
State of South Carolina
Department of Revenue
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SC PRIVATE LETTER RULING #13-5

SUBJECT: Beer and Wine Business Ownership and Employment – Three-Tier Laws (ABL)

REFERENCES: S.C. Code Ann. Section 61-2-100 (2009)
S.C. Code Ann. Section 61-2-150 (2009)
S.C. Code Ann. Section 61-4-735(D) (2009)
S.C. Code Ann. Section 61-4-940(D) (2009)
S.C. Code Ann. Section 61-6-150 (2009)
S.C. Code Ann. Section 61-6-1300 (2009)
1 S.C. Regs. 7-301.1 (Supp. 2012)

AUTHORITY: S. C. Code Ann. Section 12-4-320 (2000)
S. C. Code Ann. Section 1-23-10(4) (2005)
SC Revenue Procedure #09-3

SCOPE: A Private Letter Ruling is an advisory opinion issued to a specific taxpayer by the Department to apply principles of law to a specific set of facts or a particular tax situation. It is the Department’s opinion limited to the specific facts set forth, and is binding on agency personnel only with respect to the person to whom it was issued and only until superseded or modified by a change in statute, regulation, court decision, or another Departmental advisory opinion, providing the representations made in the request reflect an accurate statement of the material facts and the transaction was carried out as proposed.

Questions:

1. Is it permissible for a sister to operate a beer and wine business at the wholesale level, while her brother operates a beer and wine business at the retail level, where the siblings stipulate that the brother will have no interest or involvement in any way at the wholesale level except that his retail business would be a potential customer like all other retailers in the area?

2. Is it permissible for a person to be employed simultaneously by a wholesale beer and wine business and by a retail beer and wine business, each owned by third parties unrelated to each other, where the employed person is paid a flat salary with no commission, where he has limited managerial responsibilities at the retail business and none at the wholesale business, and where he has no other financial connection, direct or indirect, to either business?

Conclusions:

1. The three-tier laws applicable to beer and wine do not prohibit one sibling from owning a Tier Two wholesale beer and wine business at the same time another sibling owns a Tier Three retail beer and wine business solely because of the familial relationship. However, the three-tier laws do prohibit cross-tier financial or ownership interests generally, and the Department is authorized to establish conditions or restrictions it deems necessary to assure the absence of this type of interest before it issues or renews a license.

Note: The siblings have stipulated that the brother will have no interest or involvement in the sister's proposed wholesale business. A further stipulation that the sister neither has nor will have any ownership or financial interest in the brother's business, nor will she be involved in any way in the brother's business, must be provided before licensure.

2. The provisions of Title 61 of the South Carolina Code prohibit the cross-tier employment arrangement described in Question 2 because the arrangement does not remove the employee from control over business decisions. In general, an individual who is an employee of a beer or wine business on one tier may not simultaneously serve a business on another tier in any capacity, whether as an employee or consultant or otherwise, unless the individual has no control over business decisions and the individual's compensation is unrelated to the profits of the business.

Facts:

Facts Relevant to Question 1. Sister wishes to open a wholesale beer and wine business in South Carolina after establishing in-state residence. Her brother lives in South Carolina and is a 50% owner of a retail beer and wine business. Sister and Brother stipulate that Brother will have absolutely no interest or involvement in any way in the wholesale business except that his retail business would be a potential customer like all other retailers in the area.

Facts Relevant to Question 2. Once Sister's wholesale business is established, Brother intends to sell his interest in the retail business. Brother anticipates that he will be employed simultaneously by Sister's wholesale beer and wine business and by the retail beer and wine business he previously owned. Both businesses will pay him a flat salary with no commission. Brother will have limited managerial responsibilities at the retail business and none at the wholesale business. Brother will have no other financial connection, direct or indirect, to either business.

Discussion:

The Three-Tier System in General. Within its borders South Carolina regulates commerce in beer and wine by means of a three-tier licensing system. On Tier One are the manufacturers, producers and importers of beer and wine. On Tier Two are the wholesalers. On Tier Three are the retailers.¹

The three-tier statutes in Chapter 4, Title 61 of the South Carolina Code restrict cross-tier interests. The statutes provide that a person in the beer or wine business “on one tier, or a person acting directly or indirectly on his behalf, may not have ownership or financial interest in [a beer or wine] business operation on another tier.”² The object is to maintain the integrity of the beer and wine industry by spreading control among many.³

Question 1. Although several cross-tier relationships are expressly allowed in the three-tier statutes that regulate beer and wine businesses, familial relationships by blood or marriage are neither expressly allowed nor expressly barred.⁴ Instead, the language of the three-tier statutes requires a two-pronged inquiry.

¹ S.C. Code Ann. §§61-4-735(D) and 61-4-940(D). Code Section 61-4-735(D) concerns wine businesses and provides in part:

A producer, winery, vintner, and importer of wine are declared to be in business on one tier, a wholesaler on another tier, and a retailer on another tier. For the purpose of this section, a manufacturer or producer of wine is declared to be a tier one business, a wholesaler or an importer owned solely by a wholesaler is declared to be a tier two business, and a retailer is declared to be a tier three business. Except [in the case of retail sales at certain wineries] as provided in Sections 61-4-720 and 61-4-730, a person or entity in the wine business on one tier or a person acting directly or indirectly on his behalf may not have ownership or financial interest in a wine business operation on another tier.

Similarly, Code Section 61-4-940(D), which concerns beer businesses, provides in part:

A manufacturer, brewer, and importer of beer are declared to be in business on one tier, a wholesaler on another tier, and a retailer on another tier. A person or an entity in the beer business on one tier, or a person acting directly or indirectly on his behalf, may not have ownership or financial interest in the beer business operation on another tier.

² S.C. Code Ann. §§61-4-735(D) and 61-4-940(D).

³ See generally JOHN D. GEATHERS AND JUSTIN R. WERNER, THE REGULATION OF ALCOHOLIC BEVERAGES IN SOUTH CAROLINA 240-243 (2007).

The first prong concerns whether either of the siblings qualifies as a person “acting directly or indirectly on [behalf of a person in the beer or wine business on another tier].” The second prong concerns whether there is a common “ownership or financial interest” in businesses on different tiers.

With respect to the first prong, Brother currently owns a beer and wine retail business. Sister will be prohibited from owning a beer and wine wholesale business if either is deemed to be acting directly or indirectly on the other’s behalf. However, for purposes of the first question, the Siblings have stipulated that Brother will have no involvement in Sister’s proposed wholesale business. Thus, based on the facts as stated by the parties, and provided that Sister likewise will not be acting directly or indirectly on behalf of Brother, there is no basis for prohibiting issuance of a beer and wine wholesaler’s license to Sister under the first prong.

⁴ The following cross-tier situations are expressly allowed:

1. Ownership, in whole or in part, by a manufacturer or importer of beer or wine of a business that holds an on-premises retail beer and wine permit provided that:
 - (a) All beverages to be handled or sold by the retail dealer must be purchased from licensed wholesalers and purchased on the same terms and conditions as do other retail dealers.
 - (b) Sales of any product produced or distributed by the manufacturer or importer must not exceed ten percent of the annual gross sales of beer or wine by the retail permit holder.
2. Interest held on July 1, 1980 (beer), or July 1, 1993 (wine), by the holder of a wholesale permit in a business operated by the holder of a retail permit at premises other than where the wholesale business is operated.
3. Ownership of less than one percent of the stock in a corporation with a class of voting shares registered with the Securities and Exchange Commission or other federal agency under Section 12 of the Securities and Exchange Act of 1934, as amended (beer or wine).
4. A consulting agreement under which the consultant has no control over business decisions and whose compensation is unrelated to the profits of the business (beer or wine).
5. Winery sales at retail as provided in Code Sections 61-4-720 and 61-4-730.

S.C. Code Ann. §§61-4-735(D) and 61-4-940(D).

Under the second prong, the determination will turn on an identity of ownership or financial interest in business on more than one tier. “Ownership or financial interest,” in the most direct sense, means possession of stock, equity in the capital, or any interest in the profits of the licensed business. The Siblings have stipulated that Brother will have no interest in Sister’s proposed wholesale business. A further stipulation will be required that Sister neither has nor will have any ownership or financial interest in Brother’s business.

A question then arises whether “ownership or financial interest” in beer and wine wholesale or retail businesses includes certain interests by relationship. An obvious example of this type of interest is the interest of the spouse of the owner in fact. The relationship between spouses is such that an interest held in the name of one spouse only is presumed to benefit the other spouse even without a legally enforceable right of possession—in other words, a financial interest even in the absence of an ownership interest.

Of course, a spousal relationship is not at issue here. Rather, this question involves a second degree blood relationship.⁵ If the licenses in question were liquor licenses instead of beer and wine, Sister would be barred from obtaining a wholesaler’s license because she would be deemed to have an interest in Brother’s retail business by virtue of the blood relationship.⁶ However, no such prohibition has been expressed for beer and wine licenses.⁷ In the absence of an express legislative directive, the Department will not prohibit siblings from holding cross-tier beer and wine licenses based solely on the familial relationship.

⁵ As explained in SC Rev. Ruling #98-1, siblings are related in the second degree.

⁶ Code Section 61-6-1300(6) provides that no liquor wholesaler may

directly or indirectly, individually or as a member of a partnership or an association, as a member or stockholder of a corporation, or **as a relative to a person by blood or marriage within the third degree**, have an interest in a business, store, or establishment dealing in alcoholic liquors except the store or place of business covered by his wholesaler's license. [Emphasis added.]

This provision is one of several statutes that effectively impose a three-tier system on the liquor industry. JOHN D. GEATHERS AND JUSTIN R. WERNER, *THE REGULATION OF ALCOHOLIC BEVERAGES IN SOUTH CAROLINA* 240-243 (2007).

⁷ Under Code Section 61-2-150, there is sufficient identity of interests arising from a relationship by blood within the third degree or marriage to hold a successor beer, wine or liquor license holder liable for the fines incurred by the previous license holder doing business in the same location. Significantly, however, Code Section 61-2-150 does not bar the relative outright from holding the subsequent license.

In conclusion, the three-tier laws applicable to beer and wine do not prohibit one sibling from owning a Tier Two wholesale beer or wine business at the same time another sibling owns a Tier Three retail beer or wine business solely because of the familial relationship. However, the three-tier laws do prohibit cross-tier financial or ownership interests generally, and the Department is authorized to establish conditions or restrictions it deems necessary to assure the absence of this type of interest before it issues or renews a license.⁸

Question 2. This question concerns Brother's intention to sell his 50% ownership interest in the retail beer and wine business and assume the status of an employee of the retail business with "limited" managerial responsibilities for a flat salary, with no other financial connection to the retail business. He will also be employed by Sister's wholesale business.

The question here is whether an individual can be employed by businesses on different tiers simultaneously. The answer turns on the nature of the employment.

As a threshold matter, it should be noted that the proposed 50% change in ownership in the retail beer and wine business will likely come within the provisions of Code Section 61-2-140(B), requiring surrender of the license:

Licenses and permits are the property of the department and are not transferable. Licenses and permits must be surrendered immediately to the department upon the termination of a business, **upon a change of ownership, possession, or control of a corporation or business entity**, or upon a change in the character of the property, facilities, or nature of the business activity for which a license or permit has been issued. The transfer of twenty-five percent or more of corporate stock is considered a change in ownership. [Emphasis added.]

Further, a business applying for an alcoholic beverage license, whether initially or in the biennial renewal process, must disclose its principals for purposes of determining that the requirements for age, good moral character and tax compliance are satisfied.⁹ "Principal" is defined in such a way as to include owners and other individuals entitled to exercise control over business decisions for a business or entity.¹⁰ Thus, the General Assembly has deemed control as well as

⁸ S.C. Code Ann. §61-2-80.

⁹ S.C. Code Ann. §61-2-100.

¹⁰ S.C. Code Ann. §61-2-100(H)(2). Among these individuals is "an employee who has day-to-day management responsibilities for the business or entity." S.C. Code §61-2-100(H)(2)(h). "Day-to-day" is defined as "[o]ccurring on a routine or daily basis." *The American Heritage College Dictionary* 362 (4th ed. 2002). In other words, "principal" includes an employee whose

ownership to be factors in the effective regulation of the alcoholic beverage industry. Even though not an owner, Brother as a manager will be deemed a principal of the retail beer and wine business for purposes of any license application submitted after he takes up employment.

Turning to the question at hand concerning cross-tier employment, there is no question that if Brother were an owner-principal of the retail beer and wine business, he would be barred from any situation that put him in the position of acting on behalf of the owner of the wholesale business, including employment at the wholesale business.¹¹ The three-tier statutes in Chapter 4, Title 61 of the South Carolina Code provide that a person in the beer or wine business “on one tier, or a person acting directly or indirectly on his behalf, may not have ownership or financial interest in [a beer or wine] business operation on another tier.”¹² The phrase “ownership or financial interest” is not formally defined, but the following provides guidance:

For purposes of this subsection, **ownership or financial interest does not include** the ownership of less than one percent of the stock in a corporation with a class of voting shares registered with the Securities and Exchange Commission or other federal agency under Section 12 of the Securities and Exchange Act of 1934, as amended, or **a consulting agreement under which the consultant has no control over business decisions and whose compensation is unrelated to the profits the business.**¹³

Thus, “no of control over business decisions” is a precondition for the consulting agreement exception to the prohibition against cross-tier activity. This would not be necessary unless the General Assembly considered control over business decisions to be an ownership or financial interest, coequal with the right to share in the profits of the business.

Whether Brother, as an employee of the wholesale business, may be simultaneously employed in a management capacity in a retail business is resolved by reading the foregoing three-tier provisions together with general license provisions, as follows:

management responsibilities are routine, part of the employee’s job description, as opposed to an ad hoc assignment to act temporarily in the regular manager’s stead.

¹¹ The Department maintains its longstanding position that an employee of a beer or wine business on one tier may not have an ownership or financial interest in a business on another tier, unless a statutory exception applies.

¹² S.C. Code Ann. §§61-4-735(D) and 61-4-940(D).

¹³ S.C. Code Ann. §§61-4-735(D) and 61-4-940(D)(emphasis added).

- In general, any business seeking a license to sell alcoholic beverages in South Carolina must disclose on a biennial basis all owners and other individuals who may exercise control over business decisions, control being a factor in regulating the alcoholic beverage industry.¹⁴
- The phrase “ownership or financial interest” in the three-tier provisions¹⁵ includes the notion of control over business decisions as well as a right to share in the profits of the business.

In view of these provisions, it is the Department’s position that, in the absence of an express statutory exception, an individual who is an employee of a beer or wine business on one tier may not simultaneously serve a business on another tier in any capacity, whether as an employee or consultant or otherwise, unless the individual has no control over business decisions and the individual’s compensation is unrelated to the profits of the business. Because the cross-tier employment arrangement described in Question 2 does not remove Brother from control over business decisions, it would violate the three-tier statutes.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/William M. Blume, Jr.
Williams M. Blume, Jr., Director

December 10 _____, 2013
Columbia, South Carolina

¹⁴ S.C. Code Ann. §61-2-100. Control is also a factor (though at a different level than managerial business decisions) in the context of business entities and the prohibition against license transfer: In the case of a business entity licensed to sell alcoholic beverages, if there is a change in ownership, possession or control of the entity, the entity’s license must be surrendered. S.C. Code Ann. §61-2-140(B).

¹⁵ S.C. Code Ann. §§61-4-735(D) and 61-4-940(D).