THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable Shirley C. Robinson, Administrative Law Judge

Case No. 16-ALJ-17-0031-CC
Appellate Case No. 2016-001082

The Hunter-Gatherer, LLC, d/b/a The Hunter-Gatherer Brewery,.....Respondent,

v.

South Carolina Department of Revenue,.....Appellant.

FINAL REPLY BRIEF OF APPELLANT

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Pursuant to Rule 208(a)(3), SCACR, the Appellant South Carolina Department of Revenue (Department) files its Reply to the Initial Brief of Respondent.

ARGUMENTS

I. WHILE A BREWPUB OPERATES ON MULTIPLE TIERS, IT CONSTITUTES A RETAILER FOR PURPOSES OF SOUTH CAROLINA'S THREE-TIER SYSTEM.

A. Every Alcohol-Related Business Falls On A Specific Tier.

S.C. Code Ann. § 61-4-940(D) (2009) (hereinafter referred to as the "Three-Tier Law") places a South Carolina beer business on one of three tiers – the manufacturing tier, the wholesale tier, or the retail tier. Moreover, a beer business on one tier may not own or have a financial interest in a beer business on another tier. Id. The purpose of this type of three-tier system, which also applies to wine and alcoholic liquors, is to prevent vertical and horizontal integration, excessive alcohol sales, and intemperance. See John D. Geathers and Justin R. Werner, The Regulation of Alcoholic Beverages in South Carolina, 241 (2007). Thus, contrary to the Respondent's assertion, South Carolina's three-tier system was implemented, in part, to protect public health and safety. See Initial Brief of Resp't 9. Accordingly, every alcohol-related business must be on a specific tier otherwise it would be impossible to prevent vertical integration and the public health and safety concerns associated therewith.

Notwithstanding the fact that every alcohol-related business must fall on a specific tier, the General Assembly created numerous exceptions that allow, for example, a beer business on one tier to participate in activities that typically take place at beer businesses on other tiers. See e.g. S.C. Code Ann. §§ 61-4-1500 et seq. (Supp. 2015) (allowing a brewery to operate on multiple tiers while still falling on the manufacturing tier). In creating these exceptions, however, the General Assembly never created a provision removing any business from a tier. In

other words, an alcohol-related business may operate on multiple tiers, but it still must fall on a specific tier in order to prevent vertical integration. As the Respondent correctly stated, the purpose of these exceptions is to foster the growth of certain alcohol-related businesses. See e.g. Initial Brief of Resp't 13, 24, 27, and 32. The purpose is not, however, to remove certain alcohol-related businesses from the three-tier system. As the Department discussed in more detail in its Initial Brief, removing an alcohol-related business from the three-tier system results in consequences that the General Assembly could not have intended. See Initial Brief of Appellant 19 – 21. Accordingly, the Respondent's argument that a brewpub falls outside the three-tier system must fail. Initial Brief of Resp't 11 – 17.

B. A South Carolina Brewpub Falls On The Retail Tier.

In reading the language of the Three-Tier Law and S.C. Code Ann. § 61-4-1700 et seq. (2009), the Administrative Law Court (ALC) should have (1) read the plain language of the statutes at issue, (2) read that language in a sense which harmonizes with its subject matter, and (3) read that language in light of the general statutory scheme. See Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 23 – 24, 579 S.E.2d 334, 336 – 337 (Ct. App. 2003). Moreover, because the term "retailer" is not defined in Title 61, the ALC should have "interpret[ed] the term in accord with its usual and customary meaning." Id. at 23, 579 S.E.2d at 337 (internal citations omitted). Dictionaries may be helpful in interpreting an undefined statutory term, but such term must still be construed based on the statutory scheme as a whole. Id. at 24, 579 S.E.2d at 337 (internal citations omitted). The ALC's failure to apply these rules of statutory construction resulted in its incorrect conclusion that a brewpub is not a retailer.

As the Department explained more fully in its Initial Brief, when looking at the statutory scheme as a whole, a brewpub clearly falls on the retail tier. See Initial Brief of Appellant 10 –

14. Specifically, a plain reading of the language in S.C. Code Ann. § 61-4-1700(1) (2009), which defines the term brewpub, demonstrates that a brewpub is a retailer. An analysis of the definition of brewpub demonstrates that a brewpub is a retail business that is allowed to participate in limited manufacturing activities. The first half of the definition, which provides that a brewpub is "a tavern, public house, restaurant, or hotel," describes a brewpub's business type. Section 61-4-1700(1). The second half of the definition, which provides that a brewpub can "produce[] on the permitted premises a maximum of two thousand barrels a year of beer for sale on the premises," describes the type of activities in which a brewpub may participate. Id. Thus, a plain reading of the language in the business description portion of the definition demonstrates that a brewpub is a retailer, and a plain reading of the language in the activity description portion of the definition demonstrates that a brewpub is allowed to participate in limited manufacturing activities in addition to its retail business. Therefore, a brewpub is a retailer that is allowed to participate in limited manufacturing activities.

Additionally, Article VIII-A of the South Carolina Constitution provides that only restaurants, hotels, or private clubs may sell alcoholic liquor by the drink. Accordingly, any business that can sell alcoholic liquor by the drink must be one of these three retail businesses. When the General Assembly decided to allow the operation of brewpubs in South Carolina, it also decided to allow them to obtain a liquor by the drink license. See S.C. Code Ann. § 61-4-1720 (2009). Since a brewpub is eligible for a liquor by the drink license, it must be one of the three aforementioned retail businesses, and thus, a retailer. To read the statutory scheme otherwise renders § 61-4-1720 unconstitutional. Thus, a reading of all the relevant statutes together demonstrates that a brewpub is a retailer for purposes of South Carolina's three-tier system.

Despite the above, the Respondent focuses on the Department's analysis of the definition of a retailer. Initial Brief of Resp't 18, 21 – 22, 27, 29, 33. In doing so, the Respondent incorrectly describes the "Department's test" as follows: any business that sells beer, wine, alcoholic liquor, and food is a retailer. Clearly, that cannot be the "test" because, as the Respondent points out, that would mean a brewery, for example, is a retailer.[1] Initial Brief of Resp't 28 – 34. Instead, the proper "test" involves reading the plain language of the statutes at issue in light of the statutory scheme as a whole. See Georgia-Carolina Bail Bonds, Inc., 354 S.C. at 23 – 24, 579 S.E.2d at 336 – 337.

In the light of the proper "test," which really is just the proper application of the rules of statutory construction, a brewpub is clearly a retailer while a brewery is not. Determining whether a business is a retailer or a manufacturer depends upon what activity that business is primarily engaged in. Any business may have several different components and activities, but in order to properly classify a business one must look at the primary activity of that business. While the dictionary defines "retail" as "to sell in small quantities directly to the ultimate consumer," applying that definition in light of the statutory scheme as a whole demonstrates a retailer for purposes of South Carolina's alcohol laws is a business that is primarily engaged in selling products in small quantities directly to the ultimate consumer. Retail, Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/retail (last visited Aug. 11, 2016). Based on that definition of retailer, a brewpub is clearly a retailer while a brewery is not. As discussed above, a brewpub is defined as "tavern, public house, restaurant, or hotel." Section 61-

[1]The Department even pointed out at the hearing that the Respondent appeared to misunderstand the Department's determination in this matter. (R. p. 41, line 18 – p. 43, line 1; Hr'g Tr. 27:18 – 29:1.) The Department went on to explain that it determined a brewpub was a retailer after "looking at the overall business structure of a brewpub . . . ." (R. p. 42, line 24 – p. 43, line 1; Hr'g Tr. 28:24 – 29:1.)

4-1700(1). A tavern, public house, restaurant, and hotel are all businesses that are *primarily* engaged in selling a product in small quantities directly to the ultimate consumer. Moreover, a reading of the statutory scheme as a whole demonstrates that taverns, public houses, restaurants, and hotels are treated as retail businesses. Accordingly, a brewpub must be a retail business based on the statutory definition of the term "brewpub" and the fact that brewpubs are primarily engaged in selling beer, wine, alcoholic liquor, and food in small quantities to the ultimate consumer. Though a brewpub does manufacture beer, manufacturing is not a brewpub's primary business activity. Thus, a South Carolina brewpub is "a retailer acting like a manufacturer." Sara Schorske, Brewpubs: Caught in the Regulatory Crossfire, CSA – Compliance Services of America, http://www.csa-compliance.com/html/CSA-Articles/brewpupbs-caught-in-the-regulatory-crossfire.html (last visited Nov. 1, 2016). Said differently, a brewpub is an exception within the retail tier.

A brewery, to the contrary, is primarily engaged in producing beer. See S.C. Code Ann. § 61-4-300 (2009) (including the term "brewery" in the definition of "producer"). A brewery can participate in limited retail activities only because the General Assembly chose to create a limited exception to the traditional three-tier scheme. See S.C. Code Ann. § 61-4-1515 (Supp. 2015). Despite the fact that a brewery can participate in limited retail activities, it still constitutes a manufacturer for purposes of the three-tier laws. The General Assembly made it clear that the exceptions it added to § 61-4-1515 did not remove breweries from the three-tier system when it specifically provided that these exceptions "do not alter or amend the structure of the three-tier laws of this State, and the wholesalers and the breweries must not discriminate in pricing at the producer or wholesaler levels." Section 61-4-1515(C)(5). The ALC even acknowledged that the General Assembly did not remove breweries from the manufacturing tier

when it allowed breweries to participate in limited retail activities. (R. p. 11; Order 11.) Thus, a brewery is a manufacturer that can participate in limited retail activities. Accordingly, reading the plain language of the statutes at issue in light of the statutory scheme as a whole demonstrates that a brewpub is on the retail tier and a brewery is on the manufacturing tier.

C. A South Carolina Brewpub Does Not Fall On The Manufacturing Tier.

The Respondent argues that if a brewpub is on a tier it falls on the manufacturing tier. Initial Brief of Resp't 17 – 28. The Respondent bases its argument on the following: the volume of beer a brewpub can produce, the statutory definition of "retail," its mistaken belief that a South Carolina brewpub is primarily engaged in producing beer, the fact that a brewery can participate in limited retail activities, Alabama law, Federal law, the brewery industry's definition of brewpub, and the fact that all of the other statutory exceptions to the three-tier laws found in Title 61 allow a manufacturer to participate in limited retail activities[2]. Initial Brief of Resp't 17 – 28. However, the Respondent's argument that a brewpub is a manufacturer must fail because, as discussed above and in the Department's Initial Brief, properly applying the rules of statutory construction demonstrates that a South Carolina brewpub is a retailer. Moreover, the only relevant law is South Carolina law, and the only relevant interpretation is that of the Department. See e.g. James M. Seff and Carrie L. Bonnington, Wine and Beer Law Leading Lawyers On Navigating The Three-Tier System And Other Regulations On Alcoholic Beverages, Aspatore, 2015 WL 9875439 *2 (Dec. 2015) (providing that laws regulating brewpubs vary by state) and Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 515,

[2]The Respondent's last argument is a red herring. The General Assembly can and did make exceptions that allow manufacturers to operate on other tiers. The General Assembly also can and did make an exception allowing a retailer to operate on other tiers. The fact that the General Assembly made an exception for just one type of retail business is irrelevant. The fact remains that the General Assembly *did* make an exception for a retail business.

560 S.E.2d 410, 414 (2002) (stating "[t]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons.").

Even if this Court were to consider other state's laws, the Respondent's reliance on Alabama's law is misplaced. Contrary to South Carolina, Alabama classifies its brewpub as an exception within the manufacturing tier and defines its brewpub as "**any premises upon which beer is actively and continuously manufactured or brewed**, subject to the barrel production limitation prescribed in this chapter, for consumption on the premises where manufactured, or for sale to any designated wholesaler licensee for resale to retail licensees." Ala. Code Ann. § 28-4A-2 (West 2016) (emphasis added). Thus, Alabama's definition focuses on the manufacturing tier while South Carolina's definition focuses on the retail tier. Further evidence of the distinction between Alabama and South Carolina's brewpub laws is that an Alabama brewpub can only sell its beer for off premises consumption through a wholesaler while a South Carolina brewpub cannot sell its beer to a wholesaler but can sell its beer at retail in containers for off premises consumption. Compare Ala. Code Ann. § 28-4A-2 with S.C. Code Ann. § 61-4-1740 (2009). Accordingly, a plain reading of the language in Alabama's statute supports Alabama's position that its brewpub is a manufacturer while a plain reading of South Carolina's statute supports the Department's position that a South Carolina brewpub is a retailer.[3]

Moreover, the Respondent's reliance on Federal law and the brewery industry's opinion is misplaced. Federal law treats a brewpub as "an alternate use of brewery premises." 27 C.F.R.

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[3]As discussed in the Department's Initial Brief, South Carolina is not the only state that places a brewpub on the retail tier. See e.g. GA. Code Ann. § 3-1-2 (West 2016) (defining brewpub as "**any eating establishment** in which beer or malt beverages are manufactured or brewed") (emphasis added) and LA. Stat. Ann. § 26:241(12) (West 2016) (defining "microbrewery" as "a **retail establishment** wherein beer and other malt beverages are brewed in small quantities . . . .") (emphasis added).

§ 25.25. Accordingly, any business that brews beer on its premises, such as a brewpub, must obtain a Federal brewer's permit regardless of what state that business is located in. This Federal permitting requirement does not dictate how South Carolina treats a brewpub or any other alcohol license holder. Thus, Federal law provides no guidance to this Court, and the Respondent's reliance on Federal law is misplaced.

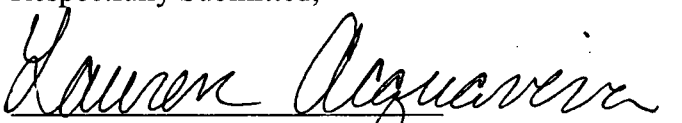
Similarly, the brewery industry traditionally views brewpubs as "breweries that brew and sell beer on their own premises . . . ." David R. Scott, Brewing Up A New Century Of Beer: How North Carolina Laws Stifle Competition In The Beer Industry And How They Should Be Changed, 3 Wake Forest J. L. & Pol'y 417, 417 (2013). South Carolina, however, does not treat a brewpub the same way as the brewery industry. In South Carolina, a brewpub is a restaurant that can produce a limited amount of beer. Thus the way the brewery industry treats brewpubs has no bearing on which tier a South Carolina brewpub falls. Accordingly, this Court should find that a plain reading of the statutes at issue viewed in light of South Carolina's statutory scheme as a whole dictates that a brewpub is on the retail tier, and the ALC erred in ruling otherwise.

CONCLUSION

The Respondent's argument that a brewpub is a hybrid permit outside the three-tier system runs contrary to the plain language of the statutes at issue and the statutory scheme as a whole. Additionally, the Respondent's alternative arguments that a brewery and brewpub are both retailers or a brewery and brewpub are both manufacturers have no legal basis. Rather, a brewpub is a retailer, and thus, a holder of a brewpub permit cannot simultaneously hold a brewery permit. The Administrative Law Court's ruling to the contrary was based on errors of

law and its failure to give the Department's determination proper deference. Accordingly, this Court should reverse the Administrative Law Court's decision.

Respectfully Submitted,



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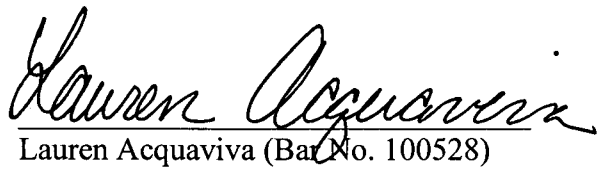
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.



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