



Philadelphia Beverage Tax survives appeals court challenge

By Andrew C. Tremble

On Wednesday, a Pennsylvania appeals court upheld the Philadelphia Beverage Tax (PBT), the controversial 1.5-cent-per-ounce tax on “sugar-sweetened beverages,” which went into effect on January 1. The court, sitting en banc, ruled 5–2 against the American Beverage Association and a group of local retailers who appealed the ruling issued by Common Pleas Court in December. The suit alleged, in its most general sense, that the cost of this tax would be passed through to the ultimate consumer of the beverage, thus effectively causing double taxation when coupled with the sales tax paid on the beverage at retail. In reaching its decision, the court found, among other things, that the PBT was not duplicative of the sales tax and therefore it does not violate Pennsylvania’s Sterling Act.¹

How is the PBT applied?

The PBT is a 1.5-cent-per-ounce tax, imposed on a distributor² upon each of the following: (1) the supply of any sugar-sweetened beverage to a dealer;³ (2) the acquisition of any sugar-sweetened beverage by a dealer, and (3) the transport of any sugar-sweetened beverage into the city by a dealer. A dealer is only required to pay the tax if it fails to report its dealer status to the distributor and proceeds to sell such sugar-sweetened beverage at retail.

What constitutes a “sugar-sweetened beverage” under the PBT?

Under the PBT, “sugar-sweetened beverages” are defined as “[a]ny non-alcoholic beverage that lists as an ingredient” either “any form of caloric sugar-based sweetener” or “any form of artificial sugar substitute” and “[a]ny non-alcoholic syrup or other concentrate that is intended to be used in the preparation of a beverage that lists” either of the foregoing sweeteners as an ingredient. The following examples of sugar-sweetened beverages are provided in the text of the ordinance: “soda[,]

¹ The Sterling Act is a Pennsylvania law that prevents a city from taxing subjects that are or may become subject to a state tax.

² A “distributor” is defined to mean any person who sells sweetened beverages to a dealer.

³ A “dealer” is defined to mean any person who sells sweetened beverages at retail.

non 100% fruit drinks[,] sports drinks[,] flavored water[,] energy drinks[,] pre-sweetened coffee or tea[] and non-alcoholic beverages intended to be mixed into an alcoholic drink.”

What is not a “sugar-sweetened beverage” under the PBT?

The PBT specifically excludes the following six items: (1) baby formula, (2) “medical food” as defined under the Orphan Drug Act, (3) any product that is milk by more than 50% of volume, (4) any product that is fresh fruit, vegetable or a combination more than 50% of volume, (5) unsweetened drinks to which sweetener can be added at the point of sale by the purchaser or seller, and (6) any syrup or other concentrate that the purchaser combines with other ingredients to create a beverage.

On what basis did the court rule that the PBT was authorized by the Sterling Act?

The main argument advanced against the PBT was that when taken off paper and put into real world effect, the cost of the tax was passed through to the ultimate consumer and it became duplicative of the Pennsylvania sales tax, thus violating the Sterling Act. The court, in beginning its discussion of this argument, articulated in simple terms that the true purpose of the Sterling Act is to prevent the double taxation of “the same thing.” The court proceeded to cite case law holding that “a tax’s ‘operation or incidence’ refers to the substantive text of the ordinance and does not concern the post-tax economic actions of private actors in response to the tax.”

The five-judge majority went on to state that the sales tax is a tax levied on a consumer upon purchasing a product at retail, while the PBT, on the other hand, “taxes non-retail distribution transactions.” As a result, the court reached the conclusion that “the PBT does not violate the duplicative-tax prohibition in the Sterling Act or encroach upon a field pre-empted by the [s]ales [t]ax because the taxes do not share the same incidence and merely have related subjects.”

What other arguments did the court reject in its decision?

Aside from the Sterling Act argument above, there were two additional substantive arguments advanced against the PBT. The first claimed that the PBT violated the Food Stamp Act by imposing a tax on the purchase of food using food stamp coupons. The court in dismissing this argument cited its previous rationale that this tax is at the distribution and not retail level and therefore there is no tax on the purchase of such food and the PBT does not violate the Food Stamp Act. The second argument claimed that the PBT is a property tax that violates the Pennsylvania Uniformity Clause due to the fact that it is imposed on a quantity and not on a fixed proportion of the value of the property. The court quickly dismissed this claim by proving that the PBT is an excise tax and not a property tax and the claim is without merit.

What is the current status of the PBT?

The PBT remains in effect after the ruling and shall continue to raise revenue for the city of Philadelphia. Since January the PBT has generated \$25 million dollars for the city of Philadelphia, falling far short of the city’s initial projections. The proceeds of the tax are earmarked to fund pre-K programs and community schools, as well as help rebuild parks and recreation centers citywide. While the ruling is a win for the city, it does not end the fight against this tax. The American Beverage Association and the local businesses could yet appeal this decision to the Pennsylvania Supreme Court, although no formal announcement of that intention has been made at this time.

For more information on the content of this alert, please contact your regular Nixon Peabody attorney or:

- Andrew C. Tremble at atremble@nixonpeabody.com or (312) 977-4389
 - Janet Garetto at jgaretto@nixonpeabody.com or (312) 425-8514
-