



The Commonwealth of Massachusetts
Department of the State Treasurer
Alcoholic Beverages Control Commission
Boston, Massachusetts 02114

Steven Grossman
Treasurer and Receiver General

DECISION

Kim J. Gainsboro, Esq.
Chairman

ROMEBEAU, INC. DBA THE COLUMBIA TAVERN
11 MERRIAM AVE.
LEOMINSTER, MA 01453
LICENSE#: 060800026
HEARD: 05/16/2012

Romebeau, Inc. dba The Columbia Tavern (the "Licensee" or "Romebeau") holds an all-alcoholic beverages general on premises license issued pursuant to M.G.L. c. 138, §12. The Alcoholic Beverages Control Commission (the "Commission") held a hearing on Wednesday, May 16, 2012, regarding Romebeau's petition filed pursuant to 204 CMR 2.13 to be removed from the credit delinquency list established under M.G.L. c. 138, §25.

The following documents are in evidence:

1. Licensee's Application for Retail Alcoholic Beverage License;
 2. Petition for Transfer of Ownership;
 3. Page from M & S Service Bureau List of Delinquencies by Wholesaler; and
 4. Page from M & S Service Bureau List of Delinquencies.
- A. Certificate of Sale of Seized Property;
 - B. U. S. Bankruptcy Court Filing Case no. 11-45056;
 - C. Westlaw Citation, Sullivan v. Cann's Cabins, 309 Mass. 519, 36 N.E.2d 371;

There is one (1) audio recording of this hearing.

FACTS

1. On May 23, 2011, Romebeau signed and filed with the local licensing authorities a series of documents in an application to transfer the license held by Chrismich's, Inc. to Romebeau.
2. Among the documents contained in the application package filed by Romebeau was the Commission's form titled "*Application for Retail Alcoholic Beverage License*." (Exhibit 1). This form was signed under the pains and penalties of perjury by Andrew Rome.
3. Question 10 disclosed the persons who would hold a direct or indirect beneficial interest in Romebeau's license. An individual (Wayne Beauregard) and a corporation (Club 54, Inc. dba Classics Pub) were each disclosed to be 50% shareholders. (Exhibit 1).
4. Question 11 disclosed that the corporation already held a license in Leominster at 285 Central Street in Leominster. (Exhibit 1).

5. Question 2 disclosed that the transaction sought by Romebeau is a "Transfer of License." (Exhibit 1).
6. Also included among the documents contained in the application package filed by Romebeau was the Commission's form titled "*Petition for Transfer of Ownership*." (Exhibit 2). This form was signed under the pains and penalties of perjury by Andrew Rome.
7. Although this form requires the "Signature of Last-Approved Licensee", no such signature was provided. In fact, no signature appears in this section of the form; rather there are merely the words from an unidentified source "Purchased at forced sale/auction (see attached)." (Exhibit 2).
8. This application to transfer the ownership of the license held by Chrismich's, Inc. to Romebeau was granted by the local licensing authorities and forwarded to the Commission for approval as required by statute.
9. The local licensing authorities documented their decision to grant this application by signing a Commission required "Form 43."
10. This Form 43 indicated that the local licensing authorities granted an application for the "Transfer of License." This Form 43 also contained the remarks from the local licensing authorities that "[l]icense was seized by the IRS from Chrismich's, Inc. EIN # [04-xxxxx86] and sold at auction."
11. The Commission received this Form 43 and application package on August 11, 2011.
12. Chrismich's Inc. had been reported as delinquent in the payment of its deliveries of alcoholic beverages and had been posted by the Commission to the credit delinquency list as required by M.G.L. c. 138, § 25, ¶ 1.¹
13. Among the documents contained in the application package received by the Commission were excerpts from Internal Revenue Service forms designated as Form 2434(CG), Form 2434 page 2, Form 2434-B Sheet 1 of 2, Form 2434-B Sheet 2 of 2, Form 2435 Part 2, and Form 2435 Part 3. None of these were offered or marked as Exhibits.
14. No Certificate for Sale of Personal Property and no Certificate of Sale Property Other Than Real Property were offered or marked as Exhibits.
15. Form 2434(CG) is titled Notice of Public Auction Sale. This Form recites that the alcoholic beverages license was "seized for nonpayment of internal revenue taxes due from Chrismichs [sic] Inc." This Form continues that "[i]f requested, the Internal Revenue Service will furnish information about possible encumbrances ... (See 'Nature of Title' for further details." The

¹ M.G.L. c. 138, § 25, paragraph 1 provides, in pertinent part, that "[i]f any licensee does not discharge in full any such indebtedness within such sixty day period, the indebtedness shall be overdue and such licensee shall be delinquent within the meaning of this section. Within three days after a licensee becomes delinquent, the licensee who extended the credit shall mail a letter of notice by certified mail to the commission and a copy thereof to the delinquent licensee. The letter of notice shall be in forms provided by the commission. The notice shall contain the name of the delinquent licensee, the date of delivery of the alcoholic beverages and the amount of the indebtedness remaining undischarged. Within five days after receipt of such a letter of notice, the commission shall post the name and address only of the delinquent licensee in a delinquent list containing the names and addresses of all delinquent licensees. Such posting shall constitute notice to all licensees of the delinquency of such licensee."

section of this Form titled "Nature of Encumbrances" indicates "*the property offered is for sale subject to any prior valid outstanding ... encumbrances ... against the taxpayer that are superior to the lien of the United States.*[italics in the original.]"

16. Form 2434-B Sheet 1 of 2 is titled "Notice of Encumbrances Against or Interests in Property Offered for Sale." The date of the information disclosed is May 4, 2011. This Form did not contain any disclosure of the delinquencies reported to the Commission and for which Chrismich's Inc. was posted to the credit delinquency as mandated by M.G.L. c. 138, § 25. This Form does expressly state that "[b]idders should ... verify for themselves the validity, priority, and amount of encumbrances against the property offered for sale. Each party listed below was mailed a notice of sale on or before" a date to be filled in. No date of such notice was inserted into this Form. No wholesaler who has reported Chrismich's Inc. as delinquent was identified as receiving this required notice.
17. Form 2434-B Sheet 2 of 2 described the "Condition of Title and Property." This Form again specifies that the interest in the property seized "is offered *subject* to any prior outstanding ... encumbrances ... against the taxpayer and are superior to the lien of the United States."
18. Form 2435 Part 3 states that the license of Chrismichs, Inc. was sold for "nonpayment of delinquent Internal revenue taxes due from Chrismichs, Inc."
19. The Commission approved this application for the transfer of the license from Chrismich's, Inc. to Romebeau on September 19, 2011.
20. Shortly following the Commission's approval, Romebeau was substituted on the credit delinquency list in compliance with M.G.L. c. 138, § 25, ¶ 4.²
21. By letter dated November 18, 2011, Romebeau filed a request to be removed from the credit delinquency list. Attached to this request were 3 pages of documents that were excerpts from Internal Revenue Service forms designated as Form 2435 Part 3, Form 2435 Part 2 and Form 2434-B Sheet 2 of 2. None of these were offered or marked as Exhibits.
22. This hearing was held on May 16, 2012 regarding this request.
23. The credit delinquency list as of May 3, 2012 showed Romebeau was posted on the list for nine (9) delinquent deliveries made at various times during the months of January and February 2011 by four (4) reporting wholesalers. (Exhibits 3 and 4).
24. No evidence was presented to the Commission that any notice was sent to the wholesalers by the Internal Revenue Service or that the Internal Revenue Service made any inquiry of the status of the reported and posted delinquencies.

² M.G.L. c. 138, § 25, paragraph 1 provides that "[w]henver the license of any licensee whose name appears on the delinquent list is transferred, the name of the transferee shall appear in the place and stead of the transferor, as of the date of license transfer, in the same manner as if no transfer had occurred, but the provisions of this sentence shall not apply to transfers of licenses by assignees, court-appointed receivers or trustees under a voluntary assignment for the benefit of creditors, provided that prior approval of such assignment is obtained from the commission after notice to all creditors has been given and reasonable time allowed for objections by such creditors."

25. During the hearing, Romebeau submitted a memorandum through its legal counsel. This Memorandum filed by counsel contained attached Exhibits designated Exhibits A, B and C. None of these Exhibits attached to the Memorandum were offered or marked as Exhibits during the Commission hearing.

DISCUSSION

A Massachusetts license to sell alcoholic beverages is "property" or "rights to property" to which a Federal tax lien may attach. Arrowhead Estates Inc. v. Boston Licensing Board, 15 Mass. App. Ct. 629 (1983). But, "[i]t has long been the rule that 'in the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property . . . sought to be reached by the statute.'" Aquilino v. United States, 363 U.S. 509, 513 (1960), quoting from Morgan v. Commissioner, 309 U.S. 78, 82 (1940)." Arrowhead Estates, 15 Mass. App. Ct. at 630.

M.G.L. c. 138, § 25 provides, in pertinent part, that "[i]t shall be unlawful for any licensee under this chapter to receive or extend credit, directly or indirectly, for alcoholic beverages sold or delivered to any licensee engaged in the sale of alcoholic beverages except in the usual course of business and for a period of not more than sixty days *Nothing in this chapter shall require any manufacturer, winegrower or wholesaler to extend credit to any licensee.* [emphasis added]. The credit period shall be calculated from the date of the delivery of the alcoholic beverages to the purchaser to the date when the purchaser discharges in full the indebtedness for which the credit was extended. If any licensee does not discharge in full any such indebtedness within such sixty day period, the indebtedness shall be overdue and such licensee shall be delinquent within the meaning of this section." This state law specifies the consequences of being delinquent. "No licensee under this chapter shall sell or deliver, directly or indirectly, alcoholic beverages to a licensee whose name is posted on the delinquent list, except for payment in cash on or before delivery, and no licensee who is posted on the delinquent list shall purchase or accept delivery of any alcoholic beverages except for payment in cash on or before delivery."

M.G.L. c. 138, § 25, paragraph 4 provides that "[w]henver the license of any licensee whose name appears on the delinquent list is transferred, the name of the transferee shall appear in the place and stead of the transferor, as of the date of license transfer, in the same manner as if no transfer had occurred, but the provisions of this sentence shall not apply to transfers of licenses by assignees, court-appointed receivers or trustees under a voluntary assignment for the benefit of creditors, provided that prior approval of such assignment is obtained from the commission after notice to all creditors has been given and reasonable time allowed for objections by such creditors."

This statutory regulation of credit to retail licensees for alcoholic beverages sales was created in 1968 by Acts 1968, Chapter 574, *An Act Modifying The Credit Laws Of The Commonwealth Pertaining To The Purchase And Sale Of Alcoholic Liquors For Resale*. This statute was approved on July 12, 1968. This system of the regulation of credit, credit delinquency reporting and the consequences of being delinquent have remained largely unchanged since enactment.

In 1970, however, this credit statute was amended by Acts 1970, Chapter 768, *An Act Providing Relief For Certain Licensees Under The Alcoholic Beverages Control Law Whose Business Is Damaged By Civil Disturbance, Riot, Fire, Explosion Or Other Disasters And Regulating The Transfer Of Licenses By Certain Delinquent Licensees*. This statutory amendment to the credit law was an emergency act, declared by the Legislature that "[w]hereas, [t]he deferred operation of this act would tend to defeat its purpose, which is, in part, to provide forthwith relief for certain licensees under the alcoholic beverages control law whose business is damaged by civil disturbance, riot, fire, explosion or other disaster,

therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.” This amendment added limited exceptions to the substitution of a transferee onto the credit delinquency list in place of the transferor. A levy and seizure by either the Massachusetts Department of Revenue or the Internal Revenue Service was not included in these limited exceptions.

Romebeau asserts six (6) arguments in support of its request to be removed from credit delinquency list. The Commission addresses each argument as follows.

The License Was Not “Transferred” To Romebeau. This argument flies in the face of the action taken by Romebeau. Romebeau signed an application under the pains and penalties of perjury stating it was seeking a transfer of the license, (Exhibit 1), together with the Petition For Transfer of Ownership. (Exhibit 2). The Form 43 evidencing the transaction granted by the local licensing authorities and approved by the Commission was a transfer of the license of Chrismich’s Inc.. Thus, this argument by Romebeau is contradicted by the facts and Romebeau’s own actions and statements under oath. The Commission is not persuaded by this argument from Romebeau.

Romebeau Was Not Provided A Required Notice. Romebeau argues that that the Commission regulation at 204 CMR 2.13 and the statute, MGL c. 138, § 25, obligates the Commission to furnish notice to Romebeau of the delinquencies incurred by the prior licensee Chrismich’s from who Romebeau obtained a transfer of license. This is not so. Romebeau misreads both the regulation and the statute.

204 CMR 2.13(1) does provide for the Commission to make available certain forms, but the Commission does not by regulation provide for any notice to a transferee of a license on the status of the credit delinquency. It is left for each transferee as part of its due diligence in choosing whether to seek a transfer of an existing license to take all steps necessary to determine the status of the transferor’s license on the credit delinquency list. See, e.g., *Food Service And Entertainment Licensing*, (MCLE, Inc. 2006) Miller, Chapter 2: *License Availability*, § 2.2 *Problems Related To Purchasing From A Current License Holder*, § 2.2.1 *Inability To Buy On Credit*,³ § 2.3 *Potential Licensing Pitfalls Regarding Business Acquisitions*, § 2.3.1 *Listing of Licensee As “Delinquent”*,⁴ § 2.3.2 *Responsibility For Debts*.⁵ No evidence was presented during the hearing that the applicant Romebeau did anything about this as part of its due diligence.

Further, this regulation of credit is achieved by statute. *Ignorantia juris non excusat ignorantia legis neminem excusat.*

Moreover, in this case with Romebeau, this is not the principals’ first foray into the Massachusetts alcoholic beverages business. The sole stockholder of Romebeau held and continues to hold a retail alcoholic beverages license in Massachusetts. With this license, that retail licensee had full authority to

³ This publication continues with a Practice Note: “The M&S Service Information Bureau is the trade organization that compiles and maintains the list for the industry and the ABCC. It will respond in writing to a written request as to whether a licensee is on the delinquency list. M&S Service Bureau’s mailing address is 55 Clarendon Street, Boston, MA 02116, and its phone number is (617) 423-1113.”

⁴ “It is a paramount concern ... that the licensee’s attorney or transferee discuss with the potential licensee whether the current licensee has outstanding liquor bills with wholesalers and distributors.”

⁵ “Practice Note: If the attorney and client do not faithfully investigate whether a current licensee is named on the delinquent credit lists of beverage wholesalers or distributors, and the license is transferred, then the name of the new licensee will appear on the delinquent list in place of that of the former licensee.”

examine the credit delinquency list. But there was no evidence presented during the hearing that it even tried. Furthermore, the statute expressly provides that “[s]uch posting shall constitute notice to all licensees of the delinquency of such licensee.” M.G.L. c. 138, § 25, ¶ 1. The Commission is not persuaded by this argument from Romebeau.

The Indebtedness At Issue Has Been Discharged Through Bankruptcy⁶. Romebeau argues that since the principal of the corporation that was the prior licensee, Chrismich’s Inc., filed an individual chapter bankruptcy on December 6, 2011, the debts of the corporation that held the license are discharged. No legal authority was presented to support his argument.

Only the individual principal of the corporation that was the licensee prior to Romebeau filed a chapter 7 bankruptcy that resulted in a discharge dated March 14, 2012. Of the documents filed, the first page of the chapter 7 bankruptcy petition represents under oath that the “Nature of Debts” are in fact “primarily consumer debts ... incurred by an individual primarily for a personal, family, or household purpose.” The bankruptcy forms have an alternative selection when the “[d]ebts are primarily business debts.” Romebeau does not address how consumer debts were lawfully incurred for a business that was licensed and actually engaged in the sale of alcoholic beverages. Romebeau also does not address how a licensed business is eligible for, let alone pursued, any bankruptcy relief in an individual consumer chapter 7 bankruptcy. The Commission is not persuaded by this argument that is not supported by any legal authority.

Romebeau Need Not Pay The Underlying Indebtedness. Romebeau argues that even though it is posted to the credit delinquency list (as required by MGL c. 138, § 25), Romebeau is not required to pay the underlying indebtedness reported by the wholesalers. The consequence of being substituted on the credit delinquency list is merely that the licensee being substituted, the transferee of a license, must operate subject to the statutory conditions, viz., that “[n]o licensee under this chapter shall sell or deliver, directly or indirectly, alcoholic beverages to a licensee whose name is posted on the delinquent list, except for payment in cash on or before delivery, and no licensee who is posted on the delinquent list shall purchase or accept delivery of any alcoholic beverages except for payment in cash on or before delivery.” M.G.L. c. 138, § 25, ¶ 3.

Romebeau cites to a decision from 1941 in support of this position. General Laws chapter 138, section 25, the statute that regulates credit for alcoholic beverages sold, was not enacted until 1968. Romebeau does not cite any legal authority to support its position that a 1941 court decision applies to the construction, operation and effect of a statute that wasn’t even in existence until 27 years after the decision.

The Commission concurs that Romebeau is not obligated to pay the underlying indebtedness so long as Romebeau is content to pay cash for all deliveries of alcoholic beverages as required by section 25 of chapter 138. However, Romebeau must address the underlying indebtedness and have them discharged in full only if Romebeau seeks credit for sales and deliveries of alcoholic beverages.

The Lien for The Indebtedness In Issue Has Been Discharged By Federal Law. Romebeau argues without any cited legal authority that the underlying indebtedness incurred by Chrismich’s Inc. is discharged by federal tax law. The Commission is not persuaded by this argument that is not supported by any cited legal authority.

⁶ Romebeau represented in a written memorandum filed with the Commission that the memorandum had an Exhibit B attached. It was eight (8) pages of documents attached to the memorandum but not all documents attached were admitted in evidence at the Commission hearing.

"It has long been the rule that 'in the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property . . . sought to be reached by the statute.'" Aquilino v. United States, 363 U.S. 509, 513 (1960), quoting from Morgan v. Commissioner, 309 U.S. 78, 82 (1940)." Arrowhead Estates, 15 Mass. App. Ct. at 630. As it has been adjudicated long ago by the Superior Court, "[t]he Supreme Judicial Court has defined a lien as 'a right to hold goods, [or] property of another, in security for some debt, duty of other obligation.' Boston v. Rockland Trust Co., 391 Mass. 48, 55 (1984)." Dorchester Discount Liquors, Inc. vs. Alcoholic Beverages Control Commission, Memorandum of Decision and Order, Suffolk Superior Court C.A. No. 93-3330-C (Cratsley, J.). For Romebeau's position to prevail, the delinquency list would have to hinder one without a property interest in Romebeau's license from attaining goods with credit from liquor wholesalers. This is not how the regulation of credit, achieved through the credit delinquency list, operates pursuant to M.G.L. c. 138, § 25.

As the Superior Court held in Dorchester Discount Liquors, "[t]he United States Supreme Court defined a property interest in the broadest of terms, extending the definition well beyond actual ownership of real estate, chattels or money. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 571-572, (1972). The Court in Roth held that for an individual to have a property interest in a benefit there must be more than an abstract desire for it, rather there must be a legitimate claim of entitlement to the benefit. *Id.* at 577." Dorchester Discount Liquors, Inc. vs. Alcoholic Beverages Control Commission, Memorandum of Decision and Order, Suffolk Superior Court C.A. No. 93-3330-C (Cratsley, J.). In applying the Roth analysis to the Romebeau case, it is clear that there is not a property interest in receiving credit from liquor wholesalers. M.G.L. c. 138, § 25 provides that "nothing in this chapter shall require any manufacturer, winegrower or wholesaler to extend credit to any licensee."

In Dorchester Discount Liquors, the Massachusetts Superior Court found that "[a]lthough Dorchester may expect to receive credit from wholesalers by not having its name on the ABCC delinquent list, there is no entitlement to credit. Accordingly, an expectation of credit does not amount to an entitlement to credit thus demonstrating that Dorchester had no property interest in having its name removed from the delinquent list." The Court continued that "[f]urthermore, deference will be given to the ABCC's interpretation of M.G.L. c. 138, § 25. Therefore, under the applicable statute, the transferee's name automatically replaces the transferor's name on the delinquent list."

Further, under the 21st Amendment to the United States Constitution, the States have broad powers "in dealing with the regulation of the sale of intoxicating liquors." Connolly v. Alcoholic Beverages Control Commission, 334 Mass. 613, 619 (1956). "What they may wholly prohibit they may permit only on terms and conditions prescribed by the Legislature." Connolly, Id. [cite]. Massachusetts has set this statutory condition regarding the regulation of credit in the sale of alcoholic beverages. The regulation of credit in this case regulates transactions that occur exclusively inside Massachusetts, between one in-state licensee (a wholesaler licensed under MGL c. 138, § 18 in whose warehouse located inside Massachusetts the alcoholic beverages must "come to rest"⁷) and a second in-state licensee (a retailer licensed under section 12 in whose licensed premises alcoholic beverages must be stored, sold and consumed by patrons. M.G.L. c. 138, §§ 2, 12.) This statute was enacted pursuant to Massachusetts' core powers under the 21st Amendment to ensure an orderly marketplace and the efficient collection of taxes.

⁷ M.G.L. c. 138, §18 provides, in pertinent part, that "[a]ll alcoholic beverages, wines and malt beverages purchased by any licensee under this section, and all alcoholic beverages, wines and malt beverages shipped into the commonwealth pursuant to any such purchase, shall be warehoused at the warehouse facilities of such licensee and held in his physical possession at such warehouse prior to reshipment to persons holding licenses under section twelve or section fifteen."

Because Romebeau purchased and had transferred the license when there was an outstanding reported delinquency to alcoholic beverages creditors, Romebeau's right to be removed from the credit delinquency list does not exist. The entitlement of credit that Romebeau asserts repeatedly throughout its memorandum does not exist. There is no entitlement to credit. Romebeau does not have a property interest in having its name removed from the delinquent list. The Commission finds that Romebeau has not proved to the Commission a basis to be removed from the credit delinquency list under 204 C.M.R. 2.13.

CONCLUSION

Romebeau's name will remain on the credit delinquency list as required by M.G.L. c. 138, §25, ¶4 and 204 C.M.R. 2.13.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Susan Corcoran, Commissioner *Susan Corcoran*

Kathleen McNally, Commissioner *Kathleen McNally*

Dated: November 21, 2012

You have the right to appeal this decision to the Superior Courts under the provisions of Chapter 30A of the Massachusetts General Laws within thirty days of receipt of this decision.

cc: Gregory Wheeler, Esq. via Facsimile
Frederick G. Mahony, Chief Investigator
Administration
File