
IN THE APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT, FOURTH DIVISION

COMMUNICATIONS & CABLE OF)	On Appeal from the Circuit Court
CHICAGO INC., SOUTH CHICAGO)	of Cook County, County Department,
CABLE, INC., and LASALLE)	Law Division, Tax & Miscellaneous
TELE-COMMUNICATIONS, INC.)	Remedies Section
(all d/b/a CHICAGO CABLE T.V.),)	
)	
Plaintiffs-Appellants,)	
)	
v.)	No. 93 L 51235
)	
The DEPARTMENT OF REVENUE of)	
of the City of Chicago, and)	
JUDITH C. RICE, as Director)	
of Revenue of the City of Chicago,)	
)	Hon. Earl Arkiss,
Defendants-Appellees.)	Judge, Presiding

**REPLY BRIEF OF PLAINTIFFS-APPELLANTS
COMMUNICATIONS & CABLE OF CHICAGO, INC.,
SOUTH CHICAGO CABLE, INC., and
LASALLE TELECOMMUNICATIONS, INC.
(all d/b/a CHICAGO CABLE T.V.)**

Fred M. Ackerson
D'ANCONA & PFLAUM
30 North LaSalle Street
Suite 2900
Chicago, Illinois 60602
(312) 580-2058

Roger J. Jones
James C. Schroeder
John E. Muench
MAYER, BROWN & PLATT
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Attorneys for Plaintiffs-Appellants

May 22, 1995

TABLE OF CONTENTS

INTRODUCTION 1

I. THE OWENS DOCTRINE IS BINDING SUPREME COURT PRECEDENT AND CANNOT BE OVERTURNED BY THIS COURT. 2

 A. The Owens Doctrine Is Still The Law Where, As Here, The Administrative Review Act Does Not Apply 2

 B. The City's Contention That There Is "No Difference" In Review Under The Administrative Review Act And Review By Certiorari Is Not Correct. 5

 C. The City's Other Policy Arguments Do Not Support Elimination Of The Owens Doctrine Either. 8

II. THE ALLEGATIONS IN THE COMPLAINT ARE MORE THAN SUFFICIENT TO INVOKE JURISDICTION UNDER OWENS. 10

 A. A Tax Is "Unauthorized by Law" When The Taxing Authority Attempts To Tax Non-Taxable Transactions. 10

 B. Plaintiffs Have Alleged That The Tax Here Is Unauthorized By Law. 12

 C. Chicago Cable Properly Pled A Due Process Violation Which Supported Jurisdiction Under the Owens Doctrine. 14

III. THE CITY'S ADMINISTRATIVE HEARING PROCEDURE IS NOT AN ADEQUATE REMEDY AT LAW. 18

CONCLUSION 16

POINTS AND AUTHORITIES

INTRODUCTION 1

Owens-Illinois Glass Co. v. McKibbin, 385 Ill. 245,
 52 N.E.2d 177 (1943) 1

 735 ILCS § 5/3-101 1

I. THE OWENS DOCTRINE IS BINDING SUPREME COURT PRECEDENT AND
 CANNOT BE OVERTURNED BY THIS COURT. 2

 A. The Owens Doctrine Is Still The Law Where, As Here, The Administrative
 Review Act Does Not Apply 2

Owens-Illinois Glass Co. v. McKibbin, 385 Ill. 245,
 52 N.E.2d 177 (1943) 2, 3, 4, 5

Illinois Bell Telephone Co. v. Allphin, 60 Ill. 2d 350,
 326 N.E.2d 737 (1975) 2, 3, 4

 735 ILCS § 5/3-102 3

Snow v. Dixon, 66 Ill. 2d 443, 362 N.E.2d 1052 (1977) 3, 4

Clark Oil & Refining Corp. v. Johnson, 154 Ill. App. 3d 773,
 506 N.E.2d 1362 (1st Dist. 1987) 3

People v. Gersch, 135 Ill. 2d 384, 553 N.E.2d 281 (1990) 3-4

West Suburban Hospital Medical Center v. Hynes, 173 Ill. App. 3d 847,
 527 N.E.2d 1086 (1st Dist. 1988) 4

Williams v. City of Chicago, 36 Ill. App. 3d 216,
 343 N.E.2d 539 (1st Dist. 1976) 4

North Pier Terminal Co. v. Tully, 62 Ill. 2d 541,
 343 N.E.2d 507 (1975), rev'd on other grounds, 66 Ill. 2d 423,
 362 N.E.2d 1030 (1977) 4

National Pride of Chicago, Inc. v. City of Chicago, 206 Ill. App. 3d 1090,
 562 N.E.2d 563 (1st Dist. 1990) 4

<u>Katz v. City of Chicago</u> , 177 Ill. App. 3d 305, 532 N.E.2d 322 (1st Dist. 1988)	4
B. The City's Contention That There Is "No Difference" In Review Under The Administrative Review Act And Review By Certiorari Is Not Correct.	5
<u>Owens-Illinois Glass Co. v. McKibbin</u> , 385 Ill. 245, 52 N.E.2d 177 (1943)	5, 8
<u>Illinois Bell Telephone Co. v. Allphin</u> , 60 Ill. 2d 350, 326 N.E.2d 737 (1975)	5
<u>Stratton v. Wenona Community Unit Dist. No. 1</u> , 133 Ill. 2d 413, 551 N.E.2d 640 (1990)	5, 6, 7
<u>Smith v. Department of Public Aid</u> , 67 Ill. 2d 529, 367 N.E.2d 1286 (1977)	6
735 ILCS § 5/3-102	6
<u>C & K Distributors, Inc. v. Hynes</u> , 122 Ill. App. 3d 525, 461 N.E.2d 560 (1st Dist. 1984)	6
<u>Funkhouser v. Coffin</u> , 301 Ill. 257, 133 N.E. 649 (1921)	6
<u>People ex rel. Loomis v. Wilkinson</u> , 13 Ill. 660 (1852)	6
<u>Hartley v. Will County Bd. of Review</u> , 106 Ill. App. 3d 950, 436 N.E.2d 1073 (3d Dist. 1982)	6
<u>National Marine, Inc. v. EPA</u> , 232 Ill. App. 847, 597 N.E.2d 911 (3d Dist. 1992), <u>rev'd in part on other grounds</u> , 159 Ill. 2d 381, 639 N.E.2d 571 (1994)	6
<u>Philger, Inc. v. Department of Revenue</u> , 208 Ill. App. 3d 1066, 567 N.E.2d 773 (5th Dist. 1991)	7
<u>Torres v. County of Kane Public Aid Committee</u> , 130 Ill. App. 3d 296, 474 N.E.2d 45 (2d Dist. 1985)	7
735 ILCS § 5/3-111	7

	<u>Nowicki v. Evanston Fair Housing Review Bd.</u> , 62 Ill. 2d 11, 338 N.E.2d 186 (1975)	7
	<u>Caldbeck v. City of Chicago Park Dist.</u> , 97 Ill. App. 3d 452, 423 N.E.2d 230 (1st Dist. 1981)	7
	<u>Burke v. Board of Review</u> , 132 Ill. App. 3d 1094, 477 N.E.2d 1351 (2d Dist. 1985)	7
	<u>Wolfe v. Board of Educ.</u> , 171 Ill. App. 3d 208, 524 N.E.2d 1177 (1st Dist. 1988)	7
C.	The City's Other Policy Arguments Do Not Support Elimination Of The <u>Owens</u> Doctrines Either.	8
	<u>Owens-Illinois Glass Co. v. McKibbin</u> , 385 Ill. 245, 52 N.E.2d 177 (1943)	8, 9, 10
	<u>Illinois Bell Telephone Co. v. Allphin</u> , 60 Ill. 2d 350, 326 N.E.2d 737 (1975)	9, 10
	30 ILCS § 230/2a	10
	<u>Sta-Ru Corp. v. Mahin</u> , 64 Ill. 2d 330, 356 N.E.2d 67 (1976)	10
II.	THE ALLEGATIONS IN THE COMPLAINT ARE MORE THAN SUFFICIENT TO INVOKE JURISDICTION UNDER <u>OWENS</u>	10
	<u>Owens-Illinois Glass Co. v. McKibbin</u> , 385 Ill. 245, 52 N.E.2d 177 (1943)	10
	<u>Santiago v. Kusper</u> , 133 Ill. 2d 318, 549 N.E.2d 1251 (1990)	10
A.	A Tax Is "Unauthorized by Law" When The Taxing Authority Attempts To Tax Non-Taxable Transactions.	10
	<u>Owens-Illinois Glass Co. v. McKibbin</u> , 385 Ill. 245, 52 N.E.2d 177 (1943)	10, 11, 12
	<u>Illinois Bell Telephone Co. v. Allphin</u> , 60 Ill. 2d 350, 326 N.E.2d 737 (1975)	11, 12
	<u>GTE Automatic Elec., Inc. v. Allphin</u> , 68 Ill. 2d 326, 369 N.E.2d 841 (1977)	11

	<u>Sta-Ru Corp. v. Mahin</u> , 64 Ill. 2d 330, 356 N.E.2d 67 (1976)	11
	<u>Saxon-Western Corp. v. Mahin</u> , 39 Ill. App. 3d 100, 349 N.E.2d 591 (1st Dist. 1976)	11
	<u>Keystone Consol. Indus. v. Allphin</u> , 45 Ill. App. 3d 714, 359 N.E.2d 1202 (3d Dist. 1977)	11
B.	Plaintiffs Have Alleged That The Tax Here Is Unauthorized By Law.	12
	Ill. Const. Art. VII, § 6(e)	13, 14
	65 ILCS § 5/11-42-11	14, 15
	Chicago Municipal Code § 4-280-170(A)	15
	<u>Satellink, Inc. v. City of Chicago</u> , 168 Ill. App. 3d 689, 523 N.E.2d 13 (1st Dist. 1988)	15
	<u>Oak Park Trust & Savings Bank v. Village of Mount Prospect</u> , 181 Ill. App. 3d 10, 536 N.E.2d 763 (1st Dist. 1989)	15
C.	Chicago Cable Properly Pled A Due Process Violation Which Supported Jurisdiction Under the <u>Owens</u> Doctrine.	15
	<u>Austin Liquor Mart, Inc. v. Department of Revenue</u> , 51 Ill. 2d 1, 280 N.E.2d 437 (1972)	15
	<u>Philger, Inc. v. Department of Revenue</u> , 208 Ill. App. 3d 1066, 567 N.E.2d 773 (5th Dist. 1991)	16, 17
	735 ILCS § 5/451	16
	<u>Mr. Car Wash, Inc. v. Department of Revenue</u> , 27 Ill. App. 3d 931, 327 N.E.2d 88 (4th Dist. 1975)	17
	<u>Material Service Corp. v. Department of Revenue</u> , 105 Ill. App. 3d 74, 434 N.E.2d 763 (1st Dist. 1982), <u>aff'd</u> , 98 Ill. 2d 382, 457 N.E.2d 9 (1983)	17
III.	THE CITY'S ADMINISTRATIVE HEARING PROCEDURE IS NOT AN ADEQUATE REMEDY AT LAW.	18
	<u>Owens-Illinois Glass Co. v. McKibbin</u> , 385 Ill. 245, 52 N.E.2d 177 (1943)	18

Puleo v. Department of Revenue, 117 Ill. App. 3d 260,
453 N.E.2d 48 (4th Dist. 1983) 18

Scott v. Department of Commerce and Community Affairs,
84 Ill. 2d 42, 416 N.E.2d 1082 (1981) 18

General Ruling 84-1, § 12 19

Mathews v. Eldridge, 424 U.S. 319 (1976) 19

CONCLUSION 16

INTRODUCTION

The City's arguments as to why the complaint here did not even state a claim sufficient to invoke the circuit court's equitable jurisdiction are completely without merit. The City's lead argument is that this Court should overrule Owens-Illinois Glass Co. v. McKibbin, 385 Ill. 245, 52 N.E.2d 177 (1943), in cases not subject to the Administrative Review Act, 735 ILCS § 5/3-101 et seq. This Court, of course, has no power to do so; decisions by the Illinois Supreme Court are binding precedent that must be followed until that Court overrules them. Even if this Court did have the authority to overturn Supreme Court precedent, there is no basis for the underlying premise on which the City's argument for overturning Owens is based -- that review by certiorari of a decision by the City Department of Revenue is identical to judicial review under the Administrative Review Act. Review by certiorari is considerably narrower than that provided by the Administrative Review Act. Litigants like the plaintiffs here would suffer significant prejudice if they are now forced to proceed before municipal agencies without the protections afforded by either the Owens doctrine or the Administrative Review Act.

The rest of the City's arguments essentially consist of improper attempts to contest the facts alleged in the complaint. The City does not dispute that cable television is a "service" occupation under Illinois law. Nonetheless, it asserts that the provision of cable converters and remotes are "separate" from the provision of cable TV services and thus can be taxed. This completely ignores the reality of the situation: the converters and remotes are useful only to receive plaintiffs' cable television services, as the complaint clearly alleges. No one in their right mind would lease a converter and remote without also subscribing to the cable

service. This is a classic example of a situation in which the property leased is incidental to the service it accompanies.

At bottom, the problem with the City's position is that it -- like the trial court -- simply refuses to accept the factual allegations contained in plaintiffs' complaint. Those allegations, at a minimum, are sufficient to state a claim that the converters and remotes are incidental to the plaintiffs' cable television service and that the City's imposition of a tax here is unauthorized by law or imposed upon property exempt from taxation. Since that is all that is required to invoke the circuit court's equitable jurisdiction, it is clear that the court erred in dismissing plaintiffs' complaint.

I. THE OWENS DOCTRINE IS BINDING SUPREME COURT PRECEDENT AND CANNOT BE OVERTURNED BY THIS COURT.

A. The Owens Doctrine Is Still The Law Where, As Here, The Administrative Review Act Does Not Apply.

The City's principal argument is that this Court should jettison the Owens doctrine in cases where, as here, the Administrative Review Act does not apply. This Court could only take that course if it were also willing to abandon a number of other fundamental legal principles, such as stare decisis and the role that the Supreme Court has in establishing Illinois law.

Twenty years have passed since the last successful challenge to the viability or scope of the Owens doctrine, in Illinois Bell Telephone Co. v. Allphin, 60 Ill. 2d 350, 326 N.E.2d 737 (1975). In that case, the Supreme Court held that Owens and its progeny no longer applied "as to those situations covered by the Administrative Review Act." Id. at 359, 326 N.E.2d at 742. The Court was careful, however, to

preserve Owens in cases not subject to the Administrative Review Act; the Court did not even question Owens's continued applicability to cases not covered by that statute.^{1/}

In fact, only two years later, the Supreme Court expressly affirmed the continuing viability of the Owens doctrine in cases where review is not available under the Administrative Review Act:

"Owens-Illinois Glass Co. v. McKibbin (1943), 385 Ill. 245, 256-57, reviewed the decisions of this court regarding injunctive relief in tax matters and acknowledged the *firmly established* principle that 'equity has jurisdiction to enjoin the collection of an unauthorized tax, although there exists a concurrent remedy at law.' *This principle continues to be viable* (see Sta-Ru Corp. v. Mahin (1976), 64 Ill. 2d 330, 334; Illinois Bell Telephone Co. v. Allphin (1975), 60 Ill. 2d 350, 359-361) despite a modification to that rule created in Illinois Bell. In Illinois Bell (60 Ill. 2d 350, 359), this court held that the above proposition from Owens was no longer applicable where an administrative remedy was available under the Administrative Review Act."

Snow v. Dixon, 66 Ill. 2d 443, 452-53, 362 N.E.2d 1052, 1056 (1977) (emphasis added). Thus, Snow and Illinois Bell establish conclusively that the Owens doctrine is alive and well in situations not covered by the Administrative Review Act. This Court is required to follow that precedent. "[A] supreme court decision is the law of the State, and it is binding upon both the circuit and appellate courts. Accordingly, once the supreme court has declared the law on any point, [this court] may not refuse to follow it." Clark Oil & Refining Corp. v. Johnson, 154 Ill. App. 3d 773, 780, 506 N.E.2d 1362, 1366 (1st Dist. 1987). See also People v. Gersch, 135 Ill. 2d 384, 396, 553 N.E.2d 281, 286 (1990) (summarizing Illinois stare

^{1/} The City mischaracterizes Illinois Bell as a routine application of the exhaustion of remedies doctrine. City Br. 14-15. As the decision itself indicates, however, the Court limited Owens specifically because of "the adoption of the Administrative Review Act." 60 Ill. 2d at 359, 326 N.E.2d at 742. This result was compelled by the explicit language of the statute. See 735 ILCS § 5/3-102 (stating that where the Administrative Review Act applies, "any other statutory, equitable or common law mode of review of decisions of administrative agencies heretofore available shall not be employed after the effective date hereof").

decisis principles). As a result, this Court need not entertain the City's policy arguments concerning Owens.

Not only is the continued viability of Owens settled by the Supreme Court's decisions, but this Court also has expressly rebuffed an attempt to limit the scope of the Owens doctrine, based on an argument (like the City's argument here) that an adequate remedy at law existed that had to be exhausted.

In West Suburban Hospital Medical Center v. Hynes, 173 Ill. App. 3d 847, 527 N.E.2d 1086 (1st Dist. 1988), this Court held as follows:

"Where a tax is unauthorized by law, or where it is levied upon property exempt from taxation, a taxpayer need not look to the remedy at law, but may seek injunctive relief. These two exceptions [under Owens] constitute independent grounds for equitable relief. In such cases, the remedy at law is not exclusive; it is not necessary that the remedy at law be inadequate. Rather, the two remedies, the legal remedy and the remedy of injunction, are cumulative and the taxpayer may elect to pursue either one."

Id. at 853, 527 N.E.2d at 1090-91. Although we relied on West Suburban Hospital in our opening brief, the City does not bother to mention the case in its brief, undoubtedly because the decision is fatal to the City's argument.^{2/}

^{2/} The City attempts to blunt the force of Snow by relegating it to a footnote and calling it and the many other subsequent cases relying on the Owens doctrine "a scattering of cases" that do not "expressly affirm the validity of the Owens exceptions in cases in which an adequate remedy at law exists in the form of certiorari review." City Br. 15 n.3. That is not true, as indicated by the quotation in the text from Snow itself. The City's argument also ignores the limited nature of the Illinois Bell holding -- the Court there did not overrule Owens in cases not covered by the Administrative Review Act -- as well as this Court's decision in West Suburban Hospital. See also Williams v. City of Chicago, 36 Ill. App. 3d 216, 219 n.3, 343 N.E.2d 539, 542 n.3 (1st Dist. 1976) (in a transaction tax case, this Court noted that the Owens doctrine survived Illinois Bell for cases not covered by the Administrative Review Act, citing North Pier Terminal Co. v. Tully, 62 Ill. 2d 541, 343 N.E.2d 507 (1975), but decided that jurisdiction was proper due to a lack of an adequate remedy at law), rev'd on other grounds, 66 Ill. 2d 423, 362 N.E.2d 1030 (1977); National Pride of Chicago, Inc. v. City of Chicago, 206 Ill. App. 3d 1090, 562 N.E.2d 563 (1st Dist. 1990) (jurisdiction to seek equitable relief based on Owens); Katz v. City of Chicago, 177 Ill. App. 3d 305, 532 N.E.2d 322 (1st Dist. 1988) (same). The fact that courts have continued to permit equitable relief under Owens in non-Administrative Review Act tax cases unquestionably reflects the fact that it is so well settled that Owens applies in that situation. This is particularly true given that Owens goes to a
(continued...)

Owens has been the law for 52 years, and decisions in the past two decades have consistently reaffirmed that it remains the law in cases not covered by the Administrative Review Act. This Court must follow Owens -- and the Owens line of cases compels the conclusion that the circuit court here erred in dismissing plaintiffs' complaint.

B. The City's Contention That There Is "No Difference" In Review Under The Administrative Review Act And Review By Certiorari Is Not Correct.

Even if this Court had the power to overrule Owens, the City's arguments for doing so do not withstand scrutiny. The City's central policy argument is that, since the Supreme Court in Illinois Bell curtailed use of the Owens doctrine where the Administrative Review Act applies, the same should occur where review of administrative action is only available by writ of certiorari -- because "[t]here is no difference in the review afforded by these two types of judicial review." City Br. 16 (emphasis added). That is not accurate.

Even the cases cited by the City reveal that important differences still exist between review by writ of certiorari and review under the Administrative Review Act. The most significant are these:

1. "[T]here is no absolute right to review by certiorari"; the decision whether to review a particular case "is within the discretion of the court." Stratton v. Wenona Community Unit Dist. No. 1, 133

2/(...continued)

court's jurisdiction, an issue that courts are obligated to consider sua sponte if the parties do not do so.

Ill. 2d 413, 428, 551 N.E.2d 640, 646 (1990).^{3/} In stark contrast, review under the Administrative Review Act is granted as a matter of right. 735 ILCS § 5/3-102.

2. Indeed, this Court has held that "application of the writ of certiorari is limited to two classes of cases": (a) where the "tribunal was without jurisdiction or where it exceeded its jurisdiction," and (b) where it "did not `proceed legally,' that is, where it did not follow the essential procedural requirements applicable to such cases." C & K Distributors, Inc. v. Hynes, 122 Ill. App. 3d 525, 528, 461 N.E.2d 560, 562 (1st Dist. 1984). Similarly, the Supreme Court emphasized in Stratton that certiorari was a means to obtain "limited review" over tribunals exercising quasi-judicial functions and that the "purpose of the writ" is to determine only whether a tribunal "proceeded according to the applicable law." 133 Ill. 2d at 427, 551 N.E.2d at 645 (citing Funkhouser v. Coffin, 301 Ill. 257, 133 N.E. 649 (1921), and People ex rel. Loomis v. Wilkinson, 13 Ill. 660 (1852)). See also, e.g., Hartley v. Will County Bd. of Review, 106 Ill. App. 3d 950, 954, 436 N.E.2d 1073, 1076 (3d Dist. 1982) ("stress[ing]" the "limited application of the writ of certiorari"); National Marine, Inc. v. EPA, 232 Ill. App. 3d 847, 851, 597 N.E.2d 911, 914 (3d Dist. 1992)(same), rev'd in part on other grounds, 159 Ill. 2d 381, 639 N.E.2d 571 (1994); Philger, Inc. v. Department of Revenue, 208 Ill. App. 3d 1066, 1071, 567 N.E.2d 773, 777 (5th Dist. 1991).^{4/}

^{3/} The City describes Stratton as a "[t]ax case" that was reviewed by certiorari. City Br. 16. That is an egregious misrepresentation. Stratton involved the expulsion of a teenager from high school; it has absolutely nothing to do with taxation. The other purported "[t]ax case" cited by the City (at 16), Smith v. Department of Public Aid, 67 Ill. 2d 529, 367 N.E.2d 1286 (1977), is also completely unrelated to taxation; Smith concerned the increased price that AFDC families had to pay for food stamps.

^{4/} The City relies upon Torres v. County of Kane Public Aid Committee, 130 Ill. App. 3d 296, 474 N.E.2d 45 (2d Dist. 1985), for its position that there are no differences between review by writ of certiorari and review pursuant to the Administrative Review Act. City Br. 16-17. This Court, of course, is bound by its own decision in C & K Distributors (which Torres rejected) and by the Supreme Court's later ruling in Stratton. In addition, Torres refused to follow older Supreme Court cases limiting the use of certiorari. 130 Ill. App. 3d at 297-98, (continued...)

3. The powers of the reviewing court acting pursuant to a writ of certiorari are severely limited, to either quashing the writ of certiorari, or quashing the action of the agency. Stratton, 133 Ill. 2d at 427, 551 N.E.2d at 645. The court's powers under the Administrative Review Act are much broader. 735 ILCS § 5/3-111.

4. In a certiorari proceeding, an agency order must be upheld if there is "any evidence [in the record] fairly tending to support" the agency's order. Nowicki v. Evanston Fair Housing Review Bd., 62 Ill. 2d 11, 15, 338 N.E.2d 186, 188 (1975); see also Caldbeck v. City of Chicago Park Dist., 97 Ill. App. 3d 452, 458, 423 N.E.2d 230, 235 (1st Dist. 1981) ("In a certiorari proceeding, the court must ascertain whether the agency had jurisdiction, whether it proceeded according to law and acted on the evidence, and whether there is anything in the record which fairly tends to sustain the action of the agency"). That standard of review is narrower than that applicable under the Administrative Review Act: whether the "manifest weight of the evidence" supports the agency's decision. Burke v. Board of Review, 132 Ill. App. 3d 1094, 1104, 477 N.E.2d 1351, 1359 (2d Dist. 1985); Wolfe v. Board of Educ., 171 Ill. App. 3d 208, 210, 524 N.E.2d 1177, 1178 (1st Dist. 1988). To be sure, there is not a dramatic difference between these two standards, but it is not difficult to conceive of cases in which the agency's ruling might withstand scrutiny under the more deferential review by certiorari, but be overturned under the somewhat more demanding administrative review standard.

4/(...continued)

474 N.E.2d at 46. Stratton's reliance on venerable authority like Funkhouser and Loomis completely undermines the foundation of the Second District's ruling in Torres (which in any event is, at best, clearly the minority view in Illinois).

In sum, the City is simply wrong in contending that there is "no difference" between the judicial review afforded by the Administrative Review Act and that available via certiorari. As a result, the rationale used to overrule Owens in cases subject to the Administrative Review Act does not apply to cases outside the scope of that statute, even if this Court had the power to dismantle Owens completely, which of course it does not.

C. The City's Other Policy Arguments Do Not Support Elimination Of The Owens Doctrine Either.

The City offers several additional policy arguments for elimination of the Owens doctrine. First, the City asserts that "[p]reempting administrative review before the record is developed and any errors corrected, would 'disrupt the orderly administration of the tax-collecting machinery, thereby embarrassing and deranging the operations of the government and causing serious detriment to the public.'" City Br. 17 (citation omitted). But the Owens doctrine poses no such risk, because it does not confer equitable jurisdiction where the taxpayer alleges mere irregularities in the tax collection process. (On this point the parties agree. See Pl. Br. 12-13; City Br. 39-40.) Further, in this case the City has performed an extensive audit and determined that Chicago Cable owes a tax; presumably the City's expertise has been utilized already in that procedure.^{5/}

^{5/} Moreover, the Owens Court considered and rejected precisely the same argument that the City is making here about the purported benefits of its administrative hearing procedures:

"Appellant, however, points out that the Retailers' Occupation Tax Act makes provision for a hearing in case the tax is improperly applied, and has provisions for appeal to the court, and that the taxpayer may obtain a refund in case of payment, where it is determined the occupation was not subject to tax. He also calls attention to the provisions of the act permitting taxes to be paid under protest, with the right to return in case it is held it is not properly collected. The presence of such provisions in the law does not prevent enjoining an illegal or unauthorized tax."

(continued...)

The City also contends that "there is no reason why home rule tax ordinances that create an administrative process should receive less judicial deference than the state statutory scheme that was at issue in Illinois Bell," and that "just as the General Assembly's creation of administrative remedies gave birth to the rule that such remedies should be exhausted, a home rule municipality's creation of similar remedies should dictate the same result." City Br. 20-21 (emphasis added). But it was the General Assembly, not the judiciary, that enacted the Administrative Review Act and excluded from its scope municipal administrative agencies. This Court must follow legislative directives just as it must follow Supreme Court decisions like Owens.

The City also urges this Court to overrule Owens in order to "harmonize home rule tax equity practices with other tax equity practices" and to "cement the uniformity of decisionmaking review." City Br. 20-21. But any suggestion that overruling Owens will harmonize State and City tax procedures is misleading, because taxpayers may contest State tax assessments in court by paying the assessed tax under protest and seeking an injunction -- without exhausting the State's administrative hearing procedures, and whether or not the assessment is alleged to be "unauthorized by law" -- under 30 ILCS § 230/2a (commonly known as the "Protest Act"). The City's attempt to eliminate Owens is not an attempt to harmonize tax procedures, but an effort to eliminate the scant procedural rights that City taxpayers currently have.

5/(...continued)
Owens, 385 Ill. at 254-55, 52 N.E.2d at 182.

In short, the City's policy arguments provide no justification for this Court to reconsider -- even if it could -- the longstanding Owens precedent.^{6/}

II. THE ALLEGATIONS IN THE COMPLAINT ARE MORE THAN SUFFICIENT TO INVOKE JURISDICTION UNDER OWENS.

The Owens doctrine provides that a court's equitable jurisdiction is properly invoked "where the tax is unauthorized by law, where the tax is levied upon exempt property, or where there exists no adequate remedy at law." Santiago v. Kusper, 133 Ill. 2d 318, 324, 549 N.E.2d 1251, 1254 (1990). Given that Owens is the law and that this Court must follow it, the only real issue in this case is whether plaintiffs' allegations -- which must be taken as true in the context of a motion to dismiss -- come within this standard.

A. A Tax Is "Unauthorized by Law" When The Taxing Authority Attempts To Tax Non-Taxable Transactions.

The City takes an extraordinarily narrow view of the Owens doctrine. Its position is that plaintiffs must allege that the entire ordinance is invalid before it is "unauthorized by law" within the meaning of Owens and its progeny. City Br. 27-31. Thus, the City asserts that, since "there is no absence of statutory authority for the Chicago transaction tax," the "imposition of taxes against Chicago Cable is authorized." City Br. 30.

^{6/} Even if Owens could be overturned, the precedent of Illinois Bell and related cases indicates that such a significant change in the law should be applied only to cases filed after the date on which the Supreme Court adopts the change. See Illinois Bell, 60 Ill. 2d at 359, 326 N.E.2d at 742 (since Bell had relied upon the Owens doctrine, "[f]undamental fairness" dictated that Owens be applied in that case); Sta-Ru Corp. v. Mahin, 64 Ill. 2d 330, 334, 356 N.E.2d 67, 69 (1976) (taxpayer's case, filed prior to decision in Illinois Bell, was allowed to proceed based on the Owens doctrine).

The first problem with the City's argument is that it is flatly inconsistent with a wealth of precedent, including Owens itself. In Owens, a bottle manufacturer complained of the Department of Revenue's imposition of Retailers Occupation Tax assessments where the taxpayer was a wholesaler but not a retailer. The taxpayer did not challenge the validity of the Retailers' Occupation Tax, but only the particular tax as applied by the Department to transactions that were not taxable. The Supreme Court found this to be sufficient to invoke the court's equitable jurisdiction:

"We can see no substantial distinction between the Director of Finance taking a course of action which determines an occupation is taxable, when it is not in fact taxable, and of levying an unauthorized tax. In either event unless the action is restrained the taxpayer is required to pay unauthorized taxes. * * *

"The allegations contained in the complaint and admitted to be true by appellant's motion disclose plaintiff who is not subject to the Retailers' Occupation Tax Act and the intention of the Director of Finance to make sales taxable which are declared not taxable under the rules of the Department. * * * We are of the opinion the complaint states a case where one not liable for the payment of the tax is made liable by action of the Director."

385 Ill. at 259, 260, 52 N.E.2d at 184. The city's brief makes no attempt to confront the huge body of case law holding, like Owens, that allegations that a tax as applied is "unauthorized by law" will support Owens jurisdiction.^{7/} Rather, the City sets up -- and of course knocks down -- the straw man argument that "Chicago Cable, instead, argues that the transaction tax is unauthorized by law because it is an unconstitutional tax on occupations and services." City Br. 30. That is simply not our contention. It is the

^{7/} Our opening brief (at 11-15) fully discusses the precedent holding that jurisdiction under Owens need not be based on a challenge to the tax statute itself, but may be based upon a challenged application of the tax to a particular set of transactions. See Illinois Bell Telephone Co. v. Allphin, 60 Ill. 2d 350, 326 N.E.2d 737 (1975); GTE Automatic Elec., Inc. v. Allphin, 68 Ill. 2d 326, 369 N.E.2d 841 (1977); Sta-Ru Corp. v. Mahin, 64 Ill. 2d 330, 356 N.E.2d 67 (1976); Saxon-Western Corp v. Mahin, 39 Ill App. 3d 100, 349 N.E.2d 591 (1st Dist. 1976); Keystone Consol. Indus. v. Allphin, 45 Ill. App. 3d 714, 359 N.E.2d 1202 (3d Dist. 1977).

City's gross mischaracterization of our position that "borders on the frivolous," not our argument. City Br. 30.

The second flaw with the City's position is that it makes no sense. Under the City's view, if a municipality lawfully enacts an ordinance authorizing a tax on the "rental of any personal property," a taxpayer could never argue that a tax was "unauthorized by law," even if the City attempted to place a tax on items clearly outside the scope of the ordinance -- say, in the example just given, a tax on legal services, or a tax on the sale of real property. That cannot be right. See Illinois Bell, 60 Ill. 2d at 362, 326 N.E.2d at 744 (a complaint "states a good cause of action under the Owens doctrine" when it alleges that the government "has levied an otherwise lawful tax on `property exempt from taxation"). Whether a tax is "unauthorized by law" is a function of two things: whether the tax was validly enacted, and whether it is being applied to a transaction within the scope of the ordinance. Limiting the meaning of "unauthorized by law" to the first category would not only be inconsistent with Owens and dozens of other cases, but it would be giving taxing authorities carte blanche to do as they wish regardless of the limitations placed on their authority by law. The City's crabbed interpretation of "unauthorized by law" is supported by neither precedent nor reason and must be rejected.

B. Plaintiffs Have Alleged That The Tax Here Is Unauthorized By Law.

Much of the City's remaining argument is an attempt to contest, deny or recast plaintiffs' factual allegations. Despite the clear requirement that the allegations in the complaint must be accepted as true on a motion to dismiss, the City strives mightily to spin the facts its way, specifically attempting to convince this Court that plaintiffs' allegations must be read as admissions that the use of the Converters and Remotes

constitute leases that are separate from the provision of cable television services. See, e.g., City Br. 29, 33.

The complaint, however, clearly alleges that "[t]he use of the Converters and Remotes by the Plaintiffs in the provision of cable television services does not constitute a lease or rental of equipment" (Complaint ¶ 57; App. A52), and this allegation is supported by detailed factual allegations as to the use of the equipment (App. A42-A47). The complaint also plainly alleges that the provision of converters and remotes, far from being "separate" from the cable television service (City Br. 33), is integral and incidental to the provision of those services, that the cost or value of the converters and remotes is a minor and incidental portion (less than 10 percent) of the services provided, and that the converters and remotes have no use apart from enabling receipt of the cable service transmissions. App. A43-A46; see Pl. Br. 5-6. Indeed, it is remarkable that the City even tries to argue that the converters and remotes are somehow "separate" from the cable television services that plaintiffs provide. As is crystal clear from the complaint, the converters and remotes are completely useless without plaintiffs' cable services; they can be used only to access plaintiffs' cable television services. If these items are not "incidental" to a service, it is difficult to know what would be.

Plaintiffs have clearly stated a claim in Count I, contending that the tax on the converters and remotes is not authorized under the ordinance, and Count II, contending that the transaction tax as applied to a service business violates the home rule provisions of the Article VII, § 6(e) of the Illinois Constitution. The rule of taxation at issue here -- that personal property transferred or used incidentally to a service is considered part of the service, and is not taxable if the service is not taxable -- is fully discussed in our opening brief. Pl. Br. 15-27. Apart from generally denying plaintiffs' factual allegations, the City also

attacks Count II of the First Amended Complaint by contending that it may tax the cable service business despite the home rule limitation. First, the City contends -- without citing a single case in support -- that the Constitutional provision "does not prohibit municipalities from taxing the lease of personal property incident to a service, let alone exclude from taxation personal property incident to a service," City Br. 33-34, and, even more remarkably, that "the Illinois Constitution does not prohibit service taxes as such, and the case law prohibits them only if they amount to occupation taxes," City Br. 38. These contentions are clearly wrong and are squarely refuted in our opening brief. See Pl. Br. at 15-21 (discussing cases).

The City also contends that the tax imposed here has been authorized by the State Legislature in 65 ILCS § 5/11-42-11, and thus does not offend the home rule restriction of the City's ability to "license for revenue or impose taxes upon or measured by income or earnings or upon occupations." Ill. Const. Art. VII, § 6(e). But that statute is universally understood to authorize the City's cable franchise fee, and not to authorize a tax (and certainly not a tax that is supposed to be paid solely by each individual customer). The City, for example, has relied upon the statutory provision to enact its franchise fee as part of its Cable Communication ordinance, which provides that "[a] grantee, in consideration of the privilege granted under the franchise for the operation of a cable television system within the public ways of the city, the expense of regulation pursuant to the franchise incurred by the city and for other costs and considerations, shall pay to the city a franchise fee of not less than five percent of its annual gross revenues during the period of its operation under the franchise." Chicago Municipal Code § 4-280-170(A) (emphasis added). But a fee enacted as part of a licensing scheme is not a tax within the meaning of the Constitutional provision, Satellink, Inc. v. City of Chicago, 168 Ill. App. 3d 689, 694-95, 523 N.E.2d 13

(1st Dist. 1988) (which construed this very franchise fee as "compensation for a benefit or for services rendered," distinguishing it from the taxes at issue in that case). See also Oak Park Trust & Savings Bank v. Village of Mount Prospect, 181 Ill. App. 3d 10, 15-16, 536 N.E.2d 763 (1st Dist. 1989). Moreover, if this franchise fee were deemed to be a tax, then it would run afoul of other Constitutional provisions, including the Uniformity Clause and the First Amendment, since broadcast television stations and satellite television services are not similarly taxed. See Satellink, Inc., 168 Ill. App. 3d at 693-96. Given all of the flaws with the City's argument, it is understandable why the City buries this point on page 39 of its brief, and did not raise it in the circuit court.^{8/}

C. Chicago Cable Properly Pled A Due Process Violation Which Supported Jurisdiction Under the Owens Doctrine.

The City attempts to brush aside Chicago Cable's allegations in Count III with the argument that "Illinois law holds that the estoppel doctrine does not apply to a governmental entity where the collection of public revenues is involved," citing Austin Liquor Mart, Inc. v. Department of Revenue, 51 Ill. 2d 1, 4, 280 N.E.2d 437, 439 (1972). City Br. 41. The circuit court similarly relied upon Austin Liquor Mart, together with a number of similar cases, in rejecting Chicago Cable's estoppel claim. App. A30-A36.

Austin Liquor Mart bears no resemblance to this case. There, the taxpayer was audited and issued a notice of tax liability for \$15,194.28 of Retailers' Occupation Tax, which the taxpayer promptly paid.

^{8/} In any event, even if the City were correct that 65 ILCS § 5/11-42-11 authorizes the imposition of the transaction tax upon the converters and remotes, the argument affects only Count II of the First Amended Complaint. Count I still supports the jurisdiction of the circuit court.

Three months later, the Department of Revenue, presumably sensing that it missed something in the audit, issued subpoenas for periods including the period previously audited, for which the limitations period had not expired. The taxpayer sought to quash the subpoenas, contending that the "final assessment" previously issued was binding on both parties, and that the Department was barred from further investigation.

This case is entirely different; plaintiffs have alleged that the positive acts of the City induced detrimental reliance, a situation considered recently in Philger, Inc. v. Department of Revenue, 208 Ill. App. 3d 1066, 567 N.E.2d 773 (5th Dist. 1991). The plaintiff, Philger, bought a restaurant and contacted the Department of Revenue to find out how much tax was owed by the former owner that Philger, as buyer, was required to withhold from payment to the seller and pay to the Department under the bulk sales rule (now found at 735 ILCS § 5/451). The Department issued a bulk sales stop order in the amount of \$20,000, but Philger was informed by a Department employee that the tax due was \$7,385. Philger paid the latter amount to the Department before closing on the acquisition of the restaurant. About a year later, the Department attempted to collect the full \$20,000 from Philger.

In those circumstances, the Fifth District would not sanction the Department's attempt to invoke the general rule of Austin Liquor Mart that the government cannot be estopped from collecting a tax. Prefacing its remarks with the comment that "administrative bodies must exercise their discretion judiciously, not arbitrarily," the Philger court distinguished Austin Liquor Mart, noting that the defendant there (like the City here) "fails to mention" the "corollary" to the Austin rule -- namely,

"that the State does not have absolute immunity from the application of equitable principles, and the State can be estopped in the exercise of its power of taxation or the collection of revenue in order to prevent fraud or injustice. In the instant case, it would be an injustice

for plaintiff to be required to pay the additional \$20,000 demanded by defendant. The \$20,000 which defendant seeks was a tax on sales made by the former owners of the restaurant, not on sales made by plaintiff. Had defendant demanded the money prior to the closing of the sale, the \$20,000 could have been deducted from the purchase price."

208 Ill. App. 3d at 1072, 567 N.E.2d at 777.

In this case, the elements of inducement and detrimental reliance are equally clear. The City induced plaintiffs not to collect the transaction tax on its converters by explicit written advice and by its published Ruling No. 7, which expressly states that personal property used incidentally to the provision of a service is not taxable. As a result, plaintiffs were induced to forego the collection of tax upon their cable subscribers -- money that cannot now be recouped. This is precisely the type of injustice that has long been considered an exception to the estoppel doctrine, and which rises to the level of a Due Process violation. See Pl. Br. 29-33.^{9/}

III. THE CITY'S ADMINISTRATIVE HEARING PROCEDURE IS NOT AN ADEQUATE REMEDY AT LAW.

Finally, in an effort to refute plaintiffs' assertions of grounds for equitable jurisdiction independent from Owens (Complaint, ¶¶ 107-11, App. A64-A68), the City argues at great length that its administrative hearing procedure provides an adequate remedy at law. City Br. 21-27. Our primary complaint on this

^{9/} The City asserts that "[t]he estoppel doctrine does not constitute an exception independently permitting equity jurisdiction" (City Br. 40-41), citing two cases which do not consider this issue, Mr. Car Wash, Inc. v. Department of Revenue, 27 Ill. App. 3d 931, 327 N.E.2d 88 (4th Dist. 1975), and Material Service Corp. v. Department of Revenue, 105 Ill. App. 3d 74, 434 N.E.2d 763 (1st Dist. 1982), aff'd, 98 Ill. 2d 382, 457 N.E.2d 9 (1983). In any event, the "estoppel" alleged by plaintiffs here constitutes an affirmative violation of the City's responsibilities, and thus is an independent basis for jurisdiction. See authorities cited at Pl. Br. 29-33.

issue is that, under the City's own hearing procedures, the City fails to provide an impartial decisionmaker, since the City Department of Revenue's hearing officer is required to serve as both prosecutor and judge:

"The Hearing Officer shall present the Department's case, cross examine witnesses who testify for others in the proceedings and otherwise represent the Department in the proceedings . . . The Hearing Officer shall not engage in ex parte discussions with any party or person, except that this provision shall not preclude discussions with other Department employees, officers or designated representatives." General Ruling 84-1, pp. 11-12, App. A105-A106.

The City cites one Illinois tax case for the proposition that this combination of functions in the hearing officer does not offend due process, Puleo v. Department of Revenue, 117 Ill. App. 3d 260, 453 N.E.2d 48 (4th Dist. 1983), but, as discussed earlier, State taxpayers have the option of paying the assessed taxes under protest and filing an action in circuit court, and therefore have full ability to present their case to an indisputably impartial decision maker. The State cases are therefore not relevant.

The City also relies on Scott v. Department of Commerce and Community Affairs, 84 Ill. 2d 42, 416 N.E.2d 1082 (1981), a case in which an injunction was sought to prevent a hearing by the State Department of Commerce and Community Affairs to determine whether individuals should be removed from the East St. Louis Housing Authority. But this case is distinguishable from Scott, and from all of the other cases cited by the City, because here the City Department of Revenue has already audited the taxpayer and determined that an additional \$4.6 million of tax is due. This assessment would be treated as prima facie correct at the hearing. General Ruling 84-1, § 12; App. A110. The hearing officer therefore must not only prosecute the City's case, but, in order to find for the taxpayer, must overturn the prior determination of his or her own Department.

The City gives lip service to the flexible due process analysis required by Mathews v. Eldridge, 424 U.S. 319 (1976), but in that case the Supreme Court mandated a balancing of interests which the City has declined to undertake:

"First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Id. at 334. Here, any changes to the City's procedures designed to separate the prosecutorial and adjudicatory functions, and to otherwise safeguard the impartiality of its hearing officers, would entail a de minimis burden on the City, which is outweighed by the taxpayer's right to a fair hearing before an impartial decisionmaker before being deprived of \$4.6 million. As a result, the City's procedures do not satisfy fundamental due process requirements under the balancing test required by Mathews.

CONCLUSION

The complaint here is easily sufficient to at least state a claim that is within the equitable jurisdiction of the circuit court. Accordingly, the circuit court's dismissal of the complaint should be reversed and the case remanded for further proceedings.

May 22, 1995

Respectfully submitted,

Roger J. Jones
James C. Schroeder
John E. Muench
MAYER, BROWN & PLATT
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Fred M. Ackerson
D'ANCONA & PFLAUM
30 North LaSalle Street
Suite 2900
Chicago, Illinois 60602
(312) 580-2058

Attorneys for Plaintiffs-Appellants