

**REVENUE COMMISSIONER'S REPORT
ON
PHILADELPHIA BEVERAGE TAX PUBLIC HEARING**

October 31, 2016

On September 8, 2016, the Department of Revenue filed with the Department of Records, pursuant to Section 8-407(a) of the Philadelphia Home Rule Charter, the Philadelphia Beverage Tax Regulations.

Public notice of the filing of the proposed amendments was published and two written requests for a public hearing were made on behalf of the American Beverage Association and Sysco. A public hearing was scheduled and held on Thursday, October 13, 2016 at 1:00 P.M. at One Parkway, 1515 Arch Street, Philadelphia, Pennsylvania. The following individuals testified:

- John Lavelle- Morgan, Lewis & Bockius on behalf of American Beverage Association (ABA)
- Wendi Kotzen – Ballard Spahr on behalf of Sysco
- Lynn Jordan- Performance Food Group (PFG)
- Terri Brown-Edwards –US Foods Inc.

In addition to the testimony provided at the hearing, the Department of Revenue sought and received written comments through October 17, 2016. Written recommendations were submitted by:

- The American Beverage Association
- Sysco
- Pennsylvania Food Merchants Group (PFMG)
- Performance Food Group
- Tri State Automatic Merchandising Council
- McLane Food Services
- Nestle Corporation

The hearing testimony and written commentary were a continuation of the helpful participation of many potentially affected taxpayers and the tax professionals that represent them. Before and after the hearing, numerous businesses and tax professionals have been engaged in ongoing communication with the Department about the regulations and implementation of the Philadelphia Business Tax. Many of the recommendations for amendments to the regulations were similar across testimony and are presented below by topic. Additionally, there were several recommendations beyond the scope of the regulations but related to the implementation itself; those are addressed at the end of this document.

Invoicing

The most frequently cited barrier to implementation by members of the industry was the requirement to include both the number of taxable ounces of sweetened beverages and the tax due on that volume on each invoice from a registered distributor. It was suggested that including either the volume or the tax amount, but not both, would resolve the IT challenges that many taxpayers face with the implementation of the Philadelphia Beverage Tax. The Commissioner agrees and necessary changes are made accordingly in ARTICLE IV DISTRIBUTOR REGISTRATION; PURCHASES FROM REGISTERED DISTRIBUTOR; NOTIFICATION OF DEALER STATUS – Section 403.

Medical Foods and Thickened Beverages

Multiple taxpayers and their representatives requested further clarification of the tax status and definition of medical foods and thickened beverages. The Commissioner agrees and changes are made accordingly in ARTICLE I GENERAL PROVISION - Section 102. This clarification indicates that medical foods and thickened beverages are excluded from the tax under certain criteria and the documentation required.

Nutritionally Complete Products and Meal Replacements

It was requested that the regulations be amended to exclude nutritionally complete products and those marketed as meal replacements. The Commissioner disagrees. All sweetened beverages, regardless of whether they are intended to deliver certain nutrients or take the place of a meal, are within the scope of this tax, except if they meet the other criteria for exclusion, such as being more than 50% milk or medical foods and thickened beverages. In those instances, such products, including nutritionally complete products and meal replacements, would be excluded and no further amendment is needed. These product categories in general do not be the guidelines for those types of exclusion; however, the Department will accept inquiries on specific products.

100% Juices

Several taxpayers sought clarity that 100% juice is not subject to the tax and that 100% juice concentrate, when reconstituted with water to be nutritionally equivalent to 100% juice, is also not subject to the tax. The Commissioner agrees and changes are made accordingly in ARTICLE I GENERAL PROVISION - Section 102.

Beverages prepared with more than 50% Fresh Fruit and/or Vegetables

Taxpayers sought clarification of the exclusion from tax of sweetened beverages prepared with 50% or more of fresh fruit and/or vegetables. The Commissioner agrees and changes are made accordingly in ARTICLE I GENERAL PROVISION - Section 102 to make clear that the fruit and/or vegetables had to be added at the point of retail sale.

One taxpayer sought to have beverages comprised of 50% fresh fruit and/or vegetables that are added prior to the point of retail sale be sufficient to reach the threshold for

this exclusion. The Commissioner disagrees upon advice from the Health Department about the nutritional significance and reasonable meaning of freshness.

Milks

It was recommended that the regulations be changed to exclude all milk substitutes from the tax. The Commissioner disagrees; however, clarifying language has been added to make clear that unsweetened milk substitutes (like all unsweetened beverages) are not the subject of this tax. Additionally, sweetened milk substitutes with the same nutritional value as dairy milk as determined by the USDA are excluded.

It was recommended that the regulations be amended to clarify the treatment of milk powders and solids. The Commissioner agrees and changes are made accordingly in ARTICLE I GENERAL PROVISION – Section 102.

Comprehensive List of Taxable Beverages

Taxpayers requested a comprehensive list of taxable products and exclusions. The Commissioner disagrees. Due to the ever changing array of products on the market, it is not possible for the Department to maintain an up-to-date list of taxable and exempt products; but to address this concern the Department will be taking several steps. First, several sections of the regulations are being clarified as discussed in this report to make clear how certain categories of beverages will be treated. Additionally, the Department will be posting examples online and answering questions from taxpayers on an ongoing basis to provide continuing guidance. Questions can be submitted to revenuetaxadvisors@phila.gov.

Taxpayers requested that upon a determination that a product is taxable by the Department, the taxpayer shall only be liable for the tax from that point forward. The Commissioner disagrees. A product is taxable if it falls within the definitions set forth in the ordinance and regulations; the fact that a taxpayer asks for clarification from the Commissioner with respect to a particular product does not excuse the taxpayer from compliance prior to receiving a response to that request.

Syrups & Concentrates

It was requested that the regulations be amended to:

- Clarify that syrups and other concentrates are only taxable when used by someone other than the end consumer to make a beverage.
- Clarify that syrups and other concentrates are only taxable when the end product, as prepared to the manufacturer's specifications, would be taxable.

The Commissioner agrees and the necessary changes have been made in ARTICLE I GENERAL PROVISION – Section 102.

It was requested that the regulations be amended to provide an alternative calculation when the amount of tax due on a product represents a significant percentage of the

retail price of the product. The Commissioner disagrees. The calculation of the tax is based upon the volume of product distributed, not the retail price of the product and thus the amount of tax due should not be based on the proportion of the retail price.

Timing of Payments & Returns

It was requested that the filing and payment frequency be shifted from monthly to quarterly. The Commissioner disagrees.

Monthly payments will ensure a steady cash flow for the City and tax compliance is improved when the City can act quickly after a filing deadline or payment is missed. Additionally, the Department is designing an easy-to-use online payment and filing system, which reduces the administrative burden on taxpayers who file.

Refunds & Credits

It was requested that Dealers be allowed to request and obtain a refund when there was a change in the destination of the product following the taxable transaction, rather than the Distributor who initially filed the return and made the payment. The Commissioner disagrees. Consistent with other tax types, only the taxpayer who made the payment is entitled to seek a refund.

It was requested that, if the above change were not made, that the regulations be clarified to outline when and how credits and refunds may be requested by the registered taxpayer. It was requested that the Distributor not be required to verify the Dealer's claim of the overpayment. The Commissioner agrees and changes are made accordingly in ARTICLE V RETURNS AND REPORTS; MAINTENANCE OF BOOKS AND RECORDS - Section 501.

Suggestions/Questions Outside the Scope of the Regulations

- Introduce a System of Email Alerts – The Commissioner agrees. Interested parties can sign up for email alerts at www.PhillyBevTax.com.
- Provide guidance on how to round tax payments – The Department's General Regulations – Section 201(2) provide guidance for rounding payments for all tax types to the nearest dollar.
- Questions about the taxability of specific categories, beverage technology, products such as coffee creamers, non-alcoholic beer, microdosing machines, and individual brands, will be addressed in FAQs posted on the Department's website and via direct interaction with taxpayers.

Accordingly, amendments to the Philadelphia Beverage Tax Regulations are hereby filed with the changes indicated above. These Regulations, as amended, shall be effective at midnight of the tenth day after this report is filed.