

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO

IN RE:

PETITION FOR DECLARATORY STATEMENT,
on behalf of BASS PLC,

Petitioner.

Final Order No. BPR-98-04558 Date 7-15-98

FILED

Dept. of Business and Professional Regulation
AGENCY CLERK

Sarah Wachman, Agency Clerk

By: Brandi M. Nichols

DECLARATORY STATEMENT

This Declaratory Statement is rendered by the Director of the Division of Alcoholic Beverages and Tobacco, ("DIVISION") pursuant to section 120.565, Florida Statutes. The Petitioner, BASS PLC, has filed a Petition for Declaratory Statement, containing a statement of facts, a discussion of relevant Florida law and administrative rules. A copy of the Petition for Declaratory Statement with appendix is attached hereto and incorporated by references.

ISSUE PRESENTED

The Petitioner presents the following issue to the Division:

Whether §§ 561.22 and 561.42(1), Florida Statutes, prohibit the proposed business arrangement described in the Petitioner's Petition for Declaratory Statement?

FINDINGS OF FACT

1. On or about April 21, 1998, BASS PLC filed a Petition for Declaratory Statement with the Division. The DIVISION renders its Findings of Fact on the basis of the information contained in the Petition for Declaratory Statement filed herein.

2. The conclusion in this Declaratory Statement is based on the facts described in the Petitioners' Petition for Declaratory Statement and its Appendix (hereinafter "the Petition"), and the particular factual assertions described therein. Accordingly, this conclusion has no application in the event that the factual circumstances and/or relationships among the entities described in the Petition change. All of the facts presented in the Petition were duly considered and form the basis for this Declaratory Statement. The facts as stated in the Petition for Declaratory Statement are as follows:

Bass is a major multinational enterprise which is engaged through subsidiary companies in a variety of businesses, including alcoholic beverage and soft drink production, hotels, and leisure retail (e.g. taverns, betting and gaming establishments). Bass is a United Kingdom holding company which is headquartered in London, England. Bass is a public company. Its stock is traded on the London Stock Exchange and on the New York Stock Exchange. As of December 1997, Bass was the 26th largest public limited company in the United Kingdom on the basis of market capitalization.

Bass does not engage in the manufacture or sale of alcoholic beverages. Each of its operating subsidiaries conducts business independent of Bass and independent of

each other. With the recently announced acquisition of the Intercontinental Hotel chain, the primary business of Bass is the ownership, operation and franchise of hotels worldwide. A subsidiary of Bass, Bass Brewers, Ltd. ("BBL") is a manufacturer of beer products. Bass, through a wholly owned subsidiary other than BBL, intends to acquire upscale hotels in Florida. These hotels will engage in the sale of alcoholic beverages at retail.

Attached as Appendix 1 is a "Basic Ownership Chart" reflecting the ownership structure of Bass and its subsidiaries. As can be seen from the Chart, the alcoholic beverage manufacturing business is operated totally separate and apart and independent of the hotel and other operations of Bass. The subsidiaries of Bass involved in the manufacturing of alcoholic beverages are indicated on the left side of the chart. Those subsidiaries directly involved in the manufacturing of alcoholic beverages are identified as the Brewing Unit. The left side of the chart reflects that Bass Investments Limited and Bass Overseas Holding Ltd. are wholly owned subsidiaries of Bass. Bass Holdings Ltd. is a wholly owned subsidiary of Bass Investments Limited. BBL is a wholly owned subsidiary of Bass Investments Limited. BBL in turn owns Bass Beers Worldwide, Ltd. Bass Beers Americas is a wholly owned subsidiary of Bass Beers Worldwide Ltd. and so on.

The subsidiaries of Bass involved in the hotel business are identified on the right side of the chart. Each subsidiary identified on the hotel side of the chart is wholly owned by the preceding subsidiary, and each subsidiary is operated independently of the other subsidiaries. Each subsidiary has been created for a specific business purpose or function. No subsidiary in the Brewing Unit on the chart has any officer in common with any subsidiary in the Hotel Unit, nor is any member of the Board of Directors of any corporation in the Brewing Unit a member of the Board of Directors of any corporation in the Hotel Unit. Accordingly, each corporation in the Brewing Unit operates independently of each corporation in the Hotel Unit. No corporation, or director or officer of any corporation, in the Brewing

Unit influences the operations of, or is involved with, any corporation in the Hotel Unit.

A. Bass' Hotel Operations

Bass has been involved in the hotel industry for many years. Until the late 1980's it owned and operated the Crest Hotel chain in Europe and the Middle East and also owned Bass Horizons hotels which operated resort hotels in Spain and the Mediterranean. In 1988, Bass acquired ownership of a majority of the assets of Holiday Inns outside North America, including international rights to the Holiday Inn trademark. That same year it acquired ownership of thirteen (13) Holiday Inn hotels in the United States. In 1990, it acquired the remainder of the Holiday Inn hotel chain for approximately 2.3 billion dollars.

The Bass hotels are owned and operated by the Bass subsidiary Holiday Hospitality Corporation ("HHC"). HHC, through its subsidiaries and affiliates, own, operate and franchise more than 2,380 hotels with approximately 392,000 guest rooms in more than 60 countries. In March of 1998, Bass acquired the Inter-Continental Hotel chain for approximately 3 billion dollars. There are 161 Inter-Continental Hotels owned and operated worldwide, with a total of approximately 60,000 guestrooms. Approximately eighty percent (80%) of all hotels owned by Bass are located in the United States. The hotels are operated under a variety of brand names, including Crowne Plaza, Holiday Inn, Holiday Inn Select, Holiday Inn Express and Inter-Continental. HHC does not presently own or operate any hotel in the State of Florida other than the recently acquired Intercontinental Hotel in Miami, Florida. However, previously and for a brief time, HHC did own and operate seven Holiday Inns in Florida (See Appendix 2). Each hotel was granted an alcoholic beverage license by the Division. It was the policy of the Division at that time that \$561.22 and \$561.42 did not apply to foreign alcoholic beverage

manufacturers.¹ (See Appendix 3-the Intercontinental Hotel in Miami held an alcoholic beverage vendor license under this policy). Bristol Hotel Company subsequently acquired these hotels.

Bristol Hotel Company ("Bristol"), is a publicly-owned Texas corporation headquartered in Dallas. Bristol owns and operates hotels throughout the United States under the Bristol Suites, Harvey Hotel and Harvey Suites brand names. In 1997, Bristol acquired ownership of 60 Holiday Inn hotels in North America, including the Florida hotels owned by HHC. In consideration for the acquisition, Bristol issued approximately 32% of its outstanding shares of stock to two subsidiaries of Bass, Bass America, Inc., and Holiday Corporation, which own 23.5% and 8.5% respectively, of Bristol's stock. Pursuant to the Universal Studio and Sega Declaratory Statements such stock ownership is not prohibited and does not adversely affect the Bristol alcoholic beverage vendor license and would not preclude subsidiaries of Bass from holding alcoholic beverage licenses. Holiday Inns Franchising, Inc. ("HIFI"), a wholly-owned subsidiary of Bass (USA) Franchising, Inc., licenses the HHC trademarks to franchisees for use with respect to the ownership and operation of hotels in the United States, which hotels hold retail alcoholic beverage licenses.

HHC sets quality standards for all of its hotel brands and operates a sophisticated customer satisfaction and quality measurement system to insure those standards are met or exceeded. For example, in 1994, HHC launched an initiative to modernize the North American, full-service portion of its hotel portfolio, with franchisees investing more than one billion dollars in the renovation and upgrading of their properties. In addition, as of September 30, 1997 there were franchise agreements for 658 hotels with approximately 71,000 rooms that remained to be constructed and integrated into the HHC hotel

¹The Division subsequently rescinded its policy of not applying \$561.22 and \$561.42 to foreign manufacturers. (Footnote is in the original).

system. The construction, conversion and development of hotels is dependent upon a number of factors, including franchisees obtaining suitable financing at acceptable interest rates.

Because conventional financing institutions are sometimes reluctant to extend financing to franchisees to construct, renovate, furnish and equip hotels, it has become customary for hotel franchisors to extend financing to franchisees in the form of loans and leases of furniture, fixtures and equipment upon competitive terms and rates. General Innkeeping Acceptance Corporation ("GIAC"), a wholly owned subsidiary of HHC, and GIAC Leasing Corp. ("GIAC Leasing"), a wholly-owned subsidiary of GIAC, are engaged in the leasing and financing of the purchase of hotel furniture and fixtures by franchisees of HIFI. GIAC also provides real estate mortgage financing to various HIFI franchisees in connection with construction, permanent refinancing and other loans regarding new and existing hotel properties. These transactions are bonafide, arms-length transactions, consistent with custom and practice in the hotel-financing industry, and are not in any way, directly or indirectly, related to the purchase or sale of alcoholic beverages.

In addition, HIFI, in the normal course of its business, may defer the payment of franchise application fees as well as other royalty and system fees and will accept instruments evidencing such deferral. These deferrals are customary commercial transactions related to the franchise industry and are not in anyway associated with the distribution or sale of any alcoholic beverage products.

B. Bass' Brewing/Distribution Operations

Bass has been engaged in the brewing business for many years through BBL, which presently operates eight (8) breweries in the United Kingdom, producing over sixty (60) brands of beer. Bass Ale is sold worldwide by Bass Beers Worldwide Ltd. ("BBW"), which handles the export of all BBL brands. Through another subsidiary, Bass owns an

equity interest in breweries located in the Czech Republic and China.

Until 1997, Bass Ale was the only brand produced by BBL and sold in the United States. The brand has been, and is currently, imported into the United States by Guinness Import Company, an independent company, unrelated to Bass, which sells the brand to licensed wholesalers throughout the United States, including Florida wholesalers. In 1997, Bass Beers Americas, headquartered in Atlanta, was formed to sell Hooper's Hooch alcohol lemon drink, another BBL brand, to licensed wholesalers throughout the United States. This brand is presently sold in the State of Florida. As reflected on the attached Basic Ownership Chart, BBL is not a part of the corporate chain of ownership on the hotel side of the Bass businesses and the corporations owning and operating the hotels are not, in anyway, owned, controlled or connected to BBL, except very remotely through Bass. No subsidiary of Bass, except BBL, holds an alcoholic beverage license or engages in the sale or distribution of alcoholic beverages.

No BBL alcoholic beverage product will be sold in any hotel acquired by Bass or its subsidiaries in the State of Florida.

(Emphasis in original)

CONCLUSIONS OF LAW

3. The DIVISION has jurisdiction over this matter pursuant to Sections 120.565, 561.02, 561.08 and 561.11, Florida Statutes, and is responsible for the application and enforcement of Chapters 561 and 562, Florida Statutes, specifically sections 561.22 and 561.42, Florida Statutes.

4. The Petitioner is substantially affected by the

statutory provisions cited above and have standing to seek this Declaratory Statement.

5. Section 561.08, Florida Statutes, empowers and directs the DIVISION to enforce the provisions of the Beverage Law and perform such acts as may be necessary to carry out the provisions thereof. Accordingly, it is the DIVISION that construes and interprets the alcoholic beverage laws of the State of Florida and makes the determination as to whether they are applicable to a specific set of facts.

6. An agency's determination of the intent of a statutory provision within its power to enforce and interpret as well as agency action based upon this construction, will generally be upheld by a court. Thus, where an agency is acting within the scope of its authority as defined by law, a court will not substitute its judgment for that of an agency, where there is room for a difference of intelligent opinion on the subject. Storrs v. Pensacola & A.R. Co., 11 So. 266 (1892); Wilson v. Pest Control Com., 199 So.2d 277 (4th DCA 1967); Baptist Hospital, Inc. v. State, Department of Health and Rehabilitative Services, 500 So.2d 620 (First DCA 1986); SOS Alford v. School Board, 511 So.2d 438 (1st DCA 1987).

7. Therefore, it is the responsibility and duty of the

DIVISION to construe and interpret the provisions of Section 561.22 and Section 561.42, Fla. Stat. and apply said provisions to a stated set of facts in a reasonable manner, that comports with the purpose, intent and spirit of the statutory provisions and which avoids an absurd result.

8. It is well established in Florida jurisprudence that a statute should be interpreted so as to give effect to the clear and unambiguous legislative intent. Zuzkerman v. Alter, 615 So.2d 661 (Fla. 1993). However, of equal importance is the well established principal that a statute should be interpreted so as to avoid arbitrary, absurd and/or unreasonable results. Carawan v. State, 515 So.2d 161 (Fla. 1987); Towerhouse Condominium, Inc. v. Millman, 475 So.2d 674 (Fla. 1985); Fletcher v. Fletcher, 573 So.2d 941 (Fla. 1st DCA 1991). Hamilton v. State, 645, So.2d 555 (Fla. 2nd DCA 1994).

9. The presented facts raise the issue of whether the proposed business relationship between a vendor and a manufacturer is violative of the Beverage Law, specifically whether the prohibitions and limitations in section 561.22 and sections 561.42(1), Florida Statutes, would prohibit the proposed relationship.

10. Section 561.22(1), Fla. Stat., states in pertinent part that a "...a license or registration may not be issued to a manufacturer, distributor or exporter as a vendor, ..." Section 561.22(2)(b), Florida Statutes, further provides as follows:

If any applicant for a vendor's license or renewal thereof is a copartnership such copartnership is within the provisions of subsection (1) if any member of the copartnership is interested or connected, directly or indirectly, with any corporation which is engaged, directly or indirectly, or through any subsidiary or affiliate corporation, including any stock ownership asset forth in subsection (3) in manufacturing, distributing, or exporting alcoholic beverages under license or registration of this state or any state of the United States.

11. Section 561.22(3), Florida Statutes, further provides as follows:

If any applicant for a vendor's license ... is a corporation, such corporation is within the provisions of subsection (1) if such corporation is affiliated with, directly or indirectly, any other corporation which is engaged in manufacturing, distributing, or exporting alcoholic beverages ... or if such applicant corporation is controlled by or the majority stock therein owned by another corporation, which latter corporation owns or controls in any way the majority stock or controlling interest in any other corporation that is engaged, directly or indirectly, in manufacturing, distributing, or exporting alcoholic beverages under a license or registration in this state or any other state in the United States.

12. Under Section 561.22(3), Florida Statutes, a prohibited

connection or affiliation would exist between an applicant for a vendor's license and a manufacturer of alcoholic beverages because of stock ownership, or if applicant is controlled by the manufacturer through stock ownership, or if the applicant is owned by another corporation or entity, which latter corporation or entity owns or controls in any way the majority stock or controlling interest in any other corporation that is engaged, directly or indirectly in manufacturing of alcoholic beverages.

13. Section 561.42(1), Florida Statutes, states in pertinent part as follows:

... No licensed manufacturer or distributor of any of the beverages herein referred to shall have any financial interest, directly or indirectly, in the establishment or business of any vendor licensed under the Beverage Law; nor shall such licensed manufacturer or distributor assist any vendor by any gifts or loans of money or property or property of any description.

14. State and federal courts construing Florida's "tied-house evil" provisions have provided guidance as to the intent and application of these statutory provisions. The overall intent underlying the enactment of section 561.42 (the "tied-house evil" statute) and section 561.22 was to divorce the manufacturing and distributing activities of the liquor business from that of retailers/vendors. Mayhue's Super Liquor Store, Inc. v Meiklejohn, 426 F.2d 142 (5th Cir. 1970). Likewise, the statute was enacted to

prevent distributors from having a financial interest in vendor's businesses or from controlling the retail outlets. Central Florida Distributing Co. v Jackson, 324 So.2d 143 (Fla. 1st DCA 1975), Musleh v Fulton Distributing Co. of Fla., 254 So.2d 815 (Fla. 1st DCA 1971).

15. In Pickerill v. Schott, 55 So.2d 716 (Fla. 1951), the Florida Supreme Court stated that "tied house evil" statutes are aimed at preventing the integration of retail and wholesale outlets and to remove the retail dealer of intoxicating liquors from financial or business obligations to the wholesaler, with the exception of ordinary commercial credit for liquors sold. The court traced the history of the tied-house evil provisions and concluded that the purpose of the act was to prevent monopoly or control by manufacturers or distributors of the retail outlets for the sale of intoxicating liquors.

16. In Central Florida Distributing Co. v. Jackson, 324 So.2d 143 (Fla. 1st DCA 1976), the court stated that the purpose of section 561.42 is to prohibit any financial obligation between a distributor and a vendor, thus preventing the control of retail outlets by the distributor. When again confronted with construing and applying the provisions of Florida's tied-house evil law, the First District Court of Appeal in Musleh v. Fulton Distributing Co.

of Florida, 254 So.2d 815 (Fla. 1st DCA 1971), determined that the purpose of the tied-house evil law was to prohibit manufacturers, wholesalers and distributors of alcoholic beverages from controlling retail outlets operated by licensed vendors through the granting, withholding or extension of credit.

17. Other states, construing similar tied-house evil provisions, have likewise concluded that the purpose of the tied-house evil provisions is to prevent a manufacturer from owning and controlling a retail outlet and gaining some advantage or control in the industry, and to likewise prohibit any influence or control by the manufacturer in the management and operation of a distributor. See for example Bohemian Breweries v. Koehler, 332 P.2d 875 (S.Ct.Idaho, 1958); Joseph Schlitz Brewing Co. v. Central Beverage Co., Inc., 359 N.W. 2d 566 (Court of Appeals, Ind. 1977); and Wine and Spirits Merchandisers, Inc. v. Illinois Liquor Control Commission, 432 N.E. 2d. 1013 (Ill.1982). Influence or control by the distributor in the management and operation of a retailer has also been prohibited. Markstein Distributing Company v. Rice, 135 Cal. RPTR. 255 (1976).

18. The case of State ex rel. Continental Distilling Sales Co. v. Vocelle, 27 So.2d 728 (Fla. 1946), is directly analogous to the facts presented by the Petitioner. Continental Distilling

Corporation was a manufacturer of liquors and Continental Distilling Sales Co. was a wholesaler (distributor). In Continental Distilling Sales Co., Continental Distilling Corporation and Continental Distilling Sales Co. brought an action against the Director of the Beverage Division to compel the issuance of a license as a wholesale distributor of liquor Continental Distilling Sales Co. Both companies were owned by a common parent corporation that acted as a holding company that could directly control the affairs of each subsidiary. The court refused to apply the subject statute, the current section 561.22, to prohibit the licensure of Continental Distilling Sales Co. as a wholesaler. The Court ruled that corporations were legal entities by fiction of law and that there was no evidence that the corporations had been formed for the purpose of evading the statute. As a result, the beverage director was required to issue a wholesale distributor license to Continental Distilling Sales Co., regardless of its affiliation with a manufacturer arising from the manufacturer's and distributor's status as wholly owned subsidiaries of the same corporation.

19. Under the facts as stated in the Petition, BASS PLC's purchase of a hotel licensed under the beverage law does not require or involve BASS PLC's control of the management or

operation of a retail alcoholic beverage vendor. BASS PLC will not control the decisions of the vendor regarding the sale of alcoholic beverages, or control the decisions of the vendor as to the alcoholic beverage products it will sell, serve, or promote. Furthermore, the other subsidiaries of Petitioner directly involved in the alcoholic beverages industry, including the manufacturer Bass Brewers, LTD. (collectively referenced as "the Brewing Unit"), and will likewise not exercise any control of the management or operation of the vendor hotels. It further appears that Holiday Hospitality Corporation through its subsidiaries and affiliates, and its associated hotel unit corporations (collectively referenced as "the Hotel Unit") will independently operate and manage the vendor hotels. The Hotel Unit will make its own independent decisions, and Bass PLC and the Brewing Unit will not be involved in the decisions of the Hotel Unit with respect to the sale of alcoholic beverages, including those manufactured by the Brewing Unit. The Hotel Unit's affiliation with the Brewing Unit will be remote. Therefore, the relationships among and between BASS PLC, the Brewing Unit, and the Hotel Unit are not violative of the provisions of Section 561.22, Florida Statutes.

20. As indicated by the facts presented in the Petition, the proposed relationship is arguably as remote and lawful as the

ownership interest in Continental Distilling Sales Co. v. Vocelle. Such an interest would not violate sections 561.22 and 561.42(1), Florida Statutes.

21. The proposed relationship appears not to be done in such a manner as to create an impermissible financial or business obligation from the vendor to the manufacturer. The facts presented in the Petition, establish that the Hotel Unit will independently manage and control the hotel vendors and that the hotel vendors are under no obligation to promote or give preference to Brewing Unit's products or to exclude any non-Brewing Unit products in the operation of its hotels.

22. The following caveat must be presented. As decided in this Declaratory Statement, there is no inherent Tied House Evil violation in the facts presented. However, care must be taken in practice to prevent any influence by BASS PLC or the Brewing Unit in the management and operation of the Hotel Unit's vendor businesses. The vendor must also avoid any practice that would indicate an obligation to act on behalf of the manufacturer. For example, the Hotel Unit should avoid giving any preference to Brewing Unit's products or excluding non-Brewing Unit products in the operation of its vendor hotels. Failure to do so would be indicative of a violation of section 561.42, Florida Statutes.

23. The conclusions made in this Declaratory Statement are compelled by the case law from the Florida courts, Federal courts, and the courts of other states, interpreting and applying sections 561.42, 561.22, and other Tied House Evil Laws. Nothing in this Declaratory Statement or the law upon which it is based is intended to effect or relate to the legality of any other interest, either direct or indirect, which may be prohibited under the Beverage Law, and is further limited to the facts presented in the Petition.

CONCLUSION

Based upon the specific facts presented by the Petitioner, and the legal conclusions set forth in full herein,

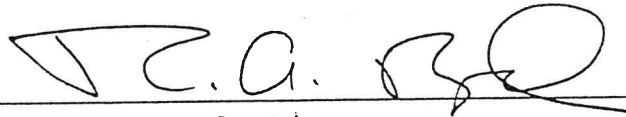
THE DIVISION HEREBY CONCLUDES:

A. That sections 561.22 and 561.42, Florida Statutes, do not prohibit BASS PLC's subsidiary Hospitality Corporation, through its subsidiaries and affiliates, to own, operate and franchise alcoholic beverage licensed hotels in the State of Florida; and

B. That this conclusion is based on the facts

described in the Petitioners' Petition for Declaratory Statement, including the Appendix, and the particular factual assertions described therein. Accordingly, this conclusion has no application in the event that the factual circumstances and/or relationships among the entities described herein are incorrect or change.

DATED this 15 day of July, 1998.



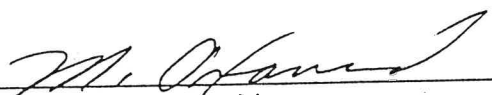
Richard A. Boyd, Director
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RIGHT TO APPEAL

THIS DECLARATORY STATEMENT CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULE 9.110, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH SARAH L. WACHMAN, AGENCY CLERK FOR THE DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, WITHIN 30 DAYS OF THE RENDITION OF THIS DECLARATORY STATEMENT.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: J. RILEY DAVIS, Esquire, KATZ, KUTTER, HAIGLER, ALDERMAN, BRYANT & YON, P.A., 106 E.COLLEGE AVE., STE. 1200, TALLAHASSEE, FLORIDA 32301; WILLIAM B. SCHREIBER, Esquire, WORMSER, KIELY, GALEF & JACOBS LLP, 711 THIRD AVENUE, NEW YORK, NEW YORK 10017; and BARRY R. DAVIDSON, Esquire, COLL, DAVIDSON, CARTER, SMITH, SALTER & BARKETT, 3200 MIAMI CENTER, 201 SOUTH BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131-2312, this 15th day of July, 1998.


Miguel Oxamendi
Assistant General Counsel