

APPEAL # 22-607
TAX TYPE: BEER TAX
TAX YEAR: 2019-2021
DATE SIGNED: 3/7/2024
COMMISSIONERS: J.VALENTINE, M.CRAGUN, R.ROCKWELL, AND J.FRESQUES

BEFORE THE UTAH STATE TAX COMMISSION

<p>TAXPAYER,</p> <p style="text-align: center;">Petitioner,</p> <p>v.</p> <p>AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="text-align: center;">Respondent.</p>	<p style="text-align: center;">INITIAL HEARING ORDER</p> <p>Appeal No. 22-607</p> <p>Account No: #####</p> <p>Tax Type: Beer Tax</p> <p>Audit Period: 2019 - 2021</p> <p>Judge: Phan</p>
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Presiding:
Jane Phan, Administrative Law Judge

Appearances:
For Petitioner: PETITIONER'S REP-1, Manager
For Respondent: RESPONDENT'S REP-1, Assistant Attorney General
RESPONDENT'S REP-2, Deputy Director, Auditing
RESPONDENT'S REP-3, Compliance Manager
RESPONDENT'S REP-4, Tax Manager
RESPONDENT'S REP-5, Problem Resolution Specialist

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on October 25, 2022 for an Initial Hearing in accordance with Utah Code Ann. §59-1-502.5. Petitioner (“Taxpayer”) is appealing the Statutory Notice issued on March 8, 2022, in which Respondent (“Division”) denied the refund of beer tax the Taxpayer had claimed on amended returns for the monthly filing

periods from January 2019 through December 2021 (“audit period”). The amount of the beer tax refund claimed by the Taxpayer for the audit period had been \$\$\$\$\$.

APPLICABLE LAW

Utah Code §59-15-101(2020)¹ imposes a tax on beer as follows:

- (1)(a) A tax is imposed at the rate specified in Subsection (1)(b) on all beer, as defined in Section 32B-1-102, that is imported or manufactured for sale, use, or distribution in this state.
- (b) The tax described in Subsection (1)(a) shall be imposed at a rate of:
 - (i) \$11 per 31-gallon barrel for beer imported or manufactured:
 - (A) before July 1, 2003; and
 - (B) for sale, use, or distribution in this state; and
 - (ii) \$13.10 per 31-gallon barrel for beer imported or manufactured:
 - (A) on or after July 1, 2003; and
 - (B) for sale, use, or distribution in this state.
- (c) The tax imposed under this Subsection (1):
 - (i) shall be imposed at a proportionate rate for:
 - (A) any quantity of beer other than a 31-gallon barrel; or
 - (B) the fractional parts of a 31-gallon barrel; and
 - (ii) may not be imposed more than once on the same beer.
- (2) A tax may not be imposed on beer:
 - (a) sold to the United States and its agencies; or
 - (b) (i) manufactured or imported for sale, use, or distribution outside the state; and
 - (ii) exported from the state.

There is no definition for “all beer” in the Alcoholic Beverage Control Act, at Utah Code §32B-1-102, but there is a definition for “beer” and a definition for “heavy beer,” as well as other definitions used in that act. Utah Code §32B-1-102 provided the following relevant definitions:

As used in this title:

...

(3) "Alcoholic beverage" means the following:

(a) beer; or

(b) liquor.

...

(10) (a) Subject to Subsection (10)(d), "beer" means a product that:

¹ For consistency of reference, the Tax Commission is citing the Utah Code in effect as of January 1, 2020. There were some changes to the code that occurred part way through the audit period, including an increase to the limit of alcohol in products qualifying as “beer” and “heavy beer.” But for all periods at issue the “heavy beer” subject to the refund request met the alcohol limit in effect for that period and the other requirements to be “heavy beer.”

- (i) contains at least .5% of alcohol by volume, but not more than 5% of alcohol by volume or 4% by weight; and
- (ii) is obtained by fermentation, infusion, or decoction of malted grain.
- (b) "Beer" may or may not contain hops or other vegetable products.
- (c) "Beer" includes a product that:
 - (i) contains alcohol in the percentages described in Subsection (10)(a); and
 - (ii) is referred to as:
 - (A) beer;
 - (B) ale;
 - (C) porter;
 - (D) stout;
 - (E) lager; or
 - (F) a malt or malted beverage.
- (d) "Beer" does not include a flavored malt beverage.

...

- (49)(a) "Heavy beer" means a product that:
 - (i) contains more than 5% alcohol by volume; and
 - (ii) is obtained by fermentation, infusion, or decoction of malted grain.
- (b) "Heavy beer" is considered liquor for the purposes of this title.

...

- (63)(a)
 - (i) "Liquor" means a liquid that:
 - (A) is:
 - (I) alcohol;
 - (II) an alcoholic, spirituous, vinous, fermented, malt, or other liquid;
 - (III) a combination of liquids a part of which is spirituous, vinous, or fermented;
 - or
 - (IV) other drink or drinkable liquid; and
 - (B)
 - (I) contains at least .5% alcohol by volume; and
 - (II) is suitable to use for beverage purposes.
 - (ii) "Liquor" includes:
 - (A) heavy beer;
 - (B) wine; and
 - (C) a flavored malt beverage.
- (b) "Liquor" does not include beer.

Utah Code §32B-2-304(2) provides that sales of heavy beer, spirituous liquor, wine and flavored malt beverages are subject to a mark up as follows:

- (2) Except as provided in Subsection (3):
 - (a) spirituous liquor sold by the department within the state shall be marked up in an amount not less than 88% above the landed case cost to the department;
 - (b) wine sold by the department within the state shall be marked up in an amount not less than 88% above the landed case cost to the department;
 - (c) heavy beer sold by the department within the state shall be marked up in an amount not less than 66.5% above the landed case cost to the department; and

(d) a flavored malt beverage sold by the department within the state shall be marked up in an amount not less than 88% above the landed case cost to the department.

Utah Code §59-15-104 provides procedures to contest an assessment of beer tax as follows:

If any person, after filing a return and paying the tax provided by this chapter, is aggrieved by the assessment made by the commission, the person may file a request for agency action.

Utah Code §59-1-1417 addresses burden of proof and statutory construction as follows:

(1) In a proceeding before the commission, the burden of proof is on the petitioner except for determining the following, in which the burden of proof is on the commission:

(a) whether the petitioner committed fraud with intent to evade a tax, fee, or charge;

(b) whether the petitioner is obligated as the transferee of property of the person that originally owes a liability or a preceding transferee, but not to show that the person that originally owes a liability is obligated for the liability; and

(c) whether the petitioner is liable for an increase in a deficiency if the increase is asserted initially after a notice of deficiency is mailed in accordance with Section 59-1-1405 and a petition under Part 5, Petitions for Redetermination of Deficiencies, is filed, unless the increase in the deficiency is the result of a change or correction of federal taxable income:

(i) required to be reported; and

(ii) of which the commission has no notice at the time the commission mails the notice of deficiency.

(2) Regardless of whether a taxpayer has paid or remitted a tax, fee, or charge, the commission or a court considering a case involving the tax, fee, or charge shall:

(a) construe a statute imposing the tax, fee, or charge strictly in favor of the taxpayer; and

(b) construe a statute providing an exemption from or credit against the tax, fee, or charge strictly against the taxpayer.

Parties are entitled to an Initial Hearing pursuant to Utah Code Sec. 59-1-502.5 as follows:

(1) At least 30 days before any formal hearing is held in response to a party's request for agency action, one or more tax commissioners or an administrative law judge designated by the commission shall hold an initial hearing at which proffers of evidence, including testimony, documents, and other exhibits may be made and oral or written argument on legal issues may be received.

...

(5) At the initial hearing, or as soon thereafter as reasonably practicable, the commission may take any action the commission deems appropriate to settle, compromise, or reduce the deficiency, or adjust the assessed valuation of any property.

(6) Nothing in this section may limit a party's right to a formal hearing under Title 63G, Chapter 4, Administrative Procedures Act.

(7) A party has not exhausted the party's administrative remedies in accordance with Section 63G-4-401 unless:

- (a) the party requests a formal hearing within the time period provided by law; and
- (b) the commission has issued a final unappealable administrative order.

DISCUSSION

The issue in this appeal has not previously been presented to the Tax Commission in a hearing and the parties did not cite to any court or appellate decisions that could provide guidance.² In addition, the parties did not present any of the legislative history involving the applicable statutes at issue in this appeal. The facts the parties presented are not in dispute and the issue presents a question of law to the Commission. For the period from January 2019 to December 2021 the Taxpayer had filed monthly TC-386 Beer Tax Returns. On those forms there is a column A to list all “Beer” manufactured in Utah or imported into Utah and a column B to list all “Heavy Beer” manufactured in Utah or imported into Utah. The Taxpayer primarily manufactures “heavy beer” and it is only the applicability of the beer tax on “heavy beer” that is in dispute. On the TC-386 the Taxpayer listed the “heavy beer” it manufactured each month, calculated the excise tax or beer tax as instructed by the form TC-386 on the “heavy beer” and remitted that tax to the Tax Commission with the form. In January 2022 the Taxpayer concluded, based on its understanding of the law, that there was no beer tax imposed on “heavy beer,” that instead, §59-15-101(1)(a) imposed the excise tax only on “beer.” It was the Taxpayer’s position that the Division had improperly added the beer tax on “heavy beer” by adding “heavy beer” to the form TC-386 and that was outside what was authorized by statute.³ The Taxpayer filed amended returns for each of the monthly filings in the Audit Period, requesting a refund in the amount of \$\$\$\$\$, which was all the beer tax paid by the Taxpayer for the “heavy beer” that the Taxpayer had manufactured during the audit period.

² At a Telephone Status Conference held on DATE, the ALJ discussed with the parties the possibility of waiving the Initial Hearing and having the matter proceed directly to a Formal Hearing. However, the Taxpayer wanted to proceed with the Initial Hearing.

³ Although the Taxpayer had thought at some point the TC-386 forms had only asked for the beer manufactured, and then the forms were later changed by the Division to include the heavy beer, the Taxpayer could not produce a prior year’s form where a listing of the heavy beer was not specifically required and at the hearing the Division stated they had looked back at the TC-386 for many years and that as far back as they could find, the TC-386 asked specifically for both beer and heavy beer.

The Taxpayer's representative explained that it was his understanding that §59-15-101(1)(a) imposed an excise tax, or the beer tax, on beer that is imported into Utah or manufactured for sale, use, or distribution in Utah. The tax is imposed on the manufacturer at the time the beer is manufactured, or the importer at the time beer is imported into Utah. Utah Code §59-15-101(1)(a) specifically states, "[a] tax is imposed at the rate specified in Subsection (1)(b) on all beer, as defined in Section 32B-1-102, that is imported or manufactured for sale, use, or distribution in this state." The Taxpayer argued that based on the statutory definitions at Utah Code §32B-1-102, "heavy beer" is not "beer." The Alcoholic Beverage Control Act, at §32B-1-102, provides a definition at Subsection 32B-1-102(10) for "beer" and at Subsection 32B-1-102(49) for "heavy beer." Subsection 32B-1-102(49) provides that "heavy beer" contains more than 5% alcohol by volume and "is considered liquor for the purposes of this title." The definition of "beer" at Subsection 32B-1-102(10) provides that "beer" is a product that must have less than or equal to 5% of alcohol by volume among other requirements. Factually, it was not in dispute that the "heavy beer" for which the Taxpayer had paid the beer tax and was now requesting the refund, met the statutory definition of "heavy beer" at Subsection 32B-1-102(49). It was the Taxpayer's position that "heavy beer" is not "beer" as defined in Section 32B-1-102 and while Utah Code §59-15-101(1)(a) imposes beer tax on "beer" it does not impose the tax on "heavy beer."

The Taxpayer also pointed out that "beer" and "heavy beer" are treated differently based on Utah law. "Beer" is sold at grocery and convenience stores in Utah but cannot be sold at state liquor stores or state licensed package agencies. "Heavy beer" may only be sold through the state liquor stores or state licensed package agencies, the same as other liquors and wine. The Taxpayer also indicated that "heavy beer," other liquor and wine sold at the state liquor stores or state licensed package agencies, is subject to a "markup" pursuant to Utah Code §32B-2-304 and the markup amount is substantially higher than the beer tax. The Taxpayer stated that based on the Division's interpretation of the law, which was that the beer tax is imposed on both "beer" and "heavy beer," "heavy beer" is the only alcohol product subject to both an excise tax (the beer tax) and the markup. It was his position, and it was not contradicted by the Division, that all of the other liquor, wine and malt beverage products sold through the state liquor stores or state licensed package agencies are only subject to the markup.

Although the Division acknowledged that its interpretation and implementation of the beer tax to "heavy beer" results in "heavy beer" being the only alcoholic product taxed both by an

excise tax and the markup,⁴ the Division’s representatives asserted that they had correctly interpreted the applicable statutes. In support of its interpretation, the Division pointed to the word “all” in Utah Code §59-15-101(1)(a). As noted above, Utah Code §59-15-101(1)(a) imposes the beer tax “on *all* beer, as defined in Section 32B-1-102, that is imported or manufactured for sale, use, or distribution in this state (emphasis added).” There is no definition in Utah Code §32B-1-102 for “all beer,” but there is a definition for “beer” and a definition for “heavy beer.” The product at issue in this appeal does not qualify as “beer” under those definitions, but it does qualify as “heavy beer,” which is defined as a product that has more than 5% alcohol by volume and is considered to be liquor. The Division argued that because the beer tax imposition statute used the word “all” it includes any type of beer. Regarding the fact that the definition of “heavy beer” at Utah Code §32B-1-102 states that “heavy beer” is liquor, the Division argued in its Prehearing brief:⁵

Although the definition of heavy beer under 32B-1-102(50) refers to its consideration as liquor, that is only for purposes of “this title”, the ABCA, and does not extend to Title 59 under which beer tax is authorized. Had the drafters of this code section intended to extend classification of heavy beer as liquor to Title 59 for tax purposes, it could easily have been added. The absence of this extension is further evidence that heavy beer is merely a type of beer and should be taxed as such.

Upon analyzing the facts presented by the parties and how they apply to the applicable laws, it is first noted that the facts that were presented by the parties are not in dispute and what is at issue is a question of statutory construction. The first step of statutory interpretation is, as noted by the Utah Supreme Court in *Steiner v. Tax Commission*, 2019 UT 47, at ¶58, “[a]s in all cases of statutory interpretation, we begin with the text.” And in *Ivory Homes v. Tax Commission*, at 2011 UT 54, ¶21 the Court provided the following guidance:

When interpreting statutory language, our primary objective is to ascertain the intent of the legislature. To discern legislative intent, we first look to the plain language of the statute. “We presume that the legislature used each word advisedly and read each term according to its ordinary and accepted meaning.” However, “our plain language analysis is not so limited that we only inquire into individual words and subsections in isolation; our interpretation of a statute requires that each part or section be ‘construed in connection with every other part or section so as to produce a harmonious whole.’”

⁴ While the Tax Commission through its divisions implements and collects the beer tax, it is not involved in collecting or implementing the markup imposed under the Alcoholic Beverage Control Act.

⁵ Respondent’s Prehearing Brief, pg. 5.

Upon consideration of the parties arguments and looking at the “plain language” of the applicable laws in “connection with every other part or section” it is clear the parties have identified an ambiguity between the Beer Tax Act and the Alcoholic Beverage Control Act and that ambiguity makes it unclear how the beer tax is intended to be applied. Utah Code §59-15-101(1)(a), which imposes the beer tax, is a tax imposition statute. Therefore, if the plain language is not clear or subject to interpretation, Utah Code §59-1-1417(2)(a) requires the Tax Commission to “construe a statute imposing the tax, fee, or charge strictly in favor of the taxpayer.” The question is whether the legislature intended the word “all” to encompass the two statutorily distinct products “beer” and “heavy beer” for purposes of the beer tax as the Division is arguing, or whether the tax was intended to be imposed only on all “beer” as “beer” is defined at Utah Code §32B-1-102, which is what the Taxpayer is arguing. Neither party provided any legislative history or the legislative testimony or debate at the time the tax was adopted that could provide guidance on what the legislature intended.

The Utah Supreme Court’s decision in *ExxonMobil Corporation v Utah State Tax Commission*, 2003 UT 53 is relevant in addressing this matter of statutory interpretation. In *Exxon*, the Tax Commission’s division had interpreted the statutes applicable to that case one way, while Exxon sought a refund based on another interpretation. In *Exxon*, at ¶14, the court explained:

When we interpret a statute, we look first to the plain language. *In re Worthen*, 926 P.2d 853, 866 (Utah 1996). In doing so, we give all statutory provisions relevance and meaning independent of other provisions. *Id.* If we find ambiguity in the statute’s language, we look to legislative history and other policy considerations for guidance.

As the Utah Supreme Court has instructed where there is ambiguity in the statute’s language the Commission must look to legislative history and other policy considerations for guidance. However, neither party provided this information for the Commission to consider at the Initial Hearing. The legislative history is generally publicly available and could have been located and submitted by the Taxpayer for the Tax Commission to consider. Pursuant to Utah Code §59-1-1417(1) the burden of proof is on the Taxpayer. The Taxpayer has not provided the legislative history for the Tax Commission to consider and has not met the burden of proof to establish that the beer tax should not be imposed on “heavy beer.” The Commission declines to issue a decision that changes a practice or interpretation that has been applied by the Division for many years from an Initial Hearing where it does not have all the information it needs to consider before it.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Tax Commission denies the Taxpayer's appeal in this matter regarding the refund request for the January 2019 through December 2021 audit period. It is so ordered.

This decision does not limit a party's right to a Formal Hearing. However, this Decision and Order will become the Final Decision and Order of the Commission unless any party to this case files a written request within thirty (30) days of the date of this decision to proceed to a Formal Hearing. Such a request shall be mailed, or emailed, to the address listed below and must include the Petitioner's name, address, and appeal number:

Utah State Tax Commission
Appeals Division
210 North 1950 West
Salt Lake City, Utah 84134

or emailed to:

taxappeals@utah.gov

Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

DATED this ____ day of ____, 2023.

Appeal No. 22-607

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Rebecca L. Rockwell
Commissioner

Jennifer N. Fresques
Commissioner

Notice of Payment Requirement: Any balance due as a result of this order must be paid within thirty (30) days of the date of this order, or a late payment penalty could be applied.