STATE OF NEW YORK: LIQUOR AUTHORITY

Application of "tied-house" laws to a licensed New York winery seeking to hold an out-of-state on-premises license with a permit to manufacture wine

DECLARATORY RULING 2015-00073

It is the policy of the State of New York "that it is necessary to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law."[1] Consistent with that policy, the distribution of alcoholic beverages in this state is generally accomplished though what is referred to as the "three tier system".[2] With certain exceptions, manufacturers sell their products to wholesalers who, in turn, distribute the products to retailers.

The Alcoholic Beverage Control Law ("ABCL") contains numerous provisions that regulate the relationships between the three tiers. These restrictions are intended, inter alia, to prohibit manufacturers and wholesalers from having an undue influence over retail licensees. For example, manufacturers and wholesalers may not offer discounts, rebates, etc., to selected retailers.[3] While liquor and wine manufacturers may limit which wholesalers sell their product,[4] each of those wholesalers must be able to purchase the product at the same price from the manufacturer.[5] A wholesaler must offer the same price, and any discounts, for liquor and wine to all retailers.[6] With certain exceptions, manufacturers and wholesalers may not provide any gifts or free services to retail licenses.[7] This prohibition is referred to as the "gifts and services" law.

To further prevent manufacturers and wholesalers from exerting inappropriate control over retail licensees, the ABCL places restrictions on the ability of an entity in one tier to have an interest in an entity in another tier of the industry. These restrictions are commonly known as the "tied-house" laws. Licensed manufacturers and wholesalers are prohibited from having any interest, direct or indirect, in any premises where alcoholic beverages are sold at retail.[8] Retail liquor and wine stores may not have an interest in a business that manufactures or wholesales alcoholic beverages.[9] Those holding a retail on-premises license are also banned from having any interest in a business that manufactures or wholesales alcoholic beverages.[10]

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[1] ABCL §2.

[2] The United States Supreme Court has held that a state, in the exercise of its authority under the Twenty-First Amendment, can mandate a three-tier distribution system. See *North Dakota v. United States*, 495 US 423, 432 (1990).

[3] ABCL §101-b(2)(a).

[4] ABCL §101-b(4-a)(a).

[5] ABCL §101-b(3)(a).

[6] ABCL §101-b(3)(b).

[7] ABCL §101(1)(c).

[8] ABCL §101(1)(a).

[9] ABCL §105(16). The restriction applies only to those with retail licenses to sell liquor and/or wine for off-premises consumption. It does not apply to retail licensees who are limited to selling beer for off-premises consumption.

[10] ABCL §106(13)

The Authority is in receipt of a petition from the Buchman Law Firm, LLP (Mark Koslowe, Esq., Of Counsel), on behalf of its client, Brooklyn Winery LLC (hereinafter referred to as "Brooklyn Winery"), for a declaratory ruling as to whether, under the facts presented, the tied-house laws would prohibit Brooklyn Winery from obtaining an on-premises license, along with a permit to manufacture wine, in the District of Columbia. Brooklyn Winery holds a winery license issued under ABCL §76 for a location in Kings County and a farm winery license issued under ABCL §76-a for a location in Suffolk County. As permitted under ABCL §76(4), Brooklyn winery also holds an on-premises license for a restaurant it operates adjacent to its Kings County winery.

Brooklyn Winery seeks to operate an establishment in the District of Columbia similar to its venue in Kings County - a winery with a restaurant serving alcoholic beverages for on-premises consumption. It intends to devote between 3,000 and 4,000 square feet of the location to the manufacture of wine. That is as large, if not larger, than many craft wineries currently operating in this state. It further represents that if the District of Columbia had a licensing structure similar to New York's, it would apply for the winery license with the additional on-premises license. But for the distinct licensing structure in District of Columbia, the "wine pub" arrangement is the only way that Brooklyn Winery can replicate its New York establishment in that jurisdiction.

As represented in the petition, the laws and regulations governing wineries in the District of Columbia do not allow them to have retail on-premises sales privileges. However, as explained in the petition, an on-premises licensee operating certain types of establishments (such as restaurants) in the District of Columbia can obtain a permit to manufacture wine in a facility in or adjacent to the on-premises establishment.[11] This permit is referred to as a "wine pub" permit.[12]

Brooklyn Winery requests a ruling from the Members of the Authority to the effect that it may hold the District of Columbia on-premises license, along with the wine manufacturing permit, without violating New York's tied-house laws. Brooklyn Winery's argument in support of its request is based on the argument that the "wine pub" provisions of the District of Columbia are similar to the New York laws that allow a winery to obtain an on-premises license for a restaurant in or adjacent to the winery.[13] However, it concedes one significant difference. In the District of Columbia, it is the retail licensee who may obtain the separate permit to manufacture wine. The permit is a privilege of the retail license. In New York, it is the manufacturing licensee that may obtain the separate license to sell alcoholic beverages. The on-premises license is a privilege of the manufacturing licensee.

Brooklyn Winery also concedes that there is nothing in the District of Columbia Code that would prohibit a retail on-premises licensee with a wine pub permit from holding other retail licenses in the District of Columbia. To address that issue, Brooklyn Winery represents that it would not seek any other retail license in the District of Columbia. Brooklyn Winery also asserts its "belief" that the District of Columbia Alcoholic Beverage Regulation Administration would not

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[11] D.C. Code §25-124

[12] The District of Columbia also allows on-premises licensees to obtain "brew pub" " [D.C. Code §25-117] and "distillery pub" [D.C. Code §25-125] permits to manufacture beer or liquor in a facility in or adjacent to the licensee's on-premises establishment.

[13] ABCL §76(4-a)

prevent a District of Columbia licensee from holding a "cross-tier" interest outside its jurisdiction. That statement, however, maybe contradicted by provisions of the District of Columbia Code that restrict "cross-tier" relationships between out-of state manufacturers and District of Columbia retailers.[14] Brooklyn Winery states that it will advise the Authority of the position taken by the District of Columbia Alcoholic Beverage Regulation Administration when that agency acts on Brooklyn Winery's application.

Brooklyn Winery asserts that the intent of both New York and the District of Columbia, by allowing a person to operate a winery and on-premises establishment at the same location, is to increase the profitability of small wineries. However, as Brooklyn Winery acknowledges elsewhere in its request, the limited retail privileges afforded New York wineries was intended to promote increased production of New York wine as well as tourism. In the case of the District of Columbia wine pub, there are no similar limitations on the retail activities of the winery. To address that issue, Brooklyn Winery states that it will operate the District of Columbia establishment under the same requirements and conditions that apply to its on-premises establishment located in New York.

In our view, the critical issue is whether the proposed establishment in the District of Columbia may be considered a manufacturing business for purposes of New York's tied house laws. If the District of Columbia location is a retail operation, it is well settled that we have no discretion to grant Brooklyn Winery an exception to the tied house laws.[15] We have addressed this issue in prior declaratory rulings[16] and have declined to create exceptions on a case by case basis to those seeking relief from the tied house laws. Any such exception must be the result of an amendment to the tied house laws themselves. While not routine, such legislative action has been taken in the past to obtain licenses otherwise prohibited by the tied house laws.[17]

We conclude that, based on the facts, and the representations made by Brooklyn Winery regarding the restrictions under which it would operate, the proposed establishment in the District of Columbia is the equivalent of a winery with an on-premises license in New York and, therefore, should be considered a manufacturing business. Accordingly, we hold that, in the event that Brooklyn Winery obtains a single retail on-premises license with a "wine pub" permit, it will not be in violation of New York's tied house laws.

The foregoing Declaratory Ruling was formally approved by the Members of the Authority at a Full Board meeting held on January 30, 2015.

Jacqueline Held
Secretary to the Authority

[14] D.C. Code §25–302 places restrictions on the issuance of a retail license when a manufacturer has a substantial interest in the retail business. D.C. Code § 25–824 provides for the revocation of an existing retail license if it is determined that a manufacturer has a substantial interest in a business with a retail license.

[15] *Rihga International USA Inc. vs. State Liquor Authority*, 84 NY2d 876 (1993).

[16] See, for example, the declaratory rulings issued in Full Board Agenda #2013-00357 & #2011-03141C.

[17] See, for example: Chapter 301 of the Laws of 2014; Chapter 282 of the Laws of 2014; Chapter 22 of the Laws of 2011; and Chapter 390 of the Laws of 2010.