

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

July 6, 2018

Opinion No. 18-28

Certificates of Authority for Nonresident Sellers and Direct Shippers

Question

Must a foreign corporation or limited liability company obtain a certificate of authority from the Tennessee Secretary of State pursuant to Tenn. Code Ann. § 48-25-101 or § 48-249-901 when the corporation or company is licensed as a nonresident seller pursuant to Tenn. Code Ann. § 57-3-602(a) or as a direct shipper pursuant to Tenn. Code Ann. § 57-3-217?

Opinion

A foreign corporation or limited liability company licensed as a nonresident seller or direct shipper must obtain a certificate of authority only if the corporation or company transacts business in the State within the meaning of the relevant statutes, which depends on the character and extent of the corporation's or company's transactions and business in the State.

ANALYSIS

A foreign corporation is prohibited from transacting business in Tennessee until it obtains a certificate of authority from the Secretary of State. Tenn. Code Ann. § 48-25-101(a). A similar obligation is imposed on foreign limited liability companies (LLCs). *Id.* § 48-249-904(a).¹ Whether a foreign corporation or LLC is “transact[ing] business” in Tennessee depends on whether its business in the State constitutes “merely casual or occasional transactions” or “some substantial portion of its ordinary business.” *Lloyd Thomas Co. v. Grosvenor*, 144 Tenn. 347, 233 S.W. 669, 670-71 (1921).

The General Assembly has enumerated several activities that do not constitute transacting business in the State, including, for example, “[s]elling through independent contractors,” “[s]oliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside this state before they become contracts,” “[c]onducting an isolated transaction that is completed within one (1) month and that is not one in the course of repeated transactions of a like nature,” and “[t]ransacting business in interstate commerce.” Tenn.

¹ Section 48-249-904 was enacted as part of the Tennessee Revised Limited Liability Company Act, 2005 Tenn. Pub. Acts, ch. 286, § 1. *See* Tenn. Code Ann. § 48-249-101. However, some LLCs may continue to be governed by the former law, the Tennessee Limited Liability Company Act, 1994 Tenn. Pub. Acts, ch. 868, § 1. *See* Tenn. Code Ann. § 48-201-101. The relevant portions of the requirements and exemptions found in the 2005 Revised LLC Act, Tenn. Code Ann. §§ 48-294-904, 48-294-902, are materially identical to the previous requirements and exemptions in the 1994 LLC Act, Tenn. Code Ann. §§ 48-246-102, 48-246-301. Because the analysis does not differ between these sections, all references in this opinion are to the 2005 Revised LLC Act.

Code Ann. §§ 48-25-101(b), 48-249-902(a). Foreign corporations or LLCs conducting only these activities are not required to obtain a certificate of authority. *See Alison Group, Inc. v. Ericson*, 181 S.W.3d 670, 673-75 (Tenn. Ct. App. 2005).

With respect to activities other than these statutorily exempt activities, Tennessee courts evaluate the character and extent of a foreign entity's contact with the State to determine whether the contact constitutes "transacting business." *See Lloyd Thomas Co.*, 233 S.W. at 671. That is, whether a foreign corporation or LLC is transacting business in Tennessee and is required to obtain a certificate of authority is "in a large measure found in the facts" and dependent on the totality of the circumstances in each case. *United Artists Corp. v. Bd. of Censors*, 189 Tenn. 397, 225 S.W.2d 550, 554 (1949). Factors considered in the analysis may include the amount of property owned in Tennessee, the location of employees within the State, the buying or selling of products within the State, or references to Tennessee in letterhead or official correspondence. *See, e.g., Advance Lumber Co. v. Moore*, 126 Tenn. 313, 148 S.W. 212, 212-13 (1912); *Shoenterprise Corp. v. Butler*, 46 Tenn. App. 302, 329 S.W.2d 361, 363 (1959).

The fact-specific determination of whether a foreign corporation or LLC must obtain a certificate of authority is distinct from the statutory requirements applicable to foreign corporations and LLCs that wish to sell or distribute wine and alcoholic beverages in Tennessee. A "manufacturer, distillery, winery, importer, broker, or person which sells or distributes alcoholic beverages" to any wholesaler or manufacturer licensed in Tennessee must obtain a nonresident seller's permit. Tenn. Code Ann. § 57-3-602(a). And a nonresident seller's permit is required "regardless of whether the sale is consummated inside or outside Tennessee." *Id.* A nonresident seller's permit is also required of an entity that imports alcoholic beverages into Tennessee for any of the other purposes specified by the General Assembly, including warehousing wine and alcoholic beverages in Tennessee for the purpose of selling them outside the state. *Id.* § 57-3-602(b).

Because a nonresident seller is required by § 57-3-602(a) to obtain a permit to conduct even a single sale, nonresident sellers may be required to obtain a permit to sell alcoholic beverages even if they are not required to obtain a certificate of authority from the secretary of state under § 48-25-101(b) or § 48-249-902(a). For example, a foreign corporation wishing to conduct a single sale of alcoholic beverages to a Tennessee wholesaler outside of Tennessee's borders would be required to obtain a nonresident seller's permit under § 57-3-602(a). But because that single, out-of-state transaction likely would not, on its own, rise to the level of transacting business in the State, the corporation likely would not be required to obtain a certificate of authority. Foreign corporations and LLCs holding nonresident seller's permits are thus not necessarily required to obtain a certificate of authority.

The same principle is true for foreign corporations or LLCs holding direct shipper's licenses under Tenn. Code Ann. § 57-3-217. Direct shippers may make sales and deliveries of wine by common carrier to Tennessee citizens at least twenty-one years of age who purchase wine "directly from the direct shipper." Tenn. Code Ann. § 57-3-217(b). Most foreign corporations or LLCs licensed as direct shippers are likely "transacting business" in Tennessee and are thus required to obtain a certificate of authority pursuant to § 48-25-101(b) or § 48-249-902(a). It is possible, however, that a foreign corporation or LLC licensed as a direct shipper could conduct so

few transactions and have such little contact with the state that they would not be required to obtain a certificate of authority.

In sum, whether a foreign corporation or LLC licensed as a nonresident seller or direct shipper must obtain a certificate of authority will depend on the character and extent of the corporation's or LLC's transactions within and contacts with Tennessee.

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

JONATHAN DAVID SHAUB
Assistant Solicitor General

Requested by:

Clayton Byrd
Executive Director
Alcoholic Beverage Commission
500 James Robertson Parkway
Nashville, TN 37243