

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Petition of :
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 MILLER BREWING COMPANY - : DECLARATORY RULING
 Local Lodge 2587 (IAMAW) : DEC 27-12
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 For a Declaratory Ruling :
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Petitioner, Miller Brewing Company - Local Lodge 2587 of IAMAW ("Union") seeks a Declaratory Ruling under §204 of the State Administrative Procedure Act and 6 NYCRR Part 619 with respect to the applicability of New York State's "Returnable Container Act" ("Act"), Article 27, Title 10 of the Environmental Conservation Law ("ECL"), to the charging of deposits by the Miller Brewing Company ("Company") on containers of beer given to petitioner employees pursuant to a collective bargaining agreement.

The Returnable Container Act was enacted as Chapter 200 of the Laws of 1982 and amended by Chapter 149 of the Laws of 1983. The Act establishes a system of mandatory deposits by requiring that every beverage container sold or offered for sale in New York State have a refund value of not less than five cents and by imposing acceptance requirements on dealers and distributors of such containers. ECL §27-1005, §27-1007. In enacting ECL Article 27, Title 10, the Legislature declared that it "hereby finds that requiring a deposit on all beverage containers, along with certain other facilitating measures, will provide a necessary incentive for the economically efficient and

environmentally benign collection and recycling of such containers." ECL §27-1001. The statute authorizes the Department to promulgate regulations governing, inter alia, container redemption and the initiation of deposits. ECL §27-1014. These regulations have been promulgated as 6 NYCRR Part 367.

The Union and the Company are parties to a collective bargaining agreement entitling each employee of the Company three cases of the Company's beer free of charge each month. Following the effective date of the statute's mandatory acceptance requirements (September 12, 1983), the Company has been charging each employee a deposit of 5 cents per container of such beer. Petitioner argues that the monthly free cases of beer are benefits obtained by the Union in a negotiating process and are not, therefore, "sold or offered for sale" as specified in ECL §27-1005.* The Union contends, therefore that the Act should not apply to this transaction. Petitioner also reports that the Company has recently charged an additional deposit of 30 cents a case to be collected when the beer is given and reimbursed or credited toward a new case when the containers and the case are returned. Petitioner argues that this surcharge is not contemplated under the Bottle Bill.

* ECL §27-1005 provides that "every beverage container sold or offered for sale in this state shall have a refund value of not less than five cents. Each such container shall have the refund value clearly indicated thereon as provided in §27-1011 of this title."

The two questions presented by the instant petition are (1) whether a beverage manufacturer's distribution of free containers of beer to its employees pursuant to a collective bargaining agreement is subject to the requirements of ECL Article 27, Title 10 and its implementing regulations, 6 NYCRR Part 367, and (2) whether the Returnable Container Act applies to deposits charged by a beverage manufacturer on cases holding such free beer containers.

For the following reasons, the above-described transaction is a "sale" as defined by the Returnable Container Act regulations, therefore requiring the beverage manufacturer to initiate deposits upon distribution of the beer containers to its employees. However, the provisions of ECL Article 27, Title 10 do not apply to the additional deposit on the cases holding the beer containers. The determination of these issues requires an understanding of the distribution and redemption sequences within the deposit system established by ECL Article 27, Title 10 and 6 NYCRR Part 367.

The deposit system begins with the requirement that every beverage container sold in New York State have a refund value of not less than five cents. ECL §27-1005; 6 NYCRR §367.3(a). "Sale" is defined as the act of selling or offering, or distributing for use or consumption". 6 NYCRR 367.2(u) (emphasis added). In addition to the requirement that beverage containers have the specified refund value, the system imposes specific

duties upon distributors, dealers and redeemers* of containers with respect to the initiation (i.e., the first charging of deposits), and application of deposits on filled beverage containers and the redemption of empty containers. 6 NYCRR §363.3, §367.5, ECL §27-1007. With respect to deposit initiation, §367.3(d) requires that "[T]he deposit of each filled beverage container must be initiated by the first distributor of such beverage who is not a beverage manufacturer; except that (1) the beverage manufacturer must initiate the deposit on any such beverage which is sold to a person who is not a distributor." (Emphasis added) Once a deposit has been initiated on a filled container, the deposit must be charged on each sale of such filled beverage container (with an exception not applicable here for on-premises consumption) 6 NYCRR §367.3(e).

* Pursuant to ECL §27-1003 and 6 NYCRR §367.2:

"Dealer" means a person who engages in the sale of beverages in beverage containers to a consumer for off-premises consumption in this State.

"Distributor" means a person who is a beverage manufacturer or who engages in the sale of beverage in beverage containers to a dealer.

"Beverage manufacturer" means a person who bottles, cans or otherwise packages in beverage containers, or who imports filled beverage containers into the United States.

"Redeemer" means a person, other than a dealer or distributor, who demands the refund value in exchange for the empty beverage container.

When an empty beverage container is redeemed, a chain of mandatory acceptance is activated imposing the following redemption requirements:*

(1) a dealer must accept at his place of business and from any redeemer any empty containers of the type sold by the dealer regardless of whether or not the filled container was originally sold by the dealer and must pay to the redeemer the refund value of each such container; (2) a distributor, who is not a beverage manufacturer who does not engage in the sale of filled beverage containers to dealers, must accept from any dealer or redemption center empty containers of the type sold by such distributor regardless of whether or not the filled container was originally sold by the distributor and must pay the dealer or redemption center the refund value of each such container; (3) any distributor who initiates a deposit on a type of beverage container must accept empty beverage containers of that type from a distributor who does not initiate deposits on beverage containers of that type and pay the refund value of each container (and a specified handling fee). 6 NYCRR §367.5(a); ECL §27-1007.

Thus, the redemption chain enables consumers, dealers and non-initiating distributors to receive reimbursement for deposits

* There are exceptions to mandatory acceptance, not applicable here, which allow dealers to refuse to accept containers without refund value and broken or corroded cans and bottles. ECL §27-1009, 6 NYCRR 367.7.

through the chain ultimately from the distributor who initiates the deposits. The initiating distributor bears this responsibility because he benefits substantially by holding the large sums of deposit monies and can retain unclaimed deposits.

The deposit system established by Part 367, as outlined above, is designed to facilitate the effective implementation of the Returnable Container Act. 6 NYCRR §367.1. Effective implementation requires a distribution and redemption cycle that minimizes potentials for economic dislocation. See generally, "Mandatory Deposit Legislation: Benefits and Costs for New York." NYS Office of Development Planning (1982). Therefore, Part 367 necessarily has a broad reach and "applies to all transactions involving the sale, use or consumption of beverages in beverage containers in New York State" 6 NYCRR §367.1 (emphasis added). Accordingly, "sale" is defined to include the act of "distributing for use or consumption." 6 NYCRR §367.2(u). This definition of sale is intended to prohibit the giving away of beverage containers as a means to circumvent the requirements of the deposit system thereby causing economic disruption. This is particularly important with respect to the "giving away" of containers by a distributor who, if he were selling such containers for a specific price, would be required to initiate deposits; by infusing the market with a supply of containers for which no deposit has been initiated, this "donor" can cause the refund value of the containers given away to be paid ultimately by a distributor who never received deposit monies and who cannot

turn to an initiating depositor for reimbursement. Correspondingly, although Part 367 prohibits a beverage manufacturer from initiating a deposit (with an exception for refillable containers), when selling to distributors, the regulations require that the manufacturer initiate the deposit on any beverage container "which is sold to a person who is not a distributor." 6 NYCRR §367.3(d). If the term "sold" were defined narrowly, the beverage manufacturer could induce an economic hardship, described above, for distributors of the type of beverage container the manufacturer gives away.

The transaction between the Company and the Union here falls within the requirements of 6 NYCRR §367.3(d). These regulations oblige the Miller Brewing Company to initiate the deposits on the containers it distributes to its employees (i.e., persons who are not distributors) as part of the collective bargaining agreement. By distributing the containers to the Union for use or consumption, the Company's conduct is within the express terms of the definition of "sale" as utilized in Part 367. 6 NYCRR §367.2(u). This transaction is also within the §367.2(u) definition as an "act of selling". The Company's monthly distribution of beer as described by Petitioner involves bargained-for consideration and represents a form of compensation.* Union Petition p. 1. The

* Since the refund value only existed after the negotiation of the Union's contract with the Company, it is evident that the five cent per container refund value cannot have been a part of the bargained for consideration; since September 12, 1983, the statutory effective date, each beer container automatically became worth 5 cents more. The Company's compliance with the Act in charging the 5 cent deposit as a matter of law could not be constrained by the previously negotiated terms of the Union's contract with the Company.

distribution of the beer can then be considered a sale* as a transfer in exchange for valuable consideration. Commercial practices reinforce this conclusion. "Sale" is defined in Article 2 of the Uniform Commercial Code to consist of the passing of title from the seller to the buyer for a price. UCC §2-106(1); the price can be made payable "in money or otherwise." UCC §2-304(1) In Mortimer B. Burnside & Co., Inc. v. Havener Securities Corp., 25 A.D.2d 373, 269 N.Y.S.2d 724 (First Dept., 1966) the court held that the word "otherwise" is not limited in any way, and can include any consideration which is sufficient to support a contract. Therefore, as a beverage manufacturer which sells beverage containers to persons who are not distributors, the Miller Brewing Company is required by §367.3(d) to initiate the deposit on the containers it distributes to Petitioner as part of the collective bargaining agreement.

On their second point, the Petitioner correctly asserts that the Returnable Container Act does not apply to the charging of a deposit on the cases holding the beer containers. The Act specifically applies to "beverage containers" which are defined as the "individual, separate, sealed glass, metal, aluminum, steel or plastic, bottle, can or jar" used for containing beverages. ECL §27-1003(2). The Act and its implementing regulations do not address the charging of deposits for cases.*

* The Department, in its efforts to implement effectively the requirements of the statute, is assessing current and developing practices with respect to the use of deposits on these cases or "shells" and may publish recommendations for such use in the form of guidelines.

Accordingly, the charging of deposits by Miller Brewing Company on cases holding containers is not required by the Act and at most is a matter of the contractual arrangements between the Company and the Union.

Finally, Petitioner notes that the Company produces containers for distribution to states without a container law and asserts that "it would not be difficult to provide free cases of beer in containers which are not marked as required by §27-1005." Petition, p.2. The distribution of the unmarked containers as suggested by Petitioner is prohibited under the Returnable Container Act. Since the distribution of the beer containers by the Company constitutes a "sale", ECL §27-1005 requires that such containers have a refund value. Moreover, the distribution of containers without refund value is precisely counter to the statute's primary purpose to reduce litter and encourage recycling. ECL §27-1001.

Accordingly, Miller Brewing Company is properly initiating deposits on the monthly free cases of beer which the Company distributes to Petitioner Union's membership.

DATED: Albany, New York
February 9, 1984



Nicholas A. Robinson
Deputy Commissioner and General Counsel