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HOME RULE:
Imposition of Registration Requirements and Tax Collection Duties on Retailers Located Outside of a Home-Rule County's Corporate Boundaries

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Honorable James "Pate" Philip
Senate President
327 State Capitol
Springfield, Illinois 62706

Dear Senator Philip:

I have your letter wherein you pose several questions relating to Cook County Ordinance No. 92-0-28, entitled "Cook County Home Rule County Use Tax Ordinance." Specifically, you have inquired: (1) whether Cook County may impose registration requirements and tax collection duties on retailers located and conducting business outside of the county's corporate boundaries; (2) whether the Cook County Home Rule County Use Tax Ordinance's retailer registration process is an improper attempt "to license for revenue" in contravention of the Illinois Constitution of 1970; and (3) whether a municipal ordinance that conflicts with a

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home-rule county's ordinance will be given effect within the municipal boundaries. For the reasons hereinafter stated, it is my opinion that: 1) home-rule counties do not possess extraterritorial governmental powers which would allow Cook County to impose registration and tax collection duties on nonresident retailers where the transaction giving rise to the use tax occurs outside of Cook County and the retailers' only business activity in Cook County is the running of newspaper, radio or television advertisements; 2) the Cook County Home Rule County Use Tax Ordinance is not an attempt to license for revenue; and 3) to the extent that a municipal and county ordinance actually conflict, the municipal ordinance will be given effect within the corporate limits of the municipality; however, the imposition of a substantially similar tax by two separate and distinct units of government does not necessarily create a conflict.

In reviewing the materials submitted with your letter, it appears that on May 4, 1992, the Cook County Board of Commissioners "* * * as a home rule county * * * [and] as authorized by P.A. 86-962 * * *" adopted Cook County Ordinance No. 92-0-28 entitled "Cook County Home Rule County Use Tax Ordinance." Under section 3 of that ordinance, "* * * every user of tangible personal property which is purchased at retail on or after December 1, 1995 from a retailer and which is titled or, registered at a location within the corporate limits of Cook County with an agency of the State government, shall be liable for a tax

on the privilege of using such property in the County at the rate of 3/4 percent of such property's selling price * * *." Section 3 further provides that the tax is to be collected from the purchaser by retailers "maintaining a place of business in the County and making sales of tangible personal property for use in the County * * *." Section 5 of the ordinance requires "[e]very retailer maintaining a place of business in the County" to register with the county department of revenue. Section 2 of the ordinance defines the phrase "retailer maintaining a place of business in the County" to include any retailer, inter alia, "[e]ngaging in soliciting orders within the County from persons by means of catalogues, advertising or other types of solicitation, whether such orders are received or accepted within or outside the County * * *."

Against this background, you have inquired, firstly, whether Cook County may exercise its home-rule powers extraterritorially to impose registration requirements and tax collection duties on retailers located outside of Cook County whose only business activity in Cook County is the purchase of newspaper, radio or television advertisements in media which broadcast or are otherwise distributed in Cook County. Under the Illinois Constitution of 1870, Illinois counties and other units of local government had only those powers which the State, through the General Assembly, conferred. (7 Record of Proceedings, Sixth Illinois Constitutional Convention 2727.) With the

adoption of the Illinois Constitution of 1970, however, Cook County and any other county which has an elected chief executive officer have been granted home-rule powers as provided in the Constitution. (Ill. Const. 1970, art. VII, sec. 6(a).) Article VII, subsection 6(a) of the 1970 Constitution sets forth the powers of home-rule units, providing, in pertinent part:

> " * * *
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> * * * Except 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.
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> * * * "

Our supreme court has, on several occasions, reviewed the extent of the authority granted under the language quoted above. In City of Carbondale v. Van Natta (1975), 61 Ill. 2d 483, the court was asked to determine whether a municipality possessed extraterritorial zoning authority under its home-rule powers. Subsequently, in Commercial Nat'l Bank v. City of Chicago (1981), 89 Ill. 2d 45, the court was called upon to review the constitutionality of a service-tax ordinance of the city of Chicago which required nonresident sellers of services to pay and collect a tax on services performed outside of the city. In both cases, the court reviewed the history of the powers granted to home-rule units and noted that:

> " * * *
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> 'At the constitutional convention the Committee on Local Government recommended that the grant of powers in section 6(a) contain the specifically limiting wording "within its corporate limits." (7 Record of Proceedings, Sixth Illinois Constitutional Convention 1577 (hereinafter cited as Proceedings).) Though the language was not used when the section was adopted (4 Proceedings 3125), an examination of the proceedings of the convention shows that the intention was not to confer extraterritorial sovereign or governmental powers directly on home-rule units. The intendment shown is that whatever extraterritorial governmental powers home-rule units may exercise were to be granted by the legislature. See 4 Proceedings 3040-41, 3072-75 * * *.'
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> * * * "
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> (Emphasis in original.) (Commercial Nat'l Bank v. City of Chicago (1982), 89 Ill. 2d 45, 77-78, quoting City of Carbondale v. Van Natta (1975), 61 Ill. 2d 483, 485.)

The court then concluded, in both cases, that in the absence of a grant of authority by the General Assembly, home-rule units do not possess extraterritorial governmental powers. (Commercial Nat'l Bank v. City of Chicago (1982), 89 Ill. 2d at 77-79; City of Carbondale v. Van Natta (1975), 61 Ill. 2d at 485-86; see also Harris Bank of Roselle v. Village of Mettawa (1993), 243 Ill. App. 3d 103, 114.) Therefore, it will be necessary to determine whether, in these circumstances, the General Assembly has granted a home-rule county the authority to exercise its taxation powers extraterritorially.

The ordinance which is the subject of your inquiry provides that Cook County "* * * is authorized by P.A. 86-962, as amended, to impose and collect a tax upon the use of tangible personal property which is purchased at retail and which is titled or registered by an agency of State government to a person at a location within Cook County * * *." I note that Public Act 86-962, effective January 1, 1990, merely recodified the numerous statutes relating to counties into the Counties Code (55 ILCS 5/1-1001 et seq. (West 1994)); as such, it is not technically the source of any taxing authority. Assuming that it was the intent of the drafters to refer generally to the provisions of the Code, it is noteworthy that section 5-1009 of the Code (55 ILCS 5/5-1009 (West 1995 Supp.)) expressly limits a home-rule county's taxation powers, providing, in pertinent part:

> "Except as provided in Sections 5-1006, 5-1006.5, 5-1007 and 5-1008, on and after September 1, 1990, no home rule county has the authority to impose, pursuant to its home rule authority, a retailer's occupation tax, service occupation tax, use tax, sales tax or other tax on the use, sale or purchase of tangible personal property based on the gross receipts from such sales or the selling or purchase price of said tangible personal property. * * * This Section is a limitation, pursuant to subsection (g) of Section 6 of Article VII of the Illinois Constitution, on the power of home rule units to tax." (Emphasis added.)

The primary purpose of statutory construction is to ascertain and give effect to the intent of the General Assembly. (People v. Robinson (1996), 172 Ill. 2d 452, 457.) Legislative

intent is best evidenced by the language used in the statute. (People v. Thomas (1996), 171 Ill. 2d 207, 221.) Where statutory language is clear and unambiguous, it must be given effect as written. (Barnett v. Zion Park Dist. (1996), 171 Ill. 2d 378, 389.) It should also be noted that the General Assembly may limit or deny home-rule powers by an express statutory statement to that effect. Scadron v. City of Des Plaines (1992), 153 Ill. 2d 164, 187.

Under the language quoted above, it is clear that the General Assembly has expressly acted to limit a home-rule county's exercise of its home-rule powers to impose, inter alia, a use tax on tangible personal property. In accordance therewith, a home-rule county is prohibited from collecting a use tax except as provided in sections 5-1006, 5-1006.5, 5-1007 and 5-1008 of the Counties Code (55 ILCS 5/5-1006, 5-1007 and 5-1008 (West 1994); 55 ILCS 5/5-1006.5 (West 1995 Supp.)). Thus, a home-rule county's authority to impose and to cause the collection of a use tax on transactions occurring outside of the county and to cause the registration of tax collectors beyond its corporate boundaries must be found, if it exists, in one of the specified sections of the Counties Code.

Sections 5-1006, 5-1006.5 and 5-1007 of the Counties Code respectively address the imposition of retailers' occupation taxes and service occupation taxes by a home-rule county, and are therefore not determinative of the issues raised herein. Section

5-1008 of the Counties Code, however, specifically authorizes a home-rule county to impose a use tax upon tangible personal property:

> "Home Rule County Use Tax. The corporate authorities of a home rule county may impose a tax upon the privilege of using, in such county, any item of tangible personal property which is purchased at retail from a retailer, and which is titled or registered to a purchaser residing within the corporate limits of such home rule county with an agency of this State's government, at a rate which is an increment of 1/4% and based on the selling price of such tangible personal property as 'selling price' is defined in the 'Use Tax Act', approved July 14, 1955, as amended. Such tax shall be collected from persons whose Illinois address for titling or registration purposes is given as being in such county. Such tax shall be collected by the county imposing such tax.
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> This Section shall be known and may be cited as the 'Home Rule County Use Tax Law'." (Emphasis added.)

Under the language quoted above, it is clear that the corporate authorities of a home-rule county may impose a county use tax on tangible personal property sold by a retailer "* * * to a purchaser residing within the corporate limits of such home rule county * * *." It is equally apparent that a county imposing such tax is responsible for the collection thereof. Nothing in the language of the Home Rule County Use Tax Law either expressly or impliedly grants a home-rule county the authority to require retailers who are not maintaining a place of business in Cook County to collect the tax on the county's behalf. Thus, the

critical inquiry becomes whether retailers located outside of Cook County's corporate boundaries are "maintaining a place of business in the county" by the purchase of newspaper, radio or television advertisements in media broadcast or published in Cook County.

As noted above, section 2 of the Cook County Home Rule County Use Tax Ordinance defines the phrase "retailer maintaining a place of business in the county" to include any retailer, inter alia, "[e]ngaging in soliciting orders within the County from persons by means of catalogues, advertising or other types of solicitation, whether such orders are received or accepted within or outside the County * * *." The ordinance does not provide a definition for the term "soliciting." However, the same rules used in construing statutes also apply to the construction of local ordinances. (In re Application of County Collector (1989), 132 Ill. 2d 64, 72; Szpila v. Burke (1996), 279 Ill. App. 3d 964, 970.) In construing statutes, undefined statutory terms must be given their ordinary and popularly understood meaning. (People v. Bailey (1995), 167 Ill. 2d 210, 229.) In this regard, the term "solicit" implies private communication directed at a person or a known category of persons. (Smith, Waters, Kuehn, Burnett & Hughes, Ltd. v. Burnett (1989), 192 Ill. App. 3d 693, 702-03, appeal denied, 132 Ill. 2d 554 (1990).) Thus, while advertising materials mailed to a specific person or to specific types of persons have been termed solicitations (Tomei v. Tomei (1992),

235 Ill. App. 3d 166, 170-71), general advertisements placed in newspapers and broadcast on the radio generally have not. See Smith, Waters, Kuehn, Burnett & Hughes, Ltd. v. Burnett (1989), 192 Ill. App. 3d at 703; Diepholz v. Rutledge (1995), 276 Ill. App. 3d 1013, 1016-17.

In the circumstances you have described, nonresident retailers have purchased general advertising in newspapers and on radio and television stations. The retailers have not directed advertisements to specific persons or to specific types of persons. Therefore, no solicitation, in the popularly-understood meaning of the term, has occurred. Thus, in contrast to the out-of-county wholesalers who were required to collect Cook County's tax on the retail sale of alcoholic beverages in Mulligan v. Dunne (1975), 61 Ill. 2d 544, cert. denied, 425 U.S. 916, 96 S. Ct. 1518 (1976) because they were doing business within the county, the retailers who are the focus of your inquiry do not maintain a place of business or do business, as such, within the county's corporate boundaries. Consequently, it is my opinion that Cook County may not validly impose registration requirements and tax collection duties on retailers located outside of Cook County whose only business activity in Cook County is the running of newspaper, radio or television advertisements which may be published or broadcast in the county.

Even assuming, arguendo, that the nonresident retailers could be considered to be maintaining a place of business in the

county by purchasing such newspaper, radio or television advertisements, the ordinance could be susceptible to constitutional challenge. While there appears to be an absence of Illinois case law involving the application of the Home Rule County Use Tax Law to nonresident retailers, a review of those cases involving the application of State taxing statutes to out-of-state sellers provides insight into the pertinent constitutional issues. In Quill Corp. v. North Dakota (1992), 504 U.S. 298, 112 S. Ct. 1904, the Supreme Court was asked to determine whether a violation of either the Due Process Clause (U.S. Const., amend. XIV) or the Commerce Clause (U.S. Const., art. I, sec. 8) occurs when a State attempts to require an out-of-state mail-order house that has neither outlets nor sales representatives in the State to collect and pay a use tax on goods purchased for use in the State. In reaching its conclusion that the Due Process Clause did not bar enforcement of the State's use tax against the out-of-state retailer, the Court noted that "[t]he Due Process Clause 'requires some definite link, some minimum connection between a state and the person, property or transaction it seeks to tax,' * * *." (504 U.S. at 306, 112 S. Ct. at 1909.) A defendant's contacts with a jurisdiction must be such that "traditional notions of fair play and substantial justice" are not offended. 504 U.S. at 307, 112 S. Ct. at 1910, quoting International Shoe Co. v. Washington (1945), 326 U.S. 310, 66 S. Ct. 154.

When determining whether sufficient contacts are present, the Court indicated:

> " * * *
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> 'Jurisdiction in these circumstances may not be avoided merely because the defendant did not physically enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.' Id. at 476, 105 S.Ct. at 2184 (emphasis in original).
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> * * * "
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> Quill Corp. v. North Dakota (1992), 504 U.S. at 307-08, 112 S. Ct. at 1910-11 quoting Burger King Corp. v. Rudzewicz (1985), 471 U.S. 462, 476; 105 S. Ct. 2174, 2184.

By including the purposeful availment requirement, the Court has attempted to exclude random, fortuitous or attenuated contacts and the unilateral activity of another party or a third person (Burger King Corp. v. Rudzewicz (1985), 471 U.S. at 475, 105 S. Ct. at 2183), thus focusing a due process challenge on principles of fundamental fairness to individuals. Brown's Furniture, Inc. v. Wagner (1996), 171 Ill. 2d 410, 422.

Based upon the facts you have provided, the retailers who are the focus of your inquiry do not maintain a physical

presence within the corporate boundaries of Cook County, nor do they generally deliver or arrange for the delivery of their goods into Cook County. Admittedly, the nonresident retailers have advertised their wares through print and broadcast media located in Cook County. It does not appear, however, that the retailers have "purposefully directed" their advertisements toward the residents of Cook County. Rather, it appears that the retailers have generally provided for the broadcast or publication of their advertisements in regional outlets, in some instances the only media outlet available in a multi-county area. To conclude that by doing so the retailers have deliberately availed themselves of the privilege of conducting business in Cook County, in my opinion, would offend traditional notions of fair play in violation of the Due Process Clause.

Your second inquiry concerns whether the Cook County Home Rule County Use Tax Ordinance retailer registration process is an improper attempt "to license for revenue" in contravention of the Illinois Constitution of 1970. Subsection 6(e)(2) of article VII of the Illinois Constitution is a limitation upon the powers of home-rule units:

> " * * *
>
> (e) A home rule unit shall have only the power that the General Assembly may provide by law (1) to punish by imprisonment for more than six months or (2) to license for revenue

> or impose taxes upon or measured by income or earnings or upon occupations.
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> * * *
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> "

In Rozner v. Korshak (1973), 55 Ill. 2d 430, the supreme court was called upon to review the meaning of the phrase "to license for revenue" with regard to the imposition of a wheel tax license by the city of Chicago. The court noted therein:

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> * * *
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> The plaintiff's argument derived from the limitation upon the power of a home-rule unit 'to license for revenue' is based upon a misunderstanding of the meaning of that phrase. The power to regulate and the power to tax are distinct powers, but each may be exercised by the imposition of a license fee. (Citations omitted.) The phrase 'to license for revenue' describes those situations in which a governmental unit that did not have the power to tax attempted to raise revenue by the exercise of its police power. (Citations omitted.) Section 6(e) of article VII expresses a continuation of the general prohibition against such a use of the police power to produce revenue. See Report of the Local Government Committee, 7 Record of Proceedings, Sixth Illinois Constitutional Convention 1673-75.
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> * * *
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> "

(Emphasis added.) Rozner v. Korshak (1973), 55 Ill. 2d at 432-33.

The phrase "to license for revenue" thus describes situations in which a home-rule unit imposes a license fee as an exercise of its police powers. In reviewing the provisions of the Cook County Home Rule County Use Tax Ordinance, there is no indication that the retailers who are subject to the ordinance's

provisions are required to pay a registration or licensing fee. Rather, the ordinance contains a penalty provision enabling the county to impose a fine against retailers who violate the ordinance by conducting business in the county and failing to register. Consequently, it is my opinion that the Cook County Home Rule County Use Tax Ordinance is not an attempt to license for revenue in contravention of the Illinois Constitution.

Your final inquiry concerns instances in which a municipality located within a home-rule county enacts an ordinance the provisions of which conflict with those of the home-rule county's ordinance. Specifically, you have inquired which ordinance will be given effect within the municipal boundaries. Subsection 6(c) of article VII of the Illinois Constitution of 1970 addresses the resolution of conflicts between municipal ordinances and home-rule county ordinances by providing:

> " * * *
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> (c) If a home rule ordinance conflicts with an ordinance of a municipality, the municipal ordinance shall prevail within its jurisdiction.
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> * * * "

Although subsection 6(c) generally gives effect to municipal ordinances over conflicting home-rule county ordinances, the Illinois Supreme Court has indicated that subsection 6(c) establishes a principle of limited preemption, so that a home-rule county taxing ordinance is not necessarily rendered inoperative

within a municipality merely because that municipality legislates on the same subject.

In City of Evanston v. County of Cook (1972), 53 Ill. 2d 312, the supreme court was asked to determine whether a home-rule county tax could be imposed upon the sales of motor vehicles within the corporate limits of a municipality when that municipality had adopted an ordinance imposing a substantially similar tax. The court reviewed its history of permitting different taxing bodies to levy on the same property for similar purposes, and concluded that there was no conflict between the county and the municipal tax ordinances which would require the exclusion of the county's tax ordinance within the corporate limits of the municipality. Rather, the court noted that "* * *[t]his is simply a situation in which two separate and distinct units of local government are exercising the power which they possess by virtue of section 6(a) of article VII of the 1970 constitution to tax the same transaction. * * *" City of Evanston v. County of Cook, 53 Ill. 2d at 319.

Based upon the foregoing, it is my opinion that to the extent that a home-rule county ordinance and a municipal ordinance actually conflict, the municipal ordinance will be given effect within the municipality's corporate boundaries. Where, however, both a home-rule county and a municipality possess the authority to impose a substantially similar tax levy, a conflict in ordinances is not created. Therefore, in those circumstances

both a home-rule county tax and a municipal tax may be imposed and collected simultaneously within a municipality's corporate boundaries.

Sincerely,

JAMES E. RYAN
Attorney General