

BEFORE THE TENNESSEE ALCOHOLIC BEVERAGE COMMISSION

IN RE:)	
DIAGEO AMERICAS SUPPLY, INC.)	
d/b/a GEORGE A. DICKEL, & CO.)	Docket # 33.03-135867A
)	
Petitioner.)	

NOTICE OF HEARING REGARDING PETITION FOR DECLARATORY ORDER

Comes now the Tennessee Alcoholic Beverage Commission ("TABC" or "Commission"), by and through counsel and gives notice that a Petition for Declaratory Order, attached hereto as Exhibit A, has been received from Diageo Americas Supply, Inc. d/b/a George A. Dickel, & Co. requesting that the TABC declare that the storage requirements of T.C.A. § 57-2-104 do not apply to Petitioner or do not apply to the alcoholic beverages stored by Petitioner outside of the state of Tennessee.

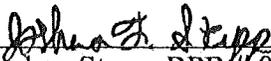
This matter shall be heard on April 26, 2016 at 1:30 p.m., or as soon thereafter as the TABC may take up this matter, at 500 James Robertson Parkway (Davy Crockett Tower), Third Floor, Nashville, TN 37243. By agreement of Petitioner, the costs of this cause shall be taxed to the Petitioner.

SUMMARY OF PETITION

On December 15, 2015, Petitioner, Diageo Americas Supply, Inc. d/b/a George A. Dickel, & Co. ("Petitioner" or "George Dickel"), by and through counsel, lawfully filed a petition for a declaratory order to be issued by the TABC pursuant to T.C.A. § 4-5-223 and Tenn. Comp. R. & Regs. 0100-04-.04. The Petition asks the Commission to interpret T.C.A. § 57-2-104 (also referred to as "the Storage Statute") in relation to its applicability to Petitioner. The statute authorizes "the holder of a license issued pursuant to § 57-2-102, or the authorized agent of such licensee, to possess, store or transport the products of the manufacturing plant within, over and across the state; provided that any alcoholic beverages or wine produced at a plant located within this state shall be stored by the licensee only within the county authorizing the operation, or in a county adjacent to the county authorizing the manufacturing operation, and such possession shall be limited to storage facilities of such manufacturer, provided that such licensee may also possess such alcoholic beverages or wine while being transported, whether within or outside of the state.

Specifically, the Petitioner requests "that the Commission issue a declaratory order interpreting the Storage Statute, Tenn. Code Ann. § 57-2-103, to be inapplicable to the storage of Distilled Spirits outside the State of Tennessee" by Petitioner.

Entered this 12th day of February, 2016.

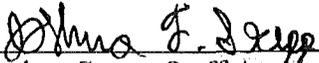


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CERTIFICATE OF SERVICE

I certify that a true and exact copy of the Notice of Hearing was sent by U.S. Certified Mail, Return Receipt Requested, to Attorney Will T. Cheek, III, of Bone Mcallester Norton, PLLC located at 511 Union Street- Suite 1600 Nashville, TN 37219, on this 12th day of February, 2016.



Joshua Stepp, Staff Attorney

BEFORE THE TENNESSEE ALCOHOLIC BEVERAGE COMMISSION

IN RE:

**DIAGEO AMERICAS SUPPLY, INC.
d/b/a GEORGE A. DICKEL & CO.,**

Petitioner.

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Docket No. _____

DEC 15 2015

PETITION FOR DECLARATORY ORDER

Pursuant to Tenn. Code Ann. § 4-5-223 and Tenn. Comp. R. & Regs. 0100-04-.04, Diageo Americas Supply, Inc. d/b/a George A. Dickel & Co. ("Petitioner"), by and through counsel, respectfully petitions the Tennessee Alcoholic Beverage Commission ("the Commission") for review of Tenn. Code Ann. § 57-2-104 (the "Storage Statute").

Petitioner requests the Commission provide a declaratory order as to the interpretation, applicability, and validity of the Storage Statute. Petitioner seeks a declaratory order from the Commission finding that the Storage Statute does not apply to the storage of alcoholic beverages outside the State of Tennessee, consistent with the Commerce Clause of the United States Constitution. U.S. Const. art. I, § 8, cl. 3.

BACKGROUND FACTS

1. Diageo Americas Supply, Inc. d/b/a George A. Dickel & Co. is a New York Corporation with its principal place of business in Norwalk, Connecticut.

2. Petitioner owns and operates the George Dickel Distillery, which has manufactured George Dickel® Tennessee Whisky in Cascade Hollow, near Tullahoma, Tennessee for more than 130 years. The George Dickel Distillery also manufactures other distilled spirits (George Dickel and other spirits are collectively referred to as "Distilled Spirits") in addition to its signature line of George Dickel® Tennessee Whisky products.

3. The Storage Statute provides as follows:

It is lawful for the holder of a license issued pursuant to § 57-2-102, or the authorized agent of such licensee, to possess, store or transport the products of the manufacturing plant within, over and across the state; *provided, that any alcoholic beverages or wine produced at a plant located within this state shall be stored by the licensee only within the county authorizing the operation or in a county adjacent to the county authorizing the manufacturing operation, and such possession shall be limited to storage facilities of such manufacturer;* and further provided, that such licensee may also possess such alcoholic beverages or wine while being transported, whether within or outside of the state. It is lawful for common carriers to transport the products of such manufacturing plant only pursuant to an agreement or contract with a licensee under this title.

Tenn. Code Ann. § 57-2-104 (emphasis added).

4. Petitioner has at all relevant times held “a license issued pursuant to § 57-2-102” that authorizes Petitioner to operate the George Dickel Distillery in Cascade Hollow, Tennessee.

5. Petitioner manufactures various Distilled Spirits at the George Dickel Distillery. Each of those Distilled Spirits meets the definition of an “alcoholic beverage” under the Tennessee Code.

6. Petitioner stores most Distilled Spirits manufactured at its George Dickel Distillery on site in Cascade Hollow. This currently includes all products sold as George Dickel® Tennessee Whisky.

7. Petitioner has transported some Distilled Spirits manufactured at its George Dickel Distillery (other than George Dickel® Tennessee Whisky) to a company-owned distillery in Kentucky and stores those Distilled Spirits there. Petitioner has not transported any product labeled Tennessee Whisky outside the State of Tennessee.

8. Under the Commerce Clause, Congress has the sole power to “regulate Commerce with foreign Nations, and among the several States.” U.S. Const. art. I, § 8, cl. 3.

9. State laws may not have extraterritorial effects. Under the Commerce Clause, a “state law that has the ‘practical effect’ of regulating commerce occurring wholly outside that State’s borders is invalid.” *Healy v. Beer Inst.*, 491 U.S. 324, 332 (1989). The Supreme Court summarized its cases on the extraterritorial effects of state economic regulation in the following three propositions: (1) the “Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State,” (2) “a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State’s authority and is invalid regardless of whether the statute’s extraterritorial reach was intended by the legislature,” and (3) “the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if” other states passed similar laws. *Id.* at 336.

10. In order to be constitutional under the Commerce Clause of the U.S. Constitution, the Storage Statute cannot: (1) regulate transactions occurring out of state, (2) treat the interstate transportation and storage of Distilled Spirits manufactured in Tennessee differently than the intra-state transportation and storage of such products, (3) discriminate against out-of-state facilities and storage services, (4) force manufacturers to store their products in-state, or (5) provide economic protection to in-state storage services.

11. Under the canon of constitutional avoidance, a “statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.” *See, e.g., Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (citing *United States v. Jim Fuey Moy*, 241 U.S. 394, 401 (1916)). The Petitioner requests that this Commission avoid a statutory interpretation that would create serious constitutional issues.

12. The Tennessee legislature would not intend to create an unconstitutional statute. The canon of constitutional avoidance “allows courts to *avoid* the decision of constitutional questions” and provides a “tool for choosing between competing plausible interpretations of a statutory text,” with the presumption that the legislature did not intend the interpretation that raises constitutional concerns. *Clark v. Suarez Martinez*, 543 U.S. 371, 381 (2005) (emphasis in original); see *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (“When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”). The Commission accordingly should determine that the legislature intended that the Storage Statute should be narrowly construed. Petitioner respectfully requests that the Commission issue an order finding that the Storage Statute does not apply to the storage of alcohol outside the State of Tennessee, consistent with the Commerce Clause, as the Tennessee Legislature would have surely intended.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Commission issue a declaratory order interpreting the Storage Statute, Tenn. Code Ann. § 57-2-104, to be inapplicable to the storage of Distilled Spirits outside the State of Tennessee.