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DOROTHY BROWN
CIRCUIT CLERK
COOK COUNTY, IL
2018L050514

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

APPLE INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	No. 2018L050514
THE CITY OF CHICAGO, and ERIN KEANE, in her official capacity as Comptroller of the City of Chicago,	)	
	)	
Defendants.	)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, Apple Inc. ("Apple"), by its attorneys, McDermott Will and Emery LLP, pursuant to 735 Ill. Comp. Stat. 5/2-701, for its Complaint for Declaratory and Injunctive Relief against, Defendants, the City of Chicago and Erin Keane, in her official capacity as the Comptroller of the City of Chicago, complains and alleges as follows:

Introduction

1. Apple provides music streaming services to customers located in Chicago and throughout the world. In June 2015, the City of Chicago's Finance Department issued a tax ruling ("Amusement Tax Ruling #5") that negatively impacts Apple's customers by imposing the Chicago Amusement Tax in an unprecedented manner.

2. Apple is now being told by the City of Chicago's Finance Department to collect a 9% Amusement Tax on its music streaming services. By way of this Complaint, Apple seeks to protect Chicago consumers from an illegal and discriminatory tax on music streaming services.

3. On June 9, 2015, the City of Chicago's Finance Department issued Amusement Tax Ruling #5 that interprets the City's 9% Amusement Tax as applying to charges paid for the "privilege to witness, view or participate in amusements that are delivered electronically."

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Amusement Tax Ruling #5 states that the 9% Amusement Tax applies to "charges paid for the privilege of listening to electronically delivered music… if delivered to a customer in the City." This lawsuit challenges the Amusement Tax ordinance and the interpretative ruling on the grounds that they violate the Internet Tax Freedom Act, Pub. L. No. 105-277, Tit. XI, 112 Stat. 2681 (1998) (as permanently extended by the Trade Facilitation and Trade Enforcement Act of 2015, H.R. 644, Sec. 922, 114th Cong., 2d Sess. (Feb. 24, 2016) (hereinafter "ITFA")), the Illinois Constitution and the Commerce and Due Process Clauses of the United States Constitution.

The Parties

4. Plaintiff, Apple, is a California corporation headquartered in Cupertino, California.

5. Defendant, the City of Chicago, is a municipal corporation and home rule unit of local government organized and existing under the laws of the State of Illinois and located in Cook County, Illinois.

6. Defendant, Erin Keane, is the Comptroller of the City of Chicago. She is sued in her official capacity. On information and belief, Keane maintains her principal office in the City of Chicago.

Jurisdiction and Venue

7. This Court has jurisdiction over this action pursuant to 735 Ill. Comp. Stat. 5/2-209(b)(3) because it arises within the State of Illinois against a municipal corporation (the City of Chicago) organized under the laws of the State.

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8. The Court also has jurisdiction pursuant to 735 Ill. Comp. Stat. 5/2-701 because this action presents an actual controversy and claims arising under a federal statute as to which Apple is entitled to a declaration of its rights.

9. Venue is proper in Cook County pursuant to 735 Ill. Comp. Stat. 5/2-103, because the Defendants have a principal office in Cook County.

10. "Exhaustion is not required where a statute or rule under which an administrative body purports to act is challenged as unauthorized." *Landfill, Inc. v. The Pollution Control Bd.*, 74 Ill. 2d 541, 550 (1979).

11. Because this lawsuit challenges the Amusement Tax Ruling #5 as being unauthorized by law, Apple's administrative remedies need not be exhausted.

12. The hearings officers of City's Department of Administrative Hearings do not have the authority to declare that Amusement Tax Ruling #5 violates the ITFA or the Illinois or United States Constitutions.

13. Since the City's Administrative Hearing Officers have no authority to declare that the Amusement Tax Ruling #5 violates ITFA or the Illinois or United States Constitutions, proceeding administratively would be a futile act not requiring the exhaustion of administrative remedies.

Background Information

14. Apple receives revenue from their customers for, among other things, charges for the privilege of listening to electronically delivered music.

15. Customers receive the electronically delivered music remotely on fixed or mobile desktop computers, tablet computers, cellphones or other devices.

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16. Because their devices are mobile, patrons of electronically delivered music are able to access and do access such amusements both while inside the City of Chicago and while outside the City of Chicago.

17. Apple's customers access the electronically delivered music over the Internet or through private networks that connect to the Internet.

18. Apple's customers separately obtain from other, unrelated service providers, their access to the Internet or other private networks that connect to the Internet.

19. The electronically delivered music provided by Apple is substantially similar or equivalent to other untaxed offline amusements.

20. Apple stores the electronically delivered music on remotely-accessible servers located in data centers. Apple's customers access the electronically delivered music by using the Internet, or other private network connected to the Internet, to connect its end user devices to the remotely-accessible servers located in data centers outside the City of Chicago. When such customers are located outside the City of Chicago and listen to electronically delivered music provided through the remotely accessed servers, the music-related services that Apple provides occur outside the City of Chicago.

21. When such customers are located inside the City of Chicago and listen to electronically delivered music provided through the remotely accessed servers, the music-related services that Apple provides occur outside the City of Chicago.

City of Chicago Amusement Tax

22. Pursuant to its home rule powers, the City of Chicago imposes a 9% Amusement Tax on "the admission fees or other charges paid for the privilege to enter, to witness, to view or to participate in such amusement…." Chi. Mun. Code 4-156-020. The Amusement Tax is

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imposed on the patrons of every "amusement within the City" of Chicago. *Id.*

23. The Chicago Municipal Code defines an "amusement" as:

> (1) any exhibition, performance, presentation or show for entertainment purposes, including, but not limited to, any theatrical, dramatic, musical or spectacular performance, promotional show, motion picture show, flower, poultry or animal show, animal act, circus, rodeo, athletic contest, sport, game or similar exhibition such as boxing, wrestling, skating, dancing, swimming, racing, or riding on animals or vehicles, baseball, basketball, softball, football, tennis, golf, hockey, track and field games, bowling or billiard or pool games; (2) any entertainment or recreational activity offered for public participation or on a membership or other basis including, but not limited to, carnivals, amusement park rides and games, bowling, billiards and pool games, dancing, tennis, racquetball, swimming, weightlifting, bodybuilding or similar activities; or (3) any paid television programming, whether transmitted by wire, cable, fiber optics, laser, microwave, radio, satellite or similar means.

Chi. Mun. Code 4-156-010.

24. The Chicago Municipal Code excludes from the Amusement Tax charges paid by "patrons of automatic amusement machines." Chi. Mun. Code 4-156-020(B)(1).

25. The Chicago Municipal Code defines "automatic amusement device" as

> any machine, which, upon the insertion of a coin, slug, token, card or similar object, or upon any other payment method, may be operated by the public generally for use as a game, entertainment or amusement, whether or not registering a score, and includes but is not limited to such devices as jukeboxes, marble machines, pinball machines, movie and video booths or stands and all games, operations or transactions similar thereto under whatever name by which they may be indicated. Bingo devices are deemed gambling devices and are therefore prohibited for use except as provided by state law. If a machine consists of more than one game monitor which permits individuals to play separate games simultaneously, each separate game monitor shall be deemed an automatic amusement device.

Chi. Mun. Code 4-156-150.

26. It is the joint and several duty of every owner, manager or operator of an amusement, or of a place where an amusement is being held, to collect the Amusement Tax from a person who acquires the privilege to enter, to witness, to view or to participate in an amusement. Chi. Mun. Code 4-156-030(A).

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27. If the owner, manager or operator fails to collect the Amusement Tax from a person who acquires the privilege to enter, to witness, to view or to participate in an amusement, then the owner, manager or operator will be liable for the amount of the Amusement Tax.

28. Until June 9, 2015, the City did not publish any guidance indicating that the definition of "amusement" also includes charges paid for the privilege to witness, view or participate in amusements that are delivered electronically.

29. On June 9, 2015, the Department of Finance issued Amusement Tax Ruling #5 declaring that the term "amusement" includes not only charges paid for the privilege to witness, view or participate in amusements in person, but also charges paid for the privilege to witness, view or participate in amusements that are delivered electronically.

30. According to Amusement Tax Ruling #5, the following charges are subject to the Amusement Tax: (1) charges for the privilege of watching electronically delivered television shows, movies or videos delivered to a customer in the City; (2) charges paid for the privilege of listening to electronically delivered music delivered to a customer in the City; and (3) charges paid for the privilege of participating in games online if the games are delivered to a customer in the City.

31. According to Amusement Tax Ruling #5, the Amusement Tax does not apply to sales of shows, movies, videos, music or video games that are transferred to the customer by disc or permanently downloaded from the Internet; the "tax applies only to *rentals* (normally accomplished by streaming or a 'temporary' download)."

32. According to Amusement Tax Ruling #5, providers that receive charges for the privilege to witness, view or participate in amusements that are delivered electronically are

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considered owners or operators and are required to collect the Amusement Tax from their Chicago customers.

33. According to Amusement Tax Ruling #5, "the amusement tax will apply to customers whose residential street address or primary business street address is in Chicago."

34. Amusement Tax Ruling #5 applies to periods on and after September 1, 2015 and currently requires amusement providers to collect the Amusement Tax from their customers with residential street or primary business street addresses in Chicago.

35. The Chicago Municipal Code thus imposes the Amusement Tax on charges paid by patrons of online amusements if their street address is within the City of Chicago, even if the amusement occurs without the City.

36. The Chicago Municipal Code imposes the Amusement Tax on charges paid by patrons of other offline amusements only if the amusement occurs "within the City." Chi. Mun. Code 4-156-020A

Harm to Plaintiff

37. An actual controversy exists between Apple and the Defendants because the Amusement Tax and Amusement Tax Ruling #5 are illegal, causing irreparable harm to Apple for which no adequate remedy at law exists.

38. Apple receives revenue from customers with Chicago billing addresses for charges for electronically delivered music. Amusement Tax Ruling #5 places Apple in an untenable position because it requires Apple to collect the Amusement Tax on charges paid for taxed online amusements by any customer with a Chicago billing address which include charges for electronically delivered music. As a result, customers are subject to an illegal tax. If Apple

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does not collect the tax from its customers, it will be directly liable for a tax that the City of Chicago has no power to impose or authority to enforce.

39. Amusement Tax Ruling #5 also imposes a significant administrative burden on Apple by requiring it to collect and remit the 9% Amusement Tax from customers with Chicago billing addresses for charges paid for the electronically delivered music.

40. In order to comply with Amusement Tax Ruling #5, Apple must incur substantial costs to reconfigure its normal business practices related to transactions with customers with Chicago billing addresses, including modifying its computer systems and invoicing procedures, preparing and filing Amusement Tax returns and maintaining secure documentary proof of taxable and nontaxable transactions, causing it irreparable harm for which it has no adequate remedy at law.

Cause of Action

Count I – Declaratory Judgment and Permanent Injunction

The Amusement Tax, as interpreted by Amusement Tax Ruling #5, violates ITFA.

41. Apple repeats and incorporates by reference each of the allegations set forth in paragraphs 1-40, above, as if fully set forth herein.

42. ITFA prohibits state and local governments from imposing discriminatory taxes on electronic commerce. ITFA § 1101(a)(2).

43. Under ITFA, "electronic commerce" is "any transaction concluded over the Internet or through Internet access, comprising the sale, lease, license, offer, or delivery of property, goods, services, or information, whether or not for consideration, and includes the provision of Internet access." ITFA § 1105(3).

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44. Under ITFA, a tax on electronic commerce is a "discriminatory tax on electronic commerce" if it imposes a tax on electronic commerce that "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."
Id. § 1105(2)(A)(i).

45. The Amusement Tax, as interpreted and applied by the Comptroller in Amusement Tax Ruling #5, imposes a discriminatory tax on electronic commerce in violation of ITFA's ban on such discriminatory taxes, because the Amusement Tax applies to charges for electronically delivered music paid by customers with residential and business street addresses in the City of Chicago for online amusements occurring inside the City of Chicago but does not apply to charges for the privilege of listening to music on automatic amusement devices located inside the City of Chicago.

WHEREFORE, with respect to Count I of this Complaint, Apple requests the following relief:

A. That the Court declare and adjudge that the Amusement Tax, as interpreted by Amusement Tax Ruling #5, violates Section 1105(2)(A)(i) of ITFA and thus is illegal because it interprets the Chicago Amusement Tax as applying to charges for electronically delivered music provided by Apple but does not tax charges for the privilege of listening to music on automatic amusement devices located within the City of Chicago;

B. That the Court enter a permanent injunction enjoining the Defendants from enforcing the Amusement Tax Ruling #5's application to charges for electronically delivered music;

C. That the Court award Plaintiff its costs of this action; and

D. That the Court award such other and further relief as it deems just and proper.

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Count II – Declaratory Judgment

The Amusement Tax, as interpreted by Amusement Tax Ruling #5, Violates Article VII, Section 6 of the Illinois Constitution because it has an Extraterritorial Effect.

In the alternative to Count I, Plaintiff complains against Defendants as follows:

46. The ESA repeats and incorporates by reference each of the allegations set forth in paragraphs 1-40 as if fully set forth herein.

47. Under Illinois law, all home rule ordinances must fall within the scope of Article VII, Section 6(a) of the Illinois Constitution which sets forth that "a home rule unit may exercise any power and perform any function pertaining to its government and affairs."

48. Illinois home rule units have no jurisdiction beyond their corporate limits except what is expressly granted by the legislature. *See, e.g., Hertz Corp v. City of Chicago*, 2017 IL 119945 (Jan. 20, 2017); *Village of Chatham v. County of Sangamon*, 351 Ill. App. Ed 889, 893 (4th Dist. 2004).

49. Taxing business transactions outside of a home rule unit's jurisdiction pursuant to its home rule powers is an extraterritorial exercise of power that is prohibited by the Illinois Constitution. *Seigles, Inc. v. City of St. Charles*, 365 Ill. App. 3d 431 (2d Dist. 2006).

50. Amusement Tax Ruling #5 extends the reach of the Amusement Tax to amusements occurring outside the City.

51. The Amusement Tax, as interpreted by Amusement Tax Ruling #5, subjects customers with Chicago billing addresses to tax on the charges paid for listening to electronically delivered music when those customers are located outside of the City at the time they incur the charges.

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52. The Amusement Tax, as interpreted by Amusement Tax Ruling #5, subjects customers with Chicago billing addresses to tax on the charges paid for listening to electronically delivered music when the amusement occurs entirely outside the City of Chicago.

53. Amusement Tax Ruling #5 exceeds the grant of the authority set forth by Article VII, Section 6(a), because it has an extraterritorial effect outside of the City's jurisdiction by subjecting Apple to collection requirements even for activities that take place primarily outside the City and by subjecting Apple's Chicago customers to tax on activities occurring outside the City.

54. Amusement Tax Ruling #5 is an attempt by the City to extraterritorially expand its taxing and regulatory jurisdiction to transactions and business activities conducted outside the City and thus is unconstitutional under Article VII, Section 6 of the Illinois Constitution.

WHEREFORE, Apple requests the Court:

A. Declare that the Amusement Tax Ruling #5 violates Article VII, Section 6 of the Illinois Constitution because it has an unauthorized extraterritorial effect;

B. Enter a permanent injunction enjoining the Defendants from enforcing Amusement Tax Ruling #5's application of the Amusement Tax on charges paid for the privilege of listening to electronically delivered music; and

D. Award Plaintiff any additional relief the Court deems reasonable and proper.

Count III – Declaratory Judgment

The Amusement Tax, as interpreted by Amusement Tax Ruling #5 and as applied to the Plaintiff, violates the Commerce Clause of the United States Constitution, Art. I, Sec. 8, Cl 3.

In the alternative to Counts I and II, Plaintiff complains against Defendants as follows:

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55. Apple realleges and incorporates by reference each of the allegations set forth in paragraphs 1-40 as if fully set forth herein.

56. The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides that Congress has the power to regulate commerce among the states.

57. A state or local tax satisfies the Commerce Clause only if it "(1) is applied to an 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); *Quill Corp. v. North Dakota*, 504 U.S. 298, 311 (1992).

58. Amusement Tax Ruling #5 interprets the Amusement Tax to apply to charges paid by customers with Chicago addresses for the privilege of listening to electronically delivered music online in instances when the customers are listening to the electronically delivered music when they are located outside of the City of Chicago.

59. The Amusement Tax, as interpreted by Amusement Tax Ruling #5 violates the Commerce Clause because there is a lack of transactional nexus between the City and the service it seeks to tax because the tax is imposed when the customer is listening to the electronically delivered music outside of the City of Chicago.

60. The Amusement Tax, as interpreted by Amusement Tax Ruling #5 violates the Commerce Clause because there is a lack of transactional nexus between the City and the services it seeks to tax because the tax is imposed on the provision of a service the performance of which occurs entirely outside of the City of Chicago.

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61. The Amusement Tax, as interpreted by Amusement Tax Ruling #5 is not fairly apportioned and thus violates the Commerce Clause because the tax is imposed when the customer is listening to the electronically delivered music outside of the City of Chicago.

62. The Amusement Tax, as interpreted by Amusement Tax Ruling #5 is not fairly related to the services provided by the City and thus violates the Commerce Clause because the tax is imposed when the customer listening to the electronically delivered music outside of the City of Chicago.

WHEREFORE, Apple requests the Court:

A. Declare that Amusement Tax Ruling #5 violates the Commerce Clause of the United States Constitution;

B. Enter a permanent injunction enjoining the Defendants from enforcing Amusement Tax Ruling #5's application of the Amusement Tax on charges paid for the privilege of listening to electronically delivered music; and

C. Award Plaintiff any additional relief the Court deems reasonable and proper.

Count IV – Declaratory Judgment

The Amusement Tax, as interpreted by Amusement Tax Ruling #5 and as applied to Plaintiff, violates the Federal Due Process Clause

In the alternative to Counts I -III, Plaintiff complains against Defendants as follows:

63. Apple realleges and incorporates by reference each of the allegations set forth in paragraphs 1-40 as if fully set forth herein.

64. The Due Process Clause of the Fourteenth Amendment to the United States Constitution sets forth that "nor shall any State deprive any person of life, liberty, or property, without due process of law..."

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65. "The Due Process Clause demands that there exist some definite link, some minimum connection, between a [jurisdiction] and the person, property or transaction it seeks to tax, as well as a rational relationship between the tax and the values connected with the taxing [jurisdiction]." *Meadwestvaco Corp. v. Illinois Department of Revenue*, 553 U.S. 16, 24 (2008).

66. Customers that have a residential street or primary business street address in Chicago will be subject to the Amusement Tax on music that is delivered electronically even if the customer listens to the music when the customer is outside Chicago.

67. Because the Amusement Tax, as interpreted by Amusement Tax Ruling #5, subjects music delivered electronically to customers even though they are located outside of the City at the time they are incurring charges for the amusement, Amusement Tax Ruling #5 violates the Due Process Clause of the Fourteenth Amendment to the United States.

68. Because Amusement Tax Ruling #5 imposes an obligation on Apple to collect the Amusement Tax on amusements that occur outside the City of Chicago, it violates the Due Process Clause of the Fourteenth Amendment to the United States.

WHEREFORE, Apple requests the Court:

A. Declare that Amusement Tax Ruling #5 violates the Fourteenth Amendment to the United States Constitution;

B. Enter a permanent injunction enjoining the Defendants from enforcing Amusement Tax Ruling #5's application of the Amusement Tax on charges paid for the privilege of listening to electronically delivered music; and

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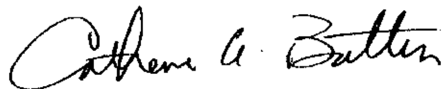
C. Award Plaintiff any additional relief the Court deems reasonable and proper.

Dated: August 27, 2018

Respectfully submitted,



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