

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION
TAX & MISCELLANEOUS REMEDIES SECTION**

ILLINOIS RETAIL MERCHANTS)
ASSOCIATION; BERKOT, LTD. D/B/A)
BERKOT SUPER FOODS; FAIRPLAY, INC.)
D/B/A FAIRPLAY FOODS;)
CHIQUITA FOOD MARKET, INC. D/B/A)
FOOD MARKET LA CHIQUITA & TAQUERIA;)
LEAMINGTON FOODS, INC.; TONY'S)
FINER FOODS ENTERPRISES, INC. D/B/A)
TONY'S FRESH MARKET;)
VALLI PRODUCE, INC.; AND WALT'S)
LAGESTEE, INC. D/B/A)
WALT'S FOOD CENTERS,)

Plaintiffs,)

v.)

THE COOK COUNTY DEPARTMENT OF)
REVENUE; ZAHRA ALI, as Director of)
the Cook County Department of Revenue;)
and the COUNTY OF COOK,)

Defendants.)

2017 JUN 27 10:10:20 AM
2017LOS0596
CALENDAR/ROOM 3
TIME 09:00
Extraordinary Remedy

**VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF
AND FOR DECLARATORY JUDGMENT**

Plaintiffs, Illinois Retail Merchants Association, Berkot, Ltd. d/b/a Berkot Super Foods; Fairplay, Inc. d/b/a Fairplay Foods; Chiquita Food Market, Inc. d/b/a Food Market La Chaquita & Taqueria; Leamington Foods, Inc.; Tony's Finer Foods Enterprises, Inc. d/b/a Tony's Fresh Market; Valli Produce, Inc.; and Walt's Lagestee, Inc. d/b/a Walt's Food Centers (collectively, "Plaintiffs"), by its attorneys, Horwood Marcus & Berk Chartered, complain of Defendants, the Cook County Department of Revenue; Zahra Ali, Director of the Cook County Department of Revenue; and the County of Cook (collectively, "Defendants" or the "Department"), as follows:

NATURE OF ACTION

1. This action challenges the legality of the Sweetened Beverage Tax, Section 74-850 *et seq.*, which was adopted by the Cook County Board of Commissioners on November 10, 2016 through Ordinance Number 16-5931 (the "Ordinance"), became effective on March 1, 2017 and requires the tax to be collected beginning on July 1, 2017.

2. The Sweetened Beverage Tax is unlawful because (1) the Ordinance creates classifications with no real and substantial difference and that bear no reasonable relationship to the purpose of the law in contravention of the uniformity clause of the Illinois Constitution (Article IX, Section 2), and (2) the Ordinance is so vague that it is impossible to give any precise or intelligible application under the circumstances it is intended to operate such that the Ordinance is unconstitutionally vague.

3. Effective July 1, 2017, the Sweetened Beverage Tax is levied at one (1) cent per ounce of sweetened beverage purchased in Cook County. Each retailer, including Plaintiffs, which make retail sales of sweetened beverages, must collect the Sweetened Beverage Tax from the purchasers of sweetened beverages. *See* Cook County Ordinances § 74-852(a)-(c).

4. Plaintiffs need not exhaust their individual administrative remedies to proceed with this action because such procedures are not required where an ordinance is attacked as improper, illegal, or unconstitutional on its face.

5. The Cook County Department of Revenue cannot declare an ordinance unlawful or unconstitutional, and administrative remedies need not be pursued where such review would be futile.

6. Plaintiffs request that the Court enter a Temporary Restraining Order and grant Plaintiffs preliminary and permanent injunctive relief against the Defendants from imposing the Sweetened Beverage Tax beginning July 1, 2017 and thereafter.

7. Defendants will suffer no prejudice or harm from the entry of immediate temporary injunctive relief in favor of Plaintiffs, because the balancing of equities weighs in favor of Plaintiffs. Temporarily enjoining the imposition of the tax in question will leave both parties in the same position as they were before the promulgation of the ordinance, so neither will be irreparably harmed by a Temporary Restraining Order.

8. This is an emergency because Plaintiffs are required to collect Sweetened Beverage Tax in violation of Illinois law and the Illinois Constitution beginning July 1, 2017.

9. Given the ongoing harm posed to Plaintiffs, they seek a declaration that the ordinance is unlawful.

PARTIES

10. Illinois Retail Merchants Association (“IRMA”) is an association of retail merchants and associations in Illinois, and is located in Cook County, Illinois. IRMA is a representative of its members, which are retailers subject to the Sweetened Beverage Tax. *See Int’l Union of Op. Eng’rs, Local 148 v. Illinois Dep’t of Empl. Sec.*, 828 N.E.2d 1104, 1111 (Ill. 2005) (expressly adopting the doctrine of association standing).

11. Berkot Ltd. d/b/a Berkot Super Foods (“Berkot”) is a retailer located in Cook County, Illinois. As a regular part of its business, Berkot makes sales of sweetened beverages to purchasers. Thus, Berkot is subject to the Sweetened Beverage Tax.

12. Fairplay, Inc. d/b/a Fairplay Foods (“Fairplay”) is a retailer located in Cook County, Illinois. As a regular part of its business, Fairplay makes sales of sweetened beverages to purchasers. Thus, Fairplay is subject to the Sweetened Beverage Tax.

13. Chiquita Food Market, Inc. d/b/a Food Market La Chiquita & Taqueria (“Chiquita”) is a retailer located in Cook County, Illinois. As a regular part of its business, Chiquita makes sales of sweetened beverages to purchasers. Thus, Chiquita is subject to the Sweetened Beverage Tax.

14. Leamington Foods, Inc. (“Leamington”) is a retailer located in Cook County, Illinois. As a regular part of its business, Leamington makes sales of sweetened beverages to purchasers. Thus, Leamington is subject to the Sweetened Beverage Tax.

15. Tony’s Finer Foods Enterprises, Inc. d/b/a Tony’s Fresh Market (“Tony’s”) is a retailer located in Cook County, Illinois. As a regular part of its business, Tony’s makes sales of sweetened beverages to purchasers. Thus, Tony’s is subject to the Sweetened Beverage Tax.

16. Valli Produce, Inc. (“Valli”) is a retailer located in Cook County, Illinois. As a regular part of its business, Valli makes sales of sweetened beverages to purchasers. Thus, Valli is subject to the Sweetened Beverage Tax.

17. Walt’s Lagestee, Inc. d/b/a Walt’s Food Centers (“Walt’s”) is a retailer located in Cook County, Illinois. As a regular part of its business, Walt’s makes sales of sweetened beverages to purchasers. Thus, Walt’s is subject to the Sweetened Beverage Tax.

18. The Cook County Department of Revenue and Zahra Ali, as Director of the Cook County Department of Revenue, are charged with the administration, assessment, and collection of taxes imposed by Cook County, including the Sweetened Beverage Tax.

STANDING

19. Each of the Plaintiffs has standing to bring this action because it will be directly injured by the imposition of the Sweetened Beverage Tax. The injury, being subject to collection requirements and tax obligations, is directly traceable to the Defendants. A decision in favor of Plaintiffs will redress that injury.

JURISDICTION AND VENUE

20. The Court has jurisdiction over this matter pursuant to 735 ILCS 5/2-701.

21. Venue is proper in this Court pursuant to 735 ILCS 5/2-101 *et seq.* because Defendants maintain offices in Cook County, Illinois.

FACTUAL BACKGROUND

22. On November 10, 2016, the Cook County Board of Commissioners adopted and approved the Sweetened Beverage Tax, Sections 74-850 through 74-859 of the Cook County Code.

23. The Cook County Board of Commissioners approved the Sweetened Beverage Tax for the express purpose of “promot[ing] public health, including lowered obesity rates.” See Cook County Ordinance No. 16-5931 at p. 2.

24. The Sweetened Beverage Tax became effective on March 1, 2017.

25. The tax imposes a one (1) cent tax per ounce of sweetened beverage purchased in Cook County beginning July 1, 2017. Cook County Ordinances § 74-852(a).

26. A distributor of bottled sweetened beverages and syrup and/or powder used to produce a sweetened beverage is required to collect the tax from any retailer to whom the sale of bottled sweetened beverages or syrup and/or powder used to produce a sweetened beverage is made and shall remit the tax to the Department. Cook County Ordinances § 74-852(c).

27. The tax on sweetened beverages in a sealed container is calculated based on the number of whole ounces stated on the sealed container. Cook County Ordinances § 74-852(e)(1).

28. The tax on sweetened beverages for purposes of a distributor's collection of the tax from a sale to a retailer of syrup and/or powder used to produce a sweetened beverage is calculated on the amount of sweetened beverage that can be produced from the syrup and/or powder, based on the manufacturer's instructions and with a reduction of five (5) percent of the calculated tax to account for spillage and product preparation at the retail level. Cook County Ordinances § 74-852(e)(2).

29. It is a violation of the Sweetened Beverage Tax for a retailer or distributor to fail to collect the tax or to otherwise absorb the tax. Cook County Ordinances § 74-852(c).

30. Any retailer of sweetened beverages shall, in turn, collect the tax from the purchaser of a sweetened beverage. Cook County Ordinances § 74-852(e)(3).

31. The tax collected by a distributor and/or retailer is collected as trustee for and on behalf of Cook County. Cook County Ordinances § 74-852(e)(5).

32. Plaintiffs, as retailers defined under Section 74-851, are required to collect the Sweetened Beverage Tax from purchasers on each retail sale of Sweetened beverages. Cook County Ordinances § 74-852(a)-(b), (e)(3).

33. As a result of the Sweetened Beverage Tax, Plaintiffs will be required to pre-pay to distributors and collect the Sweetened Beverage Tax beginning on July 1, 2017.

COUNT I
DECLARATORY JUDGMENT:
VIOLATION OF UNIFORMITY CLAUSE OF THE ILLINOIS CONSTITUTION

34. Plaintiffs reallege and incorporate by reference paragraphs 1 through 33 of this Complaint as paragraph 34 of this Count I.

35. Article IX, Section 2 of the Illinois Constitution provides: “In any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly. Exemptions, deductions, credits, refunds and other allowances shall be reasonable.”

36. The Sweetened Beverage Tax creates classifications of sweetened beverages that are not based on any real or substantial differences. For example, one such classification is “ready-to-drink, pre-made sweetened beverages” (*e.g.*, sweetened iced tea served in a bottle or from a chilled beverage dispensing machine, or a bottled Frappuccino), which are taxable, while another classification is “on-demand, custom sweetened beverages” (*e.g.*, sweetened iced tea mixed by a server or barista, or a hand-made Frappuccino), which are not subject to the tax.

37. Identical sweetened beverages are classified, under the Sweetened Beverage Tax, as both taxable and non-taxable.

38. Even if the classifications of sweetened beverages created by the Sweetened Beverage Tax are based on real and substantial differences, the classifications bear no reasonable relationship to the purpose of the Sweetened Beverage Tax, which is expressly to promote public health and reduce obesity rates, because the health consequences of identical beverages in separate classifications are the same.

39. Thus, the Sweetened Beverage Tax is in direct violation of the Illinois Constitution.

40. An actual controversy exists between the parties regarding the foregoing issues.

41. Plaintiffs are entitled to an injunction enjoining the enforcement of the Sweetened Beverage Tax.

42. Each of the Plaintiffs has a “clear and ascertainable right” to not comply with the requirement to collect taxes that are obligations contained in an ordinance creating non-uniform classifications of taxable and non-taxable objects in violation of the Illinois Constitution.

43. Each of the Plaintiffs will suffer irreparable injury in the absence of injunctive relief because it will be required to collect unconstitutional taxes, with no mechanism to return such taxes to the purchasers because Plaintiffs will have collected small amounts of tax from thousands of different purchasers for which Plaintiffs will have no practical way to maintain records to identify the purchaser and amount of tax collected. Plaintiffs will also incur additional administrative costs for complying with the illegal Sweetened Beverage Tax. Failing to collect the tax, or any other violation of the Sweetened Beverage Tax, will cause each of the Plaintiffs to suffer the penalties outlined in Section 74-857, which is \$1,000 for the first offense and \$2,000 for each subsequent offense for anyone who or which violates the Sweetened Beverage Tax. In addition, Plaintiffs will be subject to the penalties and interest as described in Article III, Chapter 34 of the Cook County Code of Ordinances.

44. Plaintiffs have no adequate remedy at law because no amount of money will remedy its ongoing obligations to comply with an unlawful tax, including collection of the tax and the administrative burdens associated with complying with the tax.

45. Plaintiffs have demonstrated a sufficient probability of success on the merits, because the Sweetened Beverage Tax is in direct violation of Article IX, Section 2 of the Illinois Constitution.

WHEREFORE, Plaintiffs pray for judgment against Defendants, as follows:

- A. A Declaration that the Cook County Sweetened Beverage Tax is invalid because it is in direct violation of the Article IX, Section 2 of Illinois Constitution which requires that classifications of the subject or object of taxes be reasonable and that the objects are taxed uniformly within each class;
- B. A temporary, preliminary and permanent injunction enjoining Defendants from imposing and enforcing the Sweetened Beverage Tax; and
- C. Such other, further, and different relief as the Court deems proper.

COUNT II
DECLARATORY JUDGMENT:
THE ORDINANCE IS UNCONSTITUTIONALLY VAGUE

46. Plaintiffs reallege and incorporate by reference paragraphs 1 through 45 of this Complaint as paragraph 46 of this Count II.

47. A law must be “complete in all its terms and conditions . . . so that every person may know by reading the law, what his rights are and how it will operate when put into execution An act is void where the language of which appears, on its face, to have a meaning but to which it is impossible to give any precise or intelligible application in the circumstances under which it is intended to operate.” *Spinelli v. Immanuel Lutheran Evangelical Congregation, Inc.*, 515 N.E.2d 1222, 1228 (Ill. 1987).

48. The Sweetened Beverage Tax, on its face, appears to have meaning, but is impossible to implement and apply in the circumstances it is intended to operate.

SALES UNDER THE
FEDERAL SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM

49. Many of the Plaintiffs’ point-of-sale systems, or cash registers, are unable to correctly charge the Sweetened Beverage Tax in connection with the Supplemental Nutrition Assistance Program (7 U.S.C. § 2011 *et seq.*) (“SNAP”).

50. Under SNAP, “a State may not participate in [SNAP] if the Secretary determines that State or local sales taxes are collected within that State on purchases of food made with benefits issued under this chapter.” 7 U.S.C. § 2013(a). The federal government has interpreted “State or local sales taxes” to include excise taxes. 7 C.F.R. § 272.1(b)(1), (2).

51. Any retailer participating in SNAP may have its authorization to participate withdrawn if it “is required under State and/or local law to charge tax on eligible food purchased with coupons or to sequence or allocate purchases of eligible foods made with coupons and cash.” 7 C.F.R. § 278.1(l)(vii).

52. Consequently, Plaintiffs cannot practically comply with the Sweetened Beverage Tax without violating federal law and risking the loss of the ability to participate in SNAP. In some cases, SNAP represents a significant portion of the retailer’s business.

53. Sweetened Beverage Tax Regulation 2017-4, effective June 16, 2017, permits retailers participating in SNAP to register as a distributor to remit tax directly to the Department until July 1, 2018.

54. Sweetened Beverage Tax Regulation 2017-4, however, does not affect the retailers’ responsibility to comply with the Sweetened Beverage Tax and SNAP, which is wholly impractical without violating SNAP rules. For example, a retailer would have to either (1) issue a cash refund to a purchaser separate from the purchase transaction, such that the coupon is converted to cash for the SNAP participant, or (2) allocate the purchase with coupons and cash. Both options, identified by Defendants, would constitute violations of SNAP if implemented by Plaintiffs. *See* 7 C.F.R. § 278.2(a), (d); 7 C.F.R. § 278.1(l)(vii).

55. Sweetened Beverage Tax Regulation 2017-4 is a change in position by Defendants that was not previously announced before June 16, 2017, approximately two weeks

prior to the date retailers must begin collecting the tax. Further, Sweetened Beverage Tax Regulation 2017-4 has been amended on at least one occasion to again reflect a change in the Department's position, without notice and without identifying the revision, which was on June 20, 2017, ten days prior to the date retailers must begin collecting the tax.

SALES OF SWEETENED BEVERAGES NOT IN SEALED CONTAINERS

56. In addition, the Sweetened Beverage Tax is intended to levy tax on sweetened beverages served by retailers in both pre-determined size containers (*e.g.*, sealed cans and bottles) and in non-pre-determined size containers (*e.g.*, fountain drinks or other dispensed beverages).

57. With respect to Plaintiffs' sales of sweetened beverages in non-pre-determined sized containers, Plaintiffs are unable to calculate with any precision or certainty the amount of tax due from a purchaser because the amount of sweetened beverage sold is either indeterminable or so impractical as to be unable to comply with the Sweetened Beverage Tax.

58. For example, because the Sweetened Beverage Tax is imposed on fountain drinks served with ice, mixed with non-taxable syrup and/or refilled by the purchaser themselves or by a server, Plaintiffs will experience unavoidable over-collection and under-collection of tax in violation of the Sweetened Beverage Tax.

59. Plaintiffs have no mechanism under the Sweetened Beverage Tax to either remit to Defendants or return to a purchaser any over-collected tax due to the Sweetened Beverage Tax's imprecise and vague rules, even if such amounts were identifiable, which often they are not.

60. Plaintiffs will be in violation of the Sweetened Beverage Tax if the tax is under-collected by Plaintiffs because a retailer is prohibited from absorbing the tax. *See* Cook County Ordinances § 74-852(c).

61. The collection of an improper amount of Sweetened Beverage Tax and/or non-compliance with the Sweetened Beverage Tax as a result of the Ordinance's vagueness and imprecision may cause *qui tam*, class action and/or criminal liability for one or more Plaintiffs.

IDENTIFICATION OF THE SWEETENED BEVERAGE TAX IN SALES PRICE

62. The Sweetened Beverage Tax requires the tax to be included in the selling price; however, this requirement, and as interpreted by Defendants' own regulations (which have been revised without notice as recently as June 20, 2017), are internally in conflict and may run afoul of the City of Chicago's Alternative Pricing System Rules for retailers and/or the Illinois Retailers' Occupation Tax.

63. Specifically, Section 74-852(c) requires a distributor and retailer to include the tax in the "sale price" of sweetened beverage, syrup and/or powder.

64. Sweetened Beverage Tax Regulation 2017-2, effective March 20, 2017 and amended June 13, 2017 (approximately two weeks prior to the date the tax is required to be collected), provides that the tax must be included in the "advertised selling price" of a sweetened beverage. The regulation further provides that the tax can be separately stated on the shelf tag, advertisement or menu from the "base price" of the sweetened beverage, but the "total price" must still be listed. In addition, the tax can be separately stated on the invoice. The regulation is an impermissible expansion of the plain language of Section 74-852(c) or, alternatively, imposes a requirement not permitted under the Sweetened Beverage Tax.

65. Sweetened Beverage Tax Regulation 2017-3, issued June 6, 2017 (less than one month prior to the date retailers are required to collect the tax), permits the retailer to include the tax in the “selling price of the beverage” or added on at the point of sale when SNAP benefits are used. If tax is included in the “selling price of the beverage,” the retailer’s point of sale system must be programmed to reduce the price by the amount of tax when the sweetened beverage is purchased using SNAP benefits. Under the regulation, “[i]f this programming is not possible, the retailer must put in place a procedure whereby a purchaser who uses SNAP benefits can receive an immediate refund at the customer service desk or other location within the retailer’s premises.” As stated above, this “option” is in violation of federal law and consequently Plaintiffs have no viable choice in complying with the Sweetened Beverage Tax.

66. The City of Chicago Alternative Pricing System Rules (“Chicago APS Rules”) requires that shelf tags display a “unit price.” *Id.* at Rule 5(a) & Rule 15(b). The “unit price” is determined by “dividing the total selling price by total count, measure or weight of the individual item.” *Id.* at Definitions. Consequently, under the Chicago APS Rules, the unit price will improperly include the Sweetened Beverage Tax because the “total selling price” must include the Sweetened Beverage Tax under Cook County Ordinances § 74-852(c).

67. The Illinois Retailers’ Occupation Tax (“ROT”) is imposed on the “selling price” of tangible personal property. *See* 35 ILCS 120/2-1; 35 ILCS 120/2-2; 35 ILCS 120/2-10. When the incidence of a tax is imposed on consumers, it does not become part of the selling price of an item. *See* 86 Ill. Admin. Code § 130.435. Because the Sweetened Beverage Tax is imposed on consumers, it must be excluded from the sales tax base for purpose of calculating the ROT. *See* Ill. Dep’t of Rev., ST 17-0019-GIL (06/08/2017). Inclusion of the Sweetened Beverage Tax in the selling price “constitutes an overcollection, for which there are specific penalties in Section

13 of the Retailers' Occupation Tax Act.” *Id.* Cook County Ordinances § 74-852(c) requires the Sweetened Beverage Tax to be included in the selling price and, therefore, is in conflict with the ROT.

68. Thus, if the Sweetened Beverage Tax is not prohibited by Article IX, Section 2 of the Illinois Constitution because the classifications of taxable sweetened beverages are uniform, the Sweetened Beverage Tax violates the Illinois Constitution because it is impermissibly vague such that distributors and retailers, including Plaintiffs, are unable to implement the tax with any precision or intelligible application in the manner in which the tax is intended to operate.

69. An actual controversy exists between the parties regarding the issues set forth herein above.

70. Plaintiffs are entitled to an injunction enjoining the enforcement of the Sweetened Beverage Tax.

71. Plaintiffs each have a “clear and ascertainable right” to not comply with the reporting requirements and to not collect taxes which are obligations contained in an ordinance passed in violation of the Illinois Constitution.

72. Plaintiffs will suffer irreparable injury in the absence of injunctive relief because it will be required to collect unconstitutional taxes, and will incur additional administrative costs for complying with the Sweetened Beverage Tax. Failing to do so will cause Plaintiffs to suffer the penalties outlined in Section 74-857, which includes penalties and interest as described in Article III, Chapter 34 of the Cook County Code of Ordinances.

73. Plaintiffs have no adequate remedy at law because no amount of money will remedy its ongoing obligations to comply with an unlawful tax, including collection of the tax and the administrative burdens associated with complying with the tax.

74. Plaintiffs have demonstrated a sufficient probability of success on the merits, because the Sweetened Beverage Tax is so vague that it is impossible to give any precise or intelligible application in the circumstances it was intended to operate.

WHEREFORE, Plaintiffs pray for judgment against Defendants, as follows:

- A. A Declaration that the Cook County Sweetened Beverage Tax is invalid because it is unconstitutionally vague;
- B. A temporary, preliminary and permanent injunction enjoining Defendants from imposing and enforcing the Sweetened Beverage Tax; and
- C. Such other, further, and different relief as the Court deems proper.

Respectfully submitted,

**ILLINOIS RETAIL MERCHANTS
ASSOCIATION; BERKOT, LTD. d/b/a
BERKOT SUPER FOODS; FAIRPLAY, INC.
d/b/a FAIRPLAY FOODS; CHIQUITA FOOD
MARKET, INC. d/b/a FOOD MARKET LA
CHAQUITA & TAQUERIA; LEAMINGTON
FOODS, INC.; TONY'S FINER FOODS
ENTERPRISES, INC. d/b/a TONY'S FRESH
MARKET; VALLI PRODUCE, INC.; AND
WALT'S LAGESTEE, INC. d/b/a WALT'S
FOOD CENTERS**

Plaintiffs.

By: 

One of Their Attorneys

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VERIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this COMPLAINT are true and correct, except as to matters therein stated to be on information and belief, and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

**THE ILLINOIS RETAIL MERCHANTS
ASSOCIATION**

By: _____

Its: _____




President / CEO

VERIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this COMPLAINT are true and correct, except as to matters therein stated to be on information and belief, and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

**TONY'S FINER FOODS ENTERPRISES, INC.
d/b/a TONY'S FRESH MARKET**

By: 
Its: President