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## Taxation: State and Local

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# Taxation: State and Local

Jeffrey D. Berry\* and Sandra E. Sawner\*\*

## TABLE OF CONTENTS

|      |   |     |
|------|---|-----|
| I.   | INTRODUCTION .....  | 655 |
| II.  | STATE TAXATION ISSUES .....   | 656 |
|      | A. <i>Constitutionality of Telecommunications Excise Tax</i> .....    | 656 |
|      | B. <i>Retailers' Occupation Tax Act — Vending Machine Sales</i> ..... | 662 |
|      | C. <i>Methods for Refunding an Overpayment of Property Tax</i> .....  | 665 |
| III. | LOCAL TAXATION ISSUES .....   | 669 |
|      | A. <i>The City of Chicago Fuel Tax</i> .....                          | 669 |
|      | B. <i>Amendment to Chicago Amusement Tax Ordinance</i> .....          | 672 |
| IV.  | CONCLUSION .....  | 677 |

## I. INTRODUCTION

During the *Survey* year, the Illinois Supreme Court considered various state and local taxation issues. With respect to state taxation issues, the court examined the constitutionality of the Telecommunications Excise Tax,<sup>1</sup> an exemption from the Retailers' Occupation Tax,<sup>2</sup> and procedures for issuing property tax refunds.<sup>3</sup> The court's decisions regarding local taxation involved the constitutionality of two home rule taxes: the City of Chicago fuel tax and an amendment to the Chicago amusement tax.<sup>4</sup>

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1. See *infra* notes 5-63 and accompanying text.
2. See *infra* notes 64-89 and accompanying text.
3. See *infra* notes 90-118 and accompanying text.
4. See *infra* notes 119-94 and accompanying text.

## II. STATE TAXATION ISSUES

### A. *Constitutionality of Telecommunications Excise Tax*

In *Goldberg v. Johnson*,<sup>5</sup> the Illinois Supreme Court upheld the constitutionality of an excise tax imposed on long distance telephone calls.<sup>6</sup> Section 4 of the Telecommunications Excise Tax Act (the "TETA")<sup>7</sup> imposes an excise tax on long distance telephone calls that originate in or are received in Illinois, and that are paid for in Illinois or billed to an Illinois address.<sup>8</sup> The supreme court held that the tax imposed by section 4 of the TETA does not violate the Illinois Constitution or the United States Constitution.<sup>9</sup>

In *Goldberg*, the plaintiffs<sup>10</sup> filed suit in the Circuit Court of Cook County against the Director of Revenue (the "Director") and numerous long-distance carriers.<sup>11</sup> The plaintiffs challenged the excise tax as a violation of the commerce clause of the United States Constitution<sup>12</sup> and the equal protection clauses of both the United States<sup>13</sup> and the Illinois Constitutions.<sup>14</sup> The circuit court held that section 4 of the TETA is unconstitutional and, therefore, granted the plaintiffs' motion for summary judgment.<sup>15</sup> The Direc-

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5. 117 Ill. 2d 493, 512 N.E.2d 1262 (1987) (per curiam), *aff'd sub nom.*, *Goldberg v. Sweet*, 109 S. Ct. 582 (1989).

6. *Id.* at 506-07, 512 N.E.2d at 1268-69.

7. ILL. REV. STAT. ch. 120, para. 2004 (1987).

8. Section 4 of the TETA states in pertinent part: "A tax is imposed upon the act or privilege of originating in this state or receiving in this state interstate telecommunications by a person in this state at a rate of 5% of the gross charge for such telecommunications purchased at retail from a retailer by such person." *Id.*

9. *Goldberg*, 117 Ill. 2d at 506-07, 512 N.E.2d at 1268-69.

10. The plaintiffs were users of long distance service who filed a class action on behalf of other long distance service users. *Id.* at 495, 512 N.E.2d at 1263.

11. *Id.* at 495-96, 512 N.E.2d at 1264.

12. U.S. CONST. art. I, § 8, cl. 3. The commerce clause of the United States Constitution provides: "The Congress shall have the power . . . [t]o regulate commerce . . . among the several states." *Id.*

13. U.S. CONST. amend. XIV, § 1. The equal protection clause of the United States Constitution provides: "Nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

14. ILL. CONST. art. 1, § 2. The equal protection clause of the Illinois Constitution provides: "No person shall be . . . denied the equal protection of the laws." *Id.*

15. *Goldberg*, 117 Ill. 2d at 497, 512 N.E.2d at 1264. The circuit court held that section 4 of TETA violates the commerce clause of the United States Constitution because the tax is assessed on the entire charge of a call and, thus, is unapportioned. *Id.* A state tax is unapportioned when it is imposed upon an activity that occurs outside of that state. *Id.* at 501, 512 N.E.2d at 1265. A state tax is apportioned when it applies only to that portion of an activity which occurs within the state. *Id.* The court also held that the excise tax violates the equal protection clause because it taxes calls initiated in Illinois and paid for in Illinois, but not calls initiated in Illinois and paid for outside Illinois, thus treating the two long distance callers differently. *Id.* at 497, 512 N.E.2d at 1264.

tor then appealed the circuit court's decision directly to the Illinois Supreme Court.<sup>16</sup>

The supreme court first addressed the issue of whether section 4 of the TETA violates the commerce clause of the United States Constitution.<sup>17</sup> The Director argued that the excise tax constitutes a retail tax on a local activity, rather than a tax on interstate commerce itself, because the amount of the tax is based on the cost of the call.<sup>18</sup> The plaintiffs, on the other hand, argued that the tax was an unconstitutional levy on an interstate activity.<sup>19</sup> The supreme court declined to characterize the tax or to consider the manner in which it is calculated to determine its effect on interstate commerce.<sup>20</sup> Instead, the supreme court stressed the substantive effect of the tax and concluded that the tax, regardless of the name given to it or the manner in which it is calculated, does affect interstate commerce.<sup>21</sup>

The supreme court then adopted the test advocated by the United States Supreme Court in *Complete Auto Transit, Inc. v. Brady*<sup>22</sup> to determine whether the excise tax affects interstate commerce in a prohibited manner.<sup>23</sup> The *Complete Auto* test directs that a tax affecting interstate commerce is constitutional if the following requirements are satisfied:

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16. *Id.*

17. *Id.* at 500, 512 N.E.2d at 1265.

18. *Id.* at 498, 512 N.E.2d at 1265. The Director argued that the tax is simply imposed on the purchase of a call that takes place solely in Illinois, rather than a tax on the call itself, which includes portions of a call in another state. *Id.*

19. *Id.*

20. *Id.* at 499, 512 N.E.2d at 1265.

21. *Id.*

22. 430 U.S. 274, *reh'g denied*, 430 U.S. 976 (1977) [hereinafter *Complete Auto*]. In *Complete Auto*, the United States Supreme Court upheld a Mississippi tax imposed on a Michigan corporation on the privilege of doing business in the State of Mississippi. *Id.* at 289. The appellant, a Michigan corporation, transported General Motors vehicles by truck to dealers throughout Mississippi. *Id.* at 276. The State of Mississippi imposed a tax, based on gross income, for the privilege of engaging in business within the state. *Id.* at 275. The appellant challenged the tax based on *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951), which held that a state tax levied on the privilege of doing business within a state is per se unconstitutional. *Complete Auto*, 430 U.S. at 278. The *Complete Auto* Court overruled *Spector Motor Service*, and held that a state may impose a tax on the privilege of doing business within a state as long as the effect of the tax is not unconstitutional. *Id.* at 289. The Court held that the tax was permissible because the appellant made no claim that the tax affected interstate commerce in an unconstitutional manner. *Id.* at 287-88. The Court noted that valid challenges to a state tax include the following: The activity taxed is not adequately connected to the state; the tax is not related to benefits provided by the state; the tax operates to discriminate against interstate commerce; and the tax is not fairly apportioned. *Id.* at 287.

23. *Goldberg*, 117 Ill. 2d at 500, 512 N.E.2d at 1266.

- (1) there is a substantial nexus between the activity taxed and the taxing state;
- (2) the tax is fairly apportioned so that it is limited to that portion of the interstate activity occurring within the taxing state;
- (3) the tax does not discriminate against interstate commerce; and
- (4) the tax is fairly related to services provided by the taxing state.<sup>24</sup>

Applying the *Complete Auto* test, the Illinois Supreme Court summarily concluded that the State of Illinois has an adequate nexus with the activity taxed, thus satisfying the first prong of the test.<sup>25</sup> The court noted that both the taxable event and the payment for the event must occur in Illinois before the excise tax is imposed.<sup>26</sup> The court also stated that the tax is applied only to calls that originate in or are received in Illinois, and that are billed to Illinois service addresses.<sup>27</sup> The supreme court concluded that these connections were sufficient to satisfy the first prong of the *Complete Auto* test.<sup>28</sup>

The supreme court then determined whether the excise tax is fairly apportioned to an activity that actually occurs in Illinois, as required by the second prong of the *Complete Auto* test.<sup>29</sup> The court found that the excise tax applies to the entirety of each call and, therefore, is an unapportioned tax.<sup>30</sup> The court stated, however, that an unapportioned tax is not per se unconstitutional.<sup>31</sup> The court explained that an unapportioned state tax is unconstitutional only if it is discriminatory, by imposing multiple taxation or creating the risk of multiple taxation.<sup>32</sup> The court then stated that

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24. *Id.* at 498, 512 N.E.2d at 1266.

25. *Id.* at 500-01, 512 N.E.2d at 1266.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 501-02, 512 N.E.2d at 1266. For a definition of apportionment, see *supra* note 15.

30. *Goldberg*, 117 Ill. 2d at 501, 512 N.E.2d at 1266.

31. *Id.* The supreme court relied on *Wisconsin Telephone Co. v. Department of Revenue*, 125 Wis. 2d 339, 371 N.W. 2d 825 (1985), which held that a similar tax on long distance telecommunications originating in Wisconsin and billed to a Wisconsin address does not violate the commerce clause, although it was unapportioned. *Id.* at 347, 371 N.W.2d at 830.

32. *Goldberg*, 117 Ill. 2d at 500, 519 N.E.2d at 1266. The court explained that the purpose of requiring apportionment is to guard against discrimination on interstate commerce. *Id.* The court stated that an unapportioned state tax imposed on an interstate activity may subject the taxpayer to multiple taxation because other states could also impose a tax on the same activity. *Id.*

if a tax is nondiscriminatory, then the fact that it is unapportioned is constitutionally irrelevant.<sup>33</sup>

Therefore, the supreme court immediately proceeded to discuss whether section 4 of the TETA discriminates against interstate commerce by posing the risk of multiple taxation.<sup>34</sup> The court noted that the excise tax applies in two circumstances:

- (1) the origination, in Illinois, of an interstate call which is paid for in Illinois or billed to an address in Illinois; or
- (2) the reception, in Illinois, of an interstate call which is billed to an address in Illinois.<sup>35</sup>

Examining the first situation, the court found that although the tax is unapportioned, no other taxing entity could levy a tax on the call.<sup>36</sup> The court, therefore, concluded that there is no risk of multiple taxation and, thus, no discrimination against interstate commerce in the first situation.<sup>37</sup>

The court then examined the situation in which the tax is imposed on a call received in Illinois.<sup>38</sup> The court found that double taxation could occur as a result of similar taxes levied by at least two other jurisdictions.<sup>39</sup> The court noted, however, that section 4 provides for a tax credit in the event of multiple taxation.<sup>40</sup> As a result, the supreme court found that the TETA remedies the constitutional infirmity caused by possible multiple taxation.<sup>41</sup> The court, therefore, concluded that the excise tax meets the third prong of the *Complete Auto* test.<sup>42</sup>

Finally, the court considered the fourth prong of the *Complete Auto* test: whether the excise tax is fairly related to services provided by the taxing state to the taxpayers.<sup>43</sup> Even though services are provided by other states when a long distance call is made, the

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33. *Id.*

34. *Id.* at 502-03, 525 N.E.2d at 1266-77. Apparently, the court was discussing the third prong of the *Complete Auto* test. See *supra* text accompanying note 24.

35. *Goldberg*, 117 Ill. 2d at 502, 525 N.E.2d at 1266.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 503, 525 N.E.2d at 1267.

40. *Id.* Section 4 of the TETA states in pertinent part:

To prevent actual multi-state taxation of the act or privilege that is subject to taxation under this paragraph, any taxpayer, upon proof that that taxpayer has paid a tax in another state on such event, shall be allowed a credit against the tax imposed in this section 4 to the extent of the amount of such tax properly due and paid in such other state.

ILL. REV. STAT. ch. 120, para. 2004 (1987).

41. *Goldberg*, 117 Ill. 2d at 503, 525 N.E.2d at 1267.

42. *Id.*

43. *Id.* at 504, 512 N.E.2d at 1267.

court found that Illinois provides substantial services which benefit the taxpayer.<sup>44</sup> The court concluded that the benefits provided by Illinois in the origination of an interstate call are fairly related to the tax imposed; thus, section 4 of the TETA satisfies the fourth prong of the *Complete Auto* test.<sup>45</sup> The court, therefore, held that the excise tax does not violate the commerce clause of the United States Constitution.<sup>46</sup>

The supreme court then addressed the plaintiffs' contention that the excise tax violates the equal protection clause of both the United States and the Illinois Constitutions.<sup>47</sup> The plaintiffs claimed that the exemption from tax of calls originating in Illinois but paid for outside of Illinois is arbitrary and irrational and, therefore, violates equal protection.<sup>48</sup> The plaintiffs contended that persons making long distance calls in Illinois engage in the same activity regardless of where the charge is billed.<sup>49</sup> Therefore, the plaintiffs argued, long distance callers who are similarly situated are treated differently without a rational reason for the disparate taxation.<sup>50</sup>

The supreme court stated that a tax will withstand an equal protection challenge if "there is any set of circumstances under which the legislative classification is, in fact, a rational exercise of the State's authority to tax."<sup>51</sup> The court stated that the group whose calls are exempt from taxation would most likely be made up of nonresidents who would not receive substantial benefit from the tax.<sup>52</sup> The group that is taxed, however, would most likely be made up of Illinois residents who do receive benefits from the tax.<sup>53</sup> The court, therefore, found that the distinction between the two

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44. *Id.*

45. *Id.*

46. *Id.* at 504, 512 N.E.2d at 1268.

47. *Id.* See *supra* notes 13-14 and accompanying text.

48. *Goldberg*, 117 Ill. 2d at 505, 512 N.E.2d at 1268. Examples of such calls include collect phone calls and credit-card calls billed to addresses in other states. *Id.* The plaintiffs asserted that there is no distinction between calls originating in Illinois, whether the calls are paid for inside or outside of Illinois. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 505-06, 512 N.E.2d at 1268 (citing *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973); *Hoffmann v. Clark*, 69 Ill. 2d 402, 425, 372 N.E.2d 74, 85 (1977); *Jacobs v. City of Chicago*, 53 Ill. 2d 421, 425, 292 N.E.2d 401, 404 (1973)).

52. *Id.* The court reached this conclusion because the calls that are exempt from tax are calls that are paid for outside Illinois. *Id.* In addition, the court stated that a tax on calls paid for outside of Illinois lacks the appropriate nexus to the state necessary to impose the tax. *Id.*

53. *Id.* The court reached this conclusion because the charge for calls that are taxed is paid in Illinois. *Id.*

groups of callers is rational.<sup>54</sup> Accordingly, the court held that section 4 of the TETA does not violate the equal protection clause of either the United States or the Illinois Constitution.<sup>55</sup>

The supreme court's decision in *Goldberg* is extremely important. The *Goldberg* decision, coupled with an appellate court decision in *Archer Daniels Midland Co. v. Department of Revenue*,<sup>56</sup> clearly indicates that the Illinois courts have rejected the "taxable moment" theory as a predicate to the imposition of excise and use taxes.<sup>57</sup> In its place, the supreme court had adopted the four-prong test in *Complete Auto* as the sole test of the constitutionality of a taxing statute under the commerce clause. In affirming the *Goldberg* decision and an earlier decision in *D.H. Holmes Co. v. McNamara*,<sup>58</sup> the United States Supreme Court has placed its imprimatur on this analysis.<sup>59</sup>

The practical effect of the *Goldberg* decision will be the exploration of avenues of attack, other than the commerce clause, on use taxes and similar taxes, such as excise taxes. The supreme court's decision last term in *Searle Pharmaceuticals, Inc. v. Department of Revenue*,<sup>60</sup> in which the court, for the first time, indicated that the uniformity clause of the Illinois Constitution provides more protection than the equal protection clause of the United States Constitution, provides taxpayers with such an avenue — the uniformity clause of the Illinois Constitution. Taxpayers' arguments relying on the uniformity clause will increase significantly because of the *Goldberg* decision, particularly in light of the *Searle* court's radical departure from past precedent.

A final comment should be made with respect to the manner in which the supreme court blurred the fair apportionment and discrimination prongs of the *Complete Auto* test.<sup>61</sup> The United States Supreme Court recognized this confusion in the beginning of the

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54. *Id.*

55. *Id.* at 506, 512 N.E.2d at 1268-69.

56. 170 Ill. App. 3d 1014, 524 N.E.2d 1010 (1st Dist. 1988).

57. The "taxable moment" theory was adopted by the courts as recently as 1975. See *Sundstrand Corp. v. Department of Revenue*, 34 Ill. App. 3d 694, 698, 339 N.E.2d 351, 354 (2d Dist. 1975) (a taxable moment had occurred within the state with respect to airplanes that taxpayer argued had been committed to interstate commerce before coming to rest in Illinois).

58. 108 S. Ct. 1619 (1988).

59. *Goldberg v. Sweet*, 109 S. Ct. 582 (1989). The Supreme Court's view that the *Complete Auto* test is the only predicate to use taxation is evidenced by the listing of cases contained in footnote 12 of the majority opinion. *Id.* at 588 n.12.

60. 117 Ill. 2d 454, 512 N.E.2d 1240 (1987), *reh'g denied*, Oct. 5, 1987.

61. See *supra* notes 29-42 and accompanying text.



*Goldberg* opinion,<sup>62</sup> but the Court ultimately found that fair apportionment did exist because "the risk of multiple taxation is low, and actual multiple taxation is precluded by the credit provision."<sup>63</sup> The Court clearly recognizes the two separate prongs, but its holding raises the question of whether, in the event of a high probability of multiple taxation, a credit mechanism will satisfy the fair apportionment prong of the *Complete Auto* test. Due to its treatment of the fair apportionment and discrimination prongs as, in essence, a single question, the Illinois Supreme Court's analysis does not provide a clear indication of the court's view on this question.

### B. Retailers' Occupation Tax Act — Vending Machine Sales

In *Canteen Corp. v. Department of Revenue*,<sup>64</sup> the Supreme Court of Illinois held that sales of certain foods purchased from vending machines fall within an exemption from tax under the Retailers' Occupation Tax Act (the "ROTA").<sup>65</sup> Section 2 of the ROTA imposes a 4% tax on the gross receipts of retail sales of tangible personal property.<sup>66</sup> Section 2 of the ROTA specifically provides that food prepared for consumption off of the premises where it is sold is subject to a reduced rate of tax.<sup>67</sup> Section 2 further provides that the reduced tax rate does not apply to "food which has been prepared for immediate consumption."<sup>68</sup> In addition, the Department of Revenue (the "Department") had promulgated a regulation under the ROTA which stated that all food sold from vending machines is food sold for immediate consumption and, therefore, not subject to the reduced tax rate.<sup>69</sup>

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62. *Goldberg*, 109 S. Ct. at 591.

63. *Id.*

64. 123 Ill. 2d 95, 525 N.E.2d 73 (1988).

65. *Id.* at 112, 525 N.E.2d at 80; ILL. REV. STAT. ch. 120, para. 441 (1987).

66. ILL. REV. STAT. ch. 120, para. 441 (1987). Section 2 of the ROTA provides in pertinent part that "[a] tax is imposed upon persons engaged in the business of selling tangible personal property at retail at the rate of 4% of the gross receipts from such sales of tangible personal property made in the course of such business." *Id.*

67. *Id.* Section 2 of the ROTA provides in pertinent part:

[W]ith respect to food for human consumption which is to be consumed off the premises where it is sold (other than alcoholic beverages and food which has been prepared for immediate consumption) . . . such tax shall be imposed at the rate of 3% for the sales or purchases on and after January 1, 1980 and before January 1 1981, and at the rate of 2% on and after January 1, 1981.

*Id.*

68. *Id.*

69. ILL. ADMIN. CODE tit. 86, § 130.310 (1985). Section 12 of the ROTA authorizes the Department to promulgate regulations relating to the ROTA. ILL. REV. STAT. ch. 120, para. 451 (1987). The Department regulation provides in pertinent part that:

In *Canteen Corp.*, the plaintiff, a retail seller of food and beverages through vending machines, filed a request with the Department for a credit from an overpayment of the retailers' occupation tax.<sup>70</sup> The plaintiff contended that a large portion of its sales should be taxed at the reduced rate because certain food items sold from its vending machines were not food that was prepared for immediate consumption.<sup>71</sup> After an administrative hearing, the Department denied the plaintiff's claim based on the regulation.<sup>72</sup>

The Circuit Court of Cook County reversed the decision of the Department because it could not find a justification for imposing a higher tax rate on sales from vending machines when the identical items sold in grocery stores were subject to the reduced rate.<sup>73</sup> The circuit court, therefore, concluded that the Department's regulation was inconsistent with section 2 of the ROTA and that the regulation violated the uniformity clause of the Illinois Constitution.<sup>74</sup>

The Illinois Supreme Court, in an opinion by Justice Moran, considered two issues on direct appeal.<sup>75</sup> First, the supreme court determined whether all food purchases from vending machines qualify as sales of food prepared for immediate consumption as defined by the Department's regulation.<sup>76</sup> Second, the supreme court considered the definition of "premises" under the ROTA, and whether the plaintiff properly proved that the food in question was consumed off the premises.<sup>77</sup>

To determine whether the Department regulation was consistent

2) Gross receipts from sales of food for which facilities are provided so that it can be consumed on the premises where it is sold and gross receipts from sales of food which has been prepared for immediate consumption do not qualify for the reduced rate. For example:

.....

C) *Sales of food items in vending machines are sales of food for immediate consumption.*

*Id.* (emphasis added).

70. *Canteen Corp.*, 123 Ill. 2d at 98, 525 N.E.2d at 74.

71. *Id.*

72. *Id.* at 102-03, 525 N.E.2d at 76.

73. *Id.* at 99, 525 N.E.2d at 74.

74. *Id.* The uniformity clause of the Illinois Constitution states: "In any law classifying the subjects or objects of nonproperty taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly. Exemptions, deductions, credits, refunds and other allowances shall be reasonable." ILL. CONST. art. IX, § 2.

75. *Canteen Corp.*, 123 Ill. 2d at 99, 525 N.E.2d at 74-75.

76. *Id.*

77. *Id.*

with the ROTA, the supreme court first considered the meaning of the statutory phrase “prepared for immediate consumption.”<sup>78</sup> The court looked to the plain and common meaning of the word “prepare” and determined that it refers to the manufacturing of food, and not the actual sale of the food.<sup>79</sup> The supreme court also determined that the term “immediate,” as used in the ROTA, refers to “food made ready to be eaten without substantial delay.”<sup>80</sup> The court differentiated between food consumed immediately after preparation and food consumed immediately after purchase, noting that food prepared for placement into vending machines does not, in all cases, constitute food for immediate consumption.<sup>81</sup>

Applying its interpretation of the statutory terms, the supreme court found that the majority of the plaintiff’s vending machine sales were not sales of food prepared for immediate consumption.<sup>82</sup> The supreme court based its finding on the fact that there was a substantial delay between the final stage of the food’s preparation and the food’s ultimate consumption.<sup>83</sup> The supreme court concluded that because the Department’s regulation did not base its determination of whether consumption is immediate on the final stage of food preparation, the regulation improperly extended the scope of the ROTA.<sup>84</sup>

The supreme court then considered whether the plaintiff proved that the food in question was consumed off the premises from

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78. *Id.*

79. *Id.* at 105, 525 N.E.2d at 77. The supreme court stated that “[t]he meaning of ‘prepared’ [does not] include the placing of food on a shelf or in a vending machine . . . . The sale and merchandising of food may be necessary to its eventual consumption but they are not necessary to its preparation.” *Id.* (emphasis in original).

80. *Id.*

81. *Id.* at 106, 525 N.E.2d at 77.

82. *Id.* at 107, 525 N.E.2d at 78. The supreme court, however, found that the hot foods sold from the plaintiff’s vending machines did not reach the final stage of preparation until they were heated after the sale. *Id.* Therefore, these items were properly taxed at the higher tax rate. *Id.* In addition, the supreme court noted that the record was unclear as to when the wrapped sandwiches and fruit sold in the vending machines were “prepared.” *Id.* As a result, the supreme court found that the plaintiff had not met its burden of proof as to these items and, therefore, the items were taxed at the higher rate. *Id.*

83. *Id.*

84. *Id.* at 108, 525 N.E.2d at 78-79. The court dismissed the Department’s argument that the regulation was consistent with the legislature’s intent to avoid a regressive tax. *Id.* at 103, 525 N.E.2d at 76. The Department contended that to effect this end, the legislature intended to tax necessities at a lower rate than luxury items. *Id.* The Department further argued that food purchased from vending machines was more likely to be for “immediate refreshment” than at home family consumption. *Id.* The court failed to except these distinctions as relevant to differential tax treatment of the same or similar food items. *Id.* at 108-09, 525 N.E.2d at 79.

which it was sold.<sup>85</sup> The supreme court defined "premises," in the context of vending machine sales, as "the area over which the vendor exercises control" and "the area in which facilities for eating are provided."<sup>86</sup> The supreme court concluded that the plaintiff's claim accurately reflected this definition of "premises" and, therefore, could not be denied.<sup>87</sup>

Finally, the supreme court declined to address the plaintiff's uniformity clause argument.<sup>88</sup> The supreme court stated that because it held that the regulation was inconsistent with section 2 of the ROTA, no constitutional issue remained.<sup>89</sup>

The court's decision in *Canteen Corp.* states the obvious: administrative agencies do not have the power to extend the scope of a statute through the use of their rule-making power. The decision is not otherwise particularly noteworthy. Even though *Canteen Corp.* involves, at least for the general public, a relatively obscure question, it represents a breath of fresh air in this era of state fiscal problems in which the courts appear to have adopted pro-revenue raising sympathies.

### C. *Methods for Refunding an Overpayment of Property Tax*

In *Lake County Board of Review v. Property Tax Appeal Board of Illinois*,<sup>90</sup> the Illinois Supreme Court resolved the issue of whether an abatement of current property tax liability owed to a county, in an amount owed to a taxpayer as a result of an overpayment of property taxes, constitutes the giving of a "refund" under section 111.4 of the Revenue Act.<sup>91</sup> The supreme court held that this procedure is permissible to collect property taxes due from a taxpayer

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85. *Id.* at 109-10, 525 N.E.2d at 79-80.

86. *Id.* at 111, 525 N.E.2d at 80. The supreme court rejected the plaintiff's contention that "premises" are limited solely to the area over which the vendor exercises control. *Id.* at 110, 525 N.E.2d at 80. The supreme court also rejected the Department's contention that "premises" include the entire building in which a vending machine is located. *Id.*

87. *Id.*

88. *Id.* at 112, 525 N.E.2d at 80. For the text of the uniformity clause, see *supra* note 74.

89. *Id.*

90. 119 Ill. 2d 419, 519 N.E.2d 459 (1988).

91. *Id.* at 423, 519 N.E.2d at 461. Section 111.4 of the Revenue Act states in pertinent part: "[A]ny taxes extended upon such unauthorized assessment or part thereof shall be abated or if already paid shall be refunded with interest as provide in section 194." ILL. REV. STAT. ch. 120, para. 592.4 (1987). Section 194 of the Revenue Act states in pertinent part: "Refunds . . . shall be made by the collector in accordance with the final orders of the Property Tax Appeal Board or the Court." ILL. REV. STAT. ch. 120, para. 675 (1987).

and simultaneously refund an overpayment of property taxes for the same property.<sup>92</sup>

The taxpayer, Marriott Corporation ("Marriott"), as a result of previous litigation,<sup>93</sup> received a reduced assessment of its 1981 property taxes on the Great America Theme Park.<sup>94</sup> In response to the entry of judgment, the Lake County Collector (the "Collector") reduced the property tax assessment due from Marriott for its 1982 and 1983 property taxes by the amount of the reduction in Marriott's 1981 taxes.<sup>95</sup> Upon notice of this procedure, Marriott filed a motion to enforce the previous order by requiring the Collector to issue a refund check.<sup>96</sup> The circuit court denied the motion, ruling that the Collector had complied with the original order.<sup>97</sup> The appellate court affirmed the circuit court's decision,<sup>98</sup> and Marriott appealed to the Supreme Court of Illinois.

Marriott argued that the abatement procedure used by the Collector violated the statutory refund procedure.<sup>99</sup> To determine whether the procedure is proper, the supreme court stated that the term "refund" must be given its ordinary and properly understood meaning and not its most narrow meaning.<sup>100</sup> The court found that, in spite of the understanding that a refund commonly involves the issuance of a check or cash, the statutory definition of refund includes the offsetting of a current obligation with the amount of a tax overpayment.<sup>101</sup> The court, therefore, concluded

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92. *Lake County Bd. of Review*, 119 Ill. 2d at 431, 519 N.E.2d at 465.

93. *See Lake County Bd. of Review v. Property Tax Appeal Bd.*, 140 Ill. App. 3d 1042, 489 N.E.2d 446 (2d Dist. 1986).

94. *Lake County Bd. of Review*, 119 Ill. 2d at 421-22, 519 N.E.2d at 460. In addition to affirming the reduced assessment, the appellate court remanded the case to the circuit court to grant appropriate relief to Marriott. *Id.* Marriott then filed a motion for entry of judgment and to order the Collector to issue a refund check. *Id.* at 422, 519 N.E.2d at 460. The circuit court granted this motion and entered judgment for Marriott. *Id.* at 422, 519 N.E.2d at 461.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Lake County Bd. of Review v. Property Tax Appeal Bd.*, 152 Ill. App. 3d 1093, 504 N.E.2d 1333 (2d Dist. 1987).

99. *Lake County Bd. of Review*, 119 Ill. 2d at 422, 519 N.E.2d at 461. For the language of the statutes governing refunds of property taxes to taxpayers, see *supra* note 91.

100. *Id.* at 423, 519 N.E.2d at 461. *See also* *Niven v. Siqueira*, 109 Ill. 2d 357, 366, 487 N.E.2d 937, 942 (1985) (term must be given its ordinary and popularly understood meaning); *Mahon v. Nudelman*, 377 Ill. 331, 335, 36 N.E.2d 550, 552 (1941) (term must be given its full meaning, not the narrowest meaning of which it is susceptible).

101. *Lake County Bd. of Review*, 119 Ill. 2d at 424, 519 N.E.2d at 461-62. Marriott disputed whether its 1982 and 1983 tax obligations were, in fact, current obligations. *Id.* at 424, 519 N.E.2d at 462. The supreme court, however, found that the tax obligations had accrued at the time of the setoff, even though Marriott was not obligated to submit

that the procedure employed by the Collector is within the statutory definition of a "refund."<sup>102</sup>

Even though the supreme court concluded that the procedure used falls within in the definition of the word "refund," it further analyzed whether the Collector's actions were proper under the circumstances.<sup>103</sup> The supreme court stated that because the procedure used by the Collector is not expressly prescribed by the Revenue Act, the court must determine whether:

- (1) the legislature has provided sufficient standards to control the collection activities at issue;
- (2) the collector exceeded the bounds of those standards; and
- (3) Marriott was denied due process of law by the particular collection procedure utilized.<sup>104</sup>

The court found that the Illinois General Assembly had lawfully empowered the Collector to collect the tax in question.<sup>105</sup> Furthermore, the supreme court concluded that the legislature had promulgated adequate rules for the Collector to follow.<sup>106</sup>

The supreme court then stated that a legislative grant of power carries with it the authority to do all that is reasonably necessary to carry out that power.<sup>107</sup> The court further stated that an administrative officer may lawfully exercise discretion to accomplish generally authorized powers.<sup>108</sup> The supreme court, therefore, summarily agreed with the appellate court that the Collector's actions represent a reasonable means of accomplishing his broad leg-

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payment immediately. *Id.* at 425, 519 N.E.2d at 462. The supreme court also noted that had the collector offset the refund against an obligation that had not yet accrued, the argument could be made that the Collector merely issued a credit rather than a refund. *Id.*

102. *Id.*

103. *Id.* at 426-27, 519 N.E.2d at 462.

104. *Id.* at 426-27, 519 N.E.2d at 463.

105. *Id.* at 427, 519 N.E.2d at 463. The power of the Collector to collect the tax is conferred by section 190 of the Revenue Act. ILL. REV. STAT. ch. 120, para. 671 (1987). The supreme court stated that this arrangement was "a lawful delegation of authority to an administrative agency." *Lake County Bd. of Review*, 119 Ill. 2d at 427, 519 N.E.2d at 463. The court acknowledged that the legislature may delegate authority to an administrative agency with only general guidelines as to application, leaving specific procedures to the "reasonable discretion" of the agency. *Id.*

106. *Lake County Bd. of Review*, 119 Ill. 2d at 427, 519 N.E.2d at 463.

107. *Id.* (citing *Townsend v. Gash*, 267 Ill. 578, 584, 108 N.E. 744, 746 (1915)). The court then stated that the word "necessary" means " 'absolutely necessary,' 'indispensable,' or, less restrictively, 'expedient' or 'reasonably convenient.' " *Id.* at 427-28, 519 N.E.2d at 463 (citing *Illinois Bell Tel. Co. v. Fox*, 402 Ill. 617, 631, 85 N.E.2d 43, 51 (1949)).

108. *Id.* at 428, 519 N.E.2d at 463 (citing *City of Chicago v. Town Underground Theatre, Inc.*, 9 Ill. App. 3d 930, 936, 293 N.E.2d 367, 372 (1st Dist. 1973)).

islative power.<sup>109</sup>

Finally, the supreme court considered whether the collection procedure used denied Marriott due process of law.<sup>110</sup> Marriott argued that the procedure used by the collector wrongfully deprived it of its property because Marriott was not issued a refund check.<sup>111</sup> The supreme court concluded, after brief analysis, that because the Collector applied the refund against a legitimate, currently due liability, Marriott was not deprived of its refund entitlement.<sup>112</sup>

In addition, Marriott argued that it was deprived of its right to protest the tax rate on the increased assessment for 1982 and 1983.<sup>113</sup> The supreme court dismissed this argument because the tax rate is determined annually and, therefore, Marriott had an opportunity to challenge the rate when it was applied to the original assessment.<sup>114</sup> The court explained that due process guarantees Marriott an opportunity to contest the tax rate before being required to pay the tax;<sup>115</sup> however, due process does not require that Marriott get another chance to contest the tax rate when it is applied to an increased assessment.<sup>116</sup> Accordingly, the court found that in this situation, the abatement procedure used by the Collector did not violate due process.<sup>117</sup>

The importance of the court's decision lies in the court's use of a three-prong test to determine whether an administrative officer's action in the interstices created by the statutory provisions of a revenue statute are lawful. Not only are there matters under the Revenue Act, procedural or otherwise, that are not dealt with therein, but similar situations exist under most, if not all, of the state's taxing provisions. Even though the court did not rigorously apply each prong of the test, it reaffirmed that there are limits to the actions of administrative agencies and their officials. In this

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109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 429, 519 N.E.2d at 464.

114. *Id.* at 429-30, 519 N.E.2d at 464. The court noted that Marriott had not requested a stay of the Property Tax Appeal Board decision; thus, the decision was binding on the collector. *Id.* In addition, pursuant to section 592.4 of the Revenue Act, appeal of a decision does not stay the decision. ILL. REV. STAT. ch. 120, para. 592.4 (1987). The court also noted that Marriott was in the process of appealing the increased assessment. *Lake County Bd. of Review*, 119 Ill. 2d at 429, 519 N.E.2d at 464.

115. *Lake County Bd. of Review*, 119 Ill. 2d at 429, 519 N.E.2d at 464.

116. *Id.*

117. *Id.* at 431, 519 N.E.2d at 465.

vein, this decision and the court's decision in *Canteen Corp.*<sup>118</sup> provide the same message to the Illinois Department of Revenue.

### III. LOCAL TAXATION ISSUES

#### A. *The City of Chicago Fuel Tax*

In *Illinois Gasoline Dealers Association v. City of Chicago*,<sup>119</sup> the Illinois Supreme Court upheld a Chicago ordinance that imposes a per gallon tax on fuel purchased within the City of Chicago.<sup>120</sup> The supreme court held that the fuel tax imposed by the City is not an unauthorized occupation tax,<sup>121</sup> and that it does not violate the equal protection clause<sup>122</sup> or the uniformity clause<sup>123</sup> of the Illinois Constitution.<sup>124</sup>

The fuel tax is imposed pursuant to the Chicago Vehicle Fuel Tax Ordinance (the "Ordinance")<sup>125</sup> adopted by the Chicago City Council.<sup>126</sup> The Ordinance imposes a five cent tax on each gallon of fuel purchased in Chicago.<sup>127</sup> The Ordinance provides that the tax is to be paid by the fuel purchaser;<sup>128</sup> however, fuel dealers are responsible for the collection of the tax, maintenance of records concerning its collection, and are liable for nonpayment.<sup>129</sup>

The plaintiffs, the Illinois Gas Dealers Association and the Midwest Petroleum Marketers Association, challenged the Ordinance

118. For a discussion of *Canteen Corp.*, see *supra* notes 64-89 and accompanying text.

119. 119 Ill. 2d 391, 519 N.E.2d 447 (1988) [hereinafter *Illinois Gasoline Dealers*].

120. *Id.* at 404-05, 519 N.E.2d at 453.

121. *Id.* at 401, 519 N.E.2d at 450. For the definition of an occupation tax, see *infra* text accompanying note 136.

122. For the text of the equal protection clause, see *supra* note 14.

123. For the text of the uniformity clause, see *supra* note 74.

124. *Illinois Gasoline Dealers*, 119 Ill. 2d at 391, 519 N.E.2d at 447.

125. *Id.* at 395, 519 N.E.2d at 448. The tax resulted from an amendment to chapter 200.10 of the Municipal Code of Chicago creating the Chicago Fuel Tax Ordinance. Chapter 200.10-2 states in pertinent part:

A tax is hereby imposed upon the privilege of purchasing or using, in the City of Chicago, vehicle fuel purchased in a sale at retail. The tax shall be at a rate of five cents per gallon of vehicle fuel. The ultimate incidence of and liability for payment of the tax shall be upon the purchaser or user of the vehicle fuel, and nothing in this chapter shall be construed to impose a tax upon the occupation of selling or distributing vehicle fuel. It shall be a violation of this chapter for any distributor or retail dealer to fail to add this tax to the retail price of vehicle fuel or to absorb the tax. This tax shall be in addition to any and all other taxes.

CHICAGO, ILL., MUN. CODE ch. 200.10-2 (1986).

126. *Illinois Gasoline Dealers*, 119 Ill. 2d at 395, 519 N.E.2d at 448.

127. *Id.*

128. *Id.* at 395, 519 N.E.2d at 450.

129. *Id.*



in the Circuit Court of Cook County.<sup>130</sup> The circuit court upheld the Ordinance and the plaintiffs appealed directly to the Supreme Court of Illinois.<sup>131</sup>

The plaintiffs challenged the Ordinance on several grounds.<sup>132</sup> Primarily, the plaintiffs argued that the fuel tax is an unauthorized occupation tax in violation of the Illinois Constitution.<sup>133</sup> The plaintiffs also argued that the Ordinance results in unconstitutional multiple taxation.<sup>134</sup>

In addressing these arguments, the supreme court considered whether the Ordinance creates a constitutionally impermissible occupation tax.<sup>135</sup> The court stated that a tax is an occupation tax if "it regulates and controls a given occupation, or imposes a tax for the privilege of engaging in a given occupation, trade or profession, or finally, whether it imposes a tax on the privilege of engaging in the business of selling services."<sup>136</sup> Applying this definition, the court found that the Ordinance does not regulate or control a given

130. *Id.* at 395, 519 N.E.2d at 448. The plaintiffs filed separate complaints that were consolidated in the circuit court. *Id.*

131. *Id.*

132. *Id.* at 396, 519 N.E.2d at 449. The plaintiffs claimed that the Ordinance delegates "powers of 'determination' [which] permit executive discretion" to the city comptroller. *Id.* at 397, 519 N.E.2d at 449. The plaintiffs further contended that the Illinois Supreme Court has narrowly viewed such delegations of taxing power. *Id.* (citing *Giebelhausen v. Daley*, 407 Ill. 25, 95 N.E. 84 (1950)).

Addressing the plaintiffs' claim that the Ordinance is an invalid delegation of taxing power, the supreme court found that the Ordinance vests the comptroller with no discretion as to who will be taxed. *Id.* at 397-98, 519 N.E.2d at 449. *See Paper Supply Co. v. City of Chicago*, 57 Ill. 2d 553, 579, 317 N.E.2d 3, 16 (1974) ("factual determinations by administrative agencies of officials . . . result[] in neither an unlawful delegation of authority nor the improper exercise of a judicial function"). *But see Bowsler v. Synar*, 478 U.S. 714 (1986) (Stevens, J., concurring) (delegation of power to the Comptroller General requiring "sophisticated economic judgment" is an exercise of excessive authority and therefore invalid). The court, instead, found that the comptroller makes solely factual determinations as to the collection of revenues. *Illinois Gasoline Dealers*, 119 Ill. 2d at 397-98, 519 N.E.2d at 449.

The court also stated that the plaintiffs' claim that the Ordinance permits the comptroller to determine the rate of tax is not supported by the language of the Ordinance. *Id.* at 398, 519 N.E.2d at 449-50.

133. *Illinois Gasoline Dealers*, 119 Ill. 2d at 396, 519 N.E.2d at 449. The Illinois Constitution provides that a "home rule unit" (a city or town) may exercise any power pertaining to its government, including taxation. ILL. CONST. art. VII, § 6(a). An exception to this general grant of power is that a home rule unit cannot impose a tax upon income or occupations unless the Illinois General Assembly specifically authorizes the tax. ILL. CONST. art. VII, § 6(e).

134. *Illinois Gasoline Dealers*, 119 Ill. 2d at 396, 519 N.E.2d at 449.

135. *Id.* at 398-99, 519 N.E.2d at 450.

136. *Id.* at 399, 519 N.E.2d at 450 (citing *Reif v. Barrett*, 355 Ill. 104, 109, 188 N.E. 889, 892 (1933); *Commercial Nat'l Bank v. City of Chicago*, 89 Ill. 2d 45, 62, 432 N.E.2d 227, 234 (1982)).

occupation.<sup>137</sup> In addition, the court rejected the plaintiffs' claim that the Ordinance has the "practical effect" of regulating an occupation.<sup>138</sup>

The plaintiffs asserted that even though the ordinance requires tax payment by fuel purchasers, placing the burden of collecting, documenting, and remitting the tax on the sellers actually creates an unauthorized occupation tax.<sup>139</sup> Relying heavily on *Commercial National Bank v. City of Chicago*,<sup>140</sup> the plaintiffs argued that placing the incidence of the tax on the purchasers of the fuel did not disguise the true nature of the tax, that of an occupation tax on the privilege of engaging in the sale of gasoline.<sup>141</sup>

Before the court analyzed whether the practical effect analysis was relevant, it analyzed whether the fuel tax was the type of tax that the Illinois constitutional convention intended to allow home rule units to impose.<sup>142</sup> The court relied on the view of the constitutional convention as expressed in the Illinois constitutional debates.<sup>143</sup> The court concluded from these debates that the convention intended to allow a home rule tax on the retail sale of tangible goods.<sup>144</sup> The court cited a report of the Local Government Committee listing a per gallon fuel tax as an example of permissible home rule taxation.<sup>145</sup> The court distinguished *Commercial National Bank*, finding that the fuel tax is a tax that the convention did not intend to deny home rule units.<sup>146</sup> The court, therefore, concluded that the "practical effect" analysis did not apply to the fuel tax, and that the tax is not an impermissible

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137. *Id.* at 399-400, 519 N.E.2d at 450.

138. *Id.*

139. *Id.* For a discussion of the Illinois constitutional limitation on home rule unit taxation, see *supra* note 133.

140. 89 Ill. 2d 45, 432 N.E.2d 227 (1982).

141. *Illinois Gasoline Dealers*, 119 Ill. 2d at 399-400, 519 N.E.2d at 450. The plaintiffs argued that the supreme court's decision in *Commercial National Bank* controlled. In *Commercial National Bank*, the supreme court held that the practical effect of a tax on services resulted in an unlawful occupation tax. *Commercial Nat'l Bank*, 89 Ill. 2d at 70, 432 N.E.2d at 244.

142. *Illinois Gasoline Dealers*, 119 Ill. 2d at 400-01, 519 N.E.2d at 451.

143. *Id.*

144. *Id.* In *Commercial National Bank*, the court also considered the 1970 Illinois constitutional convention debates which indicated that the limitation on home rule taxation was intended to prohibit taxes on services. *Commercial Nat'l Bank*, 89 Ill. 2d at 68, 432 N.E.2d at 227.

145. 7 Record of Proceedings, SIXTH ILL. CONST. CONVENTION, at 1655-56 (1970).

146. *Illinois Gasoline Dealers*, 119 Ill. 2d at 400-01, 519 N.E.2d at 451. See *infra* notes 177-86 and accompanying text for a discussion of Justice Ryan's concurring opinion in *Chicago Health Clubs, Inc. v. Picur*, 124 Ill. 2d 1, 528 N.E.2d 978 (1988).

occupation tax.<sup>147</sup>

The supreme court also addressed the plaintiffs' claim that the Ordinance results in a violation of uniformity of taxation.<sup>148</sup> The court stated that legislative bodies have broad powers in classifying the objects of taxation, and that such classifications are constitutional if they are reasonable.<sup>149</sup> In addition, the court stated that there is a presumption in favor of legislative classifications, and the burden of proving that a classification is unreasonable rests on the plaintiff.<sup>150</sup> The court, applying this standard, stated that the plaintiffs had failed to prove that the alleged classification is arbitrary.<sup>151</sup> The court, therefore, held that the Ordinance is constitutional.<sup>152</sup>

### B. Amendment to Chicago Amusement Tax Ordinance

In *Chicago Health Clubs, Inc. v. Picur*,<sup>153</sup> the Illinois Supreme Court held that an amendment to the Chicago Amusement Tax Ordinance (the "Amendment")<sup>154</sup> violated the Illinois Constitution by creating an unauthorized occupation tax.<sup>155</sup> The Chicago Amusement Tax Ordinance imposes a tax on the patrons of amusements within the City of Chicago for the privilege of participating

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147. *Illinois Gasoline Dealers*, 119 Ill. 2d at 401, 519 N.E.2d at 451. The court also stated that its conclusion is consistent with other cases upholding home rule taxes. *Id.* (citing *Town of Cicero v. Fox Valley Trotting Club, Inc.*, 65 Ill. 2d 10, 357 N.E.2d 118 (1976); *Mulligan v. Dunne*, 61 Ill. 2d 544, 338 N.E.2d 6 (1975); *S. Bloom, Inc. v. Korshak*, 52 Ill. 2d 56, 284 N.E.2d 257 (1972)).

148. *Id.* at 401-03, 519 N.E.2d at 451. The plaintiffs claimed that the fuel tax is unconstitutional because "it singles out a single subclass of retail purchases of tangible personality to the exclusion of all others." *Id.* at 402, 519 N.E.2d at 451 (citing *Fiorito v. Jones*, 39 Ill. 2d 531, 535-36, 236 N.E.2d 698, 701-02 (1968)). The plaintiffs also argued that "uniformity of taxation is violated by double taxation." *Id.* at 402, 519 N.E.2d at 452 (citing *People ex rel. Hanrahan v. Caliendo*, 50 Ill. 2d 72, 83, 277 N.E.2d 319, 326 (1971)). See also ILL. CONST. art. IX, § 2 ("[i]n any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly"). The supreme court called the plaintiffs' argument a "rather ambiguous argument against 'double taxation' stem[ming] from the constitutional mandate that taxation shall be uniform." *Illinois Gasoline Dealers*, 119 Ill. 2d at 402, 519 N.E.2d at 452.

149. *Illinois Gasoline Dealers*, 119 Ill. 2d at 403, 519 N.E.2d at 452 (citing *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973)).

150. *Id.* (citing *Jacobs v. City of Chicago*, 53 Ill. 2d 421, 293 N.E.2d 401 (1973)).

151. *Id.*

152. *Id.*

153. 124 Ill. 2d 1, 528 N.E.2d 978 (1988).

154. CHICAGO, ILL., MUN. CODE ch. 104-1 to 104-8 (1985).

155. *Chicago Health Clubs*, 124 Ill. 2d at 15, 528 N.E.2d at 984-85. For an explanation of occupation taxes, see *supra* note 136 and accompanying text.

in or viewing the amusement.<sup>156</sup> The Amendment expanded the scope of the Chicago Amusement Tax Ordinance to include health and racquetball clubs in its definition of amusements, thereby imposing a tax on the membership dues of such clubs.<sup>157</sup> The Amendment imposed the responsibility for collecting, recording, and remitting the tax on the owners and operators of the clubs.<sup>158</sup> The Amendment further provided that the owners and operators were liable for payment of the tax if their members failed to do so.<sup>159</sup>

The plaintiffs, various health club owners and members, challenged the tax in the Circuit Court of Cook County, claiming that the Amendment created an impermissible occupation tax.<sup>160</sup> The defendants, the City of Chicago and various officers, filed a motion to dismiss the claim, contending that the tax was constitutional.<sup>161</sup> The plaintiffs then moved for a preliminary injunction prohibiting the collection of the tax until disposition of the case, and the circuit court granted the injunction.<sup>162</sup> The appellate court reversed, finding that the Amendment was constitutional in all respects.<sup>163</sup> The plaintiffs then appealed to the Illinois Supreme Court.<sup>164</sup>

The supreme court considered whether the plaintiffs' motion for

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156. CHICAGO, ILL., MUN. CODE ch. 104-1 to 104-8 (1985).

157. *Id.* The City of Chicago Amusement Tax Ordinance was amended December 23, 1985, to include the following within the definition of an amusement: "[A]ny entertainment or recreational activity offered for the public participation or on a membership or other basis including but not limited to racquetball or health clubs, carnivals, amusement park rides and games, bowling, billiard and pool games, dancing, tennis, racquetball, swimming, weightlifting, body building or similar activities." *Id.* (emphasis added).

158. *Id.*

159. *Id.*

160. *Chicago Health Clubs*, 124 Ill. 2d at 4, 528 N.E.2d at 979. The plaintiffs argued that the tax imposed by the Amendment was an unauthorized occupation tax in violation of article VII section 6(e)(2) of the Illinois Constitution. *Id.* at 7-8, 528 N.E.2d at 981; ILL. CONST. art. VII, § 6(e)(2). Section 6(e)(2) prohibits home rule units from imposing occupation taxes without authorization from the legislature. *Id.* The plaintiffs also asserted that the Amendment violates the uniformity clause and the equal protection clause of the Illinois Constitution. ILL. CONST. art. IX, § 2; ILL. CONST. art. I, § 2.

161. *Chicago Health Clubs*, 124 Ill. 2d at 4, 528 N.E.2d at 979. The defendants argued that the tax was not an occupation tax because it was imposed on the patrons and not the owners of the clubs. *Id.* at 15, 528 N.E.2d at 984.

162. *Id.* at 4-5, 528 N.E.2d at 979. The circuit court found that the Amendment created an unauthorized occupation tax in violation of article VII, section 6(e)(2) of the Illinois Constitution. *Id.* The circuit court also found that the amendment was unconstitutionally vague and that it violated the due process clause of both the Illinois and United States Constitutions. *Id.* at 5, 528 N.E.2d at 979.

163. *See Chicago Health Clubs v. Picur*, 155 Ill. App. 3d 482, 508 N.E.2d 742 (1st Dist. 1987).

164. *Chicago Health Clubs*, 124 Ill. 2d at 5, 528 N.E.2d at 980.

preliminary injunction was properly granted by the circuit court.<sup>165</sup> In doing so, the court addressed whether the tax on health club memberships was unconstitutional as an unauthorized occupation tax.<sup>166</sup> The supreme court stated that even though a statute recites that a tax is imposed on a purchaser, rather than on a seller, the tax may still be an occupation tax.<sup>167</sup> The court also stated that the "practical operation and effect" of the tax must be considered in determining whether a tax is an occupation tax.<sup>168</sup> The court found that the practical effect of the Amendment was not only to place the burden of collecting and remitting the tax on the owners of the clubs, but also to place the ultimate burden of payment on the owners.<sup>169</sup> The court, therefore, concluded that the Amendment created an occupation tax on the provision of health club services.<sup>170</sup>

The court also briefly addressed the contention of the defendants

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165. *Id.* at 7-8, 528 N.E.2d at 981.

166. The supreme court stated that "[i]n appealing the grant of the preliminary injunction and the denial of the motion to dismiss, defendants argued only the likelihood of success on the merits, *i.e.*, they focused on the constitutionality of the amendment." *Id.* The court did not discuss the other requirements for granting a preliminary injunction: (1) that no adequate remedy at law exists; and (2) that failure to grant the injunction would expose plaintiffs to irreparable harm. *Id.* at 7, 528 N.E.2d at 981 (citing *Central Bldg. & Cleaning Co. v. Vodnansky*, 84 Ill. App. 3d 586, 406 N.E.2d 32 (1st Dist. 1980)).

167. *Id.* at 9-10, 528 N.E.2d at 981-82. The supreme court noted that the purpose for prohibiting occupation taxes was to prevent home rule units from evading the constitutional restriction prohibiting income based taxes by labeling them occupation taxes. *Id.* at 10, 528 N.E.2d at 982. In addition, the court stressed that labeling a tax as one imposed on purchasers of a service does not make the tax constitutionally permissible. *Id.* (citing *Commercial Nat'l Bank v. City of Chicago*, 89 Ill. 2d 45, 432 N.E.2d 22 (1982)). For a discussion of *Commercial National Bank*, see *supra* notes 140-46 and accompanying text.

168. *Chicago Health Clubs*, 124 Ill. 2d at 10, 528 N.E.2d at 982.

169. *Id.* The court found that the Amendment mandated that owners were "responsible for paying the tax to the city *regardless* of whether their patrons fail or refuse to remit the tax." *Id.* (emphasis in original). In addition, the court found that the owners were subject to "very substantial penalties" for delays in remitting the tax. *Id.* The court then stated that these factors were also present in other decisions in which the supreme court found taxes were *de facto* occupation taxes. *Id.* (citing *Community School Dist. No. 60 v. City of Waukegan*, 95 Ill. 2d 244, 254-55, 447 N.E.2d 345, 348-49 (1983); *Commercial Nat'l Bank v. City of Chicago*, 89 Ill. 2d 45, 66-67, 432 N.E.2d 227, 229 (1981)).

170. *Id.* The court also addressed a City of Chicago revenue ruling that interpreted the Amendment to require only that owners make a good faith effort to comply with the Amendment to avoid penalties. *Id.*; CITY OF CHICAGO Rev. Rul. 86-1 (Feb. 17, 1986). The court found that the revenue ruling was "intended to respond to an argument that the substantive burden of the tax herein is that of an occupation tax." *Chicago Health Clubs*, 124 Ill. 2d at 11, 528 N.E.2d at 982. The court concluded that "[a] self-serving administrative ruling obviously cannot amend an ordinance to save it from constitutional infirmities." *Id.*

that even if the tax was imposed on health club owners, it was not an occupation tax because it was also imposed on any persons providing the stated services, regardless of whether they owned a health club.<sup>171</sup> The court dismissed this argument, stating that “the city has gone far beyond merely taxing particular activities and has imposed a tax unique to those types of commercial enterprises.”<sup>172</sup> The court stated that a tax on membership fees to health and racquetball clubs is a tax on those occupations.<sup>173</sup>

Having concluded that the tax in question was an occupation tax, the court considered whether the occupation tax was authorized by the legislature.<sup>174</sup> The defendants argued that if the Amendment created an occupation tax, then the tax was authorized by the legislature as an amusement tax.<sup>175</sup> The court noted that a tax could not be imposed on establishments as places of amusement unless the establishment is “at least *predominately* engaged in offering amusement activities.”<sup>176</sup> In addition, the court recognized that activities such as tennis,<sup>177</sup> horse racing,<sup>178</sup> amusement parks,<sup>179</sup> and movie theaters<sup>180</sup> are capable of being taxed as amusements.<sup>181</sup>

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171. *Chicago Health Clubs*, 124 Ill. 2d at 11, 528 N.E.2d at 982.

172. *Id.*

173. *Id.*

174. *Id.* at 12, 528 N.E.2d at 983. The Illinois Constitution prohibits home rule units, such as Chicago, from imposing income based taxes or occupation taxes unless they are authorized by the legislature. ILL. CONST. art. VII, § 6(e)(2). See *supra* note 133.

175. *Chicago Health Clubs*, 124 Ill. 2d at 12, 528 N.E.2d at 983. The defendants relied on section 11-42-5 of the Illinois Municipal Code, which states that “[t]he corporate authorities of each municipality may . . . tax . . . amusements and may . . . tax . . . all places for amusement.” *Id.* (quoting ILL. REV. STAT. ch. 24, para. 11-42-5 (1987)). The defendants claimed that paragraph 11-42-5 authorizes a tax on health club memberships as a tax on amusements, even though not all activities conducted at the clubs are amusements. *Id.* The defendants’ reasoning was that paragraph 11-42-5 “authorizes a tax not only on amusements but also on *places* of amusement.” *Id.* (emphasis in original). The court stated that this argument was irrelevant because the Amendment did not attempt to tax the clubs as places of amusement; rather, the Amendment included the activities at health and racquetball clubs within the definition of “amusements.” *Id.* Nevertheless, the court analyzed the defendants’ argument that the Amendment taxed the clubs as places of amusement. *Id.* at 12-13, 528 N.E.2d at 983.

176. *Id.* at 13, 528 N.E.2d at 983 (emphasis original).

177. See *Greater Chicago Indoor Tennis Clubs, Inc. v. Village of Willowbrook*, 63 Ill. 2d 400, 349 N.E.2d 3 (1976).

178. See *Town of Cicero v. Fox Valley Trotting Club, Inc.*, 65 Ill. 2d 10, 357 N.E.2d 1118 (1976).

179. See *Isberian v. Village of Gurnee*, 116 Ill. App. 3d 146, 452 N.E.2d 10 (1st Dist. 1983).

180. See *Kerasotes Rialto Theater Corp. v. City of Peoria*, 77 Ill. 2d 491, 397 N.E.2d 790 (1979).

181. *Chicago Health Clubs*, 124 Ill. 2d at 14, 528 N.E.2d at 983.

The supreme court, however, differentiated the tax on health club memberships from taxes on other amusements.<sup>182</sup> The court based this distinction on the fact that health club memberships cover a variety of amusement, as well as non-amusement activities.<sup>183</sup> As a result, the court concluded that health clubs do not engage predominantly in amusements and, thus, cannot be taxed as places of amusement.<sup>184</sup> The court, therefore, held that the circuit court properly granted the plaintiffs' preliminary injunction, and remanded the case for further proceedings.<sup>185</sup>

Justice Ryan specially concurred with the majority opinion, considering the case in light of *Illinois Gasoline Dealers Association v. City of Chicago*.<sup>186</sup> In *Illinois Gasoline Dealers*, the supreme court held that even though gasoline dealers were responsible for the collection of a fuel tax, it was not an occupation tax.<sup>187</sup> Justice Ryan believed that, on the surface, these cases seem inconsistent.<sup>188</sup> According to Justice Ryan, the key factor in considering whether a tax is constitutional is to look first to the relevant constitutional provision.<sup>189</sup> Based on the debates at the constitutional convention, Justice Ryan contended that a clear intent had been expressed to allow a tax on the transfer of tangible items but not on services.<sup>190</sup> The convention delegates wanted to prohibit home rule units from imposing additional income based taxes, and they expressed concern that the effect of any tax on services would be the same as a tax levied or measured by income.<sup>191</sup> The debates, however, stated that a tax on the retail sale of a tangible good is a

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182. *Id.*

183. *Id.* at 13-14, 528 N.E.2d at 983. The court admitted that health clubs offer amusement activities such as tennis and racquetball. *Id.* The court also found that health clubs offer a variety of non-amusement activities, such as nutritional instructions, weight loss counseling, diet counseling, cardiovascular examinations and counseling, and instruction in weightlifting and other physical fitness activities. *Id.*

184. *Id.* at 14, 528 N.E.2d at 983.

185. *Id.* at 16, 528 N.E.2d at 984-85.

186. 119 Ill. 2d 391, 519 N.E.2d 447 (1988).

187. *Id.* at 401, 519 N.E.2d at 451.

188. *Chicago Health Clubs*, 124 Ill. 2d at 16-17, 528 N.E.2d at 984-85 (Ryan, J., specially concurring).

189. *Id.* at 17, 528 N.E.2d at 985 (Ryan, J., specially concurring). The Illinois Constitution provides in pertinent part: "A home rule unit shall have only the power that the General Assembly may provide by law . . . [to] impose taxes . . . upon occupations." ILL. CONST. art. VII, § (6)(e).

190. *Chicago Health Clubs*, 124 Ill. 2d at 16-17, 528 N.E.2d at 984-85 (Ryan, J., specially concurring).

191. *Id.* at 18, 528 N.E.2d at 987-88 (Ryan, J., specially concurring).

permissible home rule tax.<sup>192</sup> A tax on the retail sale of tangible goods, therefore, is within permissible home rule taxing powers as expressed by the convention; however, the power to impose a tax on services was not intended by the convention.<sup>193</sup> Justice Ryan continued that only after determining that the tax on health clubs was not within the permissible home rule taxing powers expressed by the convention does the practical effect of the tax become relevant to determine whether it is an occupation tax.<sup>194</sup>

The contrast between and the importance of *Illinois Gasoline Dealers* and *Chicago Health Clubs* are succinctly contained in Justice Ryan's concurring opinion in *Chicago Health Clubs*. The practical effect analysis of the *Commercial National Bank* court is not appropriate in the case of a transfer of tangible property; rather, it is applicable only when services are being provided. The question of where the incidence of taxation falls becomes dispositive only after it is determined that a tax is otherwise subject to the limitations imposed on the taxing powers of home rule units. Only after it is determined that a tax may be subject to such limitations is the practical effect analysis of *Commercial National Bank* relevant. It is useful to note that the practical effect analysis of *Commercial National Bank*, in the area of occupation taxes, is consistent with the philosophy underlying the four-prong test in *Complete Auto*, which was applied by the court in *Goldberg*.

#### IV. CONCLUSION

The *Goldberg* decision is clearly the most significant tax case decided by the supreme court during the *Survey* year. It is the first decision in which an Illinois court has used the four-prong *Complete Auto* test, thus rejecting earlier Illinois precedent. Coupled with the supreme court's decision in *Searle*, during the prior *Survey* year, taxpayer litigation will begin to focus on the uniformity clause of the Illinois Constitution and the greater protection it affords over the equal protection clause of the United States Constitution.

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192. *Id.* (Ryan, J., specially concurring). See also 7 Record of Proceedings, SIXTH ILL. CONST. CONVENTION, at 1655-56 (1970).

193. *Chicago Health Clubs*, 124 Ill. 2d at 17-18, 528 N.E.2d at 986-87 (Ryan, J., specially concurring).

194. *Id.* at 18, 528 N.E.2d at 985 (Ryan, J., specially concurring).



