees on “mixed transactions,” i.e., sales that include both taxable and nontaxable sales and/or sales that are taxed at different tax rates. In general, if the shipping fees are taxable but separately stated for each item purchased, then the tax on shipping may be calculated separately for each listed item on the customer’s invoice. Using this method, the tax rate for delivery charges will be separately calculated at the high rate on high-rate items, the low rate on low-rate items and as exempt on items that are exempt from sales tax.

When an invoice contains a lump sum shipping fee for separately listed items, taxpayers are to apply the Department’s “lump sum rule” to determine the appropriate tax for the shipping fees. Under the lump sum rule, the selling price of the items dictate whether the shipping fee is taxable or not taxable or, if taxable, if taxed at the high or low tax rate. For example, if the selling price of the items exempt from sales tax is greater than the selling price of the items which are taxable, then the lump sum shipping fee for all items purchased will be exempt from sales tax.

The Department has provided a number of examples illustrating taxation of shipping fees and mixed transactions.

2. Medical Cannabis Privilege Tax Law—86 Ill. Admin. Code 429.110; 40 Ill. Reg. 3173 (February 19, 2016) (proposed); 40 Ill. Reg. 3305 (emergency) (February 19, 2016); 40 Ill. Reg. 9222 (July 8, 2016) (adopted)

This regulatory amendment provides guidance for cultivators to determine the Medical Cannabis Cultivator Privilege Tax on medical cannabis infused products and concentrates.

3. Payment of Taxes By Electronic Funds Transfer—86 Ill. Admin. Code 750.300; 40 Ill. Reg. 1660 (January 22, 2016) (Proposed); 40 Ill. Reg. 6862 (April 29, 2016) (JCAR Statement of Recommendations); 40 Ill. Reg. 9229 (July 8, 2016) (adopted)

The regulation governing payments required to be paid by electronic funds transfer is being amended to reflect changes made to section 2505-210 of the Civil Administrative Code of Illinois (Department of Revenue Law) (20 ILCS 2505/2505-210) by P.A. 96-1027. Beginning October 1, 2010, a taxpayer (other than an individual taxpayer) who has an annual tax liability of \$20,000 or more and an individual taxpayer who has an annual tax liability of \$200,000 or more shall make all payments of tax to the Department by electronic funds transfer. A taxpayer who has an annual tax liability of \$1,000 or more under the Telecommunications Excise Tax must continue to make all payments of tax to the Department by electronic funds transfer. A new subsection (j) has been added to address electronic payments of taxes imposed by the Motor Fuel Tax Law and payments of the fee imposed by the Environmental Impact Fee Law. A new subsection (k) has been added to address electronic payments of the tax imposed by the Medical Cannabis Cultivation Privilege Tax Act.

4. Income Tax—86 Ill. Admin. Code 100.9320; 100.9410; 40 Ill. Reg. 5174 (April 8, 2016) (proposed); 40 Ill. Reg. 10925 (August 12, 2016) (adopted)

This rulemaking amends the sections that provide guidance on income tax statutes of limitation for the Department to issue notices of deficiency and for taxpayers to file refund claims to reflect legislation and case law arising since the sections were last amended.

5. Tobacco Products Tax Act of 1995—86 Ill. Admin. Code 660; 40 Ill. Reg. 10954 (August 12, 2016) (adopted)

This regulatory section is being amended in response to changes made to the Tobacco Products Tax Act of 1995 by Public Acts 97-688, 98-273 and 98-1055, and to incorporate some existing statutory provisions. Amendments include (in part): (1) adding a definition of “moist snuff” and reflect the change in the manner moist snuff is taxed—from a percentage basis to a weight-based approach—made by P.A. 97-688; (2) language reflecting the increase in the rate of the tax on other tobacco products from 18% of the wholesale price to 36%; (3) language noting that beginning July 1, 2013, little cigars in packages containing 20 or 25 little cigars are taxed in the same manner and at the same rate as cigarettes; (4) adding definitions for “contraband cigarettes,” “little cigars,” “stamps,” “stamping distributor” and several existing statutory definitions; and (5) requiring retailers of tobacco products to obtain retailer’s licenses.

6. Income Tax—86 Ill. Admin. Code 100.5020; 40 Ill. Reg. 6676 (April 22, 2016) (proposed); 40 Ill. Reg. 13432 (September 23, 2016) (adopted)

This rulemaking amends the regulatory section that provides automatic extensions of time for filing Illinois income tax returns. The Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 (Public Law 114-41) (the “Act”) changed the due dates for filing federal income tax returns of corporations from the 15th day of the third month after the end of the taxable year (March 15th for a calendar-year taxpayer) to the 15th day of the fourth month after the end of the taxable year (April 15th for a calendar-year taxpayer). This change in the

due date automatically changes the due date for Illinois income tax returns under IITA section 505(a)(1), which provides that the due date for corporate income tax returns is the 15th day of the third month after the end of the taxable year “unless the income or loss of a taxpayer is reported for federal purposes on a return with a due date later than the 15th day of the third month following the close of the taxable year, in which case the same due date shall apply to the corresponding Illinois return.” The Act also changes the due date for partnership returns from the 15th day of the fourth month after the end of the taxable year (April 15th for a calendar-year taxpayer) to the 15th day of the third month after the end of the taxable year (March 15th for a calendar-year taxpayer). This change does not affect the due date for Illinois partnership returns. The language of the automatic extension provisions in section 100.5020 allows all taxpayers a six-month extension to file returns, except corporations are allowed a seven-month extension. Under this language, as it applied before the Act, calendar-year taxpayers all had an extended due date of October 15 for filing their Illinois returns. After the Act, a calendar-year corporation will have until November 15 to file its Illinois return. Also, should the General Assembly amend the IITA so that Illinois partnership returns will be due on the same date as their federal income tax returns, calendar year partnerships would have only until September 15 to file their returns. This rulemaking amends the extension language to grant a six-month extension for returns otherwise due on the 15th day of the fourth month after the end of the taxable year and a seven-month extension for returns otherwise due on the 15th day of the third month after the end of the taxable year, so that the extended due dates for calendar year filers will again be October 15th.

7. Retailers’ Occupation Tax—86 Ill. Admin. Code 130.330; 40 Ill. Reg. 5174 (April 8, 2016) (proposed); 40 Ill. Reg. 13448 (September 23, 2016) (adopted)

This rulemaking amends section 130.330 to implement changes to the manufacturing machinery and equipment exemption pursuant to the decision in *Nokomis Quarry Co. v. Department of Revenue*, 295 Ill. App. 3d 264, 692 N.E.2d 855 (5th Dist. 1998). *Nokomis* held that extractive activities such as blasting may constitute manufacturing in some cases. When blasting is deliberately and systematically performed with specific desired results, and the process results in a new article of tangible personal property with a different form, with new qualities or combinations, the manufacturing machinery and equipment exemption may apply. *Nokomis* invalidated a portion of 130.330(b)(4). The rule currently states that the extractive process of quarrying does not constitute manufacturing. This rulemaking removes that provision from the rule and incorporates the *Nokomis* court’s holding that the extractive process of quarrying may constitute manufacturing in some cases.

This rulemaking further amends section 130.330 to reflect changes to the law made by P.A. 98-58, which provides that the manufacturing machinery and equipment exemption does not include equipment used to generate electricity or to generate or treat natural or artificial gas or water for sale that is delivered to customers through pipes, pipelines or mains. Though electricity is considered tangible personal property, this rulemaking reflects the Department’s policy that it is not taxable under the sales tax laws, and that the machinery and equipment used to generate electricity does not qualify for the manufacturing machinery and equipment exemption.

8. Use Tax—86 Ill. Admin. Code 150.201; 40 Ill. Reg. 5174 (April 8, 2016) (proposed); 40 Ill. Reg. 13471 (September 23, 2016) (adopted).

A new click thru nexus provision was added by P.A. 98-1089. This new provision changed the earlier law, in part, by adding a rebuttable presumption that nexus is created if the retailer engages in the statutorily specified activities. This rulemaking includes the rebuttable presumption and details the process that the Department will require in order to rebut the presumption of nexus.

9. Income Tax—86 Ill. Admin. Code 100.2465; 40 Ill. Reg. 7522 (May 20, 2016) (proposed); 40 Ill. Reg. 14762 (October 28, 2016) (adopted)

This rulemaking adds section 100.2465, which provides guidance on the subtraction modification allowed to taxpayers who were allowed a federal income tax itemized deduction (or a federal income tax credit in lieu of a deduction) as the result of repaying an amount that had been included in taxable income in a previous year under the “claim of right” doctrine.

10. Income Tax—86 Ill. Admin. Code 100.5060; 100.5100; 100.5130; 100.5215; 100.7035; 100.8010; 100.9400; 40 Ill. Reg. 5174 (March 25, 2016) (proposed); 40 Ill. Reg. 6540 (April 15, 2016) (proposed); 40 Ill. Reg. 7297 (May 13, 2016) (proposed); 40 Ill. Reg. 15575 (November 18, 2016) (adopted)

This rulemaking amends section 100.5215 regarding the filing of unitary returns by taxpayers who are not permitted to join with other members of their unitary business group in the filing of a single combined return, to provide examples for partnership computations. This rulemaking also amends the sections that provide guidance on the filing of composite returns by partnerships and S corporations to implement the provisions of P.A. 98-478. Prior to P.A. 98-478, partnerships and S corporations were allowed to file composite returns, reporting and paying Illinois income tax on behalf of some nonresident partners and shareholders, and were required to withhold Illinois income tax from nonresidents who were not included on composite returns. P.A. 98-478 repealed the general authority to file composite returns, so that partnerships and S corporations now withhold from nonresident partners and shareholders rather than comply with two different methods of reporting and paying tax for nonresident members/shareholders. P.A. 98-478 also amended the provisions for computing the required withholding to allow credits earned by the partnership or S corporation and passed through to the nonresident partners and shareholders to reduce the amount of required withholding. Finally, this rulemaking implements the provisions of P.A. 98-925, which amended IITA section 909 to require the Department to adopt regulations allowing a taxpayer to elect to apply overpayments of Illinois income tax reported on any return or amended return against the taxpayer’s Illinois income tax obligation for a subsequent taxable year. Under existing regulations, this election could only be made on a timely filed original return.

B. PROPOSED

1. Retailers’ Occupation Tax—86 Ill. Admin. Code 130.340; 40 Ill. Reg. 10083 (July 29, 2016) (proposed)

This rulemaking updates and restructures the rolling stock exemption rule to: (1) set forth the elements of the exemption in a logical order and delete obsolete and dated provisions; (2) implement P.A. 98-584, which sets forth the test for whether an aircraft or watercraft meets the

requirements to qualify as “rolling stock” exempt from sales and use tax; (3) replace references to the Interstate Commerce Commission with the Federal Motor Carrier Safety Administration; and (4) add examples of what types of intrastate movements do and do not qualify as interstate trips or miles.

2. Coin-Operated Amusement Device and Redemption Machine Tax—86 Ill. Admin. Code 460.101; 460.105; 40 Ill. Reg. 15669 (November 28, 2016) (proposed)

Section 460.101 is amended to implement a statutory change to the definition of “coin-operated amusement device” contained in section 1 of the Coin-Operated Amusement Device and Redemption Machine Tax Act (the “Act”). The statutory change expanded the definition of “coin-operated amusement device” to include any device operated or operable by insertion of coins, tokens, chips or similar objects. The Department is also updating the definition of a coin-operated amusement device to include a device that is operated by the use of a debit or prepaid card or mobile device. Additional amendments are made to section 460.101 to notify taxpayers that they may file claims pursuant to section 2 of the Act for tax, penalty and interest paid in error. Section 460.105 is also amended to implement statutory changes to the definition of “redemption machine” contained in section 28-2(a)(4) of the Illinois Criminal Code. The definition redemption machine is also amended to reflect changes in technology, such as games that use computer-generated graphics and electrical displays to simulate the throwing, rolling, bowling, shooting, placing or propelling of a ball or object. Other changes have been made to the definition to explain the limitation on awards that may be awarded by a redemption machine.

3. Income Tax—86 Ill. Admin. Code 100.3380; 100.3390; 40 Ill. Reg. 15878 (December 2, 2016) (proposed)

This rulemaking amends sections 100.3380 and 100.3390 pursuant to P.A. 98-478 to provide that an alternative formula for apportioning business income to Illinois could be allowed or required if the statutory formula does not fairly represent the “market” for the taxpayer’s goods and services in Illinois (rather than the extent of the taxpayer’s business activities in Illinois under prior law) and to reflect current Department policies.

4. Income Tax—86 Ill. Admin. Code 100.7310; 100.7325; 40 Ill. Reg. 16181 (December 27, 2016) (proposed)

This rulemaking amends sections 100.7310 and 100.7325 to terminate the programs allowing annual filing of withholding returns and annual payment of taxes withheld, because too many employers were confused by the programs and made incorrect filings and payments.

5. Income Tax—86 Ill. Admin. Code 100.3370; 40 Ill. Reg. 16711 (December 30, 2016) (proposed)

This rulemaking amends section 100.3370 to reflect certain amendments to the Illinois Income Tax Act with respect to the sourcing of income for purposes of the sales factor of the state’s apportionment formula.

IV. ISSUES TO MONITOR

- A. Illinois Budget – Potential tax increases?
- B. Illinois Tax Credits that expired:
 - 1. Research & Development Credit – Expired 1/1/16
 - 2. Sales Tax Temporary Storage Exemption – Expired 6/30/16
 - 3. Income Tax EDGE Credit – Expired 12/31/16
- C. IDOR Developments

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