
State of South Carolina
Department of Revenue
301 Gervais Street, P. O. Box 125, Columbia, South Carolina 29214

SC REVENUE ADVISORY BULLETIN #01-8

SUBJECT: Alcoholic Beverages
(ABC)

EFFECTIVE DATE: Applies to all open periods under the statute.

REFERENCES: S. C. Code Ann. Section 61-6-20 (Supp. 2000)
S. C. Code Ann. Section 61-6-30 (Supp. 2000)
S. C. Code Ann. Section 61-4-10 (Supp. 2000)

AUTHORITY: S. C. Code Ann. Section 12-4-320 (2000)
S. C. Code Ann. Section 1-23-10(4) (2000)
SC Revenue Procedure #99-4

SCOPE: The purpose of a Revenue Advisory Bulletin is to provide guidance to the public and to Department personnel. It is a written statement issued to apply principles of tax law to a specific set of facts or a general category of taxpayers. A Revenue Advisory Bulletin does not have the force or effect of law, and is not binding on the public. It is, however, the Department's position and is binding on agency personnel until superseded or modified by a change in statute, regulation, court decision, or advisory opinion.

Question:

What is the basis for determining if a product containing alcohol (and listed in Code Section 61-6-30) is an alcoholic beverage under Code Section 61-6-20 or is "unfit for beverage purposes" under Code Section 61-6-30?

Conclusion:

The basis for determining if a product containing alcohol (and listed in Code Section 61-6-30) is an alcoholic beverage under Code Section 61-6-20 or is "unfit for beverage purposes" under Code Section 61-6-30 is whether or not the product has a "substantial actual use" as a beverage.

If a product containing alcohol (and listed in Code Section 61-6-30) has a "substantial actual use" as an alcoholic beverage, then the product must be taxed and regulated as a beverage under the provisions of Title 12 and Title 61. This does not require that the chief use of the product be as a beverage.

A product may have multiple uses and if one of its actual uses is as a beverage and that use is substantial, then it must be taxed and regulated as a beverage even though it may also have a “substantial actual use” for non-beverage purposes.

If a product containing alcohol (and listed in Code Section 61-6-30) does not have a “substantial actual use” as an alcoholic beverage, then the product is “unfit for beverage purposes” and is not taxed and regulated as a beverage under the provisions of Title 12 and Title 61.

Note: Regardless of its “substantial actual use,” if a person knowingly sells any product enumerated in Code Section 61-6-30 (items (1), (2), (3), or (4)) for beverage purposes, then that person is “guilty of a misdemeanor and, upon conviction, is subject to a fine of not more than two hundred dollars or imprisonment of not more than sixty days, or both.”

Facts:

In South Carolina, alcoholic liquors are sold for beverage purposes in retail liquor stores and sold and consumed for beverage purposes in restaurants, places furnishing accommodations and in nonprofit clubs meeting the licensing requirements of Title 61 of the South Carolina Code of Laws. Other products containing alcohol are sold as flavoring extracts or for medicinal or other non-beverage purposes in grocery, drug and other stores.

Sometimes it is difficult to determine if a product is for beverage purposes or for other purposes. This advisory opinion will attempt to provide guidance for making this determination.

Discussion:

South Carolina law (Section 61-6-20) defines “alcoholic liquor” or “alcoholic beverage,” in part, to mean:

any spirituous malt, vinous, fermented, brewed (whether lager or rice beer), or other liquors or a compound or mixture thereof by whatever name called or known which contains alcohol and is used as a beverage, but does not include:

(a) wine when manufactured or made for home consumption and which is not sold by the maker thereof or by another person; or

(b) a beverage declared by statute to be nonalcoholic or nonintoxicating; (Emphasis added.)

Code Section 61-4-10 concerns beverages declared to be nonalcoholic or nonintoxicating and states:

All beers, ales, porter, and other similar malt or fermented beverages containing not in excess of five percent of alcohol by weight and all wines containing not in excess of twenty-one percent of alcohol by volume are declared to be nonalcoholic and nonintoxicating beverages.¹

The South Carolina law (Section 61-6-30) further states:

No provision in the ABC Act applies to alcohol intended for use in the manufacture and sale of any of the following when they are unfit for beverage purposes:

- (1) Denatured alcohol produced and used pursuant to acts of Congress and regulations promulgated thereunder;
- (2) Patent, proprietary, medicinal, pharmaceutical, antiseptic, and toilet preparations;
- (3) Flavoring extracts, syrups, and food products; and
- (4) Scientific, chemical, mechanical, and industrial products.

A person who knowingly sells any product enumerated in items (1), (2), (3), or (4) for beverage purposes is guilty of a misdemeanor and, upon conviction, is subject to a fine of not more than two hundred dollars or imprisonment of not more than sixty days, or both. No provision of the ABC Act applies to ethyl alcohol intended for use by hospitals, colleges, governmental agencies, or other permittees entitled to obtain this alcohol tax free, as provided by acts of Congress and regulations promulgated thereunder. (Emphasis added.)

Based on the above, our determination concerning whether or not one of the products listed in Code Section 61-6-30 is an alcoholic liquor is based on whether it is fit for beverage purposes.

In Wah Shang v. United States, 44C.C.P.A. 155 (1957) the Court of Customs and Patent Appeals addressed the issue of a medicinal preparation containing between 20 and 50 percent alcohol and stated:

The term “fit for beverage use” is not satisfied by a mere possibility of such use, and requires a substantial actual use as a beverage. But the term does not in our opinion require that the chief use of the merchandise shall be as a beverage. It is entirely possible that a liquid chiefly used as a medicinal preparation may also be used as a beverage to an extent sufficient to justify holding that it is fit for such use.

¹ Even though beer and wine are declared to be nonalcoholic and nonintoxicating under this section (61-4-10), they are still taxed and regulated under the provisions of Title 12 and Title 61.

The court upheld the lower court's determination that the product in question was "fit for beverage use."

In W.R. Filbin & Co. v. United States, 945 F. 2d 390 (Fed. Cir. 1990), the United States Court of Appeals, in reviewing the decision of the trade court, stated:

The trade court found that the substantial actual use of the products is as a frozen ice pop and that any use as a beverage is at most incidental. Filbin, 744F. Supp. At 292. In making these findings, the trade court relied both on testimony of witnesses and on physical evidence. The trade court specifically considered the experience and credibility of both parties' witnesses. The trade court also considered other evidence: Kisko Drinks, which Kisko obviously uses to target the beverage market, as the straw and picture make clear. In addition, Kisko's Super Pops, Giant Freezies and Freezies 36 Pack bear no instructions to drink the product, as opposed to Kisko Drinks, which do. And while it calls its beverage product "Kisko Drinks," for the products at issue, Kisko uses the terms "Freezies" or "Pops," which implies a frozen product meant to be eaten.

* * * *

We hold that in order for merchandise to be classified as "fit for use" as a beverage, it must have a "substantial actual use" as a beverage, and Kisko's products at issue, sold and promoted in frozen form, failed to satisfy this standard and thus were properly classified ... as edible preparations rather than as beverages.

Based on the above, a product containing alcoholic liquor (and listed in Code Section 61-6-30) must have a "substantial actual use" as a beverage in order for it to be taxed and regulated as a beverage. This does not require that the chief use of the product be as a beverage.

Finally, regardless of its "substantial actual use," if a person knowingly sells any product enumerated in Code Section 61-6-30 (items (1), (2), (3), or (4)) for beverage purposes, then that person is "guilty of a misdemeanor and, upon conviction, is subject to a fine of not more than two hundred dollars or imprisonment of not more than sixty days, or both."

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/Elizabeth A. Carpentier

Elizabeth A. Carpentier, Director

July 30, 2001
Columbia, South Carolina