

FILED IN
4TH DISTRICT COURT
STATE OF UTAH
UTAH COUNTY

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**IN THE TAX DIVISION OF THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

UTAH TAXPAYERS ASSOCIATION, UTAH
RESTAURANT ASSOCIATION, UTAH
SHAKE COMPANY, LLC,

Plaintiffs,

vs.

UTAH COUNTY,

Defendant.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF AND FOR
DAMAGES AND ATTORNEY'S FEES**

Case No. 100403515

Judge Low

Plaintiffs, Utah Taxpayers Association, Utah Restaurant Association, and Utah County
Shake Company, LLC, for causes of action allege as follows:

JURISDICTION AND VENUE

1. This court has jurisdiction under Utah Code Ann. § 78A-5-102(1)(2010) (vesting district courts with original jurisdiction in all matters civil and criminal); § 78B-6-401(2010)

(vesting district courts with jurisdiction to declare rights, status and other legal relations); § 59-1-301(2010) (vesting the tax division of a district court with jurisdiction in actions to recover taxes “deemed unlawful” by the party taxed and paid under protest); and § 59-2-1326(2010) (vesting district courts with jurisdiction to enjoin collection of any tax “not authorized by law”).

2. Venue is appropriate in this court under Utah Code Ann. § 78B-3-307(2010) (action tried in the county in which the cause of action arises, or in which any defendant resides).

PARTIES

3. Plaintiff Utah Taxpayers Association is a statewide Utah association of approximately 2,500 Utah taxpayer-members, including: (1) the individually named plaintiff restaurant which is located in Utah County, Utah, and other restaurants located in Utah County and throughout Utah; (2) other individual and business Utah taxpayers residing or located in Utah County, Utah, and throughout Utah; and (3) Plaintiff Utah Restaurant Association, which is a member of the Utah Taxpayers Association. The Utah Taxpayers Association has been an advocate for economy and efficiency in government and taxpayer rights for its members since 1923.

4. Plaintiff Utah Restaurant Association is a statewide Utah association of Utah member restaurants, including restaurants which are both members of the Utah Taxpayers Association and the Utah Restaurant Association (collectively “Plaintiff Associations”), and Plaintiff Utah County Shake Company, LLC, which owns and operates an Iceberg Drive Inn restaurant located in Utah County, Utah.

5. Plaintiff Utah County Shake Company, LLC is a restaurant owner of an Iceberg Drive Inn located in Utah County, Utah. Iceberg Drive Inn restaurants are located throughout the United States, including approximately ten Iceberg Drive Inn restaurants in Utah, and including several Iceberg Drive Inn restaurants in Utah County. All Iceberg Drive Inn restaurants sell food to restaurant patrons for “on-premises” and/or “immediate consumption,” and/or “off-premise” and/or “not immediate consumption.”

6. Defendant Utah County is one of 29 Utah counties in which the individually named Plaintiff restaurant and the restaurants’ members of the Plaintiff Associations, do business. Pursuant to Utah Code Ann. § 59-12-603(1)(a)(ii)(2010) the Utah County legislative body has opted to impose the “Restaurant Tax,” which is a “tax of not to exceed 1% of all sales” of “food and food ingredients or prepared food” that are sold by “restaurants” doing business in Utah County.

FACTS IN COMMON TO ALL CLAIMS

7. The Restaurant Tax was first enacted in Utah in 1992 as part of the Tourism, Recreation, Cultural, Convention, and Airport Facilities Tax Act (the “Act”), now codified at Utah Code Ann. § 59-12-601.1, *et seq.* As provided under the Act, Utah Code Ann. § 59-12-603(1)(a)(ii)(2010), “a county legislative body of any county may [not must, thus making the tax optional to the county] impose a tax not to exceed 1% (the “Restaurant Tax”) on all sales of the following that are sold by a restaurant [within the county’s jurisdictional area]: (A) alcoholic beverages [effective February 24, 2009 retroactive to January 1, 2007]; (B) food and food ingredients; or (C) prepared food;”and if so imposed, “the tax is administered, collected and

remitted as part of other Utah sales and use taxes.” Utah restaurants upon which a Utah county imposes the Restaurant Tax collects the tax from restaurant patrons on restaurant sales to such patrons. Restaurants report and remit such collected taxes to the Utah State Tax Commission on form TC-62F, Restaurant Tax Return. The Restaurant Tax Return and remittance is due when the Sales and Use Tax Return is due. A copy of form TC-62F is attached as Exhibit A.

8. As defined in Utah Code Ann. § 59-12-602(5)(a), a “restaurant” subject to the Restaurant Tax includes “any coffee shop, cafeteria, luncheonette, soda fountain, or [not “and,” which means not limited to] fast-food service where food is prepared for immediate consumption.” Utah Code Ann. § 59-12-602(5)(b) further states that “restaurant” does not include: “(i) any retail establishment whose primary business or function is the sale of fuel or [not “and,” which means not limited to “fuel” sellers but also sellers of] food items for off-premise, but not immediate, consumption; and (ii) a theater that sells food items, but not a dinner theater.” A “theater” is defined as an indoor or outdoor location for the presentation of movies, plays, or musicals. Utah Admin. Code R865-12L-17(A)(3). Vendors that sell food and beverages prepared for “immediate consumption” and that believe they are not subject to the prepared food and beverages tax must apply by letter to the Utah State Tax Commission, and be granted an exemption before they are excused from collecting the Restaurant Tax. Utah Admin. Code R865-12L-17(D).

9. Under the Act, food and food ingredients include substances, whether in liquid, concentrated, solid, frozen, dried or dehydrated form, that are sold for ingestion or chewing by

humans and are consumed for their taste or nutritional value. The term does not include alcoholic beverages, tobacco, or prepared food. Utah Code Ann. § 59-12-102(42)(2010).

10. Under the Act, “prepared food” means food sold in a heated state or heated by the seller; two or more food ingredients mixed or combined by the seller for sale as a single item; or food sold with an eating utensil provided by the seller, including a plate, knife, fork, spoon, glass, cup, napkin, or straw, but not including a container or packaging used to transport food. “Prepared food” does not include food that a seller only cuts, packages or pasteurizes, raw eggs, fish, meat, or poultry, or an item containing any of those items if the United States Food and Drug Administration recommends that a consumer cook the item to prevent food borne illness. Utah Code Ann. § 59-12-102(78)(2010).

11. The named Plaintiff restaurant owner, Utah County Shake Company, LLC, as well as the restaurants which are members of the Utah Taxpayers Association and/or the Utah Restaurant Association, are and have been legally obligated to collect the 1% Restaurant Tax from its restaurant patrons in Utah County, and have collected and timely remitted such taxes to the Utah State Tax Commission.

12. While the named Plaintiff restaurant owner, Utah County Shake Company, LLC, has collected and remitted the Restaurant Tax since Utah County imposed the Restaurant Tax without prior protest, on October 11, 2010, Utah County Shake Company, LLC, collected and remitted \$577.84 in restaurant taxes under protest to the Utah State Tax Commission. A copy of the Plaintiff restaurant owner’s check to the Utah State Tax Commission, making payment of the Restaurant Tax collected in Utah County under protest, is attached as Exhibit B.

FIRST CLAIM FOR RELIEF

**(VIOLATION OF UTAH AND UNITED STATES CONSTITUTIONALLY
PROTECTED EQUAL PROTECTION)**

13. Plaintiffs incorporate by reference paragraphs 1 through 12 of this Complaint as though restated here in their entirety.

14. As stated in paragraph 8, the Restaurant Tax is imposed on (1) restaurant sales of food and beverages, while other “retail establishments” that sell the same or similar food and beverage items are exempted from the tax; and (2) restaurant sales of food and beverages for “immediate consumption,” while other retail establishment sales of the same or similar food and beverages for “off-premise” consumption are exempted from the tax, even though the sales of such food and beverage by retail establishments may constitute a significant part of their business.

15. The Act’s distinctions listed in paragraphs 8 and 14 above, between restaurants subject to the Restaurant Tax, and other retail establishments not subject to the tax, are arbitrary, irrational and discriminatory against restaurants because both businesses (restaurants and retail establishments) sell or may sell identical or substantially similar food and beverage items. As a result, sales of food and beverage items by establishments defined as “restaurants,” such as fountain drinks at a restaurant, are and have been subject to the Restaurant Tax. Yet sales of the same or similar food, such as fountain drinks purchased at a retail establishment that also sells, for instance, gasoline and food, are not subject to the Restaurant Tax, even though both vendors sell identical and/or similar fountain drinks as well as other identical or similar “(A) alcoholic

beverages; (B) food and food ingredients; or (C) prepared food,” both for “off premise” and on premises consumption.

16. The Act also provides a statutory distinction between a seller whose “primary business” is selling food, which subjects such sales to the Restaurant Tax, and a “retail establishment,” whose primary sales are something other than food. The restaurant is subject to the Restaurant Tax whereas such a retail establishment (whose primary business is not selling food) is not subject to the tax even though food sales may be and/or are a significant source of revenue to the retail establishment. This distinction, between a business whose primary source of revenue is selling food, and a business whose primary source of revenue may not be selling food, even though food sales are a significant part of its revenue, is also arbitrary, irrational and discriminatory against restaurants. Such distinction is arbitrary, irrational and discriminatory because (modifying a hypothetical example as provided in Tax Commission Publication 55) a candy store that sells loose candy (or similar food items), and whose sales account for 49% of its business is not subject to the Restaurant Tax, whereas an identical business that sells identical candy (or similar food items), but whose sales account for more than 50% of its business, is subject to the Restaurant Tax.

17. In addition to the arbitrary, irrational and discriminatory distinctions as stated in the above paragraphs between retail establishments and restaurants that sell the same or similar “food and food ingredients” and/or “prepared food,” and the arbitrary, irrational and discriminatory distinctions as to a seller’s “primary” business (50.1%) and an otherwise identical seller’s secondary business (49.9%) in food sales, the other statutory distinction between “on”

and “off” premises and/or “immediate consumption” and/or take-home consumption is arbitrary, irrational and discriminatory against restaurants. This is because both restaurants, including the Plaintiff restaurant and restaurants who are members of the Plaintiff Associations, and retail establishments, as defined in Utah Code Ann. § 59-12-602(5)(b)(2010), sell food, food ingredients and beverages to their business patrons both for “immediate” and/or “off-premise” consumption.

18. Notwithstanding such arbitrary, irrational and discriminatory distinctions against restaurants, the Act compels restaurants to collect and remit the Restaurant Tax on sales of its food and beverages, whereas purchases of the same items or similar food and beverages at a retail establishment are not subject to the Restaurant Tax. As shown in attached Exhibit C, the retail establishment Flying J (a retail establishment) sold the exact same item, exempt from the Restaurant Tax, which a Subway (restaurant) sold, although Subway was subject to the Restaurant Tax.

19. Because the Restaurant Tax is arbitrary, irrational and discriminatory against restaurants, as proven in the above paragraphs, the Restaurant Tax violates the Plaintiff restaurant and the member restaurants of the Plaintiff Associations’ rights to Equal Protection. Constitutional rights to equal treatment are secured by the Utah Constitution, Article 1, Section 24, which provides, “All laws of a general nature shall have uniform operation”; and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which provides that “no state shall ... deny to any person within its jurisdiction the equal protection of the laws.” Defendant Utah County, by passage and implementation of the Restaurant Tax

against the Plaintiff restaurant and the member restaurants of the Plaintiff Associations, has deprived Plaintiffs and/or their member restaurants of their constitutional rights to Equal Protection.

SECOND CLAIM FOR RELIEF

**(DECLARATORY JUDGMENT UNDER UTAH CODE ANN. § 78B-6-401
AND INJUNCTIVE RELIEF**

20. Plaintiffs hereby incorporate paragraphs 1 through 19 of this Complaint as though realleged here in their entirety.

21. Because the Restaurant Tax violates Plaintiffs' constitutional rights to Equal Protection as secured by the Utah Constitution and United States Constitution, Plaintiffs are further entitled to declaratory relief as authorized by Utah Code Ann. § 78B-6-401(2010) that the Restaurant Tax is unconstitutional on its face and as applied. Plaintiffs are further entitled to Injunctive Relief against Utah County's imposition of the Restaurant Tax because, since the tax is unconstitutional, in violation of both the Equal Protection Clause of the United States Constitution and the Uniformity Clause of the Utah Constitution, Utah County's continuous imposition of the Restaurant Tax will continue to deprive Utah County restaurants of their constitutional rights.

THIRD CLAIM FOR RELIEF

**(REFUND OF UNLAWFULLY COLLECTED TAXES UNDER
UTAH CODE ANN. § 59-1-301)**

22. Plaintiffs hereby incorporate paragraphs 1 through 21 of this Complaint as though realleged here in their entirety.

23. Pursuant to Utah Code Ann. § 59-1-301(2010), Plaintiff restaurant has paid all or a portion of the Utah County imposed Restaurant Tax under protest to the Utah State Tax Commission. As referenced in paragraph 12 of this Complaint, a copy of the Plaintiff restaurant's check to the Utah State Tax Commission, stating that such payment was made under protest is attached as Exhibit B. Because Utah County's imposition of the Restaurant Tax is illegal, as a deprivation of Plaintiff and Plaintiff member restaurants' constitutional rights, the Plaintiff restaurant is entitled to recovery of such taxes paid under protest, with interest.

WHEREFORE Plaintiffs pray for the following relief:

1. An order declaring that Defendant Utah County's imposition of the Restaurant Tax violates Equal Protection as secured under the Utah Constitution, Article 1, Section 24, and the Equal Protection Clause of the United States Constitution.

2. An order declaring that the Restaurant Tax is illegal because it violates both the United States Constitution and the Utah Constitution; and that the Plaintiff restaurant and Utah County restaurants who are members of the Plaintiff Associations are hence entitled to recover all Restaurant Taxes that Utah County has imposed on such restaurants doing business in Utah County, including taxes paid protest to the Utah State Tax Commission, with interest; and an injunction against Utah County for further collection of the Restaurant Tax; and

3. For such other and further relief as the court deems just and equitable in the premises.

DATED this 15th day of October, 2010.



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