



SC PRIVATE LETTER RULING #89-3

TO: ABC, Incorporated

SUBJECT: Exemption
(Soft Drink Tax)

REFERENCE: S.C. Code Ann. Section 12-21-1900 (1976)
S.C. Code Ann. Section 12-21-1880 (1976)
S.C. Code Ann. Section 12-21-1710 (Supp. 1987)
S.C. Code Ann. Section 12-21-1730 (Supp. 1987)
S.C. Code Ann. Section 12-21-2120 (Supp. 1987)
S.C. Code Ann. Section 12-21-3010 (1976)

AUTHORITY: S.C. Code Ann. Section 12-3-170 (1976)
SC Revenue Procedure #87-3

SCOPE: A Private Letter Ruling is a temporary document issued to a taxpayer, upon request, and it applies only to the specific facts or circumstances related in the request. Private Letter Rulings have no precedential value and are not intended for general distribution.

Questions:

1. Is ABC liable for the soft drink tax on a juice, which they have failed to register as an exempt soft drink pursuant to Code Section 12-21-1900?
2. If the drink in question qualifies for the exemption found in Code Section 12-21-1880, and ABC registers it as an exempt drink pursuant to Code Section 12-21-1900, would ABC's customers be liable for any taxes (if ABC is not liable for such taxes) for periods prior to the registration?

Facts:

ABC, Incorporated sells and distributes a natural fruit juice in South Carolina. ABC has been selling the juice in this State for several years; however, the company was not aware of the registration requirements of Code Section 12-21-1900.

Code Section 12-21-1900 reads:

Any bottled soft drink for which exemption is claimed under Section 12-21-1880 must be registered with the Commission. No such bottled soft drinks shall be entitled to the exemption contained in that section until such registration has been accomplished. Registration shall be accomplished by the filing of an application for exemption on forms to be prescribed by the Commission, and such forms shall include an affidavit setting forth the complete and itemized formulas by volume of the drinks herein referred to, and the failure to submit such affidavit shall be prima facie evidence that such bottled soft drink does not contain thirty per cent or more of natural fruit or vegetable juice or thirty per cent or more of natural liquid milk. All bottled soft drinks which are not registered therefor which do not have affixed thereto the proper revenue stamps, lids, or crowns, shall be subject to confiscation, as provided by Section 12-21-2870. The Commission, or any duly authorized representative, may at any time check the formulas or the manufacturing of such bottled soft drinks for which exemption is claimed under Section 12-21-1880, and in addition thereto, the Commission, or any duly authorized representative, may at any time take samples of any product for which exemption has been claimed, from any or all persons offering such product for sale, for the purpose of ascertaining by analysis the contents thereof. The sample shall be clearly marked for identification, and such sample may be turned over to any registered chemist designated by the Commission, for the purpose of analysis.

If such investigation establishes that such bottled soft drinks contain less than thirty per cent by volume of natural fruit, or natural vegetable juice, as defined in Section [12-21-1890], or bottled natural liquid milk as defined in Section 12-21-1890, or if any person engaged in the selling manufacturing, purchasing, consigning, using, shipping or distributing for the purpose of sale within this State who has applied for an exemption under Section 12-21-1880 fails or refuses to allow the Commission, or its duly authorized representative, to check the formulas or inspect the manufacturing of such bottled soft drinks, the tax imposed by this article shall apply to all sales of such products, and all such products offered for sale and not properly stamped shall be subject to confiscation, as provided by Section 12-21-2870.

ABC contends the drink is exempt pursuant to Code Section 12-21-1880. That section reads:

All bottled soft drinks containing thirty per cent or more natural fruit or natural vegetable juice as herein-after defined, and all bottled natural liquid milk drinks containing thirty per cent or more of natural liquid milk, as hereinafter defined shall be exempt from the tax imposed by this article. Provided, that this exemption shall not apply to any fruit, or vegetable juice drink, to which is added any one or more of the following: Any coloring, artificial flavoring or preservative. Sugar or salt or vitamins shall not be construed as an artificial flavor or preservative.

ABC is not licensed in South Carolina as a soft drink distributor or wholesaler and has not paid the tax with respect to the juice in question. As a matter of practice, the company does not deliver product to a warehouse or to wholesaler/distributors in South Carolina. Sales and deliveries are made directly to the retail trade for subsequent sale to the ultimate consumer.

The salesman representing ABC in South Carolina lives in another state and calls on South Carolina retailers and brokers representing ABC. Retail customers place their orders through the brokers or directly through the salesman, subject to review and approval by the home office in Florida.

ABC is concerned about a possible past liability for failure to register the juice as required by Code Section 12-21-1900, even though they contend the juice meets the requirements of the exemption.

Discussion:

1. The first issue to be addressed is whether or not ABC has a liability for the soft drink tax.

Code Section 12-21-1730 provides that;

Every person doing domestic or intrastate business within this State and engaging in the business of selling, manufacturing, purchasing, consigning, using, shipping or distributing, for the purpose of sale within this State, bottled drinks of every kind, including but not limited to the following articles or things: soda water, ginger ale, coca-cola, lime-cola, pepsi-cola, any product having an alcohol content of less than one-half percent of weight or volume, fruit juices, vegetable juices, and all drinks and other beverages and things commonly designated as "soft drinks" are, for the privilege of carrying on the business, subject to the payment of a license tax which is measured by and graduated in accordance with the sales of the person within the State, except as otherwise provided in this article.

Every person, firm, corporation, club, or association, or any organization or individual within the State of South Carolina, importing, receiving or acquiring from without the State, or from any other source, beverages commonly designated as soft drinks as contemplated by this article, for use or consumption within South Carolina is subject to payment of [the] license tax at the rates provided for the sale, offer for sale, or distribution of such soft drinks. (emphasis added)

Code Section 12-21-2120, which provides an alternative method of paying the tax, reads:

Each manufacturer, wholesaler, distributor, or retailer first receiving untaxed bottled soft drinks, syrups, pre-mixed soft drink, or powders and bases for sale or disposition in this State is subject to a tax at the rate of one dollar and twenty-two cents a gross for each one cent of face value in the case of bottled soft drinks and a tax at the rates prescribed in this article for syrups, premixed soft drink, or powders and bases. Each manufacturer, wholesaler, distributor, or retailer required to pay the tax shall make a report to the Commission, in the form as the Commission may prescribe, of all bottled soft drinks, syrups, premixed soft drink, powders and bases sold or disposed of in this State and pay the taxes due thereon not later than the twentieth day of the month next succeeding the month of the sale of disposition. (emphasis added)

In summary, an entity conducting domestic or intrastate business in South Carolina and distributing soft drinks, is subject to the license tax. In addition, those first receiving soft drinks, from outside this State, are also subject to the license tax.

However, Code Section 12-21-1710(b) provides that:

Out-of-state distributors and wholesale dealers shall obtain appropriate distributors' or wholesale dealers' licenses upon compliance with provisions of this article and the regulations and administrative rules as may be issued by the Commission.

Subsection (c) of Section 12-21-1710 reads:

Distributors, wholesale, and retail dealers licensed under this section shall file the reports with the Commission as may be required not later than the twentieth day of each month showing transactions for the preceding month. Any person who fails to file the required reports must be penalized not less than twenty dollars nor more than one hundred dollars, to be assessed and collected in the same manner as other taxes are assessed and collected. The Commission may remit the penalty in whole or in part.

Therefore, the statute permits an out-of-state distributor or wholesaler to act as a collection agent for the soft drink tax, but imposes no liability for the tax.

Furthermore, Code Section 12-21-3010 reads, in part:

The taxes and penalties imposed by this chapter shall be deemed a debt owing to the State by the person against whom they shall be charged...

The word "charged" is not defined in the statute. It is an accepted practice in South Carolina to resort to the dictionary to determine the literal meaning of words used in statutes. For cases where this has been done, see *Hay v. South Carolina Tax Commission*, 273 SC 269, 255 SE 2d 837 (1979); *Fennell v. South Carolina Tax Commission*, 233 S.C. 43, 103 SE2d 424 (1958); *Etiwan Fertilizer Co. v. South Carolina Tax Commission*, 217 SC 484, 60 SE2d 682 (1950).

The Second College Edition of the American Heritage Dictionary defines "charge" as: "To entrust with a duty, responsibility or obligation...".

In summary, a licensed out-of-state distributor has an obligation, or a duty, to collect the soft drink tax and, therefore, has a debt to the State for the taxes required to be collected.

2. The second issue to be resolved is whether or not ABC's customers have any liability for periods prior to the date the drink is registered as an exempt drink.

A determination of this issue requires a review of Code Section 12-21-1900. That section reads, in part:

Any bottled soft drink for which exemption is claimed under [Section] 12-21-1880 must be registered with the Commission. No such bottled soft drink shall be entitled to the exemption contained in that section until such registration has been accomplished (emphasis added).

The section requires an "affidavit setting forth the complete and itemized formulas by volume" of any drink registered. With respect to the affidavit the section further reads, in part:

...failure to submit such affidavit shall be prima facia evidence that such bottled soft drink does not contain thirty-percent or more of natural fruit or vegetable juice or thirty percent or more of natural liquid milk. All bottled soft drinks which are not registered shall be subject to confiscation....

A review of Code Section 12-21-1900 requires a determination as to the legislative intent in stating that "[n]o such bottled soft drink shall be entitled to the exemption contained in [Section] 12-21-1880 until such registration has been accomplished." The key word in this quote is "until".

The following definition of "until" can be found in 91 C.J.S. page 509.

The word "until" may be used as a conjunction or it may be used as an adverb of time. It is a restrictive word, and a word of limitation, and is defined as meaning up to the time of, (an action, occurrence, etc.), implying cessation or reversal at that time; up to a certain time, place, or event; up to the time when; up to a specified time; during the whole time before; and it is used ordinarily to restrict what immediately precedes it to what immediately follows it. The office of the word is to fix some point of time or some event upon the arrival or occurrence of which what precedes will cease to exist, or have any further force or effect, and the word presupposes that, when the condition following such word shall become operative, the precedent condition or status shall fall. It is a proper word to be used in creating a limitation.

"Until" has been held to be equivalent to, or synonymous with, "as long as" see 6 C.J.S. p781 note 77, "before" see 10 C.J.S. p231 note 61, "till" see 86 C.J.S. p823 note 20, "to" see 86 C.J.S. p910 note 88, and "up to."

It has been compared with, or distinguished from "before," see 10 C.J.S. p231 note 63. The word "until" is frequently used in expressing a period of time for the performance of an act, and whether a period of time so expressed will or will not include the day or date to which reference is made is treated in Time Section 13(4) - Section 23(16).

A review of the word "until" in Words and Phrases indicates that the courts have held it synonymous with the word "unless."

Therefore, the word "until" is "ambiguous and not susceptible to exact definition". E.M. Boerke, Inc. v. Williams 137 N.W. 2d 489, 28 Wis. 2d 672. Its meaning depends on the context of the particular statute.

Administrative interpretations of statutes by the agency charged with their administration and not expressly changed by the legislative body are entitled to great weight. Marchant v. Hamilton 309 S.E. 2d 781 (1983). When as in this case, the construction or administrative interpretation of a statute has been applied for a number of years and has not been changed by the legislature, there is created a strong presumption that such interpretation or

construction is correct. Ryder Truck Lines, Inc. v. South Carolina Tax Commission, 248 S.C. 148, 149 S.E. 2d 435 (1966); Etiwan Fertilizer Company v. South Carolina Tax Commission, 217 S.C. 354, 60 SE 2d 682 (1950).

It has been the Commission's long-standing interpretation of the statute, based on the context of the statute within the soft drink tax code, that the person first receiving soft drinks into South Carolina will not be held accountable for any taxes for periods prior to the manufacturer's voluntary registration of the product as an exempt soft drink. However, where it is discovered subsequent to registration, that the drink does not in fact qualify for the exemption, the person first receiving the soft drink in this State will be held liable for all periods open under statute.

In addition, where a manufacturer refuses to register a product for any reason, the person first receiving the soft drink will be held liable for all periods up to such time as the manufacturer registers the product as an exempt soft drink.

Conclusions:

1. ABC is not licensed, or required to be licensed, as an in-state or out-of-state distributor for soft drinks within South Carolina. In addition, ABC is not "first receiving" untaxed soft drinks into South Carolina. Therefore, ABC is not liable for the soft drink tax imposed by Chapter 21 of Title 12.

However, if any liability is due, such would fall upon the in-state retailer first receiving the juice into South Carolina.

2. If ABC voluntarily registers the drink and the Commission approves it as an exempt soft drink, the South Carolina customer first receiving the drink, in accordance with past Commission practice, will not be held liable for any soft drink taxes.

However, if the formula is changed and no longer qualifies for the exemption, or it is discovered that the drink did not satisfy the exemption criteria during any time it was sold in this State, the person first receiving the drink will be held liable for any taxes due for all periods, during which the exemption criteria were not satisfied.

SOUTH CAROLINA TAX COMMISSION

s/S. Hunter Howard, Jr.

S. Hunter Howard, Jr., Chairman

s/A. Crawford Clarkson, Jr.

A. Crawford Clarkson, Jr., Commissioner

s/T. R. McConnell

T. R. McConnell, Commissioner

Columbia, South Carolina
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