

Philly Soft Drink Tax Targeted In Beverage Groups' Suit

By **Alex Wolf**

Law360, New York (September 14, 2016, 7:43 PM EDT) -- The American Beverage Association and a group of retailers, distributors and consumers who oppose Philadelphia's recently passed tax on sweetened drinks hit the city with a state court lawsuit Wednesday, accusing it of duplicating a tax imposed by the state that will diminish the purchasing power of local residents.

In a 61-page complaint, the ABA and other parties took aim at the city and the commissioner of its Department of Revenue over its sweetened beverage tax, a 1.5-cent-per-ounce tax on sugary drinks and diet sodas that was passed in June.

According to the plaintiffs, the not-so-sweet taxing arrangement runs counter to state law, which prohibits a local government from taxing the same subject of property as an existing state tax. Since Pennsylvania already has a 6 percent soft drink tax in place, the city should be prohibited from imposing its own tax, the complaint says.

In addition to creating a duplicative tax, the city has unlawfully attempted to circumvent Pennsylvania's taxation supremacy by imposing its own measure on the distribution of beverages that will be held out for retail instead of levying the fee on the actual retail sale of soft drinks to consumers, the filing parties said.

"Permitting the Philadelphia soft drink tax to stand would create a roadmap for every local government in the commonwealth to evade the commonwealth's supreme taxation structure on thousands of products — from over-the-counter pharmaceuticals to cars — merely by imposing a duplicative tax at a different level in the distribution chain than a tax already imposed by the commonwealth," the suit reads.

Further, the sweetened beverage tax violates the uniformity clause of the Pennsylvania Constitution because the tax is based on volume, not the actual value or price of the item, which contravenes longstanding precedent precluding such a nonvalue-based method of calculation of taxes on property, the ABA and others argue.

They contend that the city tax will cause sales of soft drinks subject to the state tax to decrease, resulting in a \$2.7 million to \$7.8 million net loss of revenue per year for the state despite the higher end price to consumers.

"Thus, the Philadelphia soft drink tax is void as it impermissibly frustrates and obstructs the revenue-

raising purpose of the Pennsylvania soft drink tax," the plaintiffs claim.

The city's tax will also frustrate Pennsylvania's prohibition on the charging of sales and use taxes for purchases made using the Supplemental Nutrition Assistance Program, according to the suit.

The measure, signed into law by Mayor Jim Kenney in June, is expected to raise \$91 million over the next year. The legislation was approved by the city council in a 13-4 vote.

The measure makes Philadelphia the first major American city to enact a sweetened beverage tax, following in the footsteps of a voter referendum in Berkeley, California, that approved a 1-cent-per-ounce tax on sugary drinks in November 2014. The new revenue is expected to fund pre-K expansion, community schools and reinvestment in parks and recreation centers, and help shore up the city's budget in general.

Kenney and City Solicitor Sozi Pedro Tulante issued statements on Wednesday in response to the allegations, saying they are prepared to defend what they believe was a "proper exercise of City Council's authority" and protect the investment planned for the city's neighborhoods and education system.

"While it is repugnant that the multibillion-dollar soda industry would try to take away these educational and community programs from the hundreds of thousands of Philadelphians who need them, we were not surprised by their lawsuit given the [\$10 million] they have already spent opposing the tax," the mayor said. "I have no doubt we'll be successful in defeating the lawsuit."

The officials noted that the city has retained former City Solicitors Ken Trujillo of Chamberlain Hrdlicka and Mark Aronchick of Hangley Aronchick Segal Pudlin & Schiller to join the city's litigation team.

The plaintiffs are represented by Shanin Specter and Charles Becker of Kline & Specter PC and by Marc J. Sonnenfeld, John P. Lavelle Jr. and Thomas J. Sullivan of Morgan Lewis & Bockius LLP.

Counsel information for the defendants was not immediately available Wednesday.

The case is Williams et al. v. City of Philadelphia et al., case number 160901452, in the Pennsylvania Court of Common Pleas, Philadelphia County.

--Additional reporting by Matt Fair. Editing by Catherine Sum.