IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION
TAX AND MISCELLANEOUS REMEDIES SECTION

MICHAEL LABELL, ET AL.,	
Plaintiffs,	
v.	Case No. 15 CH 13399
THE CITY OF CHICAGO, ET AL.,	Honorable Carl Anthony Walker Calendar 1
Defendants.	

OPINION AND ORDER

I. OPINION

This matter comes before the Court on Plaintiffs', Michael Labell, *et al.* ("Plaintiffs") and Defendants', The City of Chicago, *et al.* ("Defendants"), Cross Motions for Summary Judgment. Plaintiffs seek to enjoin the ruling extending Chicago's 9% "amusement tax" to cover Internet-based streaming services: (1) as a violation of the federal Internet Tax Freedom Act; (2) as a violation of the United States Commerce Clause; (3) as a violation of the uniformity clause of the Illinois Constitution; and (4) as an extraterritorial application of Defendants' taxing power. For the reasons below, Plaintiffs' Motion for Summary Judgment is denied, and Defendants' Motion for Summary Judgment is granted.

BACKGROUND

The City of Chicago imposes a 9% tax on admission fees or other charges paid for the privilege to enter, witness, view, or participate in some activities within the City of Chicago that the Chicago Municipal Code ("Code") defines as "amusements" (the "amusement tax"). Chi. Mun. Code 4-156-020. On June 9, 2015, the City of Chicago, through its Comptroller, issued Amusement Tax Ruling #5 ("Ruling"), which declares the term "amusement" as defined by Chi. Mun. Code 4-156-010, to include "charges paid for the privilege to witness, view or participate in amusements that are delivered electronically." Ruling ¶ 8. According to the Ruling, charges paid for the privilege of "watching electronically delivered television shows, movies or videos, . . . listening to electronically delivered music, . . . and participating in games, on-line or otherwise" are subject to the amusement tax if they are "delivered to a patron (i.e., customer) in the City." Ruling ¶ 8.

The Ruling requires providers of Internet services to collect the amusement tax from their customers and remit the proceeds to the City. The Ruling adopts the sourcing rules from the Mobile Telecommunications Sourcing Conformity Act, 35 ILCS 638/1 *et seq.* ("Mobile Sourcing Act").

It imposes the amusement tax on individuals "whose residential street address or primary business street address is in Chicago, as reflected by their credit card billing address, zip code or other reliable information." Ruling ¶ 13. The Ruling further indicates the amusement tax is imposed on the patron and applies only to the activity that takes place within the borders of Chicago. Ruling ¶ 14.

On December 17, 2015, Plaintiffs–customers of Internet services–filed their six count First Amended Complaint. On January 19, 2016, Defendants moved to dismiss the Amended Complaint. On July 21, 2016, this Court granted Defendants' 2-615 Motion to Dismiss on Counts I, II, and III, and denied Defendants' 2-615 Motion to Dismiss on Counts IV, V, and VI. On October 12, 2016, Plaintiffs filed their Second Amended Complaint. Both parties filed Cross Motions for Summary Judgment.

LEGAL STANDARD

Summary judgment should be granted when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact" and the "moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2018). The interpretation of a statute is a matter of law and is thus appropriate for summary judgment. *Village of Chatham v. County of Sangamon*, 216 Ill. 2d 402, 433 (2005). When parties file cross motions for summary judgment, they agree no factual issues exist and the disposition of the case turns on the court's resolution of purely legal issues. *Maryland Casualty Co. v. Dough Management Co.*, 2015 IL App (1st) 141520, ¶ 45.

DISCUSSION

As a preliminary matter, the amusement tax is imposed by Section 4-156-020(A) of the Municipal Code of Chicago, which states, "an amusement tax is imposed upon the patrons of every amusement within the City." Section 4-156-020(G.1)[1] provides businesses with a method of collecting the amusement tax.

A. *Internet Tax Freedom Act*

Plaintiffs allege the amusement tax is unfairly applied, and it imposes a discriminatory tax on users of streaming services. Plaintiffs contend the amusement tax on streaming services violates the Internet Tax Freedom Act ("ITFA"). Plaintiffs also argue the City requires customers to pay the amusement tax on streaming services but not an equal tax on similar services, such as automatic amusement machines. Automatic amusement machines are machines operated with a coin, slug, token, card or similar object, or upon any other payment method, generally for use as a game, entertainment, or amusement. *See* Chicago Municipal Code § 4-156-150 (2016).

In addition, Plaintiffs maintain that the City taxes live performances at a lower rate than it taxes streaming services. Defendants contend the amusement tax does not violate the ITFA

[1] In the case of amusements that are delivered electronically to mobile devices, as in the case of video streaming,, audio streaming and on-line games, the rules set forth in the Illinois Mobile Telecommunications Sourcing Conformity Act, 35 ILCS 638, as amended, may be utilized for the purpose of determining which customers and charges are subject to the tax imposed by this chapter. If those rules indicate that the tax applies, it shall be presumed that the tax does apply unless the contrary is established by books, records or other documentary evidence.

because the activities are much different. The City asserts there is a real and substantial difference between streaming and live performances. Therefore, they are not "similar" under the ITFA.

The ITFA prohibits a state or political subdivision of a state, from imposing discriminatory taxes on electronic commerce that:

> (i) is not generally imposed and legally collectible by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means;
> (ii) is not generally imposed and legally collectible at the same rate by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means, unless the rate is lower as part of a phase-out of the tax over not more than a 5-year period; [or]
> (iii) imposes an obligation to collect or pay the tax on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means.
> (iv) establishes a classification of Internet access service providers or online service providers for purpose of establishing a higher tax rate to be imposed on such providers than the tax rate generally applied to providers of similar information services delivered through other means.

ITFA §1105(2)(A). In this instance, Plaintiffs cannot equate live performances to movies and music streamed on-line because they are different amusements. On-line streaming services allow users to stream several movies and shows in any location during any time, while a live performance is enjoyed at a venue in the moment.

For example, the Illinois Supreme Court approved the favoring of "live fine arts performances" over other forms of amusement. *Pooh-Bah Enterprises, Inc. v. County of Cook,* 232 Ill. 2d 463, 496 (2009). The court noted that the goal of the exemption "is to encourage live fine arts performances in small venues" and that this goal would not be advanced by "movies, television, promotional shows, [or] performances at adult entertainment cabarets ...." *Id.* This Court finds live performances are not sufficiently similar to performances or movies delivered through on-line streaming services. There is a legitimate justification for the exemption for live performances in small venues because live performances foster tourism and business (hotels, restaurants, and gift shops). As stated during oral arguments, if an individual paid hundreds of dollars for a live performance and arrived at the theatre to learn that the performance must be viewed on a television monitor, the individual would find this not acceptable. This is because watching a performance on a television monitor is not in any way similar to watching a live performance. Thus, the conformity difference does not create a violation of the ITFA.

In addition, the automatic amusement machines cannot be equated to movies and music streamed on-line because there are real and substantial differences. The automatic amusement machines are stationary devices owned by businesses. The customers may not take the devices away from the establishment, the devices are shared among all of the establishment's customers, and they are operated with coins on a per-use basis. However, the on-line streaming products are used on devices owned by a consumer, and the streaming products can be used on a mobile device

at any location the customer chooses. The customer is generally the exclusive user of the on-line streaming product, and rather than paid for on a per use basis, the streaming products are paid for by credit or debit card on a monthly basis pursuant to a subscription.

This Court finds these are real and substantial differences. Plaintiffs do not dispute the differences, but instead Plaintiffs question whether the differences justify the City imposing a tax of $150 per year on each automatic amusement device versus a 9% amusement tax based on the amount a customer pays to use the device. Defendants counter stating that a 9% tax for each use would be administratively inconvenient. This Court agrees. Requiring owners of bars, restaurants and arcades to collect a percentage-based tax from patrons who pay a small amount of money to play individual songs or games with coins would be administratively inconvenient for the businesses, customers, and the City of Chicago. Administrative convenience and expense in the collection or measurement of the tax alone are a sufficient justification for the difference between the treatments in taxes. *See Paper Supply Co. v. City of Chicago*, 57 Ill. 2d 553, 574 (1974). Therefore, there is no violation of the ITFA.

B. *The United States Commerce Clause*

Plaintiffs argue the amusement tax imposed on streaming services used outside Chicago violates the Commerce Clause. Plaintiffs specifically allege there is no substantial nexus between Chicago and streaming services, and the substantial nexus rule requires the City to have a connection with the activity it is taxing and not just the actor who pays the tax. In addition, Plaintiffs assert the tax is not fairly apportioned because it is not externally consistent.

Defendants contend Plaintiffs lack standing to bring an action under the Commerce Clause because the Commerce Clause intended to protect competitors and not consumers, and as such Plaintiffs are the wrong party to bring this action. In addition, Defendants assert the amusement tax has a substantial nexus with the taxing city since it taxes Chicago residents who pay for and receive the privilege of viewing and listening to amusement in Chicago, and the tax is fairly related to services provided since Chicago residents who pay the tax receive the services within Chicago.

i. Standing

As a threshold matter, this Court will address the standing issue. To prove standing the Plaintiffs must show: (1) Plaintiffs suffered an injury in fact, (2) have a causal nexus between that injury and the conduct complained of, and (3) it must be likely the injury will be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Here, Plaintiffs have shown an interest because they are the individuals taxed for their streaming activities, and they will suffer an injury if the tax is levied on the streaming services. Plaintiffs thus have standing to bring this action.

ii. Commerce Clause Concerns

The Commerce Clause provides that "Congress shall have the power . . . to regulate commerce . . . among the several States." U.S. Const., Art. I § 8, cl.3. "Even where Congress has not acted affirmatively to protect interstate commerce, the Clause prevents States from discriminating against that commerce." *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 29 (1998).

A local tax satisfies the Commerce Clause if it: "(1) is applied to the activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the state." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

Under the first prong of the *Complete Auto* test, to find whether a substantial nexus exists, courts examine the level of a taxpayer's "presence" within the taxing state or city. *In re Wash Mutual, Inc.*, 485 B.R. 510, 517 (Bankr. D. Del. 2012). Here, the tax is applied to customers who receive the services in Chicago, and it is a fair assumption that the taxpayers' residence will be their primary places of streaming. Thus, the tax does have a substantial nexus with the City of Chicago because it is fairly related to the services provided by the City to its residents.

The second prong of the *Complete Auto* test requires a local tax to be fairly apportioned. The U.S. Constitution "imposes no single apportionment formula on the States." *Container Corp. of America v. Franchise Tax Bd.* 463 U.S. 159, 164 (1983). The central purpose behind the apportionment requirement is to ensure that each state or city taxes only its fair share of an interstate transaction. *Id.*

Pursuant to *Goldberg v. Sweet*, the test to determine whether a tax is fairly apportioned requires an examination of whether the tax is internally and externally consistent. 488 U.S. 252, 261 (1989). To be internally consistent, the tax must be structured so that if every state were to impose an identical tax no multiple taxation would result. *Id.* On the other hand, external consistency requires the state to tax only the portion of revenues from interstate activity, which reasonably reflects an in-state component of activity. *Id.* Plaintiffs acknowledge the tax is internally consistent. However, Plaintiffs argue the tax is not externally consistent because the City is taxing the use that occurs outside of the City of Chicago.

The external consistency test asks whether the State or City has taxed that portion of the revenues from the interstate activity which reasonably reflects the in-state or in-city component of the activity being taxed. The Court finds the amusement tax has many of the characteristics of a sales tax. The tax is assessed on individual consumers, collected by the retailer, and accompanies the retail purchase of streaming services. It may not be purely local, but it reasonably reflects the way consumers purchase the new technology (streaming services). *See McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 58 (1940).

The external consistency test is a practical inquiry. The U.S. Supreme Court has endorsed apportionment formulas based upon the miles a bus, train, or truck traveled within a taxing jurisdiction. *See Central Greyhound Lines, Inc. v. Mealey,* 334 U.S. 653, 663 (1948). Those cases involved the movement of large physical objects over identifiable routes upon which it was possible to keep track of the travel within each state. This case, on the other hand, deals with intangible movement of electronic streaming services. Therefore, an apportionment formula based on some division of use "would produce insurmountable administrative and technological barriers." *Goldberg* 488 U.S. at 264. Apportionment does not require the City of Chicago to adopt a tax that poses true administrative burdens. *See American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 296 (1987).

Defendants' amusement tax only applies to consumers whose billing address is in the City of Chicago. If another jurisdiction attempted to tax consumers based on usage outside of the City of Chicago, some streaming use could be subject to multiple taxation. However, this limited possibility of multiple taxation is not sufficient to invalidate the ordinance based on external consistency. *Id* at 264. Defendants' method of taxation is a practical solution to the technology of the 21st century. The tax on streaming activity is based on the customer's billing address, which reflects that the in-city activity and the primary use of the streaming services will take place at their residences. Thus, the tax meets the fairly apportioned prong of the *Complete Auto* inquiry.

Under the third prong of the *Complete Auto* test, the taxing jurisdiction is prohibited from imposing a discriminatory tax on interstate commerce. *Goldberg,* 488 U.S. at 265. A tax discriminates against interstate commerce when it imposes a disproportionate share of the tax burden to interstate transactions. *Id.* Plaintiffs agree that the third prong of the *Complete Auto* test is satisfied.

The forth prong of the *Complete Auto* test examines whether the tax is fairly related to the presence and activities of the taxpayer within the jurisdiction. The purpose of this test is to ensure that a jurisdiction's tax burden is not placed upon persons who do not benefit from services provided by that jurisdiction. *See Commonwealth Edison v. Montana*, 453 U.S. 609, 627 (1981). The analysis focuses on the wide range of benefits provided to the taxpayer. *Goldberg,* 488 U.S. at 267. For example, a taxpayer's police and fire protection and the use of public roads and mass transit are benefits provided by the City of Chicago, and those benefits satisfy the requirement that the tax is fairly related to benefits the City provides to the taxpayer. Therefore, the forth prong of the *Complete Auto* test is satisfied.

For the reasons stated above, this Court finds the amusement tax the City of Chicago imposes is consistent with the Commerce Clause of the U.S. Constitution. The amusement tax is applied to an activity with a substantial nexus with the City; it is fairly apportioned; it does not discriminate against interstate commerce; and it is fairly related to services which the City of Chicago provides to the taxpayers.

C. *Uniformity Clause*

In addition to their federal constitutional claims, Plaintiffs contend the amusement tax violates the uniformity clause because it applies to streaming services differently than it applies to other amusements in the city.

Article IX, § 2 of the Illinois Constitution, otherwise known as the uniformity clause, provides: "[i]n any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly. Exemptions, deductions, credits, refunds and other allowances shall be reasonable." Ill. Const. 1970, art. IX § 2.

The uniformity clause of the Illinois Constitution was intended to be a broader limitation on legislative power than the limitation of the Equal Protection Clause of the federal constitution. *Arangold Corp. v. Zehnder*, 204 Ill. 2d 142, 153 (2003): *Searle Pharms., Inc. v. Dep't of Revenue*, 117 Ill. 2d 454, 469 (1987); *Milwaukee Safeguard Ins. Co. v. Selcke*, 179 Ill. 2d 94, 102 (1997).

Although the uniformity clause imposes a more stringent standard than the Equal Protection Clause, the scope of a court's inquiry under the uniformity clause remains relatively narrow. *Allegro Services, Ltd v. Metro. Pier & Exposition Auth*, 172 Ill. 2d 243, 250 (1996). Statutes bear a presumption of constitutionality, and broad latitude is afforded to legislative classifications for taxing purposes. *Id.*

The uniformity clause was "designed to enforce minimum standards of reasonableness and fairness as between groups of taxpayers." *Id.*; *Geja's Café v. Metro. Pier & Exposition Auth*, 153 Ill. 2d 239, 252 (1992). To survive scrutiny under the uniformity clause, a non-property tax classification must: (1) be based on a real and substantial difference between the people taxed and those not taxed, and (2) bear some reasonable relationship to the object of the legislation or to public policy. *Arangold*, 204 Ill. 2d at 153. These two requirements should be considered and treated separately. *Casey's Mktg. Co. v. Hamer*, 2016 IL App (1st) 143485, ¶ 22.

First, Plaintiffs argue the tax imposed on streaming services treats consumers of streaming services differently based on billing addresses, not based on where the streaming services are used. Yet in other instances, the amusement tax applies only to consumers who incur charges for amusements that take place in the city.

Second, Plaintiffs argue the amusement tax subjects streaming services to greater taxation than automatic amusement machines that deliver the same types of entertainment and thus violates the uniformity clause. Third, Plaintiffs assert the tax violates the uniformity clause because it taxes some performances at a higher rate than in-person performances.

Defendants respond there are real and substantial differences between residents of Chicago and non-residents. For example, the City of Chicago provides protection and other benefits to its residents and their property. Defendants argue there are real and substantial differences between an automatic amusement device and streaming products. Defendants assert: (1) an automatic amusement device is owned by a business such as a bar or arcade, and (2) an automatic amusement device is a stationary device that a consumer may not take away from an establishment, while a streaming product can be used on a mobile device at any location the consumer may choose. Finally, Defendants argue there are real and substantial differences between an amusement that is viewed in-person and one delivered electronically for viewing on a television or other device.

i. Real and Substantial Difference

When Plaintiffs challenge a legislative classification, they have the burden of showing the classification is arbitrary or unreasonable. *Geja's Café*, 153 Ill. 2d at 248. If a set of facts can reasonably be conceived that would sustain the legislative classification, the classification must be upheld. *Id.* In a uniformity clause challenge, Plaintiffs are not required to negate every conceivable basis that might support the tax classification. *Empress Casino Joliet Corp. v. Giannoulias*, 231 Ill. 2d 62, 72 (2008). Rather, once Plaintiffs have established a good-faith uniformity clause challenge, the burden shifts to the taxing body to produce a justification for the tax classification. *Id.* If the taxing body does so, the burden shifts back to Plaintiffs to persuade the court that the justification is insufficient, either as a matter of law or as unsupported by the facts. *Id.* If the plaintiff fails to meet that burden, judgment is proper for the taxing body as a matter of law.

Here, the ordinance grants many exemptions. The Illinois Supreme Court has "upheld tax exemptions based upon the character of an entity other than that upon which the incidence of a tax has been placed." *DeWoskin v. Lowe's Chicago Cinema*, 306 Ill. App. 3d 504, 520 (1st Dist. 1999). There is a real and substantial difference between the people taxed and those not taxed. As to streaming service, the people taxed have a Chicago billing address, and at least one of the Plaintiffs testified that he watches Netflix about 75% of the time on his home television. The other deposed Plaintiff stated that he uses Netflix and Spotify about 90% of the time in the City of Chicago. The City does not attempt to tax anyone without a Chicago billing address.

In addition, there are real and substantial differences between an automatic amusement device and streaming products. Specifically, the automatic amusement devices are tangible and stationary that cannot be removed, while, streaming products can be accessed from anywhere within the city of Chicago.

Moreover, there are real and substantial differences from streaming products and live performances of professional theater companies. Courts have found that live performances of professional theater companies advance the cultural interest in the community. *See Kerasotes Rialto Theater Corp. v. Peoria*, 77 Ill. 2d 491, 498 (1979) (noting that live performances of professional theater companies supply a reasonable justification for exempting patrons of live performances of professional theater companies in auditoriums or theaters that have a maximum seating capacity of not more than 750 from the tax imposed under the ordinance). As demonstrated, reasonably conceived facts exist to justify each exemption addressed in Plaintiffs' Motion for Summary Judgment. *DeWoskin*, 306 Ill. App 3d at 522.

ii. Reasonable Relationship

The next step in the uniformity clause analysis is to determine whether the tax classification bears some reasonable relationship to the object of the legislation or to public policy. The first task is to identify the purpose of the tax. *See Grand Chapter, Order of the Eastern Star v. Topinka*, 2015 IL 117083, ¶ 12.

Here, the Defendants show there is an administrative convenience for the City, businesses, and customers. The administrative convenience is a reasonable relationship for Defendants to impose a flat annual tax on each automatic amusement. *See Paper Supply Co. v. Chicago*, 57 Ill. 2d 553, 574-75 (1974) (holding that administrative convenience was a sufficient justification and reasonable in the collection of the tax). As noted, there are sufficient justifications for streaming products to be classified differently than live performances. *Kerasotes*, 77 Ill. 2d at 498. In any event, Defendants have shown the classification bears some reasonable relationship to the object of the legislation. Thus, Plaintiffs' fail to meet their burden. *See Arangold*, 204 Ill. 2d at 156 (noting that once the taxing body has offered a justification for the classification, "[t]he plaintiff then has the burden to persuade the court that defendant's explanation is insufficient as a matter of law, or unsupported by the facts" (internal quotation marks omitted)). Thus, this Court finds Defendants have offered a justification for the classification of streaming services, automatic amusement device and live performances.

D. ***Home Rule Authority***

Plaintiffs also contend the amusement tax on streaming services applies beyond Chicago corporate limits, and the Illinois General Assembly has not expressly authorized the City of Chicago to tax streaming services beyond the borders of the city. Next, Plaintiffs assert the Mobile Telecommunications Sourcing Conformation Act, 35 ILCS 638/1 *et seq*. ("Mobile Sourcing Act") does not justify the taxation of extraterritorial activities because the Act does not expressly authorize the amusement tax on consumers that stream services outside Chicago.

Defendants counter the home rule authority applies because the City of Chicago is taxing amusements within the City. Defendants contend the streaming services are used by Chicago residents either exclusively or primarily within Chicago. Next, Defendants argue the Act provides express statutory authority to tax streaming services provided by telecommunications companies. Moreover, Defendants have implied authority to apply the Mobile Sourcing Act to all streaming services because the Act is a reasonable means of dealing with the issue of how to source charges related to the use of mobile devices.

"Home rule is based on the assumption that municipalities should be allowed to address problems with solutions tailored to their local needs." *Palm v. 2800 Lake Shore Drive Condo. Ass'n*, 2013 IL 110505, ¶ 29. Thus, article VII, section 6(a) of the Illinois Constitution provides:

> [e]xcept as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals, and welfare; to license; to tax; and to incur debt.

Ill. Const. 1970. art. VII, § 6(a).

"Section 6(a) was written with the intention to give home rule units the broadest powers possible." *Palm*, 2013 IL 110505, ¶ 30 (citing *Scandron v. City of Des Plaines*, 153 Ill. 2d 164, 185-86 (1996)). The constitution expressly provides the "[p]owers and functions of home rule units shall be construed liberally." Ill. Const. 1970. art. VII, § 6(m); *Nat'l Waste and Recycling Ass'n v. Cnty. of Cook*, 2016 IL App (1st) 143694, ¶ 27. The Illinois Constitution, however, limits a home rule unit to legislation "pertaining to its government and affairs." *City of Chicago v. Village of Elk Grove Village*, 354 Ill. App. 3d 423, 426 (2004) (quoting Ill. Const. 1970. art. VII, § 6(a)). Furthermore, under article VII, section 6(h), the General Assembly "may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit" (Ill. Const. 1970. art. VII, § 6(h)), but if the legislature intends to limit or deny the exercise of home rule powers, the statute must contain an express statement to that effect. *Palm*, 2013 IL 110505, ¶ 31. Thus, "[i]f a subject pertains to local government and affairs, and the legislature has not expressly preempted home rule, municipalities may exercise their power." *Id.* ¶ 36 (quoting *City of Chicago v. StubHub, Inc.*, 2011 IL 111127, ¶ 22 n.2).

Plaintiffs assert the Mobile Sourcing Act does not justify the Chicago taxation of extraterritorial activities because the Act does not expressly authorize the amusement tax on consumers that stream services outside Chicago. In 2002, the United States Congress passed the

Mobile Telecommunications Sourcing Act, 4 U.S.C. §116 et seq. (MTSA). The MTSA enabled state and local governments to tax mobile telecommunications services.

Under the MTSA, a customer's mobile telephone service could be taxed "by the taxing jurisdiction whose territorial limits encompass the customer's place of primary use. Regardless of where the mobile telecommunication service originate, terminate, or pass through." 4 U.S.C. §117 (b). The MTSA provides that "the term 'place of primary use' means the street address representative of where the customer's use of the mobile telecommunications service primarily occurs." 4 U.S.C §124(8).

The Illinois State Legislature has adopted the Mobile Sourcing Act., 35 ILCS 638, and it codifies the Mobile Telecommunications Sourcing Act. 35 ILCS 638/5. The Mobile Sourcing Act defines "place of primary use" as the "street address representative of where the customer's use of the mobile telecommunications service primarily occurs, which must be: (i) the residential street address or the primary business street address of the customer; and (ii) within the licensed service area of the home service provider." The Act applies to charges "which are billed by or for the customer's home service provider," which means "the facilities-based carrier or reseller with which the customer contracts for the provision of mobile telecommunications service." 35 ILCS 638/20; 35 ILCS 638/10. The Act provides that mobile services are primarily used in the place where the customer lives.

It is a fundamental principle that when courts construe the meaning of a statute, the primary objective is to ascertain and give effect to the intention of the legislature, and all other rules of statutory construction are subordinated to this cardinal principle. *Metzger v. DaRosa*, 209 Ill. 2d 30, 34 (2004). The plain language of the statute is the best indicator of the legislature's intent. *Id.* at 34-35. When the statute's language is clear, it will be given effect without resort to other aids of statutory construction. *Id.* at 35.

The Mobile Sourcing Act applies to charges "which are billed by or for the customer's home service provider," which means "the facilities-based carrier or reseller with which the customer contracts for the provision of mobile telecommunications services." 35 ILCS 638/20; 35ILCS 638/10. Many "home service providers" offer streaming services. For example, AT&T and Comcast are facilities based carriers, and they offer streaming services. As previously indicated, "[t]he plain language of the statute is the best indicator of the legislature's intent." *Metzger v. DaRosa*, at 34-35. Thus, the City has express authority to apply the Mobile Sourcing Act to streaming services provided by telecommunication companies.

However, even if the Defendants do not have express authority, Defendants have implied authority. *See* 65 ILCS 5/8-3-15 ("The corporate authorities of each municipality shall have all powers necessary to enforce the collection of any tax imposed and collected by such municipality, whether such tax was imposed pursuant to its home rule powers or statutory authority…"). The Mobile Sourcing Act is a reasonable means of addressing the concern of how to source charges related to the use of mobile devices. Other jurisdictions have analyzed the implied authority with respect to the Mobile Sourcing Act. *See e.g., Virgin Mobile USA, SP v. Arizona Department of Revenue*, 230 Ariz. 261 (2012) (stating nothing in the MTSA prohibits a state [or municipality]

from establishing itself as a tax situs for mobile service); *T-Mobile South, LLC v. Bonet*, 85 So. 3d 963 (Ala. 2011).

When the Mobile Sourcing Act is silent with respect to streaming services, the City of Chicago can still tax these services if there is a nexus to the City of Chicago and if the Tax does not conflict with the Commerce Clause. *See Virgin Mobile USA, SP*, 230 Ariz. 261, ¶ 20; *Goldberg* 488 U.S. at 259. In this case, the Mobile Sourcing Act applies to streaming services provided by telecommunications companies, and it is reasonable for Defendants to apply the Mobile Sourcing Act to the same streaming services when other businesses offer those streaming services.

A municipal ordinance is presumed constitutional, and the challenging party has the burden of rebutting that presumption. *Pooh Bah Enterprises, Inc.* 224 Ill.2d 390 at 406. Plaintiffs may make a constitutional challenge to the ordinance in two ways. First, a challenge can be "as applied," in which Plaintiffs argue that the statute is unconstitutional under circumstances specific to that plaintiff. In that situation, the facts surrounding the plaintiff's particular circumstances become relevant. Alternatively, a plaintiff can raise a "facial challenge", which is a significantly more difficult route. Unlike an as-applied challenge, the ordinance is invalid on its face only if no set of circumstances exists under which it would be valid. The plaintiff's individual circumstances are irrelevant in the context of a facial challenge. *Jackson v. City of Chicago*, 2012 IL App (1st) 111044, ¶ 26.

i. Facial Challenge

Plaintiffs present a facial challenge to the validity of Section 4-156-020(G.1). Defendants maintain that Section G.1. does two things: "(1) it confirms that the amusement tax applies to video streaming, audio streaming and on-line games; and (2) it allows providers to utilize the rules set forth in the Mobile Sourcing Act." This framework allows for providers such as Hulu, Spotify, and Netflix to collect the amusement tax from Chicago residents, while overlooking non-residents.

"A facial challenge requires a showing that the statute is unconstitutional under any set of facts, i.e., the specific facts related to the challenging party are irrelevant." *People v. Thompson*, 2015 IL 118151, ¶ 36. The burden on the challenger is particularly heavy when a facial constitutional challenge is presented. *People v. Rizzo*, 2016 IL 118599, ¶ 24.

Although Plaintiffs rely on *Hertz Corp v. City of Chicago* for their argument that the tax is extraterritorial, this Court finds the case distinguishable. 2017 IL 119945. In *Hertz*, the tax at issue ("Ruling 11"), applied to vehicle rental companies doing business in the City of Chicago. Ruling 11 advised suburban vehicle rental companies within three miles of Chicago's borders to implement a specific system when renting to customers intending to use vehicles in Chicago. *Id.* Specifically, the companies were required to maintain written records of any vehicle driven in Chicago. *Id.* In the event of an audit, the written records would support any claim of exemption from the tax. *Id.* If a rental company within the three-mile radius failed to maintain proper records, then all rental customers with a Chicago address on their drivers' license are presumed to have used the rental vehicle primarily in Chicago. All rental customers without a Chicago address were presumed to have not used the rental vehicle in Chicago. *Id.* Plaintiffs alleged the tax ordinance was unconstitutional because it was an extraterritorial tax. ¶ 13. The Illinois Supreme Court held

that Ruling 11 violated the home rule authority of the Illinois Constitution because it had an extraterritorial effect, and thus was an improper exercise of Chicago's home rule powers. ¶¶ 33, 35.

Unlike *Hertz*, the customers here are residents of Chicago who pay their monthly subscription fees primarily for obtaining the privilege of using the streaming services in Chicago. The tax on streaming services applies to Chicago residents with billing addresses located within the City of Chicago. While the tax in *Hertz* was based on nothing more than a lessee's stated intention or a conclusive presumption of use in Chicago.

Here, the tax applies to the streaming services that occur within Chicago. The City of Chicago may collect taxes from entities that do business within the City limits. *See S. Bloom, Inc. v. Korshak*, 52 Ill. 2d 56 (1972) (finding that out-of-county tobacco wholesalers are required to collect sales tax from retailers who sell cigarettes to customers in Chicago); *American Beverage Ass'n v. City of Chicago*, 404 Ill. App. 3d 682 (2010) (holding that wholesalers and retailers were required to collect sales tax on sales of bottled water). The businesses that stream services to the billing addresses of Chicago residents are within the taxing jurisdiction of the City of Chicago. Thus, Section 4-156-020(G.1) of the amusement tax is not an extraterritorial tax that violates the City of Chicago's home rule authority. The city is simply taxing an event that occurs within its boundaries and in an area for which it provides services. Thus, Plaintiffs fail to meet their burden that the amusement tax is facially unconstitutional.

ii. As-Applied Challenge

Next, Plaintiffs present an as-applied challenge to the amusement tax. The Illinois Supreme Court has noted that facial and as-applied challenges are not interchangeable, and there are fundamental distinctions between them. *Thompson*, 2015 IL 118151, ¶ 36. "An as-applied challenge requires a showing the statute violates the constitution as it applies to the facts and circumstances of the challenging party." *Id.*

Here, the streaming services are used by Chicago residents either exclusively or primarily within Chicago. The streaming services are billed to the address of the Chicago residents. Indeed, some Chicago residents may use their streaming services elsewhere, for example, while on vacation outside Chicago. Even so, their main use of the services is primarily within the City limits, and the residents are being billed at the address provided to the streaming services companies. The tax here is akin to the Chicago vehicle city sticker tax based on a Chicago billing address. *See Rozner v. Korshak*, 55 Ill. 2d 430 (1973). The vehicle may rarely be driven in Chicago, but the Chicago resident must buy the city sticker. This Court therefore finds Plaintiffs fail to meet their burden that the amusement tax is unconstitutional as-applied to Plaintiffs.

For all these reasons, Defendants' Motion for Summary Judgment is granted and Plaintiffs' Motion for Summary Judgment is denied.

II. ORDER

This matter having been fully briefed and the Court being fully apprised of the facts, law and premises contained herein, it is ordered as follows:

A. Defendants' Motion for Summary Judgment is Granted.
B. Plaintiffs' Motion for Summary Judgment is Denied.
C. Plaintiffs' request to enjoin Defendants is Denied.
D. This Order is final and appealable.

ENTERED: _____
Judge Carl Anthony Walker

ENTERED
JUDGE CARL ANTHONY WALKER-1913
MAY 24 2018
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

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