

Illinois Independent
Tax Tribunal

Wayfair LLC)
 Petitioner)
))
v.))
))
Illinois Department of Revenue,)
 Respondent)



Petition

The Petitioner, Wayfair LLC (“Wayfair”), hereby petitions the Illinois Independent Tax Tribunal to review and reverse and/or modify the Notice of Tax Liability (“Notice”) issued by the Illinois Department of Revenue (“Department”) for the reasons stated below:

INTRODUCTION

1. Petitioner is a limited liability company with its principal place of business in Boston, Massachusetts. The Taxpayer Account number is 4214-8480.
2. Launched in 2011, Wayfair is an online merchant of home goods, furniture, and décor.
3. Since its founding, Wayfair has expanded its logistics and infrastructure network beyond New England, opening distribution centers throughout the United States, the United Kingdom, and Germany.
4. At all times, orders submitted through Wayfair’s website are accepted and approved at Wayfair’s headquarters in Boston.
5. At all times, payment for online orders was received by credit card at the time the order was submitted on the Wayfair website.
6. All orders were processed by Wayfair outside of Illinois.
7. Wayfair currently has a facility located at 815 Kimberly Drive, Carol Stream, Illinois. Wayfair opened this facility on February 19, 2016.

October 1, 2021

Page 2

8. Prior to February 19, 2016, Wayfair did not maintain a physical place of business in Illinois and did not have nexus with the state of Illinois.

9. Prior to (and after) February 19, 2016, Wayfair fulfilled sales to Illinois residents from inventory stored outside of Illinois.

10. Prior to (and after) February 19, 2016, Wayfair delivered sales to Illinois residents by common carrier from points outside of Illinois.

11. Prior to February 19, 2016, Wayfair did not have nexus with Illinois for purposes of the Retailers' Occupation or Use taxes.

BACKGROUND AND RELEVANT FACTS

12. Petitioner timely filed returns for the taxable period beginning February 19, 2016 through March 31, 2019.

13. On August 19, 2020, the Department issued its Sales Tax Audit Summary Analysis to Wayfair, LLC, disclosing the total additional tax proposed following an audit. Of the \$380,399.59 proposed Retailers' Occupation Tax due, tax in the amount of \$164,643.46 related to Wayfair's online sales that occurred prior to February 19, 2016. A copy of the assessment summary is attached as **Exhibit A**.

14. On October 23, 2020, Wayfair submitted Form ICB-1, requesting that the Informal Conference Board ("ICB") review the proposed assessment issued by the Department.

15. The ICB conducted the requested informal conference on March 29, 2021.

16. On June 3, 2021, the ICB issued its decision, concluding that Wayfair was obligated for the Retailers' Occupation Tax, and that no adjustment to the proposed Retailers' Occupation Tax due was required. It instructed the Audit Bureau to conclude and process the audit.

17. On August 18, 2021, the Department issued a Notice of Tax Liability to Wayfair, assessing Retailers' Occupation tax in the amount of \$334,242 in tax, and \$58,106.17 in interest for taxable periods February 19, 2016 through March 31, 2019. A copy of the "Notice" is attached to this Petition.

18. Wayfair objects to the portion of the assessment that relates to Wayfair's online sales that occurred prior to February 19, 2016 in the amount of \$164,643.46, plus interest and penalties thereon.

October 1, 2021
Page 3

APPLICABLE LAW

19. During the taxable periods, Illinois imposed the Retailers' Occupation Tax on "persons engaged in the business of selling at retail tangible personal property" 35 ILCS 120/2.

20. "[T]he business that forms the basis for the tax must be one carried on within [Illinois]." *Ex-Cell-O Corp. v. McKibbin*, 383 Ill. 316, 321 (1943).

21. Pursuant to 86 Ill. Adm. Code 220.115(b)(1), "Because the statute imposes a tax on the retail business of selling and not on specific sales, the jurisdiction in which the sale takes place is not necessarily the jurisdiction where the retailers' occupation tax is owed. Rather, it is the jurisdiction where the seller is engaged in the business of selling that can impose the tax."

22. A retailer is deemed to engage in the business of selling "in the taxing jurisdiction where its predominant and most important selling activities take place." 86 Ill. Adm. Code 220.115(b)(7).

23. Selling activities that are considered "primary" include:

- a. The location from which sales personnel exercise discretion and authority to solicit customers;
- b. The location from which the seller takes action that binds it to the sale;
- c. The location where payment is tendered and received;
- d. The location of inventory, if that inventory is in the retailer's inventory at the time of sale or delivery; and
- e. The location of the retailer's headquarters.

86 Ill. Adm. Code 220.115(c)(1).

24. Establishing where the taxable occupation of selling is carried on is a fact-specific inquiry into the activities that comprise the business of being a retailer. 86 Ill. Adm. Code 220.115(d)(2); *Hartney Fuel Oil Co. Hamer*, 2013 Ill. 115130 ¶ 32.

25. Where a retailer engages in three or more of the primary selling activities for a particular sale outside of the state, the retailer is not subject to the Retailer's Occupation Tax for that sale. 86 Ill. Adm. Code 220.115(c)(2).

26. "When a customer places an order for the purchase of tangible personal property through a consumer-based retailer website available without limitation on the world wide web

October 1, 2021

Page 4

and the retailer ships the property to the customer in this State, the Department will presume that the retailer's predominant selling activities take place outside of this State.” 86 Ill. Adm. Code 220.115(d)(3).

27. Use tax is imposed “on the privilege of using ... tangible personal property purchased at retail from a retailer”. 35 ILCS 105/3-3.

28. Retailers who have nexus with Illinois for purposes of the use tax are obligated “collect the [use] tax from users by adding the tax to the selling price of the tangible personal property....” 35 ILCS 105/3-45.

29. Use tax must be collected from the purchaser if the retailer maintains a place of business in Illinois, or is authorized by the Department as a retailer under Section 6 of the Use Tax Act. 35 ILCS 105/3-45.

30. “Every retailer maintaining a place of business in this State, if not required to register under the Retailers' Occupation Tax Act, shall apply to the Department ... for a Certificate of Registration under this Act.” 35 ILCS 105/6.

31. A “Retailer maintaining a place of business in this State” consists of a retailer maintaining an office, a subsidiary, an office, a distribution house, a sales house, a warehouse, or another place of business; an agent or representative; or entering into a contract with a person located in Illinois to which the retailer pays a commission or other consideration. 35 ILCS 105/2.

ERROR I

32. The Department erred in concluding that Wayfair was subject to the state’s Retailers’ Occupation Tax in connection with orders and credit card payments that Wayfair received and approved outside of Illinois prior to February 19, 2016.

33. Wayfair’s sales to Illinois residents are “Sales over the Internet.” 86 Ill. Adm. Code 220.115(d)(3).

34. Wayfair’s Illinois customers placed orders for the purchase of tangible personal property over Wayfair’s website. Upon approval and fulfillment of the order, Wayfair shipped the sold items to its Illinois customers.

35. Wayfair’s headquarters are located in Boston, Massachusetts.

36. Orders are received and approved, and payment processed, in Massachusetts.

37. Wayfair did not employ sales personnel in Illinois during the taxable periods.

October 1, 2021

Page 5

38. Wayfair's customers did not pick up items they purchased from Wayfair in Illinois, or otherwise take possession of the items purchased at place of business owned or leased by Wayfair in Illinois.

39. As a sale over the internet, Wayfair's predominate selling activities are presumed to take place – and in fact did take place – outside of Illinois.

40. Accordingly, Wayfair was not engaged in the business of selling in Illinois prior to February 19, 2016 and the Retailers' Occupation Tax assessed is invalid.

ERROR II

41. Wayfair was not subject to the state's Use Tax in connection with orders and credit card payments Wayfair received and approved outside of Illinois prior to February 19, 2016 .

42. Wayfair did not have nexus in Illinois until February 19, 2016, and as such did not qualify as a "Retailer maintaining a place of business in Illinois."

43. Under the Use Tax Act, a retailer's obligation to collect use tax is triggered at the point the seller receives and accepts the purchaser's order and payment, because that is the point at which the seller is obligated to add the tax to the selling price of the tangible personal property ordered.

44. A retailer who did not have nexus with Illinois at the point it receives and accept its customer's orders is not obligated to collect use tax on the order.

CONCLUSION AND RELIEF REQUESTED

45. Because Wayfair's primary selling activities did not occur in Illinois, Wayfair cannot be subject to the Retailer's Occupation Tax for those internet sales that were received and approved prior to February 19, 2016.

46. Likewise, because Wayfair received and accepted orders for items prior to the date on which it became a retailer maintaining a place of business in Illinois, Wayfair was not obligated to collect use tax from its purchaser for items to be delivered in Illinois.

October 1, 2021
Page 6

WHEREAS, Petitioner requests that the "Notice" be modified by reducing the proposed Retailers' Occupation taxes by \$164,643.46 and interest and penalty thereon, for the reasons contained herein.

NAME OF PETITIONER

By: Martin Eisenstein,
one of the Attorneys Representing Petitioner.

Representatives:

Martin I. Eisenstein (ARDC #726079)
Jamie E. Szal (*admission pro hac vice requested*)
Brann & Isaacson
PO Box 3070
Lewiston, ME 04243
207-786-3566
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Only for use by out of state attorneys:

As an attorney authorized to practice law in Maine and Massachusetts, I certify that I am in the process of complying with the Illinois Supreme Court procedures for admission to practice *pro hac vice* in Illinois. We will provide the Tribunal with a copy of my court order as soon as it is issued.

Jamie E. Szal _____

Print Name

Jamie E. Szal

Signature



Illinois Department of Revenue
Sales Tax Audit System
Schedule 1 - Summary Analysis

EXHIBIT A

Date: 08/19/2020

Time: 23:46:50

Page: 1

IBT: 4214-8480
 Taxpayer: WAYFAIR, LLC

Auditor: Julia Casimiro

<u>Item Description</u>	<u>Tax Type/Str Codes</u>	<u>Exception Amount</u>	<u>Rate</u>	<u>Tax Amount</u>	<u>Tax Paid</u>	<u>Net Tax Due</u>	<u>Total</u>
Sales Receipts Pre-Nexus	ROT / 11-100	\$2,634,295.36	06.25%	\$164,643.46	\$0.00	\$164,643.46	\$164,643.46
Sales Receipts Post 2/1/16	ROT / 11-101	\$1,024,426.83	06.25%	\$64,026.68	\$0.00	\$64,026.68	\$64,026.68
Receipts Adj Sch 5	ROT / 11-102	\$1,211,971.00	06.25%	\$75,748.19	\$0.00	\$75,748.19	\$75,748.19
Sales Receipts Adj-Expanded Audit	ROT / 11-301	\$583,640.00	06.25%	\$36,477.50	\$0.00	\$36,477.50	\$36,477.50
Assets Use Tax Adjustment	ROT / 30-100	\$218,999.67	06.25%	\$13,687.50	\$0.00	\$13,687.50	\$13,687.50
Consumable Supplies Use Tax Adj.	ROT / 31-300	\$413,060.11	06.25%	\$25,816.26	\$0.00	\$25,816.26	\$25,816.26
						Total Additional Tax	\$380,399.59

Notice of Tax Liability



August 18, 2021



#BWNKMGV
#CNXX XX76 X2X8 4568#
WAYFAIR, LLC
ATTN: RYAN HAYES
815 KIMBERLY DR
CAROL STREAM IL 60188-1801

Letter ID: CNXXXX76X2X84568
Account ID: 4214-8480
Reporting period: March 31, 2019

We have audited your Sales/Use Tax & E911 Surcharge account for the reporting periods February 19, 2016, through March 31, 2019, and the liability has been processed on Form EDA-105-R, ROT and E911 Surcharge Audit Report. As a result, we have assessed the amounts shown below.

If you agree, pay the assessment total as soon as possible to minimize additional penalty and interest. Mail a copy of this notice and your payment with the voucher on the enclosed Taxpayer Statement. By including a copy of this notice, your payment will be properly applied to the audit liability.

If you do not agree, you may protest this notice within specific time periods. See the "Protest Rights" section on the following page of this notice for additional information and instructions.

If you do not protest this notice or pay the assessment total in full, we may take collection action against you for the balance due, which may include levy of your wages and bank accounts, filing of a tax lien, or other action to satisfy your liability.

Note: If you are under bankruptcy protection, see the "Bankruptcy Information" section on the following pages of this notice for additional information and instructions.

	<u>Liability</u>	<u>Payments/Credit</u>	<u>Unpaid Balance</u>
Tax	334,242.00	0.00	334,242.00
Interest	58,106.17	0.00	58,106.17
Assessment Total	\$392,348.17	\$0.00	\$392,348.17

If you have questions, write or call us weekdays between 8:00 a.m. and 4:00 p.m. Our contact information is listed below.

**AUDIT BUREAU
TECHNICAL REVIEW SECTION
ILLINOIS DEPARTMENT OF REVENUE
PO BOX 19012
SPRINGFIELD IL 62794-9012**

217 785-6579