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October 25, 2007

Honorable Greg Aghazarian
Room 4167, State Capitol

TAXATION OF ALCOHOLIC BEVERAGES - #0729803

Dear Mr. Aghazarian:

You have asked whether the State Board of Equalization has the authority to interpret the terms "distilled spirits," "beer," and "wine" for purposes of the Alcoholic Beverage Tax Law (Pt. 14 (commencing with Sec. 32001), Div. 2, R.& T.C.).

I. Regulation and Taxation of Alcoholic Beverages in California

By way of background, Section 22 of Article XX of the California Constitution¹ vests in the state the exclusive right and power to regulate alcoholic beverages, and vests in the Department of Alcoholic Beverage Control (hereafter the department) the authority to exercise the state's licensing powers as well as the exclusive power to collect license fees and occupation taxes imposed in connection with that authority. The section further requires the State Board of Equalization (hereafter the board) to assess and collect those excise taxes as the Legislature may impose in connection with alcoholic beverages. In pertinent part, Section 22 of Article XX reads as follows:

"SEC. 22. The State of California ... shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State

"The Department of Alcoholic Beverage Control shall have the exclusive power ... to license the manufacture, importation and sale of alcoholic beverages in this State, and to collect license fees or occupation taxes on account thereof.

¹ All further article references are to the California Constitution, unless otherwise indicated.

"The State Board of Equalization shall assess and collect such excise taxes as are or may be imposed by the Legislature on account of the manufacture, importation and sale of alcoholic beverages in this State.

* * *

As can be seen, the exclusive fee and taxing power vested in the department by Section 22 of Article XX is expressly limited to only those license fees or occupation taxes imposed in connection with the manufacture, importation, or sale of alcoholic beverages. In a separate provision, Section 22 of Article XX expressly requires the board, rather than the department, to assess and collect any excise taxes imposed by the Legislature on the manufacture, importation, or sale of alcoholic beverages in the state. Because this requirement to assess and collect excise taxes applies to the board, rather than the department, it is our view that the excise taxes subject to this requirement are to be distinguished from those license fees or occupation taxes that the department is required to collect.

Pursuant to those provisions of Section 22 of Article XX that vest in the state the exclusive power to license and regulate alcoholic beverages, the Legislature enacted the Alcoholic Beverage Control Act (Ch. 1 (commencing with Sec. 23000), Div. 9, B.& P.C.; hereafter the act) that establishes the department as the entity of state government responsible for the proper administration and enforcement of state laws with respect to alcoholic beverages (see Secs. 23049 and 23051, B.& P.C.). The department's responsibilities under the act include, among other things, the implementation of alcoholic beverage licensing and license fee provisions (see generally Ch. 3 (commencing with Sec. 23300), Div. 9, B.& P.C.).

In accordance with those provisions of Section 22 of Article XX that expressly require the board to assess and collect excise taxes, the Alcoholic Beverage Tax Law (Pt. 14 (commencing with Sec. 32001), Div. 2, R.& T.C.; hereafter the ABT Law) generally imposes a tax at specified rates per gallon on all beer, wine, and distilled spirits sold in this state (Secs. 32151 and 32201, R.& T.C.).² Revenues derived under the ABT Law are deposited in the Alcohol Beverage Control Fund for transfer to the General Fund upon order of the Controller (see Secs. 32501 and 32502). Section 32010 provides that the taxes imposed under the ABT Law are in lieu of all local impositions of tax on the sale of alcoholic beverages, except for local sales or transactions taxes that apply in general to the sale and use of tangible personal property. Section 32451 authorizes the board to prescribe, adopt, and enforce rules and regulations relating to the administration and enforcement of the ABT Law.

II. Does the State Board of Equalization, as the agency required to assess and collect excise taxes on distilled spirits, beer, and wine under the Alcoholic Beverage Tax Law, have the authority to interpret the terms "distilled spirits," "beer," and "wine" for purposes of that law?

² All further section references are to the Revenue and Taxation Code, unless otherwise indicated.

Administrative agencies, such as the board, have only those powers that have been conferred on them, expressly or by implication, by the Constitution or statute (*City and County of San Francisco v. Padilla* (1972) 23 Cal.App.3d 388, 400). An administrative agency, therefore, must act within the powers conferred upon it by law and may not validly act in excess of those powers (*Ibid.*). After the Legislature has declared its policies and provided adequate primary details for the exercise of the power, it may expressly confer on administrative agencies the power to "fill up the details" by enacting rules and regulations to promote the purposes of the legislation and carry it into effect (*California Employment Com. v. Butte County Rice Growers Assn.* (1944) 25 Cal.2d.624, 632). Administrative constructions, however, may not vary or enlarge the terms or conditions of the legislative enactment or compel that to be done that lies without the scope of the statute (*Knudsen Creamery Co. v. Brock* (1951) 37 Cal.2d 485, 492-493).

Section 32002, in the ABT Law, provides that the definitions that govern the construction of that law are found both in Chapter 1 (commencing with Section 32001) of Part 14 of Division 2, contained in the ABT Law, and in Chapter 1 (commencing with Section 23000) of Division 9 of the Business and Professions Code, contained in the act. Chapter 1 (commencing with Section 32001) defines in the ABT Law the terms "sale," "tax," and "taxpayer" (see Secs. 32003, 32004, and 32005). All other definitions affecting the construction of the ABT Law, including the definitions of different types of alcoholic beverages, are found in the act in Chapter 1 (commencing with Section 23000) of Division 9 of the Business and Professions Code, which, as stated above, is administered by the department rather than the board.

With regard to administration of the act, Section 25750 of the Business and Professions Code requires the department to prescribe those rules as may be necessary or proper to carry out the purposes and intent of Section 22 of Article XX, and to enable it to exercise the powers and perform the duties conferred upon it by that section of the California Constitution or by the act (see Sec. 25750, B.& P.C.). Section 22 of Article XX also expressly grants the department the "exclusive power" to enforce the provisions of the act. The act itself is an exercise of the police powers of the state for the protection of the safety, welfare, health, peace, and morals of the people of California (Sec. 23001, B.& P.C.). We think, therefore, that because the department is granted the "exclusive power" to enforce the provisions of the act by Section 22 of Article XX and, by extension, the authority to promulgate rules necessary to carry out the purposes and intent of Section 22 of Article XX (Sec. 25750, B.& P.C.), the department's interpretations of the terms within the act are effective for both that act and the ABT Law, which incorporates, by reference, definitions contained within the act. Case law under the act places the order of priority regarding jurisdiction over the act as follows: the California Constitution, any legislative action to the extent that it does not conflict with the Constitution, and finally actions taken by the department, through rules and regulations, to the extent that those rules and regulations do not conflict with the preceding legal authorities (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1964) 228 Cal.App.2d 1, 11). Further, the department's interpretations of the act are granted deference by the courts (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 128 Cal.App.4th 1195, 1205).

The board, in contrast, has more limited administrative authority with regard to alcoholic beverages. As stated above, the board is only required to assess and collect those excise taxes as the Legislature may impose in connection with the manufacture, importation, and sale of alcoholic beverages in this state. In general, the ABT Law imposes an excise tax on a per gallon or other volume basis on the sale of beer, wine, or distilled spirit beverages and it is clear, in our opinion, that the objective of the ABT Law is the production of revenue (see Secs. 32151, 32201, and 32220). The board does not independently classify taxpayers or beverages for purposes of the ABT Law. Instead, the board relies on the department's classification of licensees in the department's administration of the act in order to identify and register taxpayers and, in turn, the board relies on the department's identification and classification of alcoholic beverages in its administration and collection of the alcoholic beverage tax with regard to those taxpayers (A.B. 417, 2005-06 Reg. Sess.; BOE Publication No. 92, January 2004). Moreover, generally speaking, the board does not act as a policing agency with regard to those items upon which the board administers a tax without legislative authority to do so (*Humane Society of the United States v. State Bd. of Equalization* (2007) 152 Cal.App.4th 349, 362).

As stated above, Section 32451 authorizes the board to prescribe, adopt, and enforce rules and regulations relating to the administration and enforcement of the ABT Law. In light of the limited purposes of the ABT Law, and its reliance upon definitions of alcoholic beverages set forth in the act, it is our view that the board may classify specific alcoholic beverages as "beer," "wine," or "distilled spirits" in furtherance of the ABT Law only within the scope of those terms as set forth in the act, and as interpreted by the department. In this connection, the board has adopted regulations that classify alcoholic beverages in conformity with this principle; those regulations are both consistent with the treatment and definition of a particular alcoholic beverage under the act while implementing the excise tax imposed on a particular type of alcoholic beverage.³

It is our opinion, therefore, that in light of the limited authority of the board with regard to alcoholic beverages, and the reliance within the ABT Law on definitions contained within the act, as administered by the department, that, while the board may interpret the terms "distilled spirits," "beer," and "wine" for purposes of the ABT Law, it must do so in a manner that is consistent with the act.

³ For example, Section 2555 of Title 18 of the California Code of Regulations provides that bitters, Chinese liquors, and other products that bear a closure or other device, as provided for by a specified federal regulation, shall, for excise tax purposes, be deemed to be distilled spirits (18 Cal. Code Regs. 2555). This is consistent with the classification of these types of alcoholic beverages under the act (see Secs. 23395 and 23398, B.& P.C. (specifying that bitters are classed as distilled spirits for taxing purposes)). In addition, Section 2557 of Title 18 of the California Code of Regulations, provides the necessary information on the implementation of the ABT Law with regard to powdered distilled spirits.

In conclusion, in light of the foregoing, the State Board of Equalization may, for purposes of the Alcoholic Beverage Tax Law (Pt. 14 (commencing with Sec. 32001), Div. 2, R.& T.C.), interpret the terms "distilled spirits," "beer," and "wine" only in a manner consistent with the definition of those terms as set forth in statute, as validly interpreted by the Department of Alcoholic Beverage Control. The State Board of Equalization may not, however, interpret the terms "distilled spirits," "beer," and "wine" in a manner that is inconsistent with the Department of Alcoholic Beverage Control's valid interpretation of those statutes.

Very truly yours,

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