

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING # 00-42**

WARNING

Letter rulings are binding on the Department only with respect to the individual taxpayer being addressed in the ruling. This presentation of the ruling in a redacted form is informational only. Rulings are made in response to particular facts presented and are not intended necessarily as statements of Department policy.

SUBJECT

Application of the price posting and price-cutting provisions of Tennessee Code Annotated Section 57-6-104 to beer contained in plastic vessels.

SCOPE

This letter ruling is an interpretation and application of the tax law as it relates to a specific set of existing facts furnished to the department by the taxpayer. The rulings herein are binding upon the Department and are applicable only to the individual taxpayer being addressed.

This letter ruling may be revoked or modified by the Commissioner at any time.

Such revocation or modification shall be effective retroactively unless the following conditions are met, in which case the revocation shall be prospective only:

- (A) The taxpayer must not have misstated or omitted material facts involved in the transaction;
- (B) Facts that develop later must not be materially different from the facts upon which the ruling was based;
- (C) The applicable law must not have been changed or amended;
- (D) The ruling must have been issued originally with respect to a prospective or proposed transaction; and
- (E) The taxpayer directly involved must have acted in good faith in relying upon the ruling; and a retroactive revocation of the ruling must inure to the taxpayer's detriment.

FACTS

Licensed beer wholesalers are required to file a wholesale price list with the Department of Revenue pursuant to T.C.A. Section 57-6-104. The wholesaler must post a separate price by brand, container and category. Traditional types of vessels used by the beer

industry over the years to package beer for sale to its customers have been cans (typically made of aluminum), bottles (typically made of glass, and produced in form that is either returnable to the manufacturer, for re-use, or non-returnable), kegs and barrels.

Brewers have recently developed and marketed, on a limited basis, a new type of vessel - plastic. Plastic is a unique material for beer packaging. Plastic is not fragile like glass yet holds its shape much better than aluminum. As one commentator said, plastic has the "look of glass and the shatter-resistance of cans." Plastic vessels have a "screw top" seal and cap. Once opened by the consumer, plastic vessels can be re-capped with their screw-top caps in a manner that may preserve the (beer product) contents more effectively than either glass bottles or aluminum cans currently preserve their contents.

The Tennessee Malt Beverage Association (TMBA) asserts that plastic offers considerable functional differences and advantages for the seller and buyer over other materials and that plastic vessels offer significant benefits for the public as well as individual consumers. The TMBA claims that:

- both glass and aluminum are unsuitable for distribution at large venues such as concerts and sports events for safety reasons;
- lightweight plastic has the advantage over glass or metal for being less likely to cause injury if thrown or dropped;
- the primary drawback to the use of plastic, which is not present with glass or aluminum, is the permeability of plastic to gases. (The carbonation in beer can gradually escape through the plastic wall, and oxygen can seep in; both processes adversely affect the product's taste and significantly reduce its shelf life.)
- another drawback to the use of plastic is the additional cost associated with manufacturing plastic vessels. (To address the problem of the permeability of plastic vessels, manufacturers have experimented with vessels made of several different plastic materials. Costs for these plastic vessels range from 30 to 40 percent more than a glass or metal package to as much as three times the cost of a glass bottle.)

The difference in cost between plastic and glass or aluminum forces the brewer, and would seem to cause the wholesaler, to price plastic vessels differently than other containers of the same volume. Because of the price differential and consumer reactions to plastic, one plastic container manufacturer said "I think this package will experience steady growth, but it won't displace glass or aluminum. It will be a third packaging option."

In view of these circumstances, beer wholesalers seek the flexibility to price plastic vessels differently than glass or aluminum packages of the same volume.

For purposes of this ruling, plastic vessels are considered to be nonreturnable packages.¹

¹ Circumstances can be envisioned where plastic vessels would be "returnable" to the manufacturer. For instance, the plastic vessels may be sufficiently durable for the manufacturer to accept the "return" of used or empty vessels for the production of new beer products. Additionally, the manufacturer might accept the "return" of used or empty plastic vessels to recycle into new plastic vessels for the packaging of new beer products.

QUESTIONS

1. May a wholesaler file a different wholesale price for beer contained in a plastic vessel than for vessels of the same volume made from other materials?
2. If a wholesaler files a different wholesale price for beer contained in plastic vessels than for beer contained in vessels of the same volume made from other materials, will that action affect the wholesaler's posted prices for those other vessels?
3. If a wholesaler files a different wholesale price for beer contained in plastic vessels than for beer contained in vessels of the same volume made from other materials, has that wholesaler engaged in a price-cutting maneuver, device or promotion prohibited by T.C.A. Section 57-6-104 (c)?

RULINGS

1. A wholesaler may not file a different wholesale price for a given beer brand of a given volume in a nonreturnable plastic vessel than its previously posted price for the same brand and volume in other nonreturnable bottles without making a price change for the other nonreturnable bottles under T.C.A. Section 57-6-104.
2. If a wholesaler files a different price for a beer brand contained in nonreturnable plastic vessels than its currently posted price for other nonreturnable bottles of the same brand and volume, the wholesaler has changed its price for its nonreturnable bottles category of the beer brand of that volume for purposes of T.C.A. Section 57-6-104. However, the wholesaler's posted price for nonreturnable bottles (which includes non-returnable plastic vessels) has no bearing on the wholesaler's posted prices for other statutorily-defined categories of beer packages (i.e., cans, returnable bottles, kegs and barrels).
3. The mere "filing" of a different wholesale price for a beer brand contained in plastic vessels than for the same brand contained in vessels of the same volume made from other materials does not itself constitute a price-cutting maneuver, device or promotion in violation of T.C.A. Section 57-6-104(c)(1). However, a wholesaler taking such action must take precautions to avoid violating other provisions of T.C.A. Section 57-6-104 when implementing a price change made by any such filing.

However, the fact that the plastic vessels in question are stated by the TMBA to be less likely to cause injury if dropped or thrown and could cost as much as three times the cost of a glass bottle make it unlikely that the plastic vessels in question are in fact "returnable."

ANALYSIS

The Wholesale Beer Tax Act (T.C.A. Section 57-6-101 et seq.) generally establishes a structure under which the Tennessee wholesale beer tax is collected and administered. A tax of 17% of the wholesale price is imposed upon the sale of beer at wholesale. T.C.A. Section 57-6-103(a).

T.C.A. Section 57-6-104 generally requires that beer wholesalers maintain and file price lists with the Department of Revenue and local tax collecting officials since the wholesale beer tax is applied to wholesale price. Wholesalers are also required to give notice of any revision of the list to the Department and other tax-collecting officials.

Another requirement of the Act is that a wholesaler must refrain from sponsoring or participating in any price-cutting maneuver, device, or promotion by changing his wholesale price of beer of a given brand, container and category. T.C.A. Section 57-6-104(c)(1).

The statutory requirements of the filing of wholesale price lists, notice of price changes and limitations upon changes in price are for the purpose of insuring the collection of the wholesale beer tax and maintaining the integrity of the tax base for beer sales in Tennessee. These requirements were not enacted for the purpose of price maintenance and are not intended to establish a price maintenance device. See Op. Atty. Gen'l, November 30, 1981 (81-625); Op. Atty. Gen'l, April 5, 1982 (82-186).

1. - 2. The general rule is that a wholesaler must maintain the same price for a particular brand of beer in the same container and of the same category. T.C.A. Section 57-6-104(b).

T.C.A. Section 57-6-104(c)(1) defines "category" to mean "cans, returnable bottles, non-returnable bottles, kegs and barrels and 'container' to size in ounces."² (Category can

² Neither "brand" nor "container" are defined in the price posting and price-cutting statute (T.C.A. Section 57-6-104) or within the Wholesale Beer Tax Law itself. However, for purposes of distilled spirits and wine products, each such product bearing a distinct "brand name" or "trade name", as those terms are defined and used in the regulations regarding labeling of wines and distilled spirits promulgated by the federal bureau of alcohol, tobacco and firearms, shall be considered a separate "brand." See T.C.A. Section 57-3-301(a)(1) and Tenn. Comp. R. & Regs. 1320-4-6-.05(2). The Department of Revenue has typically interpreted "brand" in the context of beer sales, taxation and regulation in a similar manner.

"Container" has generally been considered by the Department to signify the size of the container by volume (ounces, gallons, etc.).

Although a general understanding of these terms is important background information for these rulings, defining them precisely is not essential to reach the ruling results.

generally be considered a statutory classification of beer according to package description. However, the classification is not in all cases based on materials used to produce the package because both bottles and kegs may be made of more than one type of material.)

Plastic vessels are not listed as a separate beer "category" under the price filing statute. However, the Department will consider a nonrefundable plastic vessel to be a package includible within the nonrefundable bottles "category" for purposes of the price posting and price-cutting provisions of T.C.A. Section 57-6-104.

a. Nonrefundable plastic vessels are includible in the nonreturnable bottle category of beer under T.C.A. Section 57-6-104.

Based on the facts presented in the ruling request, it seems probable that the use of plastic vessels by the beer industry may not have been foreseen by the Tennessee legislature at the time the statute (1953 Tennessee Public Acts Chapter 76, Section 5) was originally enacted. However, a clear purpose of the Tennessee legislature in enacting laws applicable to beer and alcoholic beverages containing less than 5% alcohol has been to closely regulate the beer industry. See Beer House Distribs. v. Huddleston, 854 S.W.2d 881, 883 (Tenn Ct. App., Middle Section, 1992).

If nonreturnable plastic vessels are beer packages that, because of the Tennessee legislature's failure to list them in the statute, are not includible in any category of beer package under the Wholesale Beer Tax Act, this new type of beer packaging would escape the close regulation of the beer industry clearly intended by the legislature. Additionally, effective tax collection and administration by the Department of Revenue would become more difficult.

A statute should be so construed as to give effect to the legislative intent. United States v. Burlison, 127 F.Supp. 400 (E.D. Tenn. 1954). The premier rule of statutory construction is to ascertain and give effect to the legislative intent. Horne v. Cox, 551 S.W.2d 690 (Tenn. 1977). A statute should be construed sensibly and in harmony with its purpose so as to advance and render effective such purpose and intention of the legislature. Rittenberry v. Lewis, 222 F.Supp. 717 (E.D. Tenn. 1963), *aff'd*, 333 F.2d 573 (6th Cir. 1964).

Therefore, if T.C.A. Section 57-6-104(c)(1) can be reasonably construed such that plastic vessels are included in one of the listed categories of beer packages, the statute should be construed in that manner in order to accomplish the purpose and intent of the legislature.

It appears obvious that the plastic vessels at issue cannot be reasonably placed in either the "keg" category or the "barrel" category. According to the facts presented, the plastic vessels at issue are likely to be distributed at large venues such as concerts and sports events, where safety (potential injuries from throwing or dropping) is a factor. The vessels in question are not likely to be sized as large as either kegs or barrels in that context.

Similarly, it does not appear reasonable to categorize the plastic vessels in question as "cans" because cans, by their very nature, are made of some type of metal, typically aluminum. A plastic vessel would not ordinarily be described as a can in modern day language.

However, it would not be unusual for a person nowadays to refer to a plastic vessel containing a liquid for human consumption as a bottle even though bottles, in recent times, have been more commonly thought of as containers made of glass.

Therefore, plastic vessels can be reasonably placed in one of the bottle categories stated in T.C.A. Section 57-6-104(c)(1) - in this case the category of "nonreturnable bottles" (since it has been assumed the plastic vessels are nonreturnable). The legislative intent to closely regulate the beer industry is accomplished - and not frustrated - by this construction.

b. A wholesaler's filing of a different wholesale price for a beer brand of a particular volume in a nonreturnable plastic vessel than the wholesaler's posted price for other nonreturnable bottles of the same brand and volume is a price change under T.C.A. Section 57-6-104.

Since nonreturnable plastic vessels are included in the nonreturnable bottle category of beer packaging, a wholesaler's filing of different prices for nonreturnable plastic vessels of a given brand and volume than for (other) nonreturnable bottles of the same brand and volume would be a price change for its nonreturnable bottles category.³

c. The wholesaler's posted price for nonreturnable bottles (of a given brand and volume) has no bearing on the wholesaler's posted prices for other statutorily-defined categories of beer.

If a wholesaler files a different price for a given brand and volume of its beer sold in nonreturnable plastic vessels than its previously posted price for its "nonreturnable bottle" category of beer of the same brand and volume, the wholesaler has changed its price for the nonreturnable bottle category of such beer. However, such a price change for the nonreturnable bottle category has no bearing on the prices for the other beer package categories stated in T.C.A. Section 57-6-104(c)(1), such as cans, returnable bottles, kegs and barrels.

³ A wholesaler's change in its price must be made in accordance with the provisions of T.C.A. Section 57-6-104. Any such change would also result in certain limitations against future price changes as described in that statute.

It must be noted, however, that the general rule of T.C.A. Section 57-6-104(b) merely requires wholesaler prices to be fixed on each brand sold by container and category.

Therefore, if a wholesaler posts a different price on a particular container (size) and category (package description) because its beer brand is different, the wholesaler has not violated the price posting and price-cutting statute. Similarly, if a wholesaler posts a different price on a particular brand and category (package description) because its container (size) is different, the wholesaler has not violated the price posting and price-cutting statute.

In other words, identity of brand, container and category is required in order for the T.C.A. Section 57-6-104(b) provision requiring a wholesaler to fix its price to apply.

T.C.A. 57-6-104(b) mandates that prices be fixed on *each brand sold by container and category*. However, there is no statutory requirement that a beer wholesaler's prices be identical for different categories of beer packages.

3. T.C.A. Section 57-6-104(c)(1) prohibits wholesalers from sponsoring or participating in any "price-cutting maneuver, device or promotion" by changing their wholesale price of beer of a given brand, container and category.

The conduct prohibited by this statutory provision pertains to actions of a wholesaler that would have the effect of unlawfully cutting the wholesaler's price of a given brand, container and category. It would not generally apply to the "filing" of prices as required by the statute. The filing of prices is an overt attempt by the wholesaler to comply with the statutory provision applicable to wholesale pricing. The action of filing prices alone is not an actual price cut or a stratagem to effect such a price cut in violation of the wholesale pricing law.

Therefore, if a wholesaler files a different wholesale price for a given beer brand contained in plastic vessels than for the same brand contained in bottles of the same volume made from other materials (such as glass), the act of "filing" the different price does not itself constitute a price-cutting maneuver, device or promotion in violation of T.C.A. Section 57-6-104(c)(1).

However, the filing by such wholesaler of a higher price for a given beer brand and volume of nonreturnable (plastic) vessels than was previously filed for other nonreturnable bottles⁴ effectively reflects an imminent price increase by the wholesaler for nonreturnable bottles. Such wholesaler would have to be sure that no other provision of T.C.A. Section 57-6-104 would prohibit its overall pricing conduct.

For example, assume that a new wholesaler posted a price of \$1.00 for nonreturnable bottles of a particular brand in the 12 ounce size on December 28, 1997 and implemented such price on January 1, 1998. On December 28, 1999, the wholesaler posted a reduced price of \$0.90 for nonreturnable 12 ounce bottles of such brand and implemented the price change effective January 1, 2000. Since the \$1.00 price for nonreturnable bottles was in effect two years (or more than the 360 days required by T.C.A. Section 57-6-104(c)(2)), the wholesaler would not have violated the price-cutting provision of such statute.⁵

However, if the same wholesaler started producing plastic nonreturnable vessels or bottles (though all nonreturnable bottles the wholesaler had sold in the past had been

⁴ It is presumed that the price change filed by the wholesaler would be a higher price than the previously filed price for nonreturnable bottles. This is because the cost of producing plastic vessels is higher and thus the wholesaler's filed price would also presumably be higher.

⁵ T.C.A. Section 57-6-104(c)(2) provides as follows:

Nothing in this section shall prevent a wholesaler from permanently reducing the wholesale price of beer. However, any such wholesale price reduction to be construed to be permanent must remain in effect for a least three hundred sixty (360) days, or otherwise it shall be considered a wholesale beer price-cutting maneuver, device or promotion, and in direct violation of this section.

made of glass) and posted a price of \$1.25 on July 1, 2000 for nonreturnable plastic bottles of the same brand and size (12 ounce), and if the wholesaler proceeded to implement the \$1.25 per bottle price on July 4, 2000, the wholesaler would be in violation of T.C.A. Section 57-6-104(c)(2).

In this latter example, the wholesaler's initial price reduction on January 1, 2000, would become a non-permanent reduction in wholesale price when the wholesaler implements its posted price change on nonrefundable bottles of the particular brand and volume on July 4, 2000 since the \$0.90 price had not remained in effect for 360 days. Thus, the wholesaler's overall pricing conduct would be considered a wholesale beer price-cutting maneuver, device or promotion in violation of T.C.A. Section 57-6-104(c).

Thomas R. Bain
Tax Counsel

APPROVED: Ruth E. Johnson
Commissioner

DATE: 11/3/00