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

MICHAEL LABELL, JARED LABELL, SILAS PEPPLE, NATALIE BEZEK, EMILY ROSE, and BRYANT JACKSON-GREEN,	)	
Plaintiffs,	)	
v.	)	**Case No. 2015 CH 13399**
THE CITY OF CHICAGO, and DAN WIDAWSKY, in his official capacity as Comptroller of the City of Chicago,	)	

OPINION and ORDER

I. OPINION

The present matter is before the Court pursuant to the City of Chicago's ("City") Motion to Dismiss the Amended Complaint. For the reasons that follow, the Court grants the City's Motion in part and denies it in part.

BACKGROUND

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

The Ruling requires providers of Internet services to collect the Amusement Tax from their customers and remit the proceeds to the City. The Ruling adopts the sourcing rules from the Mobile Telecommunications Sourcing Conformity Act, 35 ILCS 638/1 *et seq.*, ("Mobile Sourcing Act"), to impose the Amusement Tax on a person "whose residential street address or primary business street address is in Chicago, as reflected by his or her credit card billing address, zip code or other reliable information." Ruling, ¶13.

On December 17, 2015, Plaintiff, who are customers of Internet services, filed their six-count First Amended Complaint. Counts I, II and III challenge the authority of the Comptroller

to apply the Amusement Tax to Internet services because Internet services are allegedly beyond the scope of the Amusement Tax section of the Code. Count IV alleges the application of the Amusement Tax to Internet services imposes an unlawful discriminatory tax on electronic commerce in violation of the Internet Tax Freedom Act ("ITFA"). Count V alleges a violation of the Uniformity Clause of the Illinois Constitution because the Amusement Tax, as interpreted by the Ruling, applies to Internet Services differently than it applies to equivalent in-person amusements. Count VI alleges a violation of the Commerce Clause of the United States Constitution because the City has no nexus with the transactions it seeks to tax, the tax is not fairly apportioned or fairly related to services the City provides.

On January 19, 2016, the City filed the Motion to Dismiss Amended Complaint presently before this Court.

STANDARD (2-615 MOTION)

Illinois is a fact-pleading state. *Adkins v. Sarah Bush Lincoln Health Center*, 129 Ill. 2d 497, 518 (1989). Accordingly, a plaintiff is required only to set out the ultimate facts supporting his cause of action and legal conclusions unsupported by allegations of specific facts are insufficient. *In re Petition for Annexation of Certain Property to the Vill. of Plainfield, Illinois*, 267 Ill. App. 3d 313, 317 (3rd Dist. 1994).

A Section 2-615 motion admits all well pleaded facts as true, but not conclusions of law or factual conclusions, which are unsupported by allegations of specific facts. *Talbert v. Home Savings of America, F.A.*, 265 Ill. App. 3d 376, 379 (1st Dist. 1994). If after disregarding any legal and factual conclusions, the complaint does not allege sufficient facts to state a cause of action the motion to dismiss should be granted. *Groenings v. City of St. Charles*, 215 Ill. App. 3d 295, 300 (2d Dist. 1991). In ruling on a motion to dismiss for failure to state a cause of action, the complaint's factual allegations are to be interpreted in the light most favorable to the plaintiff, but factual deficiencies may not be cured by liberal construction. *Id.* at 300.

DISCUSSION

The City asks this Court to dismiss all Counts of Plaintiffs' Complaint. First, the City contends Counts I through III are moot as the City Council amended the Amusement Tax in November of 2015. The City next argues the Amusement Tax does not discriminate against electronic commerce and does not violate the ITFA. Finally, the City argues the Ruling does not violate the Uniformity Clause or the Commerce Clause of the Illinois and United States Constitutions. The Court will address each issue in turn.

COUNTS I – III

In Counts I through III, Plaintiffs contend the City's Comptroller exceeded his authority by adopting the Ruling and extending the City's Amusement Tax. Plaintiffs argue the Ruling imposes a new tax that the City Council did not authorize in enacting the Amusement Tax. Plaintiffs thus request the Court enjoin the Comptroller and City from enforcing the Ruling's application of the Amusement Tax.

The City contends Counts I through III are moot as, in November 2015, the City Council amended the Amusement Tax Ordinance to endorse the use of the Mobile Sourcing Act, and in doing so confirmed the Amusement Tax applies to videos, music and games streamed over the internet. The amend reads, in pertinent part:

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

Chi. Mun. Code 4-156-020.

All the services mentioned by Plaintiffs in their Complaints are delivered electronically to mobile devices, including Netflix, Hulu, Spotify, Xbox Live and Amazon Prime.

As the City Council amended the Amusement Tax to specifically include video streaming, audio streaming and on-line games delivered electronically to mobile devices, whether the Comptroller exceeded his authority by adopting the Ruling is moot. Therefore, the City's Motion to Dismiss Counts I, II and III is granted.

COUNT IV

In Count IV, Plaintiffs contend the Ruling violates the ITFA because it taxes Internet-based streaming services for video and audio while exempting or not taxing other services for video and audio not delivered via internet.

The City contends the Amusement Tax does not discriminate against electronic commerce as the products are not similar. Specifically, the City contends a tax is "discriminatory" for ITFA purposes only if it treats electronic commerce less favorably than "Transactions involving similar property, goods, services, or information accomplished through other means." 47 U.S.C. § 1105(2)(A).

The Court notes the City's argument goes beyond a Section 2-615 Motion to Dismiss in arguing the merits of the case. Specifically, the City is arguing the Internet-services it seeks to tax through the Amusement Tax are factually distinct from the services Plaintiffs allege are exempt from taxation. Taking all well plead facts as true and interpreting them in the light most favorable to Plaintiffs, Plaintiffs' Complaint alleges sufficient facts to state a cause of action and the City's Motion to Dismiss Count IV is denied.

COUNT V

In Count V, Plaintiffs allege the Amusement Tax, as interpreted and applied by the Ruling, imposes a higher tax rate on theatrical, musical, and cultural performances delivered through an online streaming service than it imposes on those same performances if they are consumed in person. Therefore, Plaintiffs contend, the Amusement Tax violates the Uniformity Clause of the Illinois Constitution as there is no real and substantial difference between those subject to the tax and those that are not.

To the contrary, the City contends having a separate classification for live cultural performances is a reasonable way of advancing the City's objective of fostering a healthy and vibrant artistic atmosphere in the City.

As with Plaintiffs' Count relating to the ITFA, the City is arguing the merits of the case and asking the Court to make a factual determination of whether there are real and substantial differences between viewing a live cultural performance in-person and watching one on a television, computer, tablet or phone. As the Court must view the facts in the light most favorable to Plaintiffs, it finds the Complaint alleges sufficient facts to state a cause of action. Therefore, the City's Motion to Dismiss Count V is denied.

COUNT VI

Finally, in Count VI, Plaintiffs contend the Ruling violates the Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3. Specifically, Plaintiffs contend the Amusement Tax is not applied to an activity with a substantial nexus with the taxing state, is not fairly apportioned, and it discriminates against interstate commerce. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 311 (1992)

The City again argues the merits of the case, contending the Amusement Tax satisfies all the *Quill* factors and therefore does not violate the Commerce Clause.

Interpreting the facts in the light most favorable to Plaintiffs, the Court finds the Complaint adequately sets forth a cause of action for a Commerce Clause violation. Therefore, the City's Motion to Dismiss Count VI is denied.

II. ORDER

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

A. The City of Chicago's 2-615 Motion to Dismiss is granted as to Counts I, II, and III.

B. The City of Chicago's 2-615 Motion to Dismiss is denied as to Counts IV, V, and VI.

C. The City of Chicago shall file its answer to Counts IV, V, and VI within twenty-eight (28) days, on or before August 18, 2016

ENTERED: _____

Judge Carl Walker

ENTERED
JUDGE CARL ANTHONY WALKER-1913
JUL 21 2016
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK