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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

August 9, 1995

The Honorable Joe Wilson
Senator, District No. 23
Box 5709
West Columbia, South Carolina 29171

Re: Informal Opinion

Dear Senator Wilson:

You have asked that we address the following issue:

> [d]oes South Carolina Code § 61-9-315 prohibit a licensed soft drink wholesaler, who also holds a beer wholesaler's license, from providing cooling or other refrigeration equipment to a retailer when (1) the cooling equipment is used exclusively for soft drinks lawfully distributed by the wholesaler and alcoholic beverages are specifically prohibited from being placed in the cooler based on a written agreement between the wholesaler and the retailer; and (2) the furnishing of the cooling equipment is not in any way contingent upon or connected with the retailers purchase of any other product; and (3) there exists no other "tie-in" between the furnishing of the cooling equipment and the soft drink distributors activities as a beer wholesaler?

Your question arises in conjunction with a formal opinion issued by this Office on April 10, 1995. In that opinion, we concluded that:

> ... a beer wholesaler's giving or providing of cooling and refrigerated equipment to a retailer for the purpose of placing

> juices and or waters in them is clearly proscribed by Section 61-9-315.

You further state that you "have no major disagreement with the opinion as issued in the context of a wholesaler's attempt to circumvent the law by supplying equipment not directly related to the sale of beer." However, you note that

> [i]t is important to recognize that it has been a custom and practice in South Carolina for beverage distributors to also engage in the distribution of both beer and soft drinks and other products. It has been common in the soft drink business area for distributors to supply coolers and other refrigeration equipment to retailers for use in displaying and selling specific soft drink products. I would request that a new opinion clarifying this area of the law ....

I have thoroughly reviewed the opinion of April 10, 1995. Also, I have studied the excellent research materials and able briefs presented by Steven W. Hamm, Esquire, and prepared by Thom Salane, Esquire. I have also independently researched this question at considerable length. As I read Section 61-9-315, the General Assembly proscribes on its face the "giving, renting, lending or selling" of any equipment by a licensed beer wholesaler to a holder of a retail permit, regardless of whether such equipment is given in the capacity of a beer wholesaler or that of a distributor of soft drinks. Carefully considering the underlying purpose of this statute as recognized in cases throughout the country, and because the General Assembly has not seen fit to make such a distinction in the statute's wording, I am not at liberty to create the bifurcated construction of the statute as is so strongly advocated.

S.C. Code Ann., Section 61-9-315 provides in pertinent part as follows:

> ... (B) A manufacturer, brewer, importer, or wholesaler of beer, or anyone acting on their behalf, shall not furnish, give, rent, lend, or sell, directly or indirectly, to the holder of a retail permit any equipment, fixtures, free beer or service.
>
> (C) Notwithstanding subsection (B), a wholesaler may furnish at no charge to the holder of a retail permit draft beer equipment replacement parts of nominal value, including washers, gaskets, hoses, hose connectors, clamps, and tap markers, party wagons for temporary use, and point of sale advertising specialties. A wholesaler may also furnish the

> following services to a retailer: cleaning draught lines setting boxes, rotating stock, affixing price tags to beer products and building beer displays.
>
> (D) The holder of a retail permit, or anyone acting on his behalf, shall not accept, directly or indirectly, any equipment, fixtures, free beer, or service referred to in subsection (B) from a manufacturer, brewer, importer or wholesaler of beer except as provided in subsection (C).

Stated in the April 10, 1995 opinion were the governing rules of statutory construction which are applicable to the present situation. There, we stated:

> [i]n interpreting any statute, the primary purpose is to ascertain the intent of the Legislature. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). Where a statute is clear and unambiguous, its terms must be given their literal meaning. Crown Cork and Seal Co., Inc. v. S.C. Tax Comm., 302 S.C. 140, 394 S.E.2d 315 (1990). It is the duty of a court to give an unambiguous statute effect according to the clear meaning of its language. Helfrich v. Brasington Sand and Gravel Co., 268 S.C. 236, 233 S.E.2d 291 (1977). A statute which is remedial in purpose must be broadly construed to fully effectuate its purpose. South Carolina Dept. of Mental Health v. Hanna, 270 S.C. 210, 241 S.E.2d 563 (1978).

Statutes such as Section 61-9-315 are universally common and their proscriptions vary in degree only. Their purpose has been described this way:

> [e]ffect has been accorded to various regulatory provisions governing business relations between retailers and manufacturers or wholesalers. Statutes of this nature are aimed at the evil known as the "tied house". The purpose of such statutes, as variously stated, is to prevent the integration of retail and wholesale outlets, to prevent manufacturers, wholesalers, or distributors from owning or controlling retail outlets and gaining advantage or control of the industry, to prevent large firms from dominating local markets through vertical or horizontal integration and the excessive sales of alcoholic beverages, and to remove the retail dealer from

> financial or business obligations to the wholesaler, with the exception of ordinary commercial credit for liquors sold.
>
> Such statutes exist primarily to remove influence by the manufacturer over the wholesaler and the wholesaler over the retailer which might result in preference for a particular product. Some of the statutes are penal in character and are, therefore, to be construed strictly, but others are remedial, so that the language should be liberally construed. (emphasis added)

48 C.J.S. Intoxicating Liquors, § 226.

A number of cases are analogous to the present situation, strongly indicating the manner in which such statutes are construed by the courts. For example, in Miller Brands-Milwaukee v. Case, 156 Wis.2d 800, 457 N.W.2d 896 (1990), the Court was confronted with the application of Wisconsin's "tied house" law -- proscribing any brewer or wholesaler from furnishing, giving, lending, leasing or selling "any furniture, fixtures, fittings, equipment, money or other thing of value" to any campus or Class "B" licensee or permittee. The Court adopted the Wisconsin Attorney General's previous construction of the law:

> [p]roof regarding a violation [of the statute] ... does not require an actual showing of influence by a brewer or wholesaler upon the product choices of a retailer. Tied-house laws are specifically designed to alleviate the need for a showing. That is why the Legislature broadly chose to bar the described relationships whether they exist directly or indirectly.

In short, reasoned the Court, the statute did "not require that the wholesaler's prohibited activities constitute an attempt on its part to gain control over the retailer." 457 N.W.2d at 903.

James J. Sullivan, Inc. v. Cann's Cabins, 309 Mass. 519, 36 N.E.2d 371 (1941) is also an instructive decision, illustrating the court's application of a "tied house" statute to a situation where a retailer was engaged in a business which did more than just sell alcoholic beverages. There, the Court construed a provision making it unlawful for any licensee to lend or borrow money or receive credit, directly or indirectly, to or from any manufacturer, wholesaler or importer of alcoholic beverages, and for any such manufacturer, wholesaler or importer to lend money or otherwise extend credit, directly

or indirectly (except in the usual course of business), to such licensee. The plaintiff was a licensed wholesaler and the defendant was incorporated solely for the purpose of acquiring and continuing a licensee's business which consisted of a restaurant and bar combined. The previous owner had become indebted to the plaintiff for liquors purchased. While the local licensing authority granted the defendant's application for a license, the plaintiff nevertheless "protested" such acquisition. Plaintiff and defendant then executed an agreement whereby, in exchange for plaintiff's agreement to "withdraw" his protest, the defendant would pay plaintiff specified installments over a period of months. However, the defendant had owed nothing to the plaintiff previously. The Court held the agreement illegal under the statute, analyzing the provision thusly:

> [t]he prohibition of the statute is not limited by the nature of the thing for which payment is to be made. It is not limited to credit for liquors sold. Its purpose appears to have been to avoid the evils believed to result from the control of retail liquor dealers by manufacturers, wholesalers or importers through the power of credit. Those evils do not as a rule depend upon the nature of the consideration out of which the credit arose. They depend upon the power of creditor over debtor. (emphasis added)

36 N.E.2d at 372.

Another very useful decision in this area which demonstrates the courts' reluctance to artificially draw lines with respect to "tied house" statutes is State v. Zazzaro, 128 Conn. 160, 20 A.2d 737 (1941). In that instance, the Court had before it a statute forbidding a dealer in alcoholic beverages from lending "money or otherwise extending credit, directly or indirectly" to a permittee. The Court reasoned that the purpose of such a statute was broad and prohibitory in scope:

> The crux of the objection seems to be not that the prohibition is too vaguely stated, but that its clarity and comprehensiveness are too sweeping, in that it seems "to include within its scope any credit dealings ... even though the transaction had no relation to the liquor business." The act does expressly prohibit such transactions. It closes the loopholes. Its prohibitions relate directly to a lawful and important legal purpose, the abolition of the "tied house." Given a clear and lawful purpose, such a statute is not arbitrary and unreasonable merely because it comprehensively prohibits a permittee from receiving credit from a stockholder

> in a brewing company, and the latter extending such credit. Obviously the acts here charged, the indorsements of notes, are extension of credit. This very case is a good example of the evil the legislature sought to eliminate. The demurrer admits that this defendant, a stockholder in a brewing company, extended credit to thirteen different permittees. Whether the money thus secured went for the purchase of liquor, or for groceries or automobiles, is of no consequence; the potential result was to tie the permittee to the brewery, and that is a sternly forbidden act. Even if could be proved, in a given case, that such was not the purpose, the legislature could and obviously did regard it as so likely to be the reason that the act must be prohibited. We fail to discover anything arbitrary or unreasonable in this. The prohibition has direct and rational relation to its purpose.

20 A.2d at 741. (emphasis added)

Moreover, in Rihga Intl. v. New York State Liquor Authority, 84 N.Y.2d 876, 644 N.E.2d 1340 (1994), the Court interpreted a statutory provision which made it unlawful for a licensed manufacturer or wholesaler to be "... interested directly or indirectly in any premises where any alcoholic beverage is sold at retail ...." In Rihga, three unrelated manufacturers of alcohol products held ownership interests in a hotel. Each of their interests, held indirectly, aggregated to less than 10% of the ownership. Still, the Court concluded that no alcoholic beverage license could issue to the hotel:

> Petitioner correctly observes that the statutory purpose underlying Alcoholic Beverage Control Law § 101 (1) (c), which was originally enacted in 1933, is the prevention of monopolies within the alcoholic beverage industry. It contends that this statutory purpose is not served by denying its application, because petitioner has agreed to refrain from purchasing the products of the stockholding manufacturers, and because the interests of those stockholders are insignificant in size. The logic of petitioner's argument notwithstanding. Alcohol Beverage Control Law § 101 (1) (a) does not grant respondent any discretion when such ownership interests exist.

644 N.E.2d at 1341.

Also, in Central Florida Distributing Co. v. Jackson, 324 So.2d 143 (D. Ct. App. Fla. 1976), the relevant statute provided that no distributor shall have any financial interest in the business of any vendor. The Florida Division of Beverage, pursuant to that authority, promulgated and enforced against a vendor an administrative rule which forbade the leasing of equipment to a vendor by a dealer. The Division charged the wholesaler with leasing beer coolers to four retail vendors. The appellate court upheld the imposition of a $2,000 civil penalty against the wholesaler.

The promulgated rule in Central Florida prohibited any distributor from renting "any property to any vendor if the property is used in the vendor's business." The Court opined:

> [t]he purpose of Section 561.42 is to prohibit any financial obligation between a distributor and a vendor, thus prevent control of retail outlets ... The plain and specific language of Section 561.42 clearly provides sufficient standards for the adoption of Rule 7A-4.18. (emphasis added).

324 So.2d at 145.

These cases are all persuasive for the principle that the purpose of a provision such as § 61-9-315 is, simply stated, to "... remove influence by the ... wholesaler over the retailer ...." 48 C.J.S. at § 226, supra. The foregoing cases are also convincing that the question of "influence" has usually been determined by the Legislature to be inherent in the furnishing of any particular gift or equipment. Thus, the Court does not generally engage in any "line drawing" because the line has already been drawn broadly in the statute itself. Accordingly, an obligation or influence is deemed to exist whether or not equipment is provided to the retailer for the purpose of the retailer's storing beer or whether such equipment is provided with some other purpose, such as the placing of soft drinks therein. As has been stated elsewhere, "... a wholesaler licensee may not lawfully donate or give away any liquor under a statute prohibiting wholesalers from granting discounts, rebates, free goods or other inducements to their customers, and the statute is violated regardless of purpose or intent." 48 C.J.S., Intoxicating Liquors, § 246 (emphasis added).

Moreover, the fact that the wholesaler and retailer warrant or contractually agree that such equipment will be used exclusively for another non-alcohol purpose does not appear to be relevant to the General Assembly's intent in enacting these provisions. The courts have held that "equipment", is "equipment" regardless for what purpose it is used. Tri-City Beer Company v. Nebraska Liquor Control Commission, 195 Neb. 278, 237 N.W.2d 852 (1976). Moreover, it is a fundamental principle of law that an agreement

cannot be made to contravene a statute. American Interinsurance Exchange v. Diamond, 268 S.C. 35, 231 S.E.2d 304 (1977). Thus, while arguments can perhaps be made for the construction which you seek, the courts simply have not accepted those arguments. In light of the clear prohibitory purpose of "tied-house" statutes, wherein "firms operating at one level of distribution must remain free from involvement in or influence over, any other level", it would appear that such a transaction as you describe in your letter is prohibited by Section 61-9-315. California Beer W. Assn. v. Alcoholic Bev. Con. App. Bd., 96 Cal. Reptr. 297, 487 P.2d 745, 748 (1971).

Additional principles are supportive of this conclusion. As applied in the specific context of the regulation of alcoholic beverages, our Supreme Court has recognized that a statutory prohibition cannot be circumvented by indirection. In Winter v. Pratt, 258 S.C. 397, 403, 189 S.E.2d 7 (1972), or the so-called "Pirates Cove" case, the Court took the opportunity to say in no uncertain terms that "[n]o matter what the disguise or pretense, it is enough to sustain a conviction if liquor was actually sold or given in violation of the law ...". And in other contexts, the Court has held that what cannot be done directly cannot be accomplished indirectly. Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967) [constitutional prohibition against pledging credit of the State must necessarily apply to State's political subdivisions]; Cook v. Douglas, 243 S.C. 201, 133 S.E.2d 209 (1963) [the "defendant simply seeks to do indirectly here that which we held in the prior appeal could not be done directly."] Thus, to my mind, the purpose of the "three tier" law would be thwarted if we were to conclude that the statute was not violated where a beer wholesaler gave "equipment" to the retailer so long as the purpose was not to use that equipment for a purpose related to the sale of beer.

It has also been argued that a literal reading of the statute, to the effect that the furnishing of any equipment by a wholesaler to a retailer, creates "absurd, unjust or oppressive consequences [and] should be avoided whenever a reasonable application can be given consistent with the legislative purpose." This argument is answered by the numerous cases cited above which conclude that "tied-house" statutes are broadly prohibitory and designed to eliminate the possibility of any influence whatever by the wholesaler over the retailer. As stated in Zazzaro, supra, the fact that such a statute is comprehensively prohibitory does not make it arbitrary or unreasonable.

A further argument presented is that we should attempt to draw a line between those activities of a soft drink distributor which truly violate § 61-9-315 as an unlawful "tie in" and those which are simply part of the "customary and usual soft drink industry practices." It is argued that only where the wholesaler attempts "indirectly" to exercise control over a retailer as part of his soft drink activities, should the statute apply. The problem with this argument is that I am not at liberty to draw such lines with respect to the statute's application. Such is a matter for the General Assembly or the agency

charged with enforcement of the statute, here the Revenue Department. Nowhere in the statute does the Legislature provide any exception for a wholesaler who also engages in soft drink distribution. It would have been a simple matter for the Legislature to make such a distinction, particularly where other exceptions were indeed included. However, neither this Office nor the courts are so empowered. As was wisely stated by our Supreme Court in Creech v. S.C. Pub. Serv. Auth., 200 S.C. 127, 20 S.E.2d 645 (1942),

> [i]t is perhaps unnecessary to say that Courts have no legislative powers, and in the interpretation and construction of statutes their sole function is to determine, and within the constitutional limits of the legislative power to give effect to, the intention of the Legislature. They cannot read into a statute something that is not within the manifest intention of the Legislature as gathered from the statute itself. To depart from the meaning expressed by the words is to alter the statute, to legislate and not to interpret. The responsibility for the justice or wisdom of legislation rests with the Legislature, and it is the province of the Courts to construe, not to make, the laws. There is a marked distinction between liberal construction of statutes, by which Courts, from the language used, the subject-matter and the purposes of those framing them, find out their true meaning, and the act of a Court in ingrafting upon a law something that has been omitted, which the Court believes ought to have been embraced. The former is a legitimate and recognized rule of construction, while the latter is judicial legislation, forbidding the constitutional provisions, distributing the powers of government among three departments, the legislative, the executive, and the judicial.

200 S.C. at 146-147. It goes without saying that this rule against legislating by the courts applies with far more force to opinions of the Attorney General.

A number of other arguments have been called to my attention and advanced to me to the effect that a distinction should be made between a wholesaler's providing equipment relating to the sale of beer and wine and his providing equipment for use on the soft drink side of the retailer's business. The first such argument relies upon Section 61-9-315's use of the term "wholesaler". It is argued that the term "wholesaler" implies an intent by the General Assembly to apply Section 61-9-315's prohibition only when a beer wholesaler is acting in such capacity and not when the wholesaler is functioning in the capacity of a distributor of soft drinks.

I remain unconvinced. To me, it is apparent that the term "wholesaler" simply refers to a person licensed to sell beer and wine at wholesale and not to what particular capacity such wholesaler is acting at a given moment. It seems virtually impossible to take off and put on the "wholesaler's hat" at a given moment. In California Beer Wine Assn. v. Alcoh. Bev. Con. App. Bd., supra, the California Supreme Court held that a provision which forbids a beer and wholesaler from holding an off-sale retail license must be construed to include a retailer who acquires a wholesale license. The instant that the wholesale license is acquired, the Court held, the individual is then considered a "wholesaler" who is "holding" a retail liquor license. Said the Court,

> [t]o rule otherwise would be to create the anomalous situation that the right to hold both licenses would depend upon the fortuity of the order in which the party applied for them. But the error of such an incongruous result would go deeper; it would violate the legislative design of segregating wholesale from retail interests; it would permit, rather than prevent the merging of the marketing functions and powers that the Legislature meant to keep separate.

487 P.2d at 746. Common sense would seem to dictate that a person remains a "wholesaler" as long as he possesses a wholesaler's license; under any other construction, taken to its logical conclusion, if a wholesaler engaged in conduct which adversely reflected on his "moral character", but which was done in another capacity, the person would not be acting as a "wholesaler" for license revocation. In short, it is my view that the Legislature's use of the term "wholesaler" is not a limitation upon Section 61-9-315 and does not support a bifurcated view of the statute.

Next, it is urged that there has been a "longstanding administrative interpretation of Section 61-9-315(B) given by the Alcohol Beverage Control Commission ("ABC Commission"). Cited to our attention is ABC Ruling 87-4 (July 21, 1987, revised May 30, 1989) and ABC Bulletin 91-4 (July 2, 1991).

ABC Ruling 87-4 consists of a list of commonly asked questions regarding the then newly-enacted "Three Tier" law or § 61-9-315. One of the hypothetical questions posed therein is the following:

> 8. Can a wholesaler of beer that also distributes soft drinks and snacks provide free goods and services?
>
> No. If the transaction only involves snacks and soft drinks, these items are not regulated by the ABC Commission.

While admittedly there may be some ambiguity, taken as a whole, the ABC's response here makes good sense. The question posed was whether the wholesaler/soft drink distributor could provide "free goods and services". Of course, § 61-9-315 prohibits a wholesaler from providing a retailer with "services". Thus, the ABC properly answered "no", but qualified its answer in that the ABC does not regulate the provision of "snacks and soft drinks" to a retailer. It is also important to note that no suggestion that "equipment" could in any way be provided was made by the ABC. I cannot see that this Bulletin is supportive of the idea that the ABC interpreted the statute as allowing "equipment" be provided where done so as a soft drink distributor.

Also referenced is ABC Bulletin 91-4. Subsection C of this Bulletin defines in pertinent part the scope of its coverage:

> C. SCOPE: This bulletin applies to all manufacturers, brewers, importers, wholesalers and retailers of beer issued permits or certificates of registration by the South Carolina Alcoholic Beverage Control Commission (emphasis added).

It can be seen that the ABC, like the courts, views the holding of wholesale and retail licenses as sufficient to "trigger" the statute. The Bulletin also outlines a whole array of "prohibited activities." Included therein are a host of examples of gifts or services which do not have any intrinsic relationship with the sale of beer and wine, nor which could be said to be a part of a soft drink distributor's dealing with a retailer in that capacity. Many of the items prohibited are used in facilities which sell beer and wine, but are also used in any business. For example, under the item "equipment", the ABC deemed the giving of tables and chairs as prohibited, items which are entirely neutral in terms of the particular type of business involved. Likewise, "cold boxes" were listed as prohibited "equipment", and such items would be applicable to most retail businesses which sell food or soft drinks regardless of whether alcoholic beverages are sold. Among the "fixtures" listed as prohibited were furnaces, air conditioners, ceiling fans, shelves, permanent signs and counters. Listed services included the mopping of floors again a service having nothing to do with beer or soft drinks.

Several specific items not prohibited by Section 61-9-315 were also listed in the Bulletin. The ABC deemed items which could not be reasonably "classified as equipment, fixtures, free beer or service" as not prohibited by the statute (such as golf tournaments, entertainment and meals, etc.). In short, the ABC logically analyzed § 61-9-315's broad prohibitions as resting upon the category of prohibited items, i.e. "equipment", not the particular purpose or type of business involved. No effort was made to distinguish the purpose involved because the ABC appropriately recognized that it was the category of item, not the purpose, which was proscribed by the Legislature. If the item fell into the

prohibited category or categories, i.e. "tables and chairs" under "equipment", it did not matter to the ABC Commission what the wholesaler or retailer intended to do with those items. If a wholesaler who was also a soft drink distributor gave "tables and chairs" to a retailer, the ABC deemed such to prohibited. If a wholesaler who was also a soft drink distributor provided a retailer with ceiling fans for his business or a service of mopping his floors, such was deemed unlawful. I cannot discern any logical difference where a beer wholesaler who is also a soft drink distributor provides coolers to a retailer. Thus, I also read Bulletin 91-4 as supportive of the proposition that the ABC interpreted § 61-9-315 as a blanket prohibition of a proscribed item, not a prohibition only where a gift was for use in the sale of beer and wine.

I have also been referred to a brief letter, written by staff counsel for the ABC which purportedly "approves" the practice outlined here. On September 26, 1991, Legal Counsel responded to a "Three Tier Acknowledgement" which had been submitted for review to the ABC. In that draft Acknowledgement, the wholesaler and retailer acknowledged that Section 61-9-315 governed them, but that the "undersigned parties are also engaged in the respective wholesaling and retailing of soft drinks and/or other food products." The Acknowledgement also contained the following verbiage:

> [B]y executing this document the undersigned retailer affirms that it has not and will not directly or indirectly accept any equipment, fixtures, free beer or services from the undersigned wholesaler as relates to the selling of beer unless the same is specifically permitted by state law. The undersigned beer wholesaler affirms that it has not and will not provide any equipment, fixtures, free beer or other services to the retailer as relates to the sale of beer unless the same is specifically permitted by state law.
>
> To the extent that equipment, fixtures, free product (not beer) or other services are exchanged between the parties in their marketing of soft drinks and food such exchange has not and will not in any way be connected to or contingent upon the buying by the retailer or selling by the wholesaler of any beer. (emphasis added).

The ABC's counsel wrote back in a two sentence letter (the first acknowledging receipt) and stated "[t]he 'Three Tier Law Acknowledgment' attached to your letter seems to comply with ABC Commission Ruling 87-4."

I am unable to conclude that this letter from Legal Counsel would be sufficiently binding upon the ABC (Revenue Department) to authorize the contemplated proposal. First, the letter appears to be simply a "top of the head" response. Second, it does not take into account Bulletin 91-4, discussed at length above. Third, based upon my reading of official ABC interpretations, discussed above, I am simply unable to determine that this letter represents anything other than a "quick read" of proposed agreement without the benefit of the usual in-depth examination. In short, I cannot attribute to it the official position of the ABC.

It is well-recognized that an administrative agency is not estopped or bound by a subordinate's acts. Nor are such agencies

> ... precluded from proceeding against persons or concerns subject to their control by the fact of their subordinates or representatives did not consider the practices involved to be such as required regulatory or preventive measures; and they cannot be deprived of their statutory powers by agreements made by their subordinates.

73 C.J.S., Public and Administrative Law and Procedure, § 56. The law in South Carolina is that the doctrine of estoppel will not deprive the State of its police power or thwart its application of public policy and an interpretation inconsistent with that of the agency itself will not be deemed a waiver. Serv. Management, Inc. v. State Health and Human Services Fin. Comm., 298 S.C. 234, 379 S.E.2d 442 (Ct. App. 1989); S.C. Dept. of Pub. Serv. v. Parker, 275 S.C. 176, 268 S.E.2d 282 (1980); Heyward v. S.C. Tax. Comm., 240 S.C. 347, 126 S.E.2d 15 (1962); Town of Sullivan's Island v. Byrum, 306 S.C. 539, 413 S.E.2d 325 (1992) [when a landowner has actual or constructive notice of a matter and does not show any misrepresentation or concealment by the government, estoppel will not lie].

On the other hand, a public agency undoubtedly "may ratify an action of its subordinates, and an agency's subsequent approval or ratification of an act delegated to a subordinate, validates the act, which becomes the act of the agency." 73 C.J.S., § 56, supra. Based upon my research, it would appear that to date the ABC (now Revenue Department) has not ratified or endorsed the interpretation of its counsel in 1991. Of course, any future action in this regard is a matter for that agency to consider and determine either in the context of additional administrative rules or interpretations, or in the context of an administrative hearing. Such is beyond the purview of an opinion of this Office.

Reference has also been made to administrative rulings of the states of Virginia and North Carolina both of which have substantially similar statutes to § 61-9-315. It is argued that North Carolina permits the engagement "in accepted soft drink industry practices such as providing cooling equipment for soft drink products so long as the activity is not used as an inducement to tie-in sales of its beer products." With respect to Virginia, it is argued that "[s]o long as the equipment provided to a retailer is not related to the alcoholic beverage business of the licensed retailer, the activity is permitted."

The short answer is that it appears to me that South Carolina's ABC, through the above-cited Bulletins has rejected both of these attempts to draw legislative lines. As noted above, South Carolina's regulatory and enforcement agency has examined the issue by looking at the enumerated categories of the items proscribed. Gifts of tables and chairs or ceiling fans may well have no "tie-in" whatever to the sale of beer and wine, but when a wholesaler gives them to a retailer, they are prohibited all the same. Nor is a table and a chair an item intrinsically "related to the alcoholic beverage business of the licensed retailer ...". A ceiling fan could just as easily be in a hardware store where neither alcohol or soft drinks are sold, but the statute nevertheless prohibits such an item being given by a beer wholesaler to a retailer. But regardless of administrative interpretations, in the words of one court,

> [t]he evils of the "tied house" have long been recognized and most, if not all, of the states ... have prohibited the furnishing by manufacturers or distributors of buildings, bars, equipment or loans of money to a retailer.

Weisberg v. Taylor, 409 Ill. 384, 100 N.E.2d 748, 750 (1951). As stated by another, whether the prohibited gift went for alcoholic beverages, "or for groceries or automobiles is of no consequence ... [because] ... [e]ven if it could be proved in a given case that [a tie-in] ... was not the purpose, the legislature could and did regard it as so likely to be the reason that the act must be prohibited." State v. Zazzaro, supra.

One additional piece of evidence is also very persuasive in support of the interpretation of § 61-9-315 expressed above. Prior to the amendment of § 61-9-315 in 1987, which specifically inserted the language in its present form (dealing with "equipment"), the "three tier" law did not explicitly mention "equipment" but simply read as follows:

> (a) [t]he holder of a wholesale permit granted under Section 61-9-310, directly or indirectly, individually or as a member of a partnership or an association, as a member of or

> stockholder of a corporation, or as a relative to any person by blood or marriage within the third degree, shall not have any interest whatsoever in any other business, store or establishment dealing in beer or wine at retail ...

In 1984, the ABC issued ABC Bulletin 84-1, to define the term "interest" in the then-existing version of § 61-9-315. The Bulletin was deemed to apply "to all business entities holding a permit to distribute and sell beer in South Carolina." Provided also was the ABC's view of the purpose of the "three tier" law, which was

> ... to maintain a clear distinction between the various levels in the distribution chain of beer, to keep any level of the chain from dominating another, and to foster healthy competition.

A public hearing was held on June 4, 1984 to consider, inter alia, the meaning of the term "interest". Included therein as constituting an "interest" was the following, which virtually tracks the present version of § 61-9-315:

> ... [f]urnishing, giving, renting, lending, or selling any equipment, fixtures, signs, supplies money, services, meeting rooms or other things of value.

The ABC included certain exceptions, which again closely track the present statutory exceptions:

> 8. Tapping accessories.
>
> Tapping accessories, such as standards, faucets, rods, vents, taps, tap standards, hoses, washers, couplings, gas gauges, vent tongues, shanks, and check valves, may be sold to a retailer and installed in the retailer's establishment if the tapping accessories are sold at a price not less than the cost to the industry member who initially purchased them and if the price is collected within 30 days of the date of sale.

The ABC then addressed specifically the issue of those beer wholesalers who also sell other products:

20. Merchandise.

(a) An industry member, who is also engaged in business as a bona fide vendor of other merchandise (for example, groceries or snacks) may sell that merchandise to a retailer if:

(1) The merchandise is sold at its fair market value;

(2) The merchandise is not sold in combination with beer; and

(3) The merchandise is itemized separately on the industry member's invoice and other records.

(b) Equipment, fixtures, signs, glassware, supplies, services and advertising specialties may be furnished to retailers only as provided in this Bulletin. (emphasis added).

Of course, the Bulletin authorized virtually the same narrow exceptions with regard to "equipment" etc. as those presently contained in § 61-9-315. Even though the statute was much less specific with respect to "equipment" than is now the case, the ABC still was of the view that a wholesaler could not provide a retailer with "equipment" unless specifically exempted, even in the specific context where that wholesaler also sold other products.

Equally important, Bulletin 84-1 demonstrates quite clearly that the ABC has always viewed this construction as controlling. Indeed, it would defy reason for the ABC to have changed its interpretation after the much more specific and express language of § 61-9-315 as it presently exists was inserted by the General Assembly. It is well recognized that "[e]xecutive construction is entitled to additional weight where it has been impliedly indorsed of the legislature, as by the reenactment of the statute or the passage of a similar one, in the same or substantially the same terms ..." 82 C.J.S. Statutes, § 359. The practical, contemporaneous construction placed on a statute by the officers charged with its enforcement prior to codification and continued after codification will be given weight by the courts in determining the meaning of a codified statutes. Schmutzler v. Workman's Comp. Bureau, 49 N.W.2d 649 (N.D. 1951).

Where as here, virtually the very language contained in Bulletin 84-1 is used in § 61-9-315, there can be little doubt that the Legislature intended to prohibit a wholesaler from providing equipment to a retailer whether or not that wholesaler was also in the soft drink business. When a business becomes a licensed wholesaler of beer, that business continues in such capacity vis à vis his relationship with a retailer; in other words, a beer wholesaler does not wear "another hat" in such relationship for purpose of the "Three Tier" law. As cogently stated by the ABC in Bulletin 91-4, "[t]his bulletin applies to all manufacturers, brewers, importers, wholesalers and retailers of beer issued permits or certificates of registration by the South Carolina Alcoholic Beverage Control Commission."

Thus, it is my interpretation that § 61-9-315 prohibits a wholesaler from providing a retailer with "equipment" in the context you have raised. A number of other options would, of course, still be available to the wholesaler in this instance, however. Certainly, legislative amendment would be the most obvious. Then too, a separate incorporation of the dual capacities involved, i.e. separation of the beer and soft drink functions, would alleviate the problem; if a particular corporation or entity distributing soft drinks is not a licensed beer wholesaler, obviously the prohibition does not apply. And a declaratory judgment action to receive a definitive judicial determination could be sought.

Finally, the issue may be resolved through the normal administrative process. Should the administrative agency (here the Revenue Department) ever choose to ratify the previous interpretation of its staff counsel, such could, of course, be done in the form of an interpretive ruling, promulgation of a regulation etc. The previous ABC Bulletins and letter of staff counsel continue to be asserted to this office as supportive of the position that so long as there is no "tie-in" to the sale of beer, § 61-9-315 permits the kind of agreement set forth in the Acknowledgement submitted to the ABC for approval in 1991. I do not so interpret these documents, as I have stated throughout, but any future interpretation or clarification is, of course, a matter within the province of that agency and not this Office. Courts will defer to administrative interpretations by the agency charged with enforcement and will not overturn such interpretations "absent cogent reasons." Logan v. Leatherman, 290 S.C. 400, 351 S.E.2d 146, 148 (1986); Welch v. Public Service Comm., 297 S.C. 378, 377 S.E.2d 133 (Ct. App. 1989). In addition, the matter could be resolved administratively, subject to court review, (pursuant to the Administrative Procedures Act, S.C. Code Ann. § 1-23-310, et seq.) by virtue of any "contested case".

CONCLUSION

However, absent a definitive legislative, judicial or administrative change in this area, it remains my opinion that § 61-9-315 prohibits the transaction described in your letter.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an