

1983 WL 181950 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

July 26, 1983

***1 Re: Licensing of X, Inc.**

James H. Harrison, Esquire
Legal Counsel
South Carolina Alcoholic Beverage Control Commission
1205 Pendleton Street
Columbia, South Carolina 29201

Dear Jim:

I apologize for the unreasonable delay in responding to your inquiry concerning the ship chandlery business. You have asked whether X, Inc. is required to procure a wholesale beer permit pursuant to [Section 61-9-310, CODE OF LAWS OF SOUTH CAROLINA](#), 1976 (1982 Cum.Supp.). The information presented to this office concerned analysis of South Carolina's statutory scheme regulating the importation and distribution of beer and wine and its impact upon the operation of X, Inc. in this State. However, this office's review of the situation presents serious constitutional problems if South Carolina's wholesale licensing law is construed as applicable to X, Inc.'s activities in this State.

You have provided the following facts as assumed to be true. X, Inc. is an out-of-State corporation authorized to do business in South Carolina. X, Inc. operates a ship chandlery business in the Charleston area and, among other things, solicits orders from docked ships for beer and wine. X, Inc. delivers the beer to the ships while they are harbored in South Carolina ports and, generally, the Captain of the vessel makes payment upon delivery or acknowledges receipt.

X, Inc. imports its beer directly from breweries [all of whom are located outside of this State]. In addition, the beer is tax free pursuant to [Section 12-21-100 of the South Carolina Code](#) of Laws. X, Inc. maintains federal permits from Alcohol, Tobacco and Firearms to engage in the business of supplying beer to merchant vessels, including an Importer's Basic Permit, Export Warehouse Proprietor's Permit, Cartman's Card, Carriageman's Card, ATF License and Custom House License. In addition, X, Inc. sells beer only to merchant vessels for consumption by the vessels' crews while at sea. The beer delivered to the vessels is stored in lockers which are sealed by the U. S. Customs officials and the seals are not broken until the vessels have been put to sea.

[Section 61-9-310](#) of the amended Code provides:

Every person engaging in the business of selling beer . . . shall apply to the South Carolina Alcoholic Beverage Control Commission for a permit to sell such beverages.

Clearly, then, if X, Inc. is engaged in the business of selling beer in this State, it is required to maintain a permit. ¹

[Section 61-9-310](#) appears applicable to all sales of beer which occur within South Carolina's sovereignty. In [South Carolina Tax Commission v. Schafer Distributing Co.](#), 247 S.C. 491, 148 S.E.2d 156 (1966), the South Carolina Supreme Court concluded that under the facts presented therein, the sale of beer took place upon 'delivery'. At 157; *see also*, 77 C.J.S. [Sales](#) §§ 255, 256; [Jordan v. Butler](#), 182 Neb. 626, 156 N.W.2d 778 (1968). Here, upon initial inquiry, it appears that all elements of the transaction occur within South Carolina's sovereign territories and, thus, [Section 61-9-310](#) will require X, Inc. to procure an appropriate permit. ² However, where the constitutionality of a statute is in issue, every presumption must be made in favor of its validity

and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubts that it conflicts with the Constitution. [Y.C. Ballinger Electrical Contractors, Inc. v. Reach-All Sales, Inc.](#), — S.C. —, 279 S.E.2d 127 (1981); WEST'S SOUTH CAROLINA DIGEST [Constitutional Law](#) Key #48(1). Moreover, a statute will, if possible, be construed in a manner conforming to constitutional limitation. [Thompson v. Hoffman](#), 236 S. C. 314, 210 S.E.2d 461 (1974).

*2 Although a more complete amplification of the facts is necessary prior to final resolution of this inquiry, it appears that an interpretation of [Section 61-9-310](#) as requiring X, Inc. to procure a wholesale permit would violate [Article I, Section 8, cl. 3 of the United States Constitution](#) [Commerce Clause]. Neither the Twenty-first Amendment, nor this State's general police power authorizes the State to require X, Inc. to maintain a wholesale beer and wine permit to engage in sales in international commerce. It is suggested, however, that [Section 61-9-310](#) lends itself to a reasonable construction consistent with the Commerce Clause. Thus, [Section 61-9-310](#) must be construed as not precluding the activities of X, Inc. However, because of shortcomings in the presented facts, either a declaratory judgment action pursuant to [Section 15-53-10, CODE OF LAWS OF SOUTH CAROLINA, 1976 \(1982 Cum.Supp.\)](#), in the Court of Common Pleas or, more preferably, a declaratory proceeding by the Alcoholic Beverage Control Commission to determine whether licensure is required should be pursued.³

The Twenty-first Amendment cloaks the State with virtual plenary powers in the regulation of intoxicants 'destined for use, distribution or consumption within its borders'. [Hostetter v. Idelwild Liquor Corp.](#), 377 U.S. 324, 330, 12 L.Ed.2d 350, 84 S.Ct. 1293. 'This view of the scope of the Twenty-first Amendment with respect to a State's power to restrict, regulate or prevent the trafficking and distribution of intoxicants within its borders has remained unquestioned.' At 330. However, the transportation or shipment of intoxicating liquors 'through a state is not transportation or importation into the state within the meaning of the Amendment'. [Carter v. Virginia](#), 321 U.S. 131, 137, 88 L.Ed. 605, 64 S.Ct. 464; see also, [Collins v. Yosemite Park Co.](#), 304 U.S. 518, 82 L.Ed. 1502, 58 S.Ct. 1009.

The United States Supreme Court's line of cases originating with [Hostetter v. Idelwild Liquor Corp.](#), *supra*, convinces that importation of bonded tax free liquors for distribution and ultimate consumption in another sovereign is not subject to the State's authority pursuant to the Twenty-first Amendment.⁴ In [Epstein](#), the Court recognized and recited facts which similarly are presented herein. The plaintiff in [Epstein](#) operated pursuant to Federal importer's and exporter's basic permits. Plaintiff purchased bonded liquor from bonded distilleries within the United States and transported the liquor to bonded warehouses in New Jersey solely for export. The bonded liquor remained under custody and control of Customs officials. This tax free liquor was sold to vessels docked in New Jersey harbors where it was used in foreign commerce. The District Court found plaintiff's operation to be essentially the same as those identified in [Hostetter](#) and [Ammex](#). And, so finding, the Court rejected New Jersey's contention that 'delivery' actually occurred in New Jersey's territorial waters when the liquor was transported to the vessel. The court reasoned, however, that the 'sale to the consumer is not 'completed' in New Jersey in view of the finding in [Ammex](#) that the legal possession of such bonded liquor remains in the Customs officers until the border is crossed (or, in our case, until the ship sails beyond territorial waters)'. At 935, n. 12 A. Having so reasoned, the court concluded that the Twenty-first Amendment did not predicate New Jersey's licensing as a wholesaler, plaintiff's distribution center.

*3 Thus, it becomes clear that the United States Supreme Court does not recognize a delivery under the Twenty-first Amendment where legal custody remains in the Customs officials and 'ultimate delivery and use is not in [the State] but in a foreign country.' [Hostetter](#), *ibid* at 333. Assuming that the facts herein when amplified at a hearing reflect a distribution scheme similar to those recognized in the [Hostetter](#) line of cases, particularly [Epstein](#), it appears that the Twenty-first Amendment would not predicate South Carolina's authority to require X, Inc. to secure and maintain a beer wholesale license.⁵

Although South Carolina may not preclude X, Inc.'s operation pursuant to its powers under the Twenty-first Amendment, this State maintains general police powers which must be analyzed as well. 'Apart from the Twenty-first Amendment, [South Carolina's] authority to regulate liquor stems from its 'traditional police power' to regulate activities within its borders for the protection of its citizens'. [Epstein](#), *ibid* at 931. 'The potential evils of intoxicants and the difficulty of keeping them within legal bounds has long been recognized as warranting broad exercise of State authority within the traditional confines of the

Commerce Clause.’ [Cite omitted.] *Ibid*; see also, *Collins v. Yosemite Park Co.*, *supra*; *Hostetter v. Idelwild Liquor Corp.*, *supra*. This authority has been articulated in the following:

We [the District Court] read these cases [*Hostetter, et al.*] as holding that a State may reasonably regulate interstate or foreign shipments of liquor for good cause, and that where such regulations are reasonable, the burden placed on interstate commerce will not require the State regulation to be struck down. Conversely, however, a State may not prohibit such interstate or foreign shipments.

Ammex Warehouse Co. v. Department of Alcoholic Beverage Control Commission, *ibid* at 557.

In *Epstein*, the Court reasoned that a State's authority to regulate intoxicants passing through it in a manner similar to that proposed by X, Inc. would be unreasonably burdened by requiring the maintenance of a wholesale license, noting that such regulation ‘exceeds the limited sphere reserved for State action in regard to such liquor trade.’ At 937. Here, development of a full complement of facts through adjudication is particularly important. It appears that the requirement of licensure [whether it be retail or wholesale] with the attendant restrictions thereto would likely prohibit X, Inc.'s operation. Whether X, Inc. could adapt, or whether other regulatory manners may satisfy the State's need to prevent diversion should be the focus of an adjudicatory hearing. However, under the facts presented, it appears that requiring X, Inc. to obtain a wholesale beer license unreasonably burdens commerce and is beyond the State's general police power.

Thus, [Section 61-9-310](#) is construed as being inapplicable to a sale of beer that is consummated by delivery in international waters and in which the importation, transportation, delivery [and all other aspects thereof] are under the control of Customs officials and pursuant to Federal authority.

Very truly yours,

*4 Edwin E. Evans

Senior Assistant Attorney General

Footnotes

- 1 The inquiry questions solely whether X, Inc. is required to maintain a wholesale permit. However, it appears that X, Inc. possesses characteristics of both a wholesaler and a retailer. In any event, the critical question is whether X, Inc. is required to maintain a permit pursuant to [Section 61-9-310](#).
- 2 Undeniably, vessels harbored in South Carolina ports are within South Carolina's territory and are, thus, subject to this State's authority. 43 U.S.C. § 1312; [Section 1-1-10, CODE OF LAWS OF SOUTH CAROLINA](#), 1976 (1982 Cum.Supp.).
- 3 The Commission, as the executive agency charged with the regulation of beer trafficking in this State, maintains primary jurisdiction regarding the issuance of beer and wine permits subject to Court review. *Cf.*, [Fast Stops, Inc. v. Ingram, et al.](#), 276 S.C. 593, 281 S.E.2d 118 (1981).
- 4 See, *Epstein v. Lordi*, 266 F.Supp. 92 (1966, D.C.N.J.), *aff'd per curiam*, 389 U.S. 29, 19 L.E.2d 29, 88 S.Ct. 106; [Ammex Warehouse Co. v. Department of Alcoholic Beverage Control Commission](#), 224 F.Supp. 546 (1963, D.C. Cal.), *aff'd per curiam*, 378 U.S. 124, 12 L.Ed.2d 743, 84 S.Ct. 1687.
- 5 Again, amplification of critical facts is necessary prior to final resolution of this inquiry. Whether the Customs officers maintain legal custody and possession of the beer until a vessel is in international waters is not clear. Nor, is it clear that Customs officers control every step of the process including the importation, storage and delivery of the beer. These factors are most critical. See, i.e., [Avion v. Cook](#), 318 F.Supp. 1076 (1970, S.D. Ohio.)

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