

July 30, 2014

Paul Berks
Deputy General Counsel
Illinois Department of Revenue
100 W. Randolph Street, 7th Floor
Chicago, IL 60601

Dear Mr. Berks:

Since effective date of the new sourcing regulations the Equipment Leasing and Finance Association (ELFA) has collected comments and questions from industry regarding the Department's regulations. The following questions from industry members are offered as evidencing continued uncertainty. ELFA requests response in a General Information Letter providing guidance to implementation in the marketplace:

General Questions

1. Will lessors continue to be allowed to provide resale exemption certificates to their vendors reflecting a purchase for resale in respect to a conditional sales agreement?
2. The new rule only makes mention of 'a lease with a dollar or other nominal option to purchase' shall be considered a conditional sale. This simplified reference is silent with regards to other time payment agreements that could also be considered conditional sales and raises the following questions:
 - a. Will leases with a mandatory end of lease purchase (i.e. balloon payment, PUT) also be considered a conditional sale for purposes of applying §(d)(4) of the rule? Stated otherwise, if lessors are guaranteed at the time of entering into a lease that the leased property will be sold, will such lease agreements be considered a conditional sale for purposes of applying §(d)(4)?
 - b. Will other time payment agreements entered into by the seller and purchaser, such as installment sales and equipment finance agreements, also be considered conditional sales for purposes of applying §(d)(4)?
3. With respect to determining the appropriate rate of tax to apply to a sale at the time the conditional sales agreement is entered into by the parties.

4. Lessors who enter into conditional sales may not hold the inventory that they are selling. In cases where the lessor is drop-shipping property from its suppliers or where the property has to be specially manufactured, the conditional sales agreement is often entered into prior to the location of the property being known by the parties. Consequently, we urge the IDOR to adopt simple rules using the ultimate destination of the property (end-users location) as the determining or safe-harbor factor in the taxation of the property being sold through a conditional sales agreement. Here are some scenarios that could lead to significant confusion among retailers if not made clear by the Department:
5. A lessor and its customer enter into a conditional sales agreement prior to the manufacture of the property subject to the agreement. Would the Department of Revenue then default to a rate of tax determined from the location of the site of manufacturing (even if out of state), the lessor's location (even if out of state), or the ultimate destination of the property being acquired by the customer in Illinois? What if all three sites were in Illinois, would your answer change? What if the lessor records are inconclusive as to the location where the property is being manufactured?
6. A lessor and its customer enter into a conditional sales agreement prior to the lessor's ordering of the property from a third-party vendor. Would the Department of Revenue then default to using a rate of tax determined from the location of the site of shipment FOB origin (even after having been required to issue a resale exemption certificate), the lessor's location (even if out of state), or the ultimate destination of the property being acquired by the customer in Illinois? If FOB origin is determined to be the correct answer, lessors should not be required to provide resale exemption certificates to their vendors, as they are under current regulations. Would your answer change if the conditional sales agreement is conditioned upon the lessee's receipt and final acceptance of the property covered by the agreement (i.e. Sale on approval 810 ILCS 5/2-326)?
7. A lessor and its customer enter into a conditional sales agreement after the lessor ordered the property from its third-party vendor. Would the Department of Revenue then default to using a rate of tax determined from the location of the site of shipment FOB origin (even after having been required to issue a resale exemption certificate), the rate of tax determined from the location of the property while in transit by common carrier if the property had already shipped, the lessor's location (even if out of state), or the ultimate destination of the property being acquired by the customer in Illinois?
8. A lessor emails its customer a conditional sales agreement just prior to authorizing the shipment of the property out of lessor's warehouse to the customer. The property arrives at the customer's location just before the customer executes and returns the signed conditional sales agreement to the lessor. The lessor charges ROT based upon the location of the property at the customer. Has the lessor chosen the correct tax jurisdiction under the new regulations?

9. A lessor and its customer enter into an unconditional interim funding agreement for property that will be temporarily located at a logistics/configuration/staging center prior to distribution to various locations of the customer. When the property is received by the customer at its ultimate destination, the interim funding agreement terms convert into a conditional sale. Will the temporary location of the property at time of entering into the interim funding agreement be the correct location for sourcing? Or will the receipt of the property by the customer at the time the agreement converts into a conditional be the correct location for sourcing? Would this answer change if the interim funding agreement was conditioned on final receipt and acceptance by the customer under the conditional sale?

10. Under any of the above scenarios could the Department of Revenue envision the lessor/retailer defaulting back into the jurisdictional analysis required under Regulations Section 220.115(c)(1)?

Timing of Tax Liability Questions

1. The difference between the moment in which a conditional sales agreement is entered into and the moment in which such property is delivered and first invoiced to the customer can be substantial at times. Will the Department require ROT to be collected and remitted by the lessor prior to the time of delivery of the property and invoicing? Can the Department confirm that the contractual lease period and the rentals due thereunder determine the time of sale and for filing and remittance of tax rather than the date a conditional sales agreement is entered into?

2. If a lessor does an outright sale of the conditional sales agreement and is obligated to report the receipts of the sale pursuant to 130.1960(c), are the additional receipts sourced to the location of the property at the time of selling the agreement? Or are they sourced to the location of the property at the time of entering into the conditional sales agreement with the customer? Will the Department defer to any provisions of Illinois Uniform Commercial Code such as “Sale on approval” at 810 ILCS 5/2-326 or “Passing of title” at 810 ILCS 5/2-401, for purposes of determining when the conditional sale agreement is entered into?

Sincerely,

Dennis Brown
Vice President, State Government Relations
Equipment Leasing and Finance Association
Phone: (202) 238-3411
dbrown@elfaonline.org