KPMG

SALT Alert!

Updated SALT Alert! 2017-17: Cook County, Illinois: Cook County Sweetened Beverage Tax to be Collected as of August 2, 2017

On July 28, 2017, a Cook County Circuit Court judge dismissed a lawsuit filed by the Illinois Retail Merchants Association and several grocery stores alleging that imposition of the Cook County Sweetened Beverage Tax violated the Illinois Constitution and that the tax ordinance was impermissibly vague. After dismissing the suit, the court dissolved a temporary restraining order precluding enforcement of the tax that had been in place since June 30, 2017. Since that TRO had been entered, numerous Cook County employees had been laid off, according to some Cook County officials, as a result of the delay in implementing (and collecting) the tax. Cook County subsequently announced that the tax should be collected at the consumer level beginning August 2, 2017. Retailers must take inventory of their sweetened beverages for purposes of the floor tax on August 1, 2017.[1] It remains to be seen whether the plaintiffs will seek an injunction at the appeals court level.

Background

In November 2016, the Cook County Board of Commissioners passed the Cook County Sweetened Beverage Tax Ordinance. Effective July 1, 2017, this ordinance imposes a $0.01 per ounce tax on the retail sale of bottled, sweetened beverages in Cook County. The tax, which must be collected by the retailer as a separate line item on the customer's receipt, is based on the number of whole ounces stated on a sealed container. The tax also extends to the sale of syrup and/or powder used to produce a sweetened beverage and is imposed at a rate of $0.01 per ounce of sweetened beverage produced from that syrup or powder. As such, fountain drinks sold at fast food restaurants and stores are subject to the tax. A "sweetened beverage" does not capture only sugary beverages, but includes any non-alcoholic beverage, carbonated or non-carbonated, intended for human consumption that contains any caloric sweetener or non-caloric sweetener.

In late June, the Illinois Retail Merchants Association and several grocery stores filed suit seeking a temporary restraining order against the County enforcing the tax. The plaintiffs alleged that the beverage tax was unconstitutional because it created classes of taxable sweetened beverages that were not based on real or substantial differences, which violated the Uniformity Clause in Illinois' Constitution. For example, the tax will be imposed on ready-to-drink sweetened coffee beverages sold in a bottle or can, but will not be imposed on a sweetened coffee drink made to order at a coffee shop. The plaintiffs also argued that the ordinance was impermissibly vague.

Circuit Court's Ruling

At the outset, the court noted that "it was fully aware of the budgetary turmoil that has occurred as a result of this Court's proper and deliberate consideration of this matter." The court went on to state that it was not a party to the County's budget matters and was "not moved" by its public airing of those matters.

The sole issue before the court was whether the plaintiffs had set forth sufficient grounds for their suit to withstand the County's motion to dismiss. To survive scrutiny under the Uniformity Clause, a non-property tax classification must (1) be based on a real and substantial difference between the people taxed and those not taxed and (2) bear some reasonable relationship to the object of the legislation or to public policy. After considering these criteria, the court dismissed the plaintiffs' Uniformity Clause arguments. With respect to the first prong, the court found the County's assertion that the differential treatment was due to the administrative burden of imposing the tax on made-to-order sweetened drinks to be compelling. Unlike ready-to-drink sweetened beverages that are widely available for purchase and consumption, to tax made-to-order beverages, the tax collector would have to determine at the point of sale whether tax applies and in what amount. The court concluded that the administrative burden of collecting a tax is a "valid justification for assessing a tax in one instance, but not in another." With respect to the second prong, the court concluded that there was a reasonable relationship between the tax and the object of the legislation—to deter consumption of sweetened beverages and promote public health, while at the same time raising revenues for the County. The court considered—and rejected—several arguments set forth by the plaintiffs in support of their position that the Sweetened Beverage Tax ordinance was unconstitutionally vague. In the court's view, the ordinance is sufficiently detailed and specific to preclude arbitrary enforcement and that a person of ordinary intelligence should understand what is required.

Please contact Jill Nielsen, Drew Olson, or Adam Terrell with questions.

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[1] On or before August 20, 2017, every retailer of sweetened beverages will be required to submit a Floor Tax Return and remit the applicable tax amount. The Floor Tax return must reflect the retailer's inventory, on which tax was not previously paid, that was in his/her possession on August 1, 2017.