



LEGAL DIVISION
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DATE: November 3, 2015
TO: Laurel Lunt Prussing, Mayor
CC: Elizabeth Hannan, Finance Director
FROM: James L. Simon, City Attorney

RE: Food & Beverage Tax.

An issue has been raised regarding whether an organization located in Champaign is obligated to pay Urbana's privilege tax on its purchase of prepared food ("Food & Beverage Tax") when such prepared food is purchased from an Urbana-based business.

ISSUE: Whether a Champaign-based fraternity is obligated to pay Urbana's Food & Beverage Tax when purchasing food stuff from an Urbana-based caterer for preparation, service and consumption in Champaign.

ANSWER: The Champaign-based fraternity is obligated to pay Urbana's Food & Beverage Tax on food purchased from an Urbana-based business regardless of whether the food is prepared, served or consumed in Champaign for service in Champaign.

FACTS: An Urbana-based catering service ("Caterer") has entered into a contract with a Champaign-based fraternity ("Fraternity") to provide food service during the school year. The contract requires the Caterer to provide meals for 60 members during the Fall 2015 and Spring 2016 semesters. The Caterer is also responsible for:

- Supplying a cook to work with the Fraternity.
- Assuring that the cook is trained and certified in food preparation, delivery and service of meals in accordance with health regulations.
- Selecting and preparing menus in conjunction with the Fraternity
- Ordering the raw materials for food preparation in accordance with the jointly developed menu plans.
- Arranging for delivery of the food stuff from the Caterer's food purveyor directly to the Fraternity.
- Preparing and serving the food at mealtimes as well as cleaning up the kitchen.
- Paying the cost of all food
- Incurring the cost of labor costs for the cook, delivery personnel, and insurance.
- Covering liability for its employees.

In consideration for the foregoing, the Fraternity is obligated to pay the Caterer \$77,098.95 and \$79,169.80 (which includes taxes) for food service for the Fall 2015 and Spring 2016 semesters.

Payments are to be made to and received by the Caterer in Urbana. Further, the Fraternity acknowledges that those who perform work for the Fraternity pursuant to the contract are employees of the Caterer.

Following execution of the contract, the course of dealing between the Caterer and the Fraternity has involved the following:

- The Caterer-supplied cook meets with members of the Fraternity at the Fraternity's house to develop menu plans on a regular weekly basis.
- The cook has the Caterer order the food from one or more of the Caterer's food purveyors, most, if not all, of whom are located outside the City.
- The Caterer's purveyors deliver the ordered food directly to the Fraternity's house such that the food is never delivered to the Caterer at its premises in Urbana.
- The Caterer-supplied cook prepares and serves the food.

As the above arrangement indicates, the Fraternity purchases catered meals from the Caterer, the Caterer causes its purveyor(s) to deliver raw food directly to the Fraternity, the Caterer causes the food to be prepared for immediate consumption at the Fraternity, and the Fraternity pays the Caterer for the food and the food preparation and clean-up service.

APPLICABLE LAW: Urbana's Food & Beverage Tax ordinance (UCC § 22-90(c)) defines "prepared food for immediate consumption" as –

any solid, semi-solid, powder, liquid or item used or intended to be used primarily for human internal consumption and for nourishment of the human body, which is capable of consumption without further preparation ... The term shall include and be limited to:

* * *

(4) Food which is purchased hot or otherwise purchased prepared, such as from catering establishments, for immediate on-premises or off-premises consumption.

Section 22-91 (UCC § 22-91) provides: "tax, in addition to all other taxes, is hereby levied and imposed upon the privilege of purchasing prepared food for immediate consumption" Emphasis supplied. In short, the Food & Beverage Tax is imposed on the purchaser for the "privilege of purchasing" food, not on the sale, service or consumption of the food.¹ While the purchaser is obligated to pay the Food & Beverage Tax, the retailer is obligated to collect, account for and remit the tax to Urbana. UCC §§ 22-92; 22-93; 22-94.

Illinois law provides that a municipality may not enforce its ordinances beyond its boundaries. *City of Chicago v. Brent*, 356 Ill. 40, 41-42, 190 N.E. 97 (1st Dist. 1934); *Seigles, Inc. v. City of St. Charles*, 365 Ill.App. 3d 431, 435, 849 N.E.2d 456 (2nd Dist. 2006). In *Seigles, Inc.*, the court held that a sales tax ordinance which imposed a sales tax on Seigles, Inc. in

¹ On the contrary, Urbana's home rule municipal retailer's tax expressly imposes that tax on "all persons engaged in the business of selling tangible personal property." UCC § 22.1(a).

connection with orders received by and sales made from Seigles, Inc.'s central office in the Village of Hampshire was an unconstitutional extra-territorial tax even though Seigles, Inc. maintained a retail store in the City of St. Charles which may have provided the goods to the central office to fill an order. Discussing a home rule municipality's authority, the court cited to the home rule section in the Illinois Constitution of 1970: "Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs, including, but not limited to, the power to ... tax ..." 365 Ill.App.3d at 433, citing Ill.Const. 1970, art. VII, § 6(a). Thereafter, the court held that "It is now axiomatic that home rule units ... have no jurisdiction beyond their corporate limits except what is expressly granted by the legislature." *Id.* at 434. The court concluded that Seigles, Inc.'s sale of goods from its central office location in Hampshire and purchaser's directing payment for such goods to Seigles, Inc.'s central office could not be taxed by St. Charles. For purposes of the discussion below, it is also worth noting that the court stated that: "A court should not construe an ordinance in a manner that renders words or phrases superfluous or meaningless." *Id.* at 434.

DISCUSSION: As stated above, the Food & Beverage Tax is levied and imposed upon the Fraternity as purchaser for the "privilege of purchasing prepared food for immediate consumption" and the Caterer is obligated to collect, account for and remit the tax. At issue, however, is how the language "prepared food for immediate consumption."

It has been suggested that Urbana's Food & Beverage Tax should not apply to the Fraternity because the food purchased is not "food for immediate consumption" because it has to be prepared by the Caterer's cook and such preparation occurs in Champaign. Citing, UCC § 22-90(c). Likewise, it has been suggested that the tax should not apply since the Fraternity does not purchase food "hot or otherwise purchased prepared ... for immediate on-premises or off premises consumption." Citing UCC § 22-90(c)(4). Indeed, such an argument could be supported by the language in the *Seigles, Inc.* case discussed above regarding courts not construing an ordinance which renders phrases superfluous or meaningless.

However, as the facts of the contractual arrangement described above illustrate, the Fraternity in fact purchases from the Caterer "food for immediate consumption ... on-premises or off-premises." Pursuant to the parties' contract, the Caterer purchases the food in unprepared form and has its employee prepare the food "for immediate consumption" off the Caterer's premises. In short, the Caterer does not part with the food (i.e., serve the food) until it is in a condition for "immediate consumption" – i.e., the Caterer (through its employee) prepares/cooks the food and then serves it to the Fraternity's members. Further, there is no doubt that the Fraternity purchases the food in Urbana since the Caterer is based in Urbana and payment in advance is received by the Caterer in Urbana. Thus, it is appropriate to impose the tax on the Fraternity's "privilege of purchasing" food in Urbana. UCC § 22-91. One can arrive at the same conclusion by considering a more typical situation. The tax would apply if a Champaign resident bridal parent hired an Urbana caterer to provide food for the bride's wedding where the wedding is scheduled to take place in Champaign. The purchase in the immediate forgoing scenario would occur in Urbana and the prepared food would be served off-premises thereby making Urbana's Food & Beverage Tax applicable. In short, the bride's parents would be taxed on the "privilege of purchasing" food in Urbana from an Urbana-based caterer.

RECOMMENDED CLARIFICATION OF ORDINANCE: Urbana's Food & Beverage Tax ordinance was last amended in 2011. It is not known at this time whether catering

arrangements involving fraternities and/or sororities such as the one discussed above existed at the time the ordinance was last amended. However, in order to clarify the ordinance, the City Attorney recommends the following:

Sec. 22-90

As used in this article, unless the context otherwise requires:

* * *

(c) *Prepared food for immediate consumption means* any solid, semi-solid, powder, liquid or item used or intended to be used primarily for human internal consumption and for nourishment of the human body, which is capable of consumption without further preparation, except alcoholic liquor. The term shall include and be limited to:

* * *

(4) Food which is purchased hot or is otherwise purchased prepared by a food preparer, such as ~~from a~~ catering establishments, for immediate on-premises or off-premises consumption regardless of whether such consumption occurs within or outside the city

ORDINANCE NO. 2015-11-111

AN ORDINANCE AMENDING URBANA CITY CODE CHAPTER TWENTY-TWO, ARTICLE VI, SECTION 22-90(C)(4)

(Amendment to Food & Beverage Tax Ordinance to Clarify Tax Obligations for Persons Hiring Urbana-Based Caterers)

WHEREAS, the City of Urbana ("City") is a home rule unit of local government pursuant to Article VII, Section 6, of the Illinois Constitution, 1970, and may exercise any power and perform any function pertaining to its government and affairs not otherwise expressly reserved to the State of Illinois by legislation, including imposing a privilege tax on the purchase of prepared foods and beverages for immediate consumption; and

WHEREAS, the City has adopted an ordinance which provides for a privilege tax for the privilege of purchasing prepared food for immediate consumption on the premises or off the premises (UCC § 22-90); and

WHEREAS, there has been some confusion insofar as whether the aforesaid ordinance applies where a person enters into a contract with an Urbana-based caterer whereby the aforesaid person purchases food from the Urbana-based caterer for immediate consumption on the caterer's premises or off of the caterer's premises; and

WHEREAS, the City Council deems it necessary and appropriate to amend UCC § 22-90(c)4) to clarify when the food and beverage tax applies to the privilege of purchasing prepared food for immediate consumption on or off of an Urbana-based caterer's premises where such consumption may occur outside the City of Urbana.

NOW, THEREFORE, BE IT ORDAINED by the City Council of the City of Urbana, Champaign County, Illinois, as follows:

Section 1.

Urbana City Code Chapter 22, "Taxation", Article VII, "Privilege Tax on Purchase of Prepared Food for Immediate Consumption and Certain Alcoholic Liquor", Section 22-90(c)(4) shall be and hereby is amended as follows with strike-through words representing language to be deleted and underlined words representing language

to be added:

Sec. 22-90

As used in this article, unless the context otherwise requires:

* * *

(c) *Prepared food for immediate consumption means any solid, semi-solid, powder, liquid or item used or intended to be used primarily for human internal consumption and for nourishment of the human body, which is capable of consumption without further preparation, except alcoholic liquor. The term shall include and be limited to:*

* * *

(4) Food which is purchased hot or is otherwise purchased prepared by a food preparer located within the city's boundaries, such as a catering establishment, for immediate on-premises or off-premises consumption regardless of whether such service or consumption occurs within or outside the city's boundaries.

Section 2.

Those sections, paragraphs, and provisions of the Urbana City Code that are not expressly amended or repealed by this Ordinance are hereby re-enacted, and it is expressly declared to be the intention of this Ordinance not to repeal or amend any portions of the Urbana City Code other than those expressly set forth as amended or repealed in this Ordinance. The invalidity of any section or provision of this Ordinance hereby passed and approved shall not invalidate other sections or provisions thereof.

Section 3.

This Ordinance shall not be construed to affect any suit or proceeding pending in any court, or any rights acquired, or a liability incurred, or any cause or causes of action acquired or existing prior to the effective date of this Ordinance; nor shall

any right or remedy of any character be lost, impaired, or affected by this Ordinance.

Section 4.

The City Clerk is directed to publish this Ordinance in pamphlet form by authority of the corporate authorities, and this Ordinance shall be in full force and effect from and after its passage and publication in accordance with Section 1-2-4 of the Illinois Municipal Code.

This Ordinance is hereby passed by the affirmative vote, the "ayes" and "nays" being called, of a majority of the members of the Council of the City of Urbana, Illinois, at a meeting of said Council.

PASSED BY THE CITY COUNCIL this ____ day of _____, _____.

AYES:

NAYS:

ABSENT:

ABSTAINED:

Phyllis D. Clark, City Clerk
APPROVED BY THE MAYOR this ____ day of _____, _____.

Laurel Lunt Prussing, Mayor

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This Ordinance is hereby passed by the affirmative vote, the "ayes" and "nays" being called, of a majority of the members of the Council of the City of Urbana, Illinois, at a meeting of said Council.

PASSED BY THE CITY COUNCIL this ____ day of _____, _____.

AYES:

NAYS:

ABSENT:

ABSTAINED:

Phyllis D. Clark, City Clerk
APPROVED BY THE MAYOR this ____ day of _____, _____.

Laurel Lunt Prussing, Mayor