No. 124469

**IN THE**
**SUPREME COURT OF ILLINOIS**

IWAN RIES & CO., an Illinois corporation; CIGAR ASSOCIATION OF AMERICA, INC., a New York corporation; ILLINOIS ASSOCIATION OF WHOLESALE DISTRIBUTORS, an Illinois corporation; ILLINOIS RETAIL MERCHANTS ASSOCIATION, an Illinois corporation; INTERNATIONAL PREMIUM CIGAR AND PIPE RETAILERS ASSOCIATION, a New York corporation; NATIONAL ASSOCIATION OF TOBACCO OUTLETS, INC., a Minnesota corporation; and ARANGOLD CORPORATION, d/b/a ARANGO CIGAR CO., an Illinois corporation,

*Plaintiffs-Appellants*,

vs.

CITY OF CHICAGO and ERIN KEANE, not individually but solely in her capacity as the Comptroller of the Department of Finance within the City of Chicago, Illinois,

*Defendants-Appellees*.

On Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-17-0875.
There on appeal from the Circuit Court of Cook County Illinois, County Department, Law Division, Tax and Miscellaneous Remedies Section.
Case No. 2016 L 50356
Honorable Ann Collins-Dole, Judge Presiding

# REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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## TABLE OF POINTS AND AUTHORITIES

## STATEMENT OF FACTS

The Appellants generally agree with the City of Chicago's ("City's") Statement of Facts. However, as to the City's discussion of the hazards of tobacco products, it must be stressed that this is not at issue in this case. City's Br. 3-4.[1] While the General Assembly obviously understood the hazards of tobacco products, this case is about the General Assembly's limitation on the imposition of post-July 1, 1993 municipal cigarette taxes and tobacco products taxes to avoid the loss of statewide jobs and State tax revenues from reduced sales, which will surely occur as a result of the proliferation of such municipal taxes. R. C 263-266, 274. Nevertheless, the City's discussion demonstrates that its Other Tobacco Products Tax ("OTP Tax") was purposefully intended to decrease sales of these products. Thus, the City appears to openly acknowledge that the City's OTP Tax will likely *reduce* statewide jobs and *shrink* State Tobacco Products Tax revenues in direct violation of the specific purpose behind the General Assembly's limitation of these municipal taxes. *Id.*

## ARGUMENT

This case is solely about whether the unambiguous limitation language of Section 8-11-6a(2) of the Illinois Municipal Code ("Section 6a(2)") should be followed or whether the plain wording of Section 6a(2) can be sidestepped to allow the City to impose its OTP Tax.

[1] Appellants cite the record as "R. C __"; the Appellees' Brief as "City's Br.___"; and the Appendix to the Appellants Petition for Leave to Appeal as "A. ___".

In 1993, Section 6a(2) was specifically amended to prevent home rule municipalities, like the City, from imposing post-July 1, 1993 tobacco products taxes. Section 6a(2)'s restriction of such tobacco products taxes followed on the heels of the General Assembly's imposition of a new statewide Tobacco Products Tax, and its increase in the State Cigarette Tax, in order to help fund the State budget. R. C 269.[2] The legislative debates regarding Section 6a(2) reveal that the General Assembly was very concerned about the loss of State jobs and State tax revenues if municipalities were also able to impose local home rule taxes on top of these State taxes. R. C 263-266, 274.[3] As a result, the General Assembly amended Section 6a(2) to expressly limit future municipal cigarette taxes and municipal tobacco products taxes, if the municipality did not impose such a cigarette tax or tobacco products tax before July 1, 1993 (the "limitation clause"). Everyone understood this—even the City—which is why the City tried (but failed) on numerous occasions after 1993 to persuade the General Assembly to change Section 6a(2) to allow it to impose a post-July 1, 1993 tobacco products tax. R. C 316-326. In 2016, the City grew tired of unsuccessfully trying to change the law, so it went ahead and passed its OTP Tax without obtaining this required legislative approval.

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[2] *See* State of Illinois, 88th General Assembly, House Transcript, 81st Legislative Day (July 12, 1993), p. 15, http://www.ilga.gov/House/transcripts/Htrans88/HT071293.pdf; Senate Transcript, 76th Legislative Day (July 12, 1993), p. 2, http://www.ilga.gov/Senate/transcripts/Strans88/ST071293.pdf.

[3] State of Illinois, 88th General Assembly, House Transcript, 82nd Legislative Day (July 13, 1993) (R C. 263-72); Senate Transcript, 83rd Legislative Day (Oct. 28, 1993) (R C. 274-75).

## I. The Plain Language of Section 6a(2) Prohibits the City's OTP Tax.

The plain language of Section 6a(2) specifically provides that a home rule municipality (like the City) may not impose a tax on "tobacco products" unless the municipality imposed "such a tax" prior to July 1, 1993. 65 ILCS 5/8-11-6a(2). Moreover, there can be no dispute that Section 6a(2) limits the City's home rule taxing authority, since Section 6a expressly states that 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." Therefore, since there is no disagreement that the City did not impose its OTP Tax prior to July 1, 1993 (R. C 166), the City's OTP Tax is prohibited under the plain language of Section 6a(2).

This Court made it clear in *Kunkel v. Walton* that a court must look to the "plain language of a statute" in understanding its application. 179 Ill. 2d 519, 534 (1997). Even the City admits that the "plain language" of the statute should control. City's Br. 13. However, the City's argument ignores the clear and precise wording of Section 6a(2), as well as the context of how such language is used, and impermissibly reads into Section 6a(2) additional words, terms, and conditions in an effort to support its interpretation. City's Br. 13-20.

In essence, the City's main argument is that the phrase "a tax based on the number of units of cigarettes or tobacco products" as used in the first part of Section 6a(2) which authorizes a municipality to impose a tax on cigarettes or a tax on tobacco products (the "authorization clause") should have "the same meaning" in the second clause of Section 6a(2) added in 1993 (the limitation clause) which places limits on such municipal taxing power. City's Br. 13-20. But, the City's argument misses the point. There is no disagreement that this phrase in isolation has a similar meaning in both locations. Rather,

it is the context in which such phrase is used by the General Assembly that is important. *Deal v. U.S.*, 508 U.S. 129, 132 (1993) (it is a "fundamental principle of statutory construction (and indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the *context* in which it is used") (emphasis added); *Glenview Rural Fire Protection Dist. v. Raymond*, 19 Ill. App. 3d 272, 275 (1st Dist. 1974) (to understand the scope of power conferred by the law, the court conducted "an examination of the meaning and context of the phrase" at issue).

In the original 1990 authorization clause (passed in 1988) of Section 6a(2), the phrase "a tax based on the number of units of cigarettes or tobacco products" was added specifically to authorize home rule municipalities to impose either a cigarette tax, or a tobacco products tax, or possibly even both such taxes. Three years later, in the 1993 limitation clause, the same phrase was again utilized, but in a very different context. In the limitation clause, the General Assembly recognized that home rule municipalities could impose either a cigarette tax, or a tobacco tax, or both taxes, but the obvious purpose of this limitation clause was to restrict the imposition of a municipal cigarette tax or a municipal tobacco products tax (or a tax on both products) to the extent that "such a tax" was not imposed by the municipality before July 1, 1993. Therefore, when looking at this phrase in the context of how it is being used in the limitation clause, the municipality still had the authority to impose a cigarette tax or a tobacco products tax or even both taxes, but the limitation clause made it clear that if the municipality chose not to impose a cigarette tax by July 1, 1993, then it could "not impose such a tax after that date." Similarly, if the City chose not to impose a tobacco products tax prior to July 1, 1993, then it could "not impose such a tax after that date." 65 ILCS 5/8-11-6a(2).

Stripping away the pretense, the real heart of the City's argument is that Section 6a(2) should be interpreted so that if a municipality only imposed a cigarette tax before July 1, 1993, this was sufficient to authorize the municipality to later impose a separate "tobacco products" tax after that date. Yet, this makes no sense. If the legislature was truly authorizing a municipality to impose a future tobacco products tax if that municipality imposed a cigarette tax before July 1, 1993, then logically there would have been no reason to even mention the terms "or tobacco products" or "such a tax" in Section 6a(2). Rather the General Assembly would have just said:

> Provided however, any home rule municipality that did not impose a tax on cigarettes prior to July 1, 1993 could not impose a cigarette tax or any other type of tobacco tax after that date.

In other words, there would have been no need for the General Assembly to explicitly refer to a home rule municipality's failure to impose a municipal tax on "cigarette *or tobacco products*," or state that this failure to impose "*such a tax*" before July 1, 1993 would prohibit a future cigarette tax or tobacco products tax, unless it was the intent of the legislature to structure this limitation clause to precisely limit both cigarette taxes and tobacco products taxes that were not imposed before July 1, 1993. As this Court has long held, statutes "are to be read and understood primarily according to their grammatical sense" *(Warner v. King*, 267 Ill. 82, 87 (1915)), and must also be construed "so as not to render any term superfluous." *People v. Gutman,* 2011 IL 110338, ¶ 38; *Kraft, Inc. v. Edgar*, 138 Ill. 2d 178, 189 (1990). In fact, if the legislature really wanted to authorize the City to impose a post-July 1, 1993 OTP Tax, it would have passed one of the bills the City introduced over the last 26 years allowing it to do so. R. C 316-326.

## II. Section 6a(2) Specifically Refers To Municipal Cigarette Taxes and Tobacco Products Taxes and Not Some Nebulous General Category of Tobacco Taxes.

The City takes the position that, notwithstanding the concise language used in Section 6a(2), the General Assembly was actually authorizing municipalities to impose not just the explicitly stated cigarette tax or tobacco products tax, but rather a "broad general category of taxes" that encompasses cigarettes and tobacco products, and presumably any other type of tobacco-based product it could think of. City's Br. 22-24. The City cites no real authority for this position other than it fits its current argument that the phrase "such a tax" in Section 6a(2) can be interpreted as really referring to some nebulous indefinite tax on multiple different and alternative items, *i.e.*, cigarettes products or tobacco products, or possibly other tobacco-based products. This is similar to the City's earlier argument adopted by the appellate court that Section 6a(2) was really referring to a type of nicotine tax (A. 15), notwithstanding the actual wording of the law. However, as with the nicotine tax argument, this "general categories" argument ignores the explicit language of Section 6a(2), the intent and purpose of this law to limit such municipal taxes, as well as the fundamental rules of statutory construction, and thus should be rejected by this Court.[4]

[4] The City argues that in Subsection 6a(3), the legislature used the term "hotel or motel room or similar facility," so this shows that the legislature was referring to a category of tax in this subsection. City's Br. 16-18. However, *rooms* at a hotel and motel are the *exact same product*, and are taxed under the *same* State and local hotel tax. 35 ILCS 145/1 (State tax); 65 ILCS 5/8-3-13 (municipal tax). Thus, the legislature was not trying to distinguish between different products when it referred to the use of hotel and motel rooms. The legislature's use of the term "or similar facilities" makes that abundantly clear. Section 6a(2), on the other hand, involves two distinct and separate products: "cigarettes" and non-cigarette "tobacco products," which are taxed under totally different State and local taxing schemes. As a result, the taxation of one does not implicate the other. Moreover, Section 6a(2) has a limitation clause, not contained in the other subsections of 6a, which is specifically designed to limit these municipal taxes.

Likewise, the City's suggestion that Section 6a(2) was really authorizing some "broad general category of taxes" is contradicted by the City's own analysis. The City asserts that the word "such" means "of this or that kind." City's Br. 22 (emphasis added). Rationally, therefore, "such a tax" in the limitation clause of Section 6a(2) is not referring to some general category of tobacco-containing products, but rather to the two tax alternatives stated in the preceding clause, *i.e.*, a tax on cigarettes or a tax on tobacco products. In other words, a "this or that" tax. Thus, if a municipality did not impose a tax on that product before July 1, 1993, it would not have the authority to impose "such a tax" on that product after July 1, 1993.

The legal, logical, and common sense response to the City's "general category" argument is that if the legislature actually wanted to authorize a municipality to impose a tax on any "general category" of tobacco-based products, and then allow such municipality that imposed such a tax on any "general category" of tobacco-based products before July 1, 1993 to also impose additional and different taxes on tobacco-based products after that date, the General Assembly would have simply said so. For instance, the legislature could have said it was allowing "any type of tobacco tax" or "a tax on tobacco" or "a tax on any general category of tobacco-based product." But the General Assembly did not say this.

Instead, in Section 6a(2), the General Assembly precisely chose its language to expressly state it was prohibiting a municipality from imposing a tax on "cigarettes" or "tobacco products" as long as *such a tax* was not imposed prior to July 1, 1993. As this Court explained in *Kunkel v. Walton*, there "is no rule of construction which authorizes a court to declare that the legislature did not mean what the plain language of the statute

imports, and a court is not at liberty to depart from the plain language of a statute by reading into it exceptions, limitations or conditions that the legislature did not express." 179 Ill. 2d at 534.

Here, the City imposed a cigarette tax prior to July 1, 1993. Yet, it did not impose a tobacco products tax (the OTP Tax) until 2016. Therefore, under the plain wording of Section 6a(2), the City's OTP Tax was prohibited.

## III. The City's OTP Tax will Cost State Jobs and State Tax Revenues that Section 6a(2) was Expressly Designed to Prevent.

There is no disagreement as to whether the City's new OTP Tax will reduce sales and thus logically cost State jobs and decrease State Tobacco Products Tax revenues. Rather, the City admits that such reduction in sales is its stated purpose behind passing the OTP Tax (R. C 27), and the evidence introduced by Appellants in this case plainly establishes that a drop in sales, and hence in State tax revenues, is the predictable outcome of the City's OTP Tax. R. C 80, 83, 84. So it is undeniable that State jobs will be impacted and that State Tobacco Products Tax revenues will decline from the City's imposition of the its OTP Tax, which is the exact situation Section 6a(2) was designed to prevent.

In fact, the City freely admits that the possible loss of jobs were of great concern to the legislature when it drafted Section 6a(2). R. C 260. In a prior briefing, the City actually noted that:

> One supporter of the bill talked about the importance of protecting jobs at "a large tobacco company," and another said it would help people "who are employed by these large corporations." House Transcript at 68 - 69. No distinction was drawn between jobs related to cigarettes and jobs related to other tobacco products.

R. C 260; *see also* House debates (R. C 265-266). Likewise, the Senate debates made it clear that the potential loss of State tax revenues was another major reason for the passage of Section 6a(2)'s limitation clause. R. C 274. Therefore, the General Assembly was concerned with both the effects on State jobs and State tax revenues from post-July 1, 1993 municipal cigarette taxes and tobacco products taxes. Indeed, this is not a surprise since just the day before the debate on Section 6a(2), the legislature was debating the imposition of a new statewide Tobacco Products Tax and a major increase to the State Cigarette Tax.[5]

Nevertheless, the City originally suggested that the purpose behind Section 6a(2)—to limit municipal tobacco products taxes—should be disregarded, arguing that the loss of State Tobacco Products Tax revenues is not that relevant. R. C 260. In essence, since Tobacco Products Tax revenues were only $5.1 million in 1995 (R. C 279), the City intimated that losing only a few million tax dollars should not be important to the State. R. C 260.

Before this Court, the City has now changed its tune. As a result, the City currently asserts that since the State Tobacco Products Tax generated almost $43 million in tax revenue by 2013 (R. C 280; City's Br. 35), this was one of its justifications for passing its OTP Tax in 2016. But in making this assertion, the City continues to ignore that its new OTP Tax will likely cost the State not just a few million dollars in tobacco products taxes, but possibly tens of millions of tobacco products tax dollars over time by increasing the price of such products and thus motivating consumers to purchase such tobacco products online or otherwise outside the State.

[5] *See* Footnote 2.

## IV. Section 6a(2) Only Grandfathered Municipal Cigarette Taxes or Tobacco Products Taxes Imposed by a Home Rule Municipality before July 1, 1993.

The City argues that Section 6a(2) grandfathers municipalities, and not municipal taxes. City's Br. 25, 27-29. But, that is incorrect. Rather, the grandfather language in the limitations clause specifically limits what municipal taxes a municipality may impose. The General Assembly discussed this point at some length during the debate, noting that municipalities which have a cigarette tax on the books before July 1, 1993 can raise that cigarette tax by any amount at any time thereafter. Moreover, the legislators clearly knew that any "grandfathering" was expressly limited to municipal cigarette taxes since those were the only taxes imposed at the time. They spoke repeatedly about allowing municipalities with existing cigarette taxes to increase them on a whim. R. C 264-266 (Rep. Dunn: "What this Amendment says is the City of Chicago, in addition to whatever tax it has on its books now, can raise its tax by a dime, by a quarter, by a dollar, by ten dollars, by whatever it wants…"; Rep. Granberg asked: "This would not limit either the City of Chicago or the County of Cook from increasing their current taxes on cigarettes?" Rep. Hicks responded: "Correct."; Rep. Murphy noted that the amendment allows "Cook County, Chicago, Rosemont and Evanston to raise cigarette taxes at whim.").

Significantly, however, despite the fact that the legislature had just debated the new State Tobacco Products Tax the previous day, the idea of a municipality being able to impose a future "tobacco products" tax based on an existing cigarette tax was never mentioned. R. C 263-72. As a matter of fact, there is no suggestion anywhere in the text of Section 6a(2) or the legislative debates that the four municipalities mentioned in the debates could do anything other than increase the cigarette taxes they already had on their books. The obvious reason for this was that it was readily apparent that the limitation

clause in Section 6a(2) expressly prohibited such a future tobacco products tax. Consequently, since the only tax on the City's books on July 1, 1993 was a cigarette tax, that is the only City tax that was grandfathered by the 1993 amendment to Section 6a(2).

Another fatal flaw in the City's reasoning in this case is its failure to read the entirety of Section 6a(2) as a whole. Just as the first part of Section 6a(2) (the authorization clause) allowed a municipality to impose a tax on cigarettes or a tax on tobacco products, or possibly both, the second part (the limitation clause) also recognizes that authorization, but then limits its scope. Consequently, under the limitation clause, to the extent a municipality chose to impose a tax on cigarettes or a tax on tobacco products, or even a tax on both, before July 1, 1993, such a specific tax was grandfathered. So, if a municipality had imposed both taxes before July 1, 1993, it could retain and raise either or both taxes after July 1, 1993. However, if a municipality only chose to tax cigarettes before July 1, 1993, then it could retain and raise only that cigarette tax after July 1, 1993. Finally, if a municipality chose to impose neither tax before July 1, 1993, it was totally out of luck.

The City's argument also completely ignores the fact that the reference to home rule municipalities in Section 6a(2) is descriptive only to make the sentence complete. If the limitation clause omitted the term "a home rule municipality," the clause would make no sense.

> Notwithstanding the foregoing, this Section does not preempt **any home rule imposed tax** such as the following:
>
> … (2) **a tax** based on the number of units of cigarettes or tobacco products (provided, however, that ~~a home rule municipality~~ that has not imposed **a tax based** on the number of units of cigarettes or tobacco products before July 1, 1993, shall not impose **such a tax** after that date);

The focus of the entire sentence, including the 1993 amendment, is home rule-imposed **taxes**, and not home rule municipalities. The sole reason municipalities are referred to is that it is they who are imposing the taxes at issue in Section 6a.

Finally, if the City is correct that the limitation clause applies to municipalities and not whether such municipalities imposed a cigarette tax or tobacco products tax prior to July 1, 1993, then why did the General Assembly bother stating that if a home rule municipality did not imposed a tax on "cigarettes or tobacco products" by July 1, 1993, it could not impose "such a tax after that date." It stretches credulity to suggest that the legislature's use of the disjunctive "or" and the terms "tobacco products" and "such a tax" are merely superfluous. *See Kraft,* 138 Ill. 2d at 189 ("a statute should be construed so that no word or phrase is rendered superfluous or meaningless").

## V. Legislative History Does Not Support The City.

The City attempts to distance itself from the prior bills it tried to pass in the General Assembly to amend Section 6a(2), which would have enabled the City to impose its OTP Tax. City's Br. 32-36. The City argues that nothing can be inferred from the legislature's failure to pass the proposed bills. But all of these bills plainly demonstrate the City's attempt to change existing law. For instance, even in the so-called clarification bill in 2014, when Senator Kotowski was asked "[h]ow is this not an expansion of their current taxing authority to those other [tobacco] products?" Senator Kotowski responded: "This quite simply clarifies the fact that they – *they don't have the authority to tax those other products right now. This gives them the authority to tax those other products*." R. C 330 (emphasis added.). The Senator then said that he misspoke. However, Senator Righter saw through the supposed correction, stating "[t]he reason they are not taxing these now is because they do not have the authority to do that. If they did,

they would not come to the General Assembly and ask someone to give them the authority to do that." R. C 330, 98th General Assembly, Senate Transcript, 106th Legislative Day (Apr. 7, 2014).

Senator Kotowski's Freudian slip, along with Senator Righter's common sense analysis, coupled with the fact that the 2014 amendment (along with two prior attempted amendments) never passed, establishes that no one believed the City had the power to impose its OTP Tax after July 1, 1993. The number of attempts to amend Section 6a(2), and the General Assembly's reluctance to do so, surely indicates that some weight should be attributed to these actions by this Court. *See Bob Jones University v. U.S.*, 461 U.S. 574, 600 (1983); *cf., Southwestern Bell Mobile Systems, Inc. v. Dep't of Revenue,* 314 Ill. App .3d 583, 589 (2000), citing *People ex rel. Spiegel v. Lyons,* 1 Ill. 2d 409, 415 (1953) ("[A] statute that remains unaltered through successive sessions of the General Assembly over a period of years indicates legislative acquiescence in a contemporary and continuous administrative interpretation.").

## VI. Illinois Law Requires that Any Ambiguity in Section 6a(2) be Strictly Construed Against Taxation.

"[T]his court has long held that '[t]axing statutes are to be strictly construed. Their language is not to be extended or enlarged by implication, beyond its clear import. In cases of doubt they are construed most strongly against the government and in favor of the taxpayer.'" *Van's Material Co. v. Dep't of Revenue,* 131 Ill. 2d 196, 202 (1989), citing *Mahon v. Nudelman*, 377 Ill. 331, 335 (1941)*; see also Canteen Corp. v. Dep't of Revenue*, 123 Ill. 2d 95, 105 (1988); *Chet's Vending Service, Inc. v. Dep't of Revenue*, 71 Ill. 2d 38, 42 (1978); *Getto v. City of Chicago*, 77 Ill. 2d 346, 359 (1979), *quoting Oscar L. Paris Co. v. Lyons*, 8 Ill. 2d 590, 598 (1956), citing *Peoples Gas Light & Coke Co. v.*

*Ames*, 359 Ill. 152 (1934); *Gem Elec. of Monmouth, Inc. v. Dep't of Revenue*, 183 Ill. 2d 470, 475 (1998).

This strict construction requirement specifically applies to statutes authorizing municipalities the power to impose a tax, such as Section 6a(2). *Quad Cities Open, Inc. v. Vill. of Silvas*, 208 Ill. 2d 498, 508 (2004) (finding that a statute enabling a municipality to impose a tax on athletic contests was subject to strict construction); *Ross v. City of Geneva*, 71 Ill. 2d 27, 31 (1978) ("statutes granting power to a municipal corporation are construed strictly against the municipality which claims the right to exercise the power."); *Getto,* 77 Ill. 2d at 359 (statute authorizing City to impose a municipal message tax was "strictly construed"). Thus, if this Court finds that Section 6a(2) is unclear (which it is not), Section 6a(2)'s provisions must be strictly construed so that any doubt as to its application is interpreted in a fashion to limit such taxing authority.

Notwithstanding the above, the City argues that if Section 6a(2) is in any way ambiguous, that it should then be interpreted in its favor and not strictly construed against taxation. City's Br. 36. The City cites no actual authority for its position. Rather, it merely asserts that the plethora of decisions (noted above) by this Court to the contrary should be rejected because those decisions involve non-home rule taxes or State tax laws, rather than home rule taxing power. City's Br. 39. But here again, the City is simply wrong. First, and not surprisingly, the strict construction rule has been applied in cases applying home rule taxing power. *Vill. of Bedford Park v. Expedia, Inc.*, 876 F. 3d 296 (2017) (strict construction rule used in analysis of home rule hotel taxes). Second, the City forgets that its home rule power is obviously not broader than the State's taxing

power, so the City's assertions that the strict construction rule applies to State tax laws, but not City taxing power, is baseless.

More importantly, the City's argument is a red herring. The tax law before this Court is Section 6a(2), which is a State tax statute and not a home rule tax law. It is the scope of this State tax law that is at issue and not a City tax ordinance. It is undisputable that Section 8-11-6a expressly limits home rule taxing power by specifically taking away such taxing power by stating "[t]his 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." Section 6a(2) then substitutes only limited municipal power to tax cigarettes or tobacco products. Accordingly, the scope of the City's home rule power (or the standards applicable to that power) is irrelevant to this case. *See Prudential Ins. Co. v. City of Chi.*, 66 Ill. 2d 437 (1977); *Andruss v. City of Evanston*, 68 Ill. 2d 215 (1977); *Des Plaines Firemen's Ass'n v. City of Des Plaines*, 267 Ill. App. 3d 920 (1st Dist. 1994). Therefore, to the extent there is any doubt as to scope of Section 6a(2), the strict construction rule clearly applies.

**A. Section 6a(2) is a Tax Law.**

Contrary to the suggestion of the City, there is no doubt that the subsections of Section 6a (such as Section 6a(2)) are "tax statutes" that specifically "authorize" home rule municipalities to impose certain taxes. As the Illinois appellate court has stated, the plain wording and intent of these subsections make that clear. *See Accel Entm't Gaming, LLC v. Vill. of Elmwood Park*, 2015 IL App (1st) 143822; *Midwest Gaming and Entm't LLC v. Cty. of Cook*, 2015 IL App (1st) 142786; *Ill. Coin Machine Operators Assn. v. Cty. of Cook*, 2015 IL App (1st) 150547.

In *Accel,* the appellate court explained that the subsections of Section 6a specifically authorize home rule units to impose certain taxes. 2015 IL App (1st) 143822, ¶ 8. The *Accel* court addressed the issue of whether Elmwood Park (a home rule municipality) violated the restriction on home rule occupation taxes by imposing a tax on gaming businesses. ¶¶ 53-62. After reviewing Section 6a and its subsections as a whole, the appellate court concluded that these subsections grant independent authority to impose certain taxes. As a result, it held that the Elmwood Park tax ordinance was valid since "even if the Ordinance imposed an [unauthorized home rule] occupation tax, it was specifically *authorized* by the legislature" pursuant to Subsection 6a(7) of Section 6a.[6] ¶ 62 (emphasis added).

Similarly, in *Midwest Gaming*, the appellate court held that Subsection 5-1009(7) of Section 5-1009 of the Illinois County Code (the county counterpart to Section 6a) "authorized" Cook County to impose a tax on gaming machine owners, notwithstanding that such a tax may be an occupation tax not authorized under home rule. 55 ILCS 5/5-1009. ¶¶ 81-89. The appellate court reasoned that it had to look at the "true intent" of the law, and to make sure "that no term is rendered superfluous or meaningless." ¶ 81. Thus, it concluded that the wording of Section 5-1009 and its subsections independently "authorize" the County to impose the taxes stated notwithstanding and "in spite of the section's prohibition against certain taxes listed in the first sentence of the section." ¶ 84.

[6] It was logical for the appellate court to conclude that these subsections provide an independent authority to imposed the taxes stated since subsection 6a(3) refers to hotel taxes, subsection 6a(4) refers to real property transfer taxes, and subsection 6a(5) refers to lease taxes, *none* of which are taxes on the sale or use of tangible personal property that are prohibited by the first sentence of Section 6a. Likewise, Section 6a(2) at issue herein authorizes a tax on the "number of units" sold and not on sales price or gross receipts, so it also is *not* prohibited by the first sentence of Section 6a.

As in the *Accel* case, the appellate court stated that since the tax "was authorized by the General Assembly [pursuant to Subsection 5-1009(7)], the County had the authority to impose the tax even if it was an occupation tax." 2015 IL App (1st) 142786, ¶ 89; *see also Ill. Coin Machine Operators Assn. v. Cty. of Cook*, 215 IL App (1st) 150547 (same holding).

Moreover, the fact that Section 6a(2) contains limitations on the taxing authority granted does not make it any less part of a taxing law. For example, in *Canteen Corp*., this Court addressed the scope of Section 2 of the Illinois Retailers' Occupation Tax Act (hereafter "Illinois Sales Tax") which contained a limitations clause for when food could be taxed. The Illinois Sales Tax imposes a tax on retailers in Illinois that sell tangible personal property at retail. However, Section 2's food limitations clause prohibits the taxation of food at the high rate of tax, unless the food is "prepared for immediate consumption." 123 Ill. 2d at 104. In analyzing that limitations clause, this Court explained that "taxing statutes are to be strictly construed and their language is not to be extended or enlarged by implication beyond its clear import." *Id* at 105. Nevertheless, the Illinois Department of Revenue argued that this Court should interpret the limiting term "prepared for immediate consumption" to encompass not only food prepared for immediate consumption, but also food "sold" for immediate consumption. *Id.* at 109. This Court rejected that interpretation since it would change the actual wording used by the General Assembly, explaining "the legislature used the term 'prepared' not sold." *Id*. Therefore, this Court refused to interpret that limitations clause in a manner which would expand the application of the tax. *See also Quads Cities Open,* 208 Ill. 2d at 508 (strict

construction applied to limitation wording in the authorizing statute that limited the tax to only for-profit athletic events).

Likewise, in *Getto*, this Court reviewed a State statute that authorized the City of Chicago to tax sellers of messages ("Municipal Message Tax"). However, the City passed an ordinance that conflicted with the State authorizing statute as to what the City could tax as "gross receipts." This Court held that the "long-established rule" is that "taxing laws are to be strictly construed" and if "there is any doubt in their application they will be construed most strongly against the government and in favor of the taxpayer." 77 Ill. 2d at 359. Accordingly, this Court strictly construed the scope of the statutory wording that defined and limited the authorization of the City's power to impose the Municipal Message Tax, and held that City was applying its tax too broadly.

**B. Section 6a(2) is Quite Specific in its Limits on Home Rule Taxes.**

The City is also wrong when it states that Section 6a(2) is not specific enough in how it limits home rule taxing power. City's Br. 38. In fact, Section 6a(2) expressly states that the City can impose a tax on "cigarettes" or "tobacco products." Read grammatically, it further states that if the City did not impose a tax based on the number of units of "cigarettes" or a tax based on the number of units of "tobacco products" by July 1, 1993, it cannot impose "such a tax" after that date. *See, e.g., Amway Corp. v. P&G Co.*, 346 F. 3d 180, 187 (6th Cir. 2003) (the modifying clause applies to the terms both before and after the coordinating conjunction "or"). These are concise and absolutely clear terms that place explicit limits on the City's taxing power. Thus, this limitation clause can only be rationally read as meaning that the failure to impose a tax on cigarettes or the failure to impose a tax on tobacco products, or a tax on both, would prevent a municipality from taxing the product or products it chose not to tax before July

1, 1993. Any other reading would be nonsensical since it would make the legislative use of the terms "or tobacco products" and "such a tax" meaningless, as well as ignore the legislative purpose of this limitation clause in Section 6a(2) to only authorize pre-July 1, 1993 municipal taxes on these products. Therefore, the City's assertion that Section 6a(2) is not clear or specific enough is meritless.[7]

The City also suggests that if Section 6a(2) is not a tax law, but merely a preemption clause, then it must be interpreted in its favor. City's Br. 39. Again, the City is incorrect. In *Prudential*, this Court addressed whether a preemption provision in the Illinois Insurance Code prohibited the City from imposing its Employers Expense Tax on insurance companies. *Prudential v. City of Chi.,* 66 Ill. 2d 437, 442 (1977). In that case, the City argued (like in this case) that the preemption provision was ambiguous, so it should be interpreted in its favor. However, this Court disagreed, and refused to adopt the City's argument that home rule taxing power overrides statutory limitations on that power when the City can show any vagueness in a preemption law. Instead, in *Prudential*, this Court held that, while the preemption clause in the Insurance Code "can be said to create an ambiguity," when looking at the intent and context of the law "the legislature's intent to prohibit all taxes and fees is plain." 66 Ill. 2d at 442. Nowhere in *Prudential* did this Court say or even suggest that all doubts are resolved in favor of the

[7] The City erroneously suggests that *Midwest Gaming* supports its argument that Section 6a does not clearly limit the City's home rule taxing power. City's Br. 37. In *Midwest Gaming*, the appellate court held the Illinois Riverboat Gaming Act did not preempt Cook County's home rule power because it did not include the home rule limitation language required by Section 7 of the Statute on Statutes. *Midwest Gaming & Entm't, LLC v. Cnty. of Cook*, 2015 IL App (1st) 142786, at ¶ 72. But, Section 6a expressly includes the limiting language required by Section 7 by stating: "[t]his 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."

City. Rather, even with the ambiguity, this Court held that the preemption applied to prohibit the City's Employers' Expense Tax.

Here, Section 6a(2) grants limited municipal authority to impose a tax on cigarettes or a tax on tobacco products, but only when *such a tax* was imposed by the municipality prior to July 1, 1993. While this is clear and specific on its face, even if there is any ambiguity in Section 6a(2), it nevertheless must be strictly construed against taxation and consistent with the intent of the law to protect State jobs and tax revenues; thus, it must be interpreted as plainly written to prohibit the City's OTP Tax.

## CONCLUSION

For all of the foregoing reasons, Appellants ask this Court to reverse the decision of the appellate court and affirm the decision of the circuit court.

Dated: August 27, 2019

Iwan Ries & Co.; Cigar Association of America, Inc.; Illinois Association of Wholesale Distributors; Illinois Retail Merchants Association; International Premium Cigar and Pipe Retailers Association; National Association of Tobacco Outlets, Inc.; and Arangold Corporation, d/b/a Arango Cigar Co.

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**Certificate of Compliance**

I certify that this reply brief conforms to the requirements of Rule 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 20 pages.

*/s/ Stanley R. Kaminski*
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**CERTIFICATE OF SERVICE**

The undersigned attorney certifies that the foregoing Reply Brief of Plaintiffs/Appellants was electronically filed with the Clerk of Court and served upon the attorneys listed below by placing three copies in an envelope with proper postage prepaid and by depositing it in the United States Mail at 190 North LaSalle Street, Chicago Illinois and via email on August 27, 2019 before 5:00 p.m. Under penalties provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

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