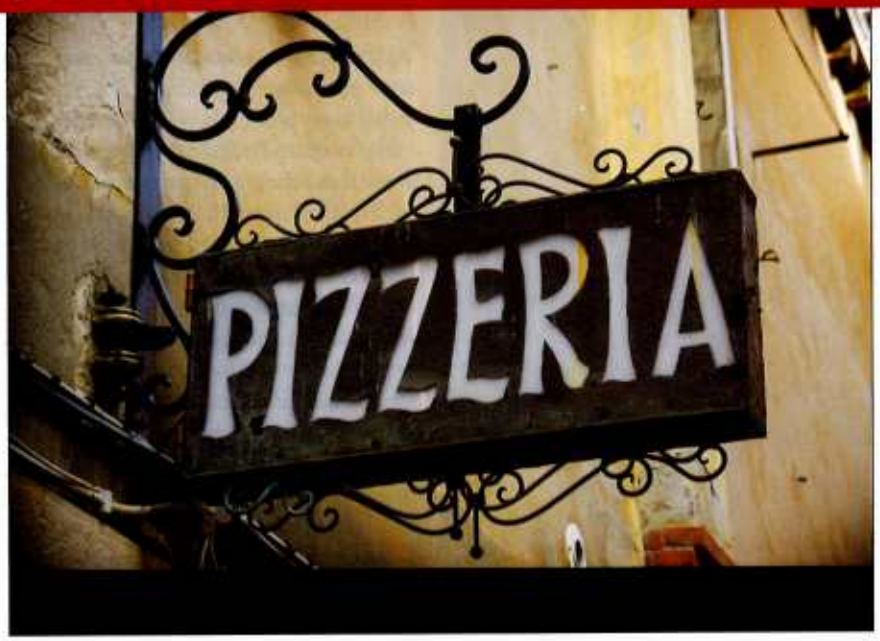
BY DANIEL A. KITTLE



Take-and-Bake Pizza Is Not a "Necessity"

For years, controversy has surrounded the sales tax treatment of Papa Murphy's "Take-and-Bake" pizzas—freshly prepared but uncooked pizzas that customers take home and bake in their own ovens. For instance, states have grappled with questions such as: Are these pizzas akin to "prepared food," similar to a hot and ready pizza prepared at a restaurant like Little Caesars or Pizza Hut and generally subject to the full measure of retail sales tax? Or should these uncooked pizzas be likened to "food or food ingredients" purchased in a grocery store, generally either tax-exempt or taxable at a significantly reduced rate?

In 2013, the Streamlined Sales and Use Tax Agreement (SSUTA) Compliance Review and Interpretations Committee concluded that take-and-bake pizzas are "prepared food" subject to full retail sales tax.[1] In response, the Streamlined Sales Tax Governing Board amended its definition of "prepared food" to allow states greater flexibility, permitting the taxation of those foods at different rates if they require "additional cooking or baking (as opposed to just reheating)."[2] Currently, states continue to take various approaches to the taxation of take-and-bake pizzas, which can cause confusion for consumers (and perhaps Papa Murphy's franchisees).

DANIEL A. KITTLE is an attorney with the law firm of Lane Powell PC in Seattle, Washington.

In *Karpowicz v. Papa Murphy's International, LLC*,[3] the Illinois Appellate Court addressed the sales tax treatment of take-and-bake pizzas in a slightly different context. Illinois imposes a significantly lower tax rate on the sale of "food for human consumption that is to be consumed off the premises where it is sold."[4] In *Karpowicz*, the court primarily addressed whether pizza is a "necessity" precluding application of Illinois' "voluntary payment doctrine."

The voluntary payment doctrine provides that where a taxpayer voluntarily pays tax on a transaction "with full knowledge of the facts," then the taxpayer cannot recover the tax paid absent fraud or payment under compulsion or duress. A payment is made under compulsion or duress where the taxpayer seeks to purchase a "necessity" and the taxpayer has "no reasonable means of immediate relief except by paying the tax."

The appellate court concluded that pizza is not a necessity. As a result, the court held the taxpayer did not remit sales tax on his take-and-bake pizza to Papa Murphy's under duress, barring the taxpayer from seeking a refund of sales tax based on his assertion that take-and-bake pizza should be subject to a reduced sales-tax rate of 1%. In contrast, the court noted that products such as feminine hygiene products, electricity, and telephones are considered "necessities of life." Apparently, pizza is not one of those necessities.[5]

While *Karpowicz* provides an interesting look at the legal issue of whether a consumer product is a "necessity," this case also provides an important reminder to follow tax challenge procedures precisely—or risk being left out in the cold. In this case, if the Papa Murphy's customer had paid the higher sales tax on his take-and-bake pizza under protest into a "protest fund" by following the Illinois Protest Fund Act, he might have been able to obtain a substantive determination from the court about the proper sales tax rate for take-and-bake pizza. Unfortunately for the taxpayer (and others seeking to minimize the amount of tax paid on their uncooked pizzas), the court was able to sidestep the issue on procedural grounds and dismiss the taxpayer's "half-baked" lawsuit.

Background. Papa Murphy's franchises prepare uncooked made-to-order pizzas by hand known as "take-and-bake" pizzas. Customers pick up the handmade pizzas, take them home, and cook them in their own ovens.

The taxpayer filed a complaint alleging that he entered a Papa Murphy's store on July 30, 2014, in Edwardsville, Illinois, and that Papa Murphy's overcharged him by collecting 9% sales tax on his $9 take-and-bake pizza purchase. About a week later, on August 7, 2014, the taxpayer filed a class action lawsuit asserting that Papa Murphy's should have imposed only 1% sales tax on his purchase, and that Papa Murphy's 9% sales tax charge was an unfair or deceptive act or practice in violation of the Illinois Consumer Fraud Act.

Within months, Papa Murphy's filed a motion to dismiss the taxpayer's complaint, asking the circuit court to dismiss the lawsuit on various grounds, including: (1) failure to follow Illinois statutory protest procedures for challenging the tax; (2) the voluntary payment doctrine; and (3) failure to allege an unfair or deceptive act or practice. The circuit court dismissed the plaintiff's claims based on the voluntary payment doctrine, finding that pizza does not constitute a "necessity" sufficient to establish that the taxpayer paid the higher rate under the duress of not being able to obtain a necessity of life. The taxpayer appealed to the Illinois Appellate Court (Fifth District).

Taxpayer failed to follow procedures. The appellate court began by noting that Illinois only allows recovery of taxes voluntarily paid if recovery "is authorized by statute or by some showing of unjust enrichment." The court noted that the taxpayer could not establish unjust enrichment because the taxpayer did not allege that Papa Murphy's retained the sales tax collected or obtained a refund from the state. In other words, as the court pointed out, if "there was unjust enrichment, it was the State that was enriched," not Papa Murphy's.

In addition, the court noted that the taxpayer failed to pay sales tax to Papa Murphy's under protest and then sue Papa Murphy's as required under Illinois law, which would have required the Papa Murphy's franchisee to deposit the challenged tax into a "protest fund" under the Illinois Protest Fund Act. As a result, the court reasoned, the taxpayer could not challenge the sales tax because he paid it voluntarily, unless he could establish an exception to the voluntary payment doctrine.

Sales tax payment was knowing, not fraudulent, and not under duress. Under Illinois law, the voluntary payment doctrine provides that "absent fraud, misrepresentation, or mistake of fact, money that is voluntarily paid under a claim of right to the payment and with full knowledge of the facts cannot be recovered solely because the claim was incorrect or illegal, unless the payment was made as a result of "compulsion" or "duress." The taxpayer-plaintiff asserted that he paid 9% sales tax due to fraudulent conduct by Papa Murphy's, that he unknowingly paid the 9% sales tax, and that he made the payment under duress or compulsion. The court rejected all three arguments.

First, the court noted that the taxpayer's conclusory assertion of a Consumer Fraud Act claim, based on an allegedly unfair or deceptive act or practice—without any factual support—could not satisfy the fraud exception to the voluntary payment doctrine. The taxpayer's only allegation supporting fraud was that he paid 9% sales tax on one take-and-bake pizza order in July 2014. He failed to allege any other facts to establish that Papa Murphy's acted with intent to defraud him, such as Papa Murphy's performing this collection practice on others or in an intentionally harmful or deceitful way.

Second, the court rejected the taxpayer's argument that his payment of sales tax was made "unknowingly" because the receipt he received from Papa Murphy's clearly set forth the date, form of payment, amount charged, amount paid, and—critically—the amount of tax that he paid. This receipt belied the taxpayer's claim that he paid 9% tax "unknowingly."

Third, the court rejected the taxpayer's claim that he paid 9% tax under duress or compulsion because, as explained below, pizza is not a "necessity" that forced him to pay the tax or forgo an essential product.

Pizza is not a "necessity." In rejecting the taxpayer's duress claim, the court explained that duress applies where the retailer holds "some actual or threatened power" over the customer such that the customer "has no reasonable means of immediate relief except by paying the tax." Specifically, the court noted, duress occurs where "the taxpayer's refusal to pay the tax would result in a loss of reasonable access to goods or services considered essential"—i.e., a "basic human necessity." For instance, the court noted that in the prior case of *Geary v. Dominick's Finer Foods, Inc.*, the Illinois Supreme Court upheld the purchase of feminine hygiene products as a purchase made under duress—which qualified as an exception to the voluntary payment doctrine—because feminine hygiene products "are necessities of life for postpubescent women," those products are "virtually the only ones available for women during menstruation," and "no reasonable alternative product exists."[6]

The taxpayer argued that *Geary* suggested that "food" was also a necessity, pointing out that the Illinois Supreme Court in that case stated that food coupons in another case "could be used for necessities such as food." Latching onto this language, the taxpayer argued that Papa Murphy's take-and-bake pizza was also a "necessity" because it is "food."

The *Karpowicz* court disagreed, pointing out that the *Geary* court "did not hold that food was a necessity" and stated that it "may be that very few products would be necessities." More importantly, the *Karpowicz* court reasoned, the taxpayer "cannot make a specialty item at a restaurant a necessity simply by identifying it within the broad genus of 'food.'" In distinguishing this case further from *Geary*, the court stated simply: "A Papa Murphy's take-and-bake pizza is not essential in the same way as feminine hygiene products are to menstruating women." The court reasoned that "reasonable alternatives exist that fulfill a consumer's basic need for sustenance."

As a result, the appellate court upheld the circuit court's decision that the taxpayer paid the tax voluntarily and, consequently, the taxpayer was not entitled to sue Papa Murphy's in a class action lawsuit over paying 9% tax on his $9 pizza purchase.

This result makes sense in light of Illinois law and the general standards required to establish duress or fraud, which are quite high. Courts do not lightly accept allegations that the plaintiff was defrauded or forced into taking a certain action that essentially rendered the plaintiff helpless to make a different choice, which is what duress requires.

In addition, the taxpayer in this case could have avoided the fraud or duress issue very simply—and avoided spending so much "dough" on litigation costs—by paying the tax under protest through the procedures set forth in the Illinois Protest Fund Act. Not surprisingly, the taxpayer's failure to do so did not garner much sympathy from the court. ■

1 SSUTA Interpretative Op. 2013-3.

2 SSUTA Amendment AM14002 (4/10/14).

3 2016 WL 3609106 (July 5, 2016).

4 35 Ill. Comp. Stat. Ann. 120/2-10.

5 *Geary v. Dominick's Finer Foods, Inc.*, 129 Ill. 2d 389 (1989) (feminine hygiene products); *Getto v. City of Chicago*, 426 N.E.2d 844 (Ill. 1981) (telephones); *Ross v. City of Geneva*, 373 N.E.2d 1342 (Ill. 1978) (electrical service).

6 129 Ill. 2d 389 (1989).