

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

PERFORMANCE MARKETING
ASSOCIATION, INC.,

PLAINTIFF,

VS.

BRIAN A. HAMER,
in his capacity as DIRECTOR,
ILLINOIS DEPARTMENT OF REVENUE

DEFENDANT.



NO. 2011 CH 26333

ORDER

The Plaintiff and Defendant have filed cross-motions for summary judgment on all counts (I-III) of the Plaintiff's Complaint for Declaratory and Injunctive Relief ("Complaint"), challenging the provisions of P.A. 96-1544 (the "Act"). The Act, as amended, became effective July 1, 2011, and is now codified at 35 ILCS 105/2. The Act amended the definition of "[r]etailer maintaining a place of business in this State", by adding ¶ 1.1. It also amended the definition of "[s]erviceman maintaining a place of business in this State", by adding ¶ 1.1 to 35 ILCS 110/2.

Upon consideration of oral arguments and supporting memoranda, and for the reasons stated in the record, the Court hereby orders that:

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Defendant's motion for summary judgment is denied; and Plaintiff's motion for summary judgment is granted.

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FINDINGS

In rendering the decision the Court makes the following findings:

1. a. The Act, as amended, fails the "substantial nexus" requirement for state use tax collection and reporting obligations under the Commerce Clause of Article 1, Section 8, Clause 3 of the United States Constitution. Failing the substantial nexus requirement renders the applicable provisions unenforceable;
- b. the unambiguous terms of the Act cannot reasonably be construed in a manner that would preserve the Act's validity; and
- c. Illinois Supreme Court Rule 19 is not required because the affected State officer, Defendant, Brian A. Hamer, has been named as a party in his capacity as Director of the Illinois Department of Revenue with the Office of the Attorney General having acted as his counsel.

Accordingly, the Plaintiff's motion for summary judgment on Count I of the Complaint is Granted.

2. The Act is preempted under the Supremacy Clause of Article 6, Clause 2 of the United States Constitution by virtue of the federal moratorium against discriminatory state taxes on electronic commerce. This moratorium is set forth in Section 1101(a)(2) of the Internet Tax Freedom Act, which remains in effect until November 1, 2014.

Accordingly, the Plaintiff's motion for summary judgment on Count III of the Complaint is Granted.

3. The Plaintiff's motion for summary judgment on Count II of the Complaint is not reached in this ruling. Whether the revised definitions of the Act violate the Commerce Clause of the United States Constitution by regulating commerce outside of the State of Illinois is rendered moot by the granting of summary judgment on Counts I and III.
4. The Court will defer action, if any, on the Plaintiff's request for an award of reasonable attorney fees pursuant to U.S.C. § 1998, pending resolution of any appeal on the merits of the Court's ruling. In accordance with Illinois Supreme Court Rule 304(a), this Court finds that there is no just reason for delaying appeal on the merits, in light of the significant issues presented in this case.
5. Additionally, pursuant to Illinois Supreme Court Rule 302(a), the constitutionality of this matter affords direct appeal to the Supreme Court of Illinois.

ENTERED: Robert Lopez Cepero

Judge Robert Lopez Cepero

Judge Robert Lopez Cepero

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Circuit Court - 1627