October 30, 2020

The Honorable President and Members

 of the Baltimore City Council

Attn: Natawna B. Austin, Executive Secretary

Room 409, City Hall, 100 N. Holliday Street

Baltimore, Maryland 21202

Re: City Council Bill 20-0631 – Excise Tax – Electronic Smoking Devices

Dear President and City Council Members:

 The Law Department has reviewed City Council Bill 20-0631 for form and legal sufficiency. The bill repeals current Subtitle 27 {“Tobacco Tax”} as abrogated by function of law and establishes an excise tax on the distribution of electronic smoking devices. It sets the rate of the tax, authorizes the Director of Finance to issue certain regulations, and provides for collection of the tax and payment of interest and penalties. The bill provides for an immediate effective date.

 The Law Department’s review of this bill focuses on the nature of the excise tax being levied. At the outset we note that the General Assembly in 1951 delegated to Baltimore City the power “to tax to the same extent as the State of Maryland has or could exercise” within the City limits. That power is now found in Article. II § 40(a) of the City Charter. *State Dep't of Assessments & Taxation v. Bendix Corp*., 270 Md. 31, 36 (1973)(“The Act of 1951, Chapter 27 was an amendment to the Baltimore City Charter giving the power to the City to tax within the limits of the City to the same extent as the State of Maryland could exercise.”). The type of taxes permitted by Article II are deemed “excise taxes.” Excises

*have been defined as taxes laid upon the manufacture, sale or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges. [citations omitted] Unless a third class of taxes, neither property tax nor excise, is recognized (which except perhaps with respect to federal taxes could serve no useful purpose), it seems convenient to regard excises as including all internal taxes that are not property taxes….*

*Herman v. Mayor & City Council of Baltimore*, 189 Md. 191, 197-98 (1947). More succinctly, Maryland courts hold that “a tax of the use of property, as distinguished from a tax based on the ownership of property, is in the nature of an excise.” *Weaver v. Prince George's County*, 281 Md. 349, 358 (1977). It is “a tax imposed upon the performance of an act, the engaging in an occupation, or the enjoyment of a privilege.” *Waters Landing Ltd. Partnership v. Montgomery*, 337 Md. 15, 26 (1994).

 An excise tax must also be distinguished from a sales tax. “A sales tax is imposed upon the occurrence of an event, a purchase…The tax is imposed upon the purchaser, upon the act of selling.” *Central Credit Union v. Comptroller of Treasury*, 243 Md. 175, 183 (1966). Furthermore, a sales tax is collected from the final purchaser. *Comptroller of Treasury v. Martin G. Imbach*, Inc., 101 Md. App. 138, 141 (1994) (“The sales and use tax provisions were enacted to assure that the State collects tax from the final purchaser”). *See also Montgomery County v. Md. Soft Drink Ass’n., Inc*., 281 Md. 116, 126 (1977). (“sales taxes are measured by the purchase price or consideration paid for the items”). In contrast, as noted above, an excise tax is based on the use of property, not the ownership of the property or on the price paid by the final purchaser.

 Given the above criteria for distinguishing an excise tax from both a property tax and a sales tax, the Law Department concludes that Council Bill 20-0631 meets the legal standards required of an excise tax. The tax is levied on the use of property or on engaging in an occupation, i.e., on the act of distributing electronic smoking devices or on transporting them into the City, and not on the mere fact of owning the property. Furthermore, the tax is levied on the distributor or a dealer of the property, and not on the final purchaser of the property. In these ways the tax authorized by this legislation is distinguished from a tax on property or on sales. It is an excise tax. The authority to enact an excise tax is well within the scope of the legislative powers delegated to the Mayor and City Council of Baltimore by the Maryland General Assembly.

 The Law Department is prepared to approve the bill for form and legal sufficiency as drafted.

Sincerely,



Victor K. Tervala

Chief Solicitor

cc: Dana Moore, Acting City Solicitor

 Matt Stegman, Mayor’s Legislative Liaison

 Caylin Young, President’s Legislative Director

 Elena DiPietro, Chief Solicitor, General Counsel Division

 Hilary Ruley, Chief Solicitor

 Ashlea Brown, Assistant Solicitor