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Opinion No. 00-087

Interpretation of Tenn. Code Ann. § 57-5-101 Concerning Microbreweries

QUESTIONS

1. Can a beer manufacturer operate as a retailer pursuant to Tenn. Code Ann. § 57-5-101(c)(1)(A) and at the same time hold a “restaurant” license pursuant to Tenn. Code Ann. § 57-5-101(c)(1)(B), or are subsections (A) and (B) mutually exclusive?

2(a). If a beer manufacturer operates as a retailer pursuant to the provisions of Tenn. Code Ann. § 57-5-101(c)(1)(A), may such a manufacturer sell beer to consumers at a site it owns that is not part of or contiguous to its manufacturing location?

2(b). If so, would any part of the sale or transfer of beer from the manufacturer’s location to the noncontiguous site be subject to the wholesale beer tax?

3(a). If a beer manufacturer holds a “restaurant” permit under the provisions of Title 57, Chapter 4 as allowed in Tenn. Code Ann. § 57-5-101(c)(1)(B), may such a manufacturer also be able to obtain a retail beer permit for the restaurant premises?

3(b). If so, would any part of the sale or transfer of beer by the manufacturer to the restaurant be subject to the wholesale beer tax?

4(a). Under Tenn. Code Ann. § 57-5-101 may a beer manufacturer sell, give or otherwise transfer beer to a beer retailer or restaurant that sells beer, where the manufacturer has a direct or indirect interest in the retailer or restaurant?

4(b). If it may, does the wholesale beer tax apply and what is the tax base if it does apply?

OPINIONS

1. A beer manufacturer may operate as a retailer under Tenn. Code Ann. § 57-5-101(c)(1)(A) and at the same time hold a restaurant license pursuant to Tenn. Code Ann. § 57-5-101(c)(1)(B). Subsections (A) and (B) are not mutually exclusive. The word “or” between these subsections as they are presently codified is an editorial addition by the Code Commission and does not derive from any act of the Legislature. Nothing in the legislative history or in the policies underlying the statute suggests that these two options should be mutually exclusive.

2(a). No. The plain language of the applicable statute clearly prohibits the sale of beer by a manufacturer at a site it owns that is non-contiguous with its manufacturing facility.

2(b). Since such sales are not possible, the question of whether or not the wholesale beer tax applies is pretermitted.

3(a). Yes. A beer manufacturer that operates as a restaurant and holds a liquor-by-the-drink license must also hold a beer permit if it wishes to sell beer. Such a restaurant is not precluded from obtaining a beer permit so long as it meets all of the applicable requirements for such a permit.

3(b). If a beer manufacturer is operating a restaurant and selling its own beer to customers under its beer permit, no wholesale sale of beer occurs and, thus, the wholesale beer tax does not apply.

4(a). No. The plain language of the applicable statute prohibits a beer manufacturer from having any interest in a beer retailer's business, but it may sell its own product as described in Tenn. Code Ann. §§ 57-5-101(c)(1)(A) and (B).

4(b). Since a beer manufacturer may not have a direct or indirect interest in such a retailer or restaurant, this question is pretermitted.

ANALYSIS

(1)

As codified, Tenn. Code Ann. § 57-5-101(c)(1) reads as follows:

Upon meeting necessary federal, state and local license requirements, notwithstanding the prohibition of subsection (a), a manufacturer:

- (A) May operate as a retailer at the manufacturer's location or a site contiguous thereto for sales of not more than five thousand (5,000) barrels of beer annually for consumption on or off the premises under the provisions of this chapter as long as the requirements of this chapter concerning the licensing of such retail establishments are met; or
- (B) May qualify for and hold a license under the provisions of chapter 4 of this title as a "restaurant."

The presence of the word "or" raises a question concerning whether the different activities specified in (A) and (B) are mutually exclusive. Much could be written about the implications of "or" and its related conjunction "and" within the text of a statute.

Yet, a complicated analysis of the word "or" in this statute is unnecessary because a review of the legislative history of Tenn. Code Ann. § 57-5-101 demonstrates that the conjunction

“or” that appears between these two subsections was an addition of the Tennessee Code Commission when it prepared the 1990 Code Supplement. The original bill passed by the Legislature, Chapter No. 906, 1990 Public Acts, did not contain the word “or” between these subsections, although the subsections were preceded by the introductory phrase “or alternatively may perform any of the following functions:”.¹ By enactment of Chapter No. 800, 1992 Public Acts, the phrase “, or alternatively” was deleted and replaced with the word “and”, demonstrating that a beer manufacturer that did not produce more than five thousand barrels of beer annually could sell directly to retailers and perform **any** of the activities described in the two subsections. In 1995, by enactment of Chapter No. 395, the Legislature deleted from § 57-5-101(c) the entire phrase “which produces not more than five thousand (5,000) barrels of beer annually may sell its beer directly to retailers and may perform any of the following functions.” This same enactment added the phrase “of not more than five thousand (5,000) barrels of beer annually” after the word “sales” in the first subsection of § 57-5-101(c). Both subsections have always started with the permissive word “may.” As the Legislature, in previous versions of this statute, has stated that brewers may engage in any of the activities mentioned in the two subsections and no subsequent amendments to the statute have included the word “or” or any other conjunction between these subsections, there is no indication that the Legislature intended the provisions of subsections (A) and (B) to be mutually exclusive.

Tenn. Code Ann. § 57-5-101(c)(1) provides an exception to the general rule that beer manufacturers shall not be involved in the retail beer business. Under the provisions of both subsections (A) and (B), beer manufacturers are allowed to sell their product themselves by two different methods - retail sales and restaurant sales - and there is no apparent policy reason to limit such sales to one or the other method. The provisions of Tenn. Code Ann. §§ 57-5-101(c)(1)(A) and 57-5-101(c)(1)(B) are not mutually exclusive.

(2a)

Tenn. Code Ann. § 57-5-101(c)(1)(A) is an exception to the general prohibition described in 57-5-101(a) that beer manufacturers can not have an interest in the retail beer business. The subsection allows beer manufacturers to “operate as a retailer at the manufacturer’s location or

¹ The original text of Tenn. Code Ann. § 57-5-101 has been diminished through a series of amendments. The 1990 enactment read as follows:

(c) Upon meeting necessary federal, state and local license requirements, notwithstanding the prohibition of subsection (a), a manufacturer which is located in an urban park center as defined in Section 57-4-102(22) and which produces not more than five thousand (5,000) barrels of product annually may sell its products directly to retailers, or alternatively may perform any of the following functions:

- (1) May operate as a retailer at the manufacturer’s location or a site contiguous thereto for sales for consumption on or off the premises under the provisions of this chapter as long as the requirements of this chapter concerning the licensing of such retail establishments are met.
- (2) May qualify for and hold a license under the provisions of Tennessee Code Annotated, Title 57, Chapter 4, as a “restaurant”.

a site contiguous thereto for sales of not more than five thousand (5,000) barrels of beer annually. . . .” This language is clear and plain. No language in this subsection of the statute or elsewhere in Tenn. Code Ann. § 57-5-101 suggests that a beer manufacturer may conduct retail sales at a location away from its manufacturing site.

(2b)

Since such retail sales would be illegal, this question is moot.

(3a)

Title 57, Chapter 4 of the Tennessee Code addresses the issuance of what are commonly referred to as “liquor-by-the-drink” licenses. As discussed recently in Op. Tenn. Atty. Gen. No. 99-098 (April 30, 1999), relevant court decisions have made it clear that the statutes governing liquor and beer sales must be read so as to maintain local control over the issuance of beer permits, even for those establishments licensed to sell liquor-by-the-drink. In that Opinion, this Office relied on the following language from *Underground II, Inc. v. City of Knoxville*, 1998 WL 46447 (Tenn. App., Feb. 4, 1998):

No authority has been expressly delegated to municipalities to regulate, license or otherwise control the operation of businesses relating to alcoholic beverages as opposed to beer. Without question, authority over beer and other beverages not falling within the definition of “alcoholic beverage” may be controlled and regulated by local governmental agencies.

This office opined that “[t]he holder of a liquor-by-the-drink license must also possess a local beer permit in order to sell beer.”

As noted in Opinion No. 99-098 the regulation of alcoholic beverages by the State and the regulation of beer sales by local governments are separate regulatory schemes and if a business desires to engage in both activities, it must meet the separate requirements for both permits. There is nothing in the language of Tenn. Code Ann. § 57-5-101 that suggests a manufacturer of beer that chooses to operate as a “brew pub” would be exempt from the requirement to hold and possess a beer permit. As the regulation of retail beer sales is a local matter, a brew pub would be able to obtain a beer permit if it meets the requirements of the applicable local beer ordinances.

(3b)

Whether or not the wholesale beer tax is applicable to any part of such beer sales depends on whether or not there is an actual transfer that could be described as a “sale of beer at wholesale.” Pursuant to Tenn. Code Ann. § 57-6-103(a), “[t]here is imposed on the sale of beer at wholesale a tax of seventeen percent (17%) of the wholesale price. Every wholesaler, on or before

the twentieth day of each month, based on wholesale sales in the preceding calendar month, shall remit to each county the amount of the net tax on such person's wholesale sales to retailers and other persons within the corporate limits of the municipality." "Wholesale" or "wholesale sale" means "a sale, gift, or other transfer and delivery of beer by a wholesaler to any person other than another wholesaler, but there shall not be included within the meaning of either term any gratuitous dispensing of beer by a brewery of its own manufacture which is consumed on the premises." Tenn. Code Ann. § 57-6-102(11). "Wholesaler" means "a person who sells beer to retailers and includes a distributor, brewery or brewery branch making sales directly to retailers." Tenn. Code Ann. § 57-6-102(12).

From these definitions and the language of Tenn. Code Ann. § 57-5-101 it does not appear that brew pubs are authorized to make sales at wholesale or act as wholesalers. The brew pub is not a wholesaler since it is not selling beer to retailers, but rather selling beer to its restaurant patrons. A beer manufacturer or brew pub that sells its own beer to consumers through its restaurant is not engaging in any "wholesale sale" since it is not a wholesaler. A beer manufacturer that holds a liquor-by-the-drink license "as a 'restaurant'" pursuant to Tenn. Code Ann. § 57-5-101(c)(1)(B) may sell its own product through the restaurant, if it has the appropriate beer permit, but it never makes a sale or transfer of the beer to another entity.

Thus, while beer manufacturers have non-manufacturing components in their businesses, they do not actually engage in transactions with separate entities. There is no sale at wholesale and, thus, the wholesale beer tax is not applicable.

(4a)

As discussed in the analysis in Part 1 *supra*, Tenn. Code Ann. § 57-5-101(a) prohibits the involvement of beer manufacturers and wholesalers in the retail beer industry. Specifically, "no brewer or wholesaler of any such beverage or its agents or agents is permitted to make any loan or furnish any fixtures of any kind or have any interest, direct or indirect, in the business of any retailer of such beverages, or in the premises occupied by such retailer." The exceptions to this general prohibition are described in Tenn. Code Ann. § 57-5-101(c)(1)(A) and (B). A beer manufacturer may sell the beer it manufactures at retail if yearly sales are not more than 5,000 barrels. Also, a beer manufacturer may operate a restaurant at or contiguous to its manufacturing location and sell its beer through that restaurant. But a beer manufacturer otherwise may not have any direct or indirect interest in a retailer or restaurant that sells beer.

(4b)

Since such transfers of beer would be illegal, this question is pretermitted.

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