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Opinion No. 12-54

Wholesale Beer Tax and Quality Control Standards Determination

QUESTIONS

1. When does Tenn. Code Ann. § 57-6-109(b) permit a beer wholesaler to determine that "quality control standards" requires the removal and replacement of product that was previously delivered to a retailer?

2. Does Tenn. Code Ann. § 57-6-109(b) limit a beer wholesaler's right to remove and replace a retailer's beer stock based on "quality control standards" solely to situations where the wholesaler has determined that such action is necessary because of either product quality or shelf-life?

3. Is the product replacement permitted by Tenn. Code Ann. § 57-6-109(b) for purposes of "quality control standards" available to a retailer in circumstances where a retailer discovers product damage, breakage, or shortages subsequent to the time of delivery to the retailer?

4. Tenn. Code Ann. § 57-6-109(b) appears to limit the remedy for a "quality control standards" determination to replacement of product returned by the retailer. Does Tenn. Code Ann. § 57-6-109(b) authorize wholesalers to make any refunds or other price adjustments in connection with the removal of product because of a determination related to "quality control standards?"

5. In the absence of a "quality control standards" determination by the wholesaler, is it a violation of Tenn. Code Ann. § 57-6-109 for a wholesaler to provide any price adjustment, refund, or replacement of beer after the time of delivery?

6. What penalty may be imposed on the wholesaler or retailer for violating Tenn. Code Ann. § 57-6-109?

OPINIONS

1. A beer wholesaler may remove and replace product that was delivered to a retailer based on the wholesaler's determination concerning "quality control standards" at any time subsequent to delivery of the product to the retailer.

2. Tenn. Code Ann. § 57-6-102(8) only permits product replacement by the wholesaler when the wholesaler determines that beer is not marketable due to product deterioration or due to improper packaging or handling by the manufacturer or wholesaler.

3. No. Pursuant to Tenn. Code Ann. § 57-6-109 a retailer may only seek replacement or adjustment for product breakage or shortages at the time of delivery to the retailer.

4. No. Tenn. Code Ann. § 57-6-109(b) only authorizes product replacement. No other adjustments, credits or refunds are permitted under this statute.

5. Yes. Tenn. Code Ann. § 57-6-109(b) authorizes reductions, adjustments or replacements after delivery only for quality control reasons.

6. Tenn. Code Ann. § 57-6-109 imposes responsibilities upon the wholesaler for making certain reductions or adjustments for the loss of beer due to shortages or damaged or broken containers at the time the beer is delivered, and violations of these responsibilities are designated a Class C misdemeanor under Tenn. Code Ann. § 57-6-114. In addition, pursuant to Tenn. Code Ann. § 57-5-108(m), a violation of Tenn. Code Ann. § 57-6-109 possibly could result in the revocation or suspension of the retailer's permit or the imposition of a civil penalty by the local authority if this violation resulted in the wholesale beer tax of Tenn. Code Ann. § 57-6-103 not being paid on beer at the retailer's location. Furthermore, Tenn. Code Ann. § 57-6-113 gives city and county officials the authority and responsibility to enforce the provisions of the Wholesale Beer Tax Act. Accordingly, cities or counties may impose penalties on wholesalers or retailers for violations of Tenn. Code Ann. § 57-6-109.

ANALYSIS

The statute under review, Tenn. Code Ann. § 57-6-109, is part of the Wholesale Beer Tax Act codified at Tenn. Code Ann. §§ 57-6-101 to -118 (hereinafter "the Act"). The Act generally establishes a structure under which the Tennessee wholesale beer tax is collected and administered. Tenn. Code Ann. § 57-6-103 imposes a seventeen percent tax on the wholesale price of beer. The Act, however, is intended not only to effectively collect this tax but also to regulate and prohibit certain trade practices. *Mascari v. Raines*, 220 Tenn. 234, 240, 415 S.W.2d 874, 876 (1967). For example, Tenn. Code Ann. § 57-6-110 generally prohibits a wholesaler from making a gift of beer or any other type of gift to any retailer.

The wholesale beer tax is due on or before the twentieth day of each month and is based on the volume of wholesale sales that were made in the preceding calendar month. Tenn. Code Ann. § 57-6-103(a). In order to accurately determine the tax to be paid, Tenn. Code Ann. § 57-6-109(a) prohibits wholesalers from making any reduction or other price adjustment for loss due to shortages or damaged or broken containers, except for product loss that occurs between the time the beer leaves the brewery until delivery to the retailer. Tenn. Code Ann. § 57-6-109(b) provides that that no price adjustment or other refund for damage shall be made by any wholesaler after delivery to the retailer. Tenn. Code Ann. § 57-6-109(b) and Tenn. Code Ann. § 57-6-102(8) provide an exception for product that fails to conform to "quality control standards" as determined by the wholesaler. Thus, a "quality control standard" determination enables a wholesaler to remove any product that fails to meet the "quality control standard," replace it with

an equal amount of new product and claim a credit towards the wholesaler's tax owed under the Act.[1]

1. The initial question is whether Tenn. Code Ann. § 57-6-109(b) imposes any time limitations on a beer wholesaler's right to claim a tax credit related to the removal and replacement of beer in the hands of retailers due to "quality control standards." Answering that question is a matter of statutory interpretation. The primary objective of statutory construction is to ascertain and give effect to the intention of the legislature. *State v. Sherman*, 266 S.W.3d 395, 401 (Tenn. 2008); *Auto Credit v. Wimmer*, 231 S.W.3d 896, 900 (Tenn. 2007). When construing a statute, courts begin with an examination of the statute in question. *Elliott v. Cobb*, 320 S.W.3d 246, 250 (Tenn. 2010). If a statute is unambiguous, courts will find legislative intent in the plain and ordinary meaning of the statutory text. *Id*. A statute is considered ambiguous only if the language can reasonably have more than one meaning. *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 527 (Tenn. 2010). Statutes relating to the same subject matter or having a common purpose are to be construed *in pari materia*. *State v. Edmondson*, 231 S.W.3d 925, 927 (Tenn. 2007).

Regarding the question posed, Tenn. Code Ann. § 57-6-109(b) states in relevant part:

> A wholesaler may determine that beer sold to a retailer does not conform to quality control standards. Upon making that determination, the wholesaler may provide the retailer with replacement beer in exchange for the beer that no longer conforms to quality control standards, if the tax paid on the total amount of replacement beer is equal to the tax credit received on the beer being returned by the retailer.

Tenn. Code Ann. § 57-6-102(8) defines "quality control standard" as follows:

> "Quality control standard" means a standard under which a wholesaler determines whether beer is marketable due to product deterioration or due to improper packaging or handling by the manufacturer or wholesaler.

The language of these statutes can be construed to convey but one meaning and both are clear and unambiguous. Reading the two statutes *in pari materia* confirms that a beer wholesaler may claim a tax credit for the removal and replacement of a retailer's stock whenever the wholesaler decides that such beer should not be sold based on concerns about product quality or damage to its packaging. There are no statutory time limits on when a wholesaler may decide to remove and replace product so long as the decision is based upon considerations that are related to product quality. The statutes thus contemplate that product deterioration may occur at various times, and the rate of deterioration can change depending on a host of conditions. Therefore, a "quality control standards" determination may be made at delivery or anytime thereafter.

2. Tenn. Code Ann. § 57-6-102(8) defines "quality control standard" to mean a standard under which a wholesaler determines whether beer is "marketable." Courts will look to

[1] Administrative rules dealing with taxes collected pursuant to the Act have been promulgated by the Tennessee Department of Revenue and are set forth at Tenn. Comp. R. & Regs. 1320-4-1-.01 to -.15.

dictionary definitions of specific words in order to ascertain the natural and ordinary meaning of statutory language. *State v. Majors,* 318 S.W.3d 850, 859 (Tenn. 2010); *State v. Clark,* 355 S.W.3d 590, 593 (Tenn. Crim. App. 2011). In common parlance, the term "marketable" means "fit to be offered for sale." *Webster's II New College Dictionary* 670 (1995). However, Tenn. Code Ann. § 57-6-102(8) further qualifies the term "marketable" to include only "product deterioration or improper packaging or handling by the manufacturer or wholesaler." Thus these are the only circumstances under which beer can be exchanged because under Tenn. Code Ann. § 57-6-109(b) it fails to conform to quality control standards.

3. The next question is whether an adjustment or refund may be made to a retailer who discovers product losses, damage or shortages at any time after delivery has been accepted. Answering this question is also a matter of statutory interpretation that requires the application of the rules of statutory construction identified above. The relevant statutes are Tenn. Code Ann. §§ 57-6-109(a) and (b). Both are clear and unambiguous. Subsection (a) states that wholesalers are prohibited from making "any reduction or adjustment for loss due to shortages or damaged or broken containers, except for the actual loss from the time the beer leaves the brewery *until it is delivered to the retailer*." Tenn. Code Ann. §57-6-109(a) (emphasis added). Subsection (b) plainly states that retailers are required to inspect the shipment for damage or shortages and then to accept the shipment, and it repeats the general prohibition against refunds or adjustments after delivery. Tenn. Code Ann. § 57-6-109(b). Accordingly these statutes do not permit a retailer to seek any adjustment or refund after delivery. *See Wells v. Tennessee Board of Regents,* 231 S.W.3d 912, 917 (Tenn. 2007) (court stating the rule of statutory construction that the express mention of one thing in a statute means the exclusion of things not mentioned). The inspection affords a retailer the opportunity to determine whether any damage or loss has in fact occurred between shipment from the brewery and delivery and not at some later date.

4. Tenn. Code Ann. § 57-6-109(b) only authorizes wholesalers to replace the portion of a retailer's stock that has been removed based on quality control concerns so long as the tax paid on the replacement beer is equal to the tax credit received on the beer being returned by the retailer. Subsection (b) does not mention any other type of remuneration for breakage discovered after the retailer has accepted delivery from the wholesaler. The failure to mention any other types of adjustments, refunds or reductions indicates that the General Assembly intended product replacement to serve as the sole remedy in such situations. *See Wells v. Tennessee Board of Regents,* 231 S.W.2d at 917.

5. Tenn. Code Ann. § 57-6-109(b) only permits post-delivery adjustments in the form of product replacement for a wholesaler's removal of a retailer's stock based on quality control concerns. The omission of any other post-delivery credits, refunds or other adjustments indicates that the General Assembly did not intend to permit any other credits, refunds or adjustments for any post-delivery damage, shortage or loss. *See Wells v. Tennessee Board of Regents,* 231 S.W.3d at 917. Thus providing any other refund, reduction or adjustment would violate Tenn. Code Ann. § 57-6-109(b).

6. A violation of Tenn. Code Ann. § 57-6-109 could result in a variety of civil and criminal penalties. Tenn. Code Ann. § 57-6-114 states that a failure to comply with Tenn. Code Ann. § 57-6-109 (and other provisions of the Wholesale Beer Tax Act) constitutes a Class C

misdemeanor.[2] As the requirements of Tenn. Code Ann. § 57-6-109 fall on the wholesaler, not the retailer, any criminal penalties resulting from violations of that section would appear to apply only to the wholesaler.

Furthermore, noncompliance with Tenn. Code Ann. § 57-6-109 could result in a failure to pay wholesale beer tax required by Tenn. Code Ann. § 57-6-103. If a retailer is in possession of beer on which the wholesale beer tax has not been paid, then a city or county could revoke or suspend the retailer's beer permit or impose a civil penalty pursuant to authority granted by Tenn. Code Ann. § 57-5-108(m).[3]

More generally, Tenn. Code Ann. § 57-6-113 gives city and county officials the authority and responsibility to enforce the provisions of the Wholesale Beer Tax Act. Accordingly, cities or counties may adopt provisions in their local beer ordinances to impose penalties on wholesalers or retailers for violations of Tenn. Code Ann. § 57-6-109.[4]

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[2] The penalty for a Class C misdemeanor is no more than 30 days imprisonment or a fine not to exceed $50, or both. Tenn. Code Ann. § 40-35-111(d)(3).

[3] For example, the Code of the Metropolitan Government of Nashville and Davidson County, § 7.08.150E, authorizes the Beer Permit Board to revoke or suspend a beer license or to impose a civil penalty on a retailer in possession of beer on which the wholesale beer tax has not been paid. *See generally* The Code of the Metropolitan Government of Nashville and Davidson County, Ch. 7.08.110, (hereinafter "the Metro Code"), *available at* http://library.municode.com/index.aspx?clientID-14214.

[4] For instance, the Metro Code, § 7.08.110A, allows the revocation or suspension of a wholesale or retail beer permit "for any violation of any provision of state law regulating the sale, storage and transportation of alcoholic beverages." The Metro Code, § 7.08.140T, also makes it unlawful for any wholesale or retail beer permit holder to "allow or engage in any criminal activity on the premises" of a beer permit holder, which presumably would include allowing or engaging in activity constituting a violation of Tenn. Code Ann. § 57-6-109.

Requested by:

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