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March 4, 2014

Joint Committee on Administrative Rules  
Attn: Committee Members  
700 Stratton Building  
Springfield, IL 62706

Re: Proposed Amendment  
Home Rule Municipal Retailers' Occupation Tax  
86 Ill. Adm. Code 270.101, *et seq.*  
First Notice Comment Period

Dear Members:

This office represents the Village of Bridgeview ("Village"), Cook County, Illinois. Please allow this letter to serve in support of the efforts of the Illinois Department of Revenue ("IDOR") to draft new rules governing the allocation of retail sales under existing retail occupational tax statutes. This letter will first explain why it is important for the Joint Committee on Administrative Rules ("JCAR") to approve rules which prevent the diversion of sales tax revenue through the business practices scrutinized by the Illinois Supreme Court in *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130 (November 21, 2013). Secondly, the Village will address the rules proposed by IDOR and the manner in which the factors codified therein are to be examined.

The Village is a home rule municipality located in the southwest suburbs of Chicago. From 2008 to 2009, the Village suffered an 18% loss in total revenue derived from retail occupational tax collections (including revenue derived from its home rule sales tax). There was no notice or indication the losses were imminent, nor was there any explanation for why the Village was collecting less sales tax revenue. There was no change in the law, no economic downturn that would explain the magnitude of the decrease, and the Village did not physically lose a significant retail presence. In 2010, after the Village's sales tax revenues remained depressed, it determined that the revenue losses were attributable to a single company, headquartered within the Village's corporate limits, diverting all of its retail sales to the City of Kankakee. The company did not alter its operations within the Village's corporate limits in any material aspect. It simply set up a straw office in the City of Kankakee through which it accepted all of its Illinois sales. Ironically, the Village was fortunate that the business scheme affecting its operational capacity was not unique. Municipalities and other units of government throughout Cook County began suffering similar fates to such a degree that the Illinois Supreme Court was forced to intervene.

Fiscal stability is dependent upon a municipal budget-making process that allows public officials to estimate revenues to fund the operational expenses of government. Municipalities are capable of incurring revenue losses resulting from a change in the law, an economic downturn, or a business closing. These events are anticipated and their effects mitigated through cost-saving mechanisms. Municipalities, however, cannot sustain the drastic revenue losses that result from a business diverting its sales to another jurisdiction because that practice is abrupt and unpredictable. A municipality cannot anticipate the loss of revenue attending these practices because they are not initiated or implemented publicly.<sup>1</sup> Likewise, the losses cannot be anticipated because the companies diverting their sales to other jurisdictions do nothing to alter their local operations. Accordingly, municipalities such as the Village expend money and incur obligations, providing the same level of governmental services these businesses have always demanded and enjoyed, but the anticipated revenue pledged to subsidize the cost during the budget-making process is never realized. Municipalities are forced to operate at a deficit during that fiscal year, and they cannot accurately budget for the future, because future revenue cannot be estimated under the threat of other businesses engaging in similar practices.

The Village is cognizant of the *non-sequitur* arguments made by municipalities like the City of Kankakee which point to a depressed local economy as justification for its interception of sales tax revenue from other jurisdictions. However, the Illinois Supreme Court has interpreted current retail occupational tax statutes to require sales tax revenue to be sourced to the jurisdiction in which the retailer enjoys the greater amount of governmental protection for its sales activities. The City of Kankakee does not provide any meaningful degree of governmental protection to the businesses that source their sales to its jurisdiction. In fact, municipalities such as the Village continue to bear the burden and expense of providing those businesses with fire and police protection, utility capacity, public works services to construct and maintain streets, and the expense of clearing streets of snow and ice in order to make commerce possible throughout the year. The polarizing disparities resulting from the combined efforts of businesses and certain municipalities cannot be permitted to continue. Inaction is not an option. Rules must be adopted to prevent the statutorily unauthorized business practices highlighted in *Hartney*.

IDOR has proposed rules adopting an analytical approach to the sales tax sourcing dilemma by codifying, as factors, those activities which the judiciary has deemed pertinent to the determination of where a retailer is engaged in the "business of selling." The factors are sufficiently clear to guide retailers, but not so restrictive in definition to preclude the consideration of other activities that may be relevant to the inquiry. The Village does offer one suggestion as to the manner in which the proposed factors are to be examined. The "composite of many activities" inquiry employed by the judiciary to determine where a retailer is engaged in the "business of selling" does not prevent or preclude the consideration of any particular sales activity. Therefore, instead of a regulatory scheme in which "secondary" factors are considered only in close cases, the Village proposes that all of the factors be considered. Those factors identified as being "primary" should be weighted more heavily than those factors identified as being "secondary." For example, each of the four (4) primary factors could be weighted at 20% (collectively, 80%), and each of the five (5) secondary factors could be weighted at 4% (collectively, 20%). This approach would allow a retailer to examine its own activities and to source its sales to the jurisdiction where IDOR would most likely find it to be engaged in the "business of selling." Most

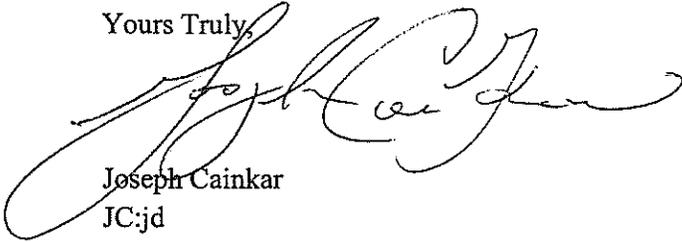
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<sup>1</sup> Indeed, the City of Kankakee effectuated this program by entering into rebate agreements with third-parties which, in turn, contracted privately with the retail companies diverting their sales. Thus, the companies that were actually sourcing their sales to the City of Kankakee were never identified in open legislative proceedings.

importantly, the primary factors will remain determinative of the analysis in clear cases, while allowing the consideration of the secondary factors in each case.

IDOR is to be commended for its expeditious and comprehensive response to the mandate imposed by the Illinois Supreme Court. The Village respectfully requests that JCAR give consideration to this letter and approve the rules as currently proposed, or as modified by suggestion in this letter.

Yours Truly,

A handwritten signature in cursive script, appearing to read "Joseph Cainkar". The signature is written in black ink and is positioned above the printed name and initials.

Joseph Cainkar  
JC:jd

cc: Vicki Thomas, Executive Director (JCAR)  
Brian Hamer, Director (IDOR)  
Paul Berks, Deputy General Counsel (IDOR)