

ABC COMMISSION – 14B NCAC 15A .1406

(December 19, 2019)

IS THE FIXING OF BAILMENT SURCHARGES EXEMPT FROM RULEMAKING UNDER THE APA?

SUMMARY:

The fixing of the bailment surcharge under Chapter 18B of the General Statutes is excluded from the definition of “Rule” as defined in G.S. 150B-2(8a) and is not subject to rulemaking under Chapter 150B of the General Statutes. The fixing of the bailment surcharge is a part of the ABC Commission’s budget and budgeting process under the State Budget Act, Chapter 143C of the General Statutes, and is therefore excluded from the definition of a rule under G.S. 150B-2(8a)b.

Background:

The bailment surcharge is an amount calculated to cover operating expenses of the ABC Commission and the retirement of bonds issued for the construction of the Commission warehouse and offices. The bailment surcharge is set in the ABC Commission’s budget adopted and approved under the State Budget Act and adopted by the General Assembly as part of the State’s Base Budget. (G.S. 18B-208(b)).

The statute requires that the bailment surcharge be collected as part of the price of spirituous liquor sold in the local ABC stores. The ABC Commission has the duty and authority to set the price of alcoholic beverages sold in local ABC stores. (G.S. 18B-203(a)(3)). G.S. 18B-804 requires the ABC Commission to set the uniform Statewide price for spirituous liquor sold in the State in accordance with the formula set forth in G.S. 18B-804(b). Included in the uniform State price is the amount per bottle of the bailment surcharge. (G.S. 18B-804(b)(6a)).

The bailment surcharge is a portion of the price of spirituous liquor paid by the consumer. The bailment surcharge, together with the distiller’s price and the bailment, are due from the local ABC board upon delivery of the spirituous liquor to the board and are paid based on the Contractor’s invoice for the product delivered. The amount of the bailment surcharge paid by the local ABC Board is recovered by the local ABC board as part of the sales price of the product sold.

ABC Budget Process:

The ABC Commission operates on a biennial budget, subject to the State Budget Act, except that unexpended surplus of its funds do not revert to the General Fund. G.S. 18B-208(b) requires the Commission to fix the bailment surcharge at an amount calculated to cover operating expenses of the

Commission and the retirement of bonds issued for the construction of the Commission warehouse and offices. The bailment surcharge is the source of revenues in the budget for the operating expenses of the Commission. As a self-funded agency, the Commission receives no funding from the General Fund. Permit fees collected by the Commission from the issuance of ABC permits go to the General Fund. Fines and penalties collected by the Commission for administrative violations by ABC permittees go to the Civil Penalty and Forfeiture Fund.

The bailment surcharge is fixed as part of the budget process under the State Budget Act. The Commission determines its needed operating costs, and the retirement of any bond indebtedness for the biennium, and calculates its anticipated budgetary expenditures. The amount of revenue needed to pay these expenditures is funded through the collection of the bailment surcharge. The bailment surcharge is fixed by dividing the amount of revenue needed for each year of the biennium by the number of cases of spirituous liquor that are projected to be sold through the local ABC boards in each year to determine the bailment surcharge rate per case. Based on the number of bottles per case, that bailment surcharge is collected as part of the purchase price of each bottle sold from the case.

The Commission submits its proposed budget to the Department of Public Safety (DPS) which approves and includes it in the Department's proposed budget submitted to the Office of State Budget and Management (OSBM). OSBM approves the budget and includes the Commission's budget as part of the State's Base Budget it submits to the General Assembly. When the General Assembly adopts the Base Budget, it adopts the Commission's budget and thereby the bailment surcharge.

Legal Argument:

Part of the process of fixing the bailment surcharge is the approval and certification by the Office of State Budget and Management under the State Budget Act of the amount of bailment surcharge that needs to be collected to fund the approved and certified expenditures of the Commission and its adoption by the General Assembly. Because the fixing of the bailment surcharge is part of the budget, it is not subject to rulemaking under Chapter 150B of the General Statutes as it is excluded under the definition of "Rule" under G.S. 150B-2(8a)b. As a self-funded agency, the bailment surcharge is the statutory mechanism for raising the revenues to fund the Commission's budget as adopted by the General Assembly. Under the State Budget Act, the Commission works with the Office of State Budget and Management for the approval and certification of its budget. The rate of the bailment surcharge per case, and ultimately per bottle, is a mathematical calculation in this budget process.

STATUTES RELEVANT TO FIXING OF BAILMENT SURCHARGES BY THE ABC COMMISSION

§ 18B-101. Definitions.

As used in this Chapter, unless the context requires otherwise:

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- (5c) "Bailment surcharge" means the charge imposed on each case of liquor shipped from a Commission warehouse as provided in G.S. 18B-208. This bailment surcharge is in addition to the bailment charge imposed by G.S. 18B-804(b)(2).
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§ 18B-203. Powers and duties of the Commission.

(a) Powers. - The Commission shall have authority to:

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- (3) Set the prices of alcoholic beverages sold in local ABC stores as provided in Article 8;
- ...
- (14) Fix the amount of bailment charges and bailment surcharges to be assessed on liquor shipped from a Commission warehouse;
- (15) Collect bailment charges and bailment surcharges from local boards;
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§ 18B-208. ABC Commission bonds and funds.

(a) Issuance of Bonds. - As a means of raising the funds needed from time to time in the design, acquisition, construction, equipping, maintenance and operation of a warehouse under G.S. 18B-204(a)(3), the Commission may, with the approval of the Governor, at one time or from time to time issue negotiable revenue bonds of the Commission. The issuance of revenue bonds shall not directly or indirectly or contingently obligate the State to levy or to pledge any form of taxation or to make any appropriation for their payment. Revenue bonds issued pursuant to this subsection shall be repaid from the bailment surcharge as provided in subsection (b). These bonds and the income from them are exempt from all taxation within the State.

(b) Special Fund. - A special fund in the office of the State Treasurer, the ABC Commission Fund, is created. On and after November 1, 1982, all moneys derived from the collection of bailment charges and bailment surcharges shall be deposited in the ABC Commission Fund for the purpose of carrying out the provisions of this Chapter. The ABC Commission Fund shall be subject to the provisions of the State Budget Act except that no unexpended surplus of this fund shall revert to the General Fund. The Commission shall fix the level of the bailment surcharges at an amount calculated to cover operating expenses of the Commission and the retirement of bonds issued for construction of a Commission warehouse and offices. Upon payment of the bonds issued pursuant to this section, the Commission shall reduce the bailment surcharge to an amount no greater than necessary to pay operating expenses of the Commission as authorized by the General Assembly.

All moneys credited to the ABC Commission Fund shall be used to carry out the intent and purposes of the ABC law in accordance with plans approved by the North Carolina ABC Commission and the Director of the Budget. The moneys in the Fund shall be expended only upon an appropriation by an act of the General Assembly.

§ 18B-804. Alcoholic beverage pricing.

(a) Uniform Price of Spirituous Liquor. - The retail price of spirituous liquor sold in ABC stores and permitted distilleries shall be uniform throughout the State, unless otherwise provided by the ABC law.

(b) Sale Price of Spirituous Liquor. - The sale of spirituous liquor, including antique spirituous liquor, sold at the uniform State price shall consist of the following components:

- (1) The distiller's or the antique spirituous liquor seller's price.
- (2) The freight and bailment charges of the State warehouse as determined by the Commission.
- (3) A markup for local boards as determined by the Commission.
- (4) The tax levied under G.S. 105-113.80(c), which shall be levied on the sum of subdivisions (1), (2), and (3).
- (5) An additional markup for local boards equal to three and one-half percent (3 1/2%) of the sum of subdivisions (1), (2), and (3).
- (6) A bottle charge of one cent (1¢) on each bottle containing 50 milliliters or less and five cents (5¢) on each bottle containing more than 50 milliliters.

(6a) The bailment surcharge.

- (6b) An additional bottle charge for local boards of one cent (1¢) on each bottle containing 50 milliliters or less and five cents (5¢) on each bottle containing more than 50 milliliters.
- (7) A rounding adjustment, the formula of which may be determined by the Commission, so that the sale price will be divisible by five.
- (8) If the spirituous liquor is sold to a mixed beverage permittee for resale in mixed beverages, a charge of twenty dollars (\$20.00) on each four liters and a proportional sum on lesser quantities.
- (9) If the spirituous liquor is sold to a guest room cabinet permittee for resale, a charge of twenty dollars (\$20.00) on each four liters and a proportional sum on lesser quantities.

(b1) Price of Spirituous Liquor Sold at Distillery. - When the holder of a distillery permit sells spirituous liquor distilled at the distillery pursuant to G.S. 18B-1105(a)(4), the retail price of the spirituous liquor shall be the uniform State price set by subsection (a) of this section. However, the holder of the distillery permit shall not be required to remit the components of the price set forth by subdivisions (2), (3), (5), (6), (6a), (6b), and (7) of subsection (b) of this section.

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