

Pennsylvania: Fight to block soda tax goes to the state Supreme Court



David M. Kall | Thursday, July 27, 2017

Last December, a trial court dismissed a lawsuit that a group of stakeholders filed against the city of Philadelphia and the Department of Revenue, as we [described](#) at the time. In their [complaint](#), the plaintiffs alleged that the so-called beverage tax, the imposition and collection of which began on Jan. 1, 2017, unlawfully duplicated the already-existing sales and use tax on soft drinks in violation of the [Pennsylvania Sterling Act](#); that it unlawfully circumvents the state taxing power; and that it violates the state constitution's uniformity clause. The uniformity clause provides that "[a]ll taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

Plaintiffs further advanced another theory that the federal Food Stamp Act and related provisions preempt the beverage tax because the tax is contrary to the purpose of the state's prohibition on charging a sales and use tax for purchases made using Supplemental Nutrition Assistance Program (SNAP) funds.

The effect of the beverage tax, they argued, would be to depress state revenues in an amount between \$2.7 million to \$7.8 million per year, thereby "impermissibly frustrate[ing] and obstruct[ing] the revenue raising purpose" of the state's sales and use tax.

After the trial court dismissed the suit, the plaintiffs immediately appealed, and last month, the court of appeals [affirmed](#), agreeing with the trial court that the 1.5 cents per fluid ounce tax on the distribution of certain sugar filled beverages is a lawful exercise of the authority of the city of Philadelphia.

Pennsylvania Fight to block soda tax goes to the s

Appellate court's rationale

With respect to the Sterling Act arguments, the court of appeals did not dispute the lower court's rationale that city and state constitute two different governmental units. Beyond this, the city's tax is on the *distribution* of the beverages at issue, while the state's is on the *retail* purchase of the sugary drinks. Thus, there is no violation of the duplicative-tax provision in the State's Sterling Act.

As for the SNAP related contentions, the appellate court cited the trial court's recognition that because the beverage tax is not imposed on consumers, but distributors, it does not collide with the SNAP regulations because such purchases are made at retail: "since the [beverage tax's] incidence of taxation is not on the consumer and the tax is not paid using SNAP benefits, the [beverage tax] is not preempted."

Finally, with respect to the uniformity clause, plaintiffs unsuccessfully argued that the beverage tax is really a property tax based on dealers' inventory, impermissible because it is imposed on quantity, rather than on an ad valorem basis (i.e., tax measured by value).

Petition for Supreme Court review

The plaintiffs/petitioners promptly filed their [petition for allowance of appeal](#), posted on line by Bloomberg. They began their petition guns blazing:

Philadelphia wanted to tax the retail sale of soft drinks within City limits. But it could not lawfully accomplish that goal because the Sterling Act prohibits Philadelphia from taxing what the Commonwealth already taxes....to circumvent the Sterling Act, Philadelphia devised a Tax that attempts to look like something other than a retail sales tax by purportedly taxing the distribution of beverages from wholesaler to retailer.

Next, regarding the uniformity clause argument, the petition claims that "Philadelphia was attempting to make the Tax look different [from] the state sales tax" by imposing it on beverage volume sold at retail. This creates wild tax burden disparities relative to the beverages' price[s]." The violation stems from "[t]hese extremely disparate tax rates upon the same class of products."

Professing that "[t]his is a crucial test case for cities and towns throughout Pennsylvania who are waiting to see whether well-established limits on their taxing authority still hold," the plaintiffs/petitioners urge the court to take the case: "if the decision below is permitted to stand, the floodgates will open to all manner of duplicative taxes—subject only to the limits of local governments' creativity."

In other jurisdictions

In Chicago, the Cook County Board of Commissioners passed the Sweetened Beverage Tax Ordinance in November 2016. The \$0.01 per ounce tax on the retail sale of all sweetened beverages in Cook County was set to take effect on July 1, 2017, but a court issued a restraining order that has prevented the tax from taking effect.

This was the result of a [complaint](#) that the Illinois Retail Merchants Association (IMRA) filed at the end of June, seeking a temporary restraining order and preliminary injunction. Similar to the plaintiffs in the Philadelphia action, IMRA [asserted](#) that the tax violates the Uniformity Clause of the Illinois Constitution, and also that it is impermissibly vague.



David M. Kall

