



City of Philadelphia

LAW DEPARTMENT
One Parkway
1515 Arch Street
17th Floor
Philadelphia, PA 19102

MEMORANDUM

TO: Honorable James F. Kenney, Mayor
FROM: Sozi Pedro Tulante, City Solicitor *By Sozi Pedro Tulante*
DATE: March 1, 2016
SUBJECT: Sugar-Sweetened Beverage Tax

You have asked for my advice about Council's authority to impose a sugar-sweetened beverage tax on the supply of those beverages in the City measured by the volume of the beverage or the volume of syrup to make such beverage. A copy of a draft ordinance establishing such a tax is attached. One never can predict a legal outcome with certainty, but I have a high degree of confidence that a court would hold this proposed tax well within the City's authority.

Opponents of the tax are likely to present two legal arguments against Council's authority to impose the tax. They would argue that the tax is preempted by the state sales tax and that it would violate the Uniformity Clause of the Pennsylvania Constitution. Neither of those arguments is persuasive.

Preemption by Sales Tax. Absent a specific authorizing statute, the City lacks the power to impose a tax "on a privilege, transaction, subject or occupation, or on personal property, which is . . . subject to a State tax or license fee."¹ Opponents previously have suggested that a sugar-sweetened beverage tax is "preempted" by the state sales tax, using a series of creative, but ultimately faulty, syllogisms. Their argument was that (i) the City intends this tax ultimately to be borne by the consumer; (ii) the tax ultimately *will* be borne by the consumer; (iii) a sales tax is borne by the consumer; therefore (iv) the sugar-sweetened beverage tax is a sales tax that would duplicate the state sales tax. The argument fails at every step.

First, there is no City "intent" that the tax will be borne by the consumer; nor is there any evidence that it *will* be borne by the consumer. In all likelihood, the cost of the tax will be allocated by market forces among manufacturers, distributors, retailers, and consumers. Second,

¹ Act of Aug. 5, 1932, P.L. 45, § 1, as amended, 53 P.S. § 15971.

I believe a court would focus on the legal incidence of the tax, rather than the manner in which market forces allocate the tax. In this case, the legal incidence of the tax is clearly placed at the distributor-retailer level of the distribution chain, *not* at the retailer-consumer level of the distribution chain.

Opponents may rely on *United Tavern Owners*, 272 A.2d 868 (Pa. 1971), but that case (i) was an opinion of a single justice of the Supreme Court, with no precedential value;² and (ii) when read carefully, held only that the Commonwealth had preempted the taxation of liquor sales. The Commonwealth's extensive regulation of the liquor industry has been held to preclude many types of taxation, *see, e.g., Wissinoming Bottling Company v. School District of Philadelphia*, 654 A.2d 208 (Pa. Commw. 1995), *affirmed by evenly divided court*, 672 A.2d 279 (Pa. 1996) (liquor regulations preempt imposition of use and occupancy tax on beer distributors). The Commonwealth does not impose any comparable regulation on sugar-sweetened beverages.

An even clearer distinction between the proposed sugar-sweetened beverage tax and a sales tax is that the proposed tax is measured, not by the price of the beverage or syrup, but by its volume. The hallmark of a sales or use tax is its imposition on the price of the purchase. Because the sugar-sweetened beverage tax is imposed on a different taxpayer and measured by a different base from a sales tax, it seems highly unlikely that a court would hold that it effectively is a sales tax.

Uniformity Clause. Opponents may argue that because the tax singles out a particular kind of beverage, the tax is unconstitutionally non-uniform. The uniformity clause is far more flexible than that argument assumes. As Pennsylvania courts have often explained:

The legislature has wide discretion in matters of taxation, and a taxpayer pursuing a Uniformity Clause challenge has the burden of demonstrating that a classification made for purposes of taxation is unreasonable and "clearly, palpably and plainly violates the Constitution." If there is "some legitimate distinction between the classes that provides a non-arbitrary and 'reasonable and just' basis for the difference in treatment," the tax legislation is to be upheld.

Concentric Network Corp. v. Commonwealth, 897 A.2d 6, 11 (Pa. Commw. 2006) (upholding different tax treatment (i) of non-facilities based Internet service providers and (ii) of facilities based and cable based providers, internal citations omitted); *see also Free Speech, LLC v. City of Philadelphia*, 884 A.2d 966, 973 (Pa. Commw. 2005) (upholding taxation of off-premises signs, but not on-premises signs). One cannot seriously argue that there is no "legitimate distinction between the classes" of sugared versus unsweetened beverages, particularly in light of the significant evidence that the former promotes obesity and other health problems.

For all of these reasons, you are hereby advised that Council would be well within the bounds of its lawful authority to enact a sugar-sweetened beverage tax.

² *See, e.g., Commonwealth v. Wilsbach Distributors, Inc.*, 513 Pa. 215, 232 n.2 (Pa. 1986) (concurring opinion) ("the result reached in *United Tavern Owners* . . . is binding as precedent only if the case is factually identical").