

STATE OF WISCONSIN
TAX APPEALS COMMISSION

ARTY'S, LLC,

DOCKET NO. 14-L-178

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING AND ORDER

LORNA HEMP BOLL, CHAIR:

This case comes before the Commission for decision on motions by both parties for summary judgment. The Petitioner, Arty's, LLC ("Arty's"), is represented by Attorney Lance E. Mueller, of Mueller, S.C. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Sheree Robertson. Both parties have moved for summary judgment and have filed briefs and affidavits in support of their respective positions. The parties have not formally stipulated to the facts; however, the material facts are not in dispute. Thus, this case involves a question of law resolvable through summary judgment.

The case involves the sale of bottled premixed cocktails sold by Petitioner. The parties initially disagreed on two issues. First, the Department asserted that Petitioner had used an incorrect method of measurement (a variation of gallons versus

liters) for tax purposes. It appears that Petitioner concedes to the liter measurement as the proper unit of measure in Wisconsin.

Second, and more significant, is the issue of the actual volume subject to tax. Petitioner asserts that only the liquor used in each bottle of premixed cocktail (1.2 oz. per 7.0 oz. bottle) should be taxed. The Department seeks to tax the full volume contained in each bottle sold by Arty's. Because the final product contained in the bottles is itself an intoxicating liquor, we find the full volume to be the appropriate measure of tax.

FACTS

Jurisdictional Facts

1. The Department issued to Petitioner a Notice of Amount Due dated September 9, 2013, assessing additional liquor tax in the amount of \$88,542.96, which included interest computed to November 8, 2013, for the tax period beginning March 31, 2012, and ending June 30, 2013. The Department adjusted the liquor tax returns because it determined that Petitioner incorrectly reported the taxable amount of product upon which the liquor tax was due. (Affidavit of Jason Kraemer ("Kraemer Aff."), Ex. 1.)

2. Petitioner timely filed with the Department a Petition for Redetermination dated November 3, 2013, objecting to the Notice of Amount Due. (Kraemer Aff., Ex. 2.)

3. By its Notice of Action dated April 30, 2014, the Department notified Petitioner that its Petition for Redetermination was denied. (Kraemer Aff., Ex. 3.)

4. Petitioner appealed to this Commission through a timely Petition for Review filed by USPS Certified Mail on July 24, 2014. (Commission file.)

Material Facts

1. Arty's is a Wisconsin Limited Liability Company having its principal office in Appleton, Wisconsin, and its production facilities¹ in Clintonville, Wisconsin. (Affidavit of Timothy Pappin (owner) ("Pappin Aff."), ¶ 4.)

2. Arty's is engaged in the production and sale of Premium Handcrafted Ready-to-Drink Cocktails. Its product line currently includes premixed cocktails, such as the Brandy Old Fashioned Sweet and Whiskey Old Fashioned Sweets & Sours. (Pappin Aff., ¶ 5.)

3. Arty's is a rectifier as defined by statute. Arty's holds a rectifier's permit as required by, and issued under, Chapter 125 of the Wisconsin Statutes. (Petition for Review; Answer.)

4. As a rectifier, Arty's bottles a mixture of alcohol, soda, water, and other flavorings. (Pappin Aff., ¶ 7; Answer.)

5. Arty's purchases brandy and other distilled spirits in bulk from Yahara Bay Distillers, Inc. ("Yahara"), a contract distillery and licensed intoxicating

¹ The Department quibbles with the term "facilities" to refer to the singular location. As is noted, the term is often used in the plural so we find no objection with the usage. See <http://dictionary.reference.com/browse/facilities?s=t>.

liquor manufacturing facility located in Madison, Wisconsin. Those spirits have an alcohol by volume (ABV) of 40%. (Pappin Aff., ¶ 6.)

6. The distilled spirits being purchased by Arty's from Yahara are "intoxicating liquors" as that term is defined by law [in Wis. Stat. § 139.01(3) and Wis. Stat. § 125.02(8)]. (Pappin Aff., ¶ 6.)

7. The intoxicating liquors Arty's purchases in bulk from Yahara require no further processing to adjust alcohol content, remove unwanted elements, or otherwise change the composition of the liquid as might be typical of the distillation process. Yahara makes any adjustments of that nature before the intoxicating liquor reaches Arty's. (Pappin Aff., ¶ 6.)

8. Arty's makes premixed cocktails by placing 1.2 ounces of the intoxicating liquors purchased from Yahara in a seven (7.0) ounce glass bottle container. (Pappin Aff., ¶ 7; Answer.)

9. Arty's adds 5.8 ounces of soda, water and flavoring ingredients to each bottle to create its product. The soda, water, and flavoring ingredients do not contain alcohol. (Pappin Aff., ¶ 7.)

10. After Arty's dilutes the intoxicating liquor it purchases, the resulting mixture of intoxicating liquor, soda, water, and flavoring contains 6.9% alcohol by volume. (Pappin Aff., ¶ 13.)

11. Arty's premixed cocktails are alcohol-containing carbonated products sold in seven (7) ounce glass bottle containers. During the periods at issue, the premixed cocktails may have been sold six bottles to a package; they are currently sold

in packages of four. (Kraemer Aff., ¶ 12; Pappin Aff., ¶ 5.)

APPLICABLE LAW

139.01(3) "Intoxicating liquors" includes all ardent, spirituous, distilled or vinous liquors, liquids, or compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of one percent or more of alcohol by volume, which are fit for use for beverage purposes, but does not include fermented malt beverages, as defined in s. 125.02.

139.03 Liquor tax. An occupational tax is imposed upon the selling of intoxicating liquor as follows:

(2m) The rate of that tax is 85.86 cents per liter on intoxicating liquor, except wine containing not in excess of 21% of alcohol by volume, containing 0.5% or more of alcohol by volume. The department of revenue may, by rule, set the amount of the taxes imposed under this section for various sizes of containers if the amounts set are in the same proportion to the size of the containers as the rate per liter under this subsection.

139.04 Exclusions. No tax is levied by ss. 139.02 [relating to malt beverages] and 139.03 above in respect to:

(4) Sale or shipment of fermented malt beverages by a brewer to a bottler or of intoxicating liquor in bulk between manufacturers, rectifiers and wineries.

139.06(1)(b) Liability for taxes at the rates under s. 139.03 (2m) on intoxicating liquor is incurred by a shipper when intoxicating liquor is shipped into this state, except that liability on liquor produced or bottled in this state or imported directly from a foreign country into this state by a Wisconsin permittee is incurred at the time of the first sale in this state and except that liability for liquor under sub. (3) or (4) is incurred when a Wisconsin permittee receives that liquor.² (emphasis added)

² Neither party has argued that 139.06(3) or (4) apply to impose liability upon Arty's receipt of the liquor from Yahara.

Wis. Admin. Code Tax § 8.01(2) Imposition.

All intoxicating liquor, including wine, shipped to a permittee located in Wisconsin shall be sold with the occupational tax imposed under s. 139.03, Stats., included in the selling price except:

(a) Shipments in bulk to a rectifier or winery. The tax liability is incurred by the permittee doing the rectifying and bottling of the distilled spirits and wine at the time of the first sale in this state.

OPINION

A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2).

When simultaneous Motions for Summary Judgment are pending, the parties in effect stipulate to the underlying material facts because they are both claiming that only issues of law are before the Commission. See *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2008 WI 38, ¶ 4, 308 Wis. 2d 684, 748 N.W.2d 154. Although the parties have not stipulated to the underlying facts, we find that the material facts are not in dispute and that this case is indeed ripe for resolution by summary judgment.

This case is one of statutory interpretation. Thus, the focus of analysis is on the statutory language itself. A statute is ambiguous only if it is capable of being understood by reasonably well-informed persons in two or more senses. It is not enough that there is a disagreement about the statutory meaning; statutory interpretation involves the ascertainment of meaning, not a search for ambiguity. *Kalal v. Dane County Cir. Ct.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citations

omitted). Here, we find no ambiguity; thus, our analysis applies the language of the various applicable statutes to the facts before us.

Section 139.03 of the Wisconsin Statutes imposes a tax on the sale of intoxicating liquor. We are faced with simultaneous questions of what is being sold and when. No tax attaches on the sale of the bulk liquor from the distillery to Petitioner; Wis. Stat. § 139.04(4) states that no tax is levied under Wis. Stat. § 139.03 with respect to sale or shipment of intoxicating liquor in bulk between manufacturers and rectifiers.

Instead, Wis. Stat. § 139.06(1)(b) indicates that liability for taxes under § 139.03(2m) on liquor produced or bottled in this state by a Wisconsin permittee is incurred at the time of the first sale in this state. The Wisconsin Administrative Code clarifies this section to explain that, with regard to shipments in bulk to a rectifier, the tax liability is incurred by the permittee/rectifier/bottler at the time of the first sale in this state. We determine that first sale to be the sale from Arty's to its customers.

We next analyze what Arty's is selling to its customers. Recognizing that the tax in question applies to "intoxicating liquor," Arty's argues that the only intoxicating liquor it sells is the 1.2 ounces it places in each bottle. The Department argues that the entire premixed cocktail is an intoxicating liquor and therefore is subject to the tax. We agree with the Department.

Arty's is a rectifier whose business involves buying liquor in bulk, which Arty's subsequently mixes in bottles with other ingredients. Our first impression is that the intoxicating liquor is not converted into something else. Moreover, the parties agree that Arty's end-products contain alcohol in excess of 0.5%. Nevertheless, we look to the

statutory definitions for a precise answer.

Petitioner's primary argument is that the premixed cocktail does not fall under the definition of "intoxicating liquor." However, Wis. Stat. § 139.01(3) defines "intoxicating liquor" as all ardent, spirituous, distilled, or vinous liquors, liquids, or compounds, by whatever name called, containing 0.5% or more of alcohol by volume, which are fit for use as beverages. More simply, these premixed cocktails are an "intoxicating liquor," if the cocktail is a beverage (liquor, liquid, or compound) which is ardent, spirituous, distilled, or vinous and which is not a fermented malt beverage. Such a beverage, by whatever name called, containing 0.5% or more alcohol by volume (ABV), is an intoxicating liquor under Wis. Stat. § 125.02(8).

Arty's premixed cocktails are certainly a beverage. Although ardent, spirituous, and venous are not specifically defined in the statutes, we take these terms to mean what most people would understand them to mean - they describe liquids which can produce intoxication. Arty's is selling bottles full of such a liquid. All agree that the premixed cocktails are not fermented malt beverages. At 6.9% ABV, the beverage is an inseparable mixture containing more than 0.05% alcohol at the time of sale. The premixed cocktails meet the statutory definition of "intoxicating liquor."

Petitioner argues that the nonalcoholic portion of the mixture should escape the tax. However, Arty's premixed cocktails are not packaged as separate ingredients. Each bottle contains a fully mixed drink that is 6.9% ABV. Petitioner concedes the liquid is "alcohol-containing." Just as a minor cannot request a mixed drink in a bar with the intent of separating out the ingredients and only drinking the

nonalcoholic portion of it, here too the contents are combined into one inseparable beverage. We find Arty's bottles are filled with a liquid that is an "intoxicating liquor."

Petitioner also argues that application of the liquor tax to the relatively low-alcohol concentration of its end-product is inconsistent with what Petitioner perceives as a hierarchy of alcohol taxation. In general, liquors (bourbon, brandy, gin, etc.) measure in the range of 40% ABV, while wine may be closer to 15-20%, and fermented beverages closer to 5%. It is true that the tax on liquor is higher than the tax on wine which is higher than the tax on beer/malt beverage products. However, this hierarchy is not necessarily related to alcohol concentration. In fact, that assertion fails in the presence of the language of Wis. Stat. § 139.03(2m) itself. The statute applies the liquor tax rate (the highest of the alcohol tax rates) to intoxicating beverages with as low as a 0.5% ABV concentration, a concentration much less than most beers or wines.

Petitioner relies on an Opinion of the Attorney General which addressed the method for taxation of bottles containing both liquor and wine. 68 Wis. Op. Att'y Gen. 138 (1979). The language of the liquor tax at that time was similar to the current language; the tax applied to intoxicating liquor "except to wine," while a different section set the tax for wine. Another provision declared that only one tax could apply. The question asked of the Attorney General was whether it was double taxation to apply the liquor tax and wine tax each proportionately to the mixture. The Attorney General opined that a blended tax rate in proportion to the amount of liquor versus wine would not constitute a double tax because the liquor tax excluded the wine portion. The issue in this matter is not a distinction between two classes of alcohol

being blended together. Here, the entire mixture is an intoxicating liquor, so we find the Attorney General's opinion not applicable.

All intoxicating liquor contains some measure of water or other diluting agent. All alcohol is sold with a description of its percentage concentration (proof or ABV); that measurement indicates that only a portion of the liquid sold consists of alcohol. For example, if a bottle is designated as 80 proof, that means it contains 40% alcohol, which in turns means it contains 60% other ingredients. The Petitioner specifically noted that Yahara adjusted its whiskey alcohol content, so water was part of what Yahara sold to Arty's.

Petitioner claims that the water, mixers, and other ingredients Arty's adds should be excluded from tax. We disagree. If the water Yahara adds is part of the product, Petitioner's water and other ingredients are as well. Both manufacturers and rectifiers may add diluting agents and flavorings. If Petitioner adds nonalcohol ingredients to an intoxicating liquor to make it more salable, those added ingredients become part of the intoxicating liquid product Arty's sells and the whole product is taxable. Moreover, we do not believe Arty's would argue against paying no tax if Arty's added additional mixers to bring the alcohol content of the entire bottle to an ABV under the 0.5% threshold.

Petitioner objects to the extent that Arty's is being treated as a manufacturer, presumably based on the implication that the premixed cocktails are a new product they have "manufactured." The parties have agreed that Arty's is not a manufacturer. Arty's is a rectifier with a rectifier permit. There is no dispute that

Petitioner's bottling activities are those of a "rectifier," and we further note that the statutory definition of a rectifier includes those who "refin[e] distilled spirits . . . by any process other than by original and continuous distillation . . . until the manufacture thereof is complete." Wis. Stat. § 125.03(16)(a) (emphasis added). The definition of a rectifier also includes those who "manufacture" any spurious, imitation, or compound liquors for sale by mixing distilled spirits "with any materials." Wis. Stat. § 125.03(16)(c). That is precisely what Arty's does.

Finally, Petitioner also presents a constitutional argument. Arty's argues that applying the liquor tax this broadly (to the entire contents of each bottle rather than just to the liquor portion) is unconstitutional. We do not agree that the Department is attempting to apply the liquor tax to nonalcoholic liquids. We find that Petitioner is selling the entire contents of each bottle. That liquid is 6.9% ABV. A liquid with that concentration falls into the category of taxable intoxicating liquor. Inasmuch as Petitioner's constitutional argument is based upon the hierarchy of taxation argument rejected above, that argument is rejected again here. Although these premixed cocktails may be seen as similar to some of the malt beverages seen on the market, as the law currently stands, the liquor tax, which is applicable to intoxicating liquors with ABV concentrations as low as 0.5%, appropriately applies to the premixed cocktails in this case.

Petitioner's final argument asserts that taxation will result in a serious injustice to the Petitioner. While the result of our decision may increase costs to the taxpayer, that result cannot be allowed to sway our just interpretation of the tax laws of

this state as they apply to the facts of a particular case.

CONCLUSION

Tax liability for liquor bottled is incurred by a Wisconsin permittee (rectifier) at the time of the first sale in this state. Petitioner sells a bottled product which is an intoxicating liquor as defined by statute. We find Petitioner is liable for liquor tax on the full volume of bottled liquid it sells to its customers.

ORDER

The Petitioner's Motion for Summary Judgment is denied. The Department's Motion for Summary Judgment is granted, and the Petition for Review is dismissed.

Dated at Madison, Wisconsin, this 19th day of May, 2016.

WISCONSIN TAX APPEALS COMMISSION



Lorna Hemp Boll, Chair



David D. Wilmoth, Commissioner



David L. Coon, Commissioner

ATTACHMENT: **NOTICE OF APPEAL INFORMATION**

WISCONSIN TAX APPEALS COMMISSION
5005 University Avenue - Suite 110
Madison, Wisconsin - 53705

NOTICE OF APPEAL INFORMATION

NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE TIMES ALLOWED
FOR EACH, AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS
RESPONDENT

A taxpayer has two options after receiving a Commission final decision:

Option 1: PETITION FOR REHEARING BEFORE THE COMMISSION

The taxpayer has a right to petition for a rehearing of a final decision within 20 days of the service of this decision, as provided in Wis. Stat. § 227.49. The 20-day period commences the day after personal service on the taxpayer or on the date the Commission issued its original decision to the taxpayer. The petition for rehearing should be filed with the Tax Appeals Commission and served upon the other party (which usually is the Department of Revenue). The Petition for Rehearing can be served either in-person, by USPS, or by courier; however, the filing must arrive at the Commission within the 20-day timeframe of the order to be accepted. Alternatively, the taxpayer can appeal this decision directly to circuit court through the filing of a petition for judicial review. It is not necessary to petition for a rehearing first.

AND/OR

Option 2: PETITION FOR JUDICIAL REVIEW

Wis. Stat. § 227.53 provides for judicial review of a final decision. Several points about starting a case:

1. The petition must be filed in the appropriate county circuit court and served upon the Tax Appeals Commission and the other party (which usually is the Department of Revenue) either in-person, by certified mail, or by courier within 30 days of this decision if there has been no petition for rehearing, or within 30 days of service of the order that decides a timely petition for rehearing.
2. If a party files a late petition for rehearing, the 30-day period for judicial review starts on the date the Commission issued its original decision to the taxpayer.
3. The 30-day period starts the day after personal service or the day we mail the decision.
4. The petition for judicial review should name the other party (which is usually the Department of Revenue) as the Respondent, but not the Commission, which is not a party.

For more information about the other requirements for commencing an appeal to the circuit court, you may wish to contact the clerk of the appropriate circuit court or the Wisconsin Statutes. The website for the courts is <http://wicourts.gov>.

This notice is part of the decision and incorporated therein.