State of West Virginia
Office of the Attorney General

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Attorney General

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August 13, 2014

The Honorable Steven A. Jones
Prosecuting Attorney
Richie County
115 East Main Street, Room 302
Harrisville, WV 26362

Dear Prosecutor Jones,

You have asked for an Opinion of the Attorney General about whether a town may tax transactions that occur outside its municipal boundaries. This Opinion is being issued pursuant to West Virginia Code § 5-3-2, which provides that the Attorney General "may consult with and advise the several prosecuting attorneys in matters relating to the official duties of their office." To the extent this Opinion relies on facts, it is based solely on the factual assertions set forth in your correspondence with the Office of Attorney General.

Your letter concerns the lawfulness of a municipal sales and use tax imposed by the Town of Harrisville. The town levies a 1% municipal sales and use tax on its citizens and businesses. *See* Ordinance Imposing Alternative Municipal Sales and Service Tax and Alternative Municipal Use Tax in Accordance with WV Code, Chapter 8, Article 13C §§ 11-44, 11-47 (amended Mar. 12, 2013). By its own terms, the town's ordinance limits the tax's application to transactions within the town's boundaries. *Id.* You state in your letter that *in operation*, however, citizens and businesses in Ritchie County within the 26362 zip code who reside beyond the borders of Harrisville are being taxed.

Your letter raises the following legal question:

*Does a municipal sales or use tax violate Article X, Section 9 of the West Virginia Constitution or Chapter 8, Article 13C, Section 4 of the West Virginia Code if applied beyond the municipality's boundaries?*

Municipal corporations require legislative authorization before they may levy taxes. As the West Virginia Supreme Court of Appeals explained in *Hunkle v. City of Huntington*, "[a] municipality has no inherent power to levy taxes; it can do so only by virtue of authority delegated to it by the legislature." 134 W. Va. 249, 255, 58 S.E.2d 780, 783 (1950) (internal

quotations omitted). The Legislature's power to authorize such taxation is found in Article X, Section 9 of the state constitution. *See* W. Va. Const. art. X, § 9 ("The Legislature may, by law, authorize the corporate authorities of cities, town and villages, for corporate purposes, to assess and collect taxes; but such taxes shall be uniform, with respect to persons and property within the jurisdiction of the authority imposing the same.").

It follows, therefore, that municipalities must strictly comply with legislative limits on any grant of taxing authority. Because a municipality's "powers are limited," "the statute vesting it with power to tax must be strictly construed and strictly followed." *Hunkle*, 134 W. Va. at 255, 58 S.E.2d 784 (internal quotations omitted). The Supreme Court of Appeals has instructed that "all doubts" over a tax statute "should be resolved against the city and in favor of the taxpayer, and [the city] must show that all conditions essential to the lawful exercise of power delegated to it have been complied with." *Id.*

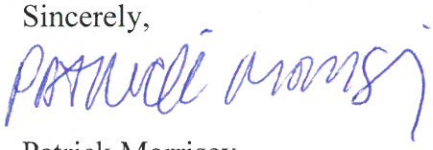
With respect to sales and use taxes, we believe that the Legislature has authorized municipal taxes *only* over sales and services that the buyer actually receives within the geographical bounds of "the municipality." Under Section 8-13C-4(c)(2) of the West Virginia Code, the Legislature has granted municipalities the power to tax sales and services "sourced to the municipality." W. Va. Code § 8-13C-4(c)(2). By statute, a sale is "sourced" to the location where the buyer receives a product, usually the seller's business location or the buyer's delivery address. *Id.* § 11-15b-15(a). This geographical limitation is further reflected in the fact that municipal sales and service taxes are subject to the same base as state taxes levied "on sales made and services rendered *within the boundaries of the municipality*." *Id.* § 8-13C-4(c)(1) (emphasis added). Similarly, municipal sales and service taxes are considered to be "in addition to" state taxes "on sales made and services rendered *within the boundaries of the municipality*." *Id.* § 8-13C-4(f) (emphasis added).

Here, it appears that the Town of Harrisville has not in fact authorized any municipal sales or use taxes beyond its municipal boundaries. *See* Ordinance Imposing Alternative Municipal Sales and Service Tax and Alternative Municipal Use Tax in Accordance with WV Code, Chapter 8, Article 13C § 11-44 (amended Mar. 12, 2013) (imposing a tax "upon all persons or entities engaging in business within the municipal boundaries of the Town of Harrisville . . . on all sales and services rendered within the boundaries of the municipality of the Town of Harrisville"); *id.* § 11-47 (imposing a tax "on the use within this municipality of tangible personal property, custom software, and taxable services").

But if the tax is being applied "according to zip code," as you state, it would appear to be unlawful in operation. As you note in your correspondence, the 26362 zip code covers a much larger geographical area than the Town of Harrisville. If the town's tax is being imposed throughout that zip code, it would appear to violate the Legislature's limited grant of taxing authority, as well as the plain text of the town's own ordinance. As we do not have knowledge

of any specific instances of the tax being applied beyond the town's boundaries, we do not address broader questions about the liability of any municipality, state officials, or businesses who may have collected unauthorized taxes.

Sincerely,



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