Advisory Opinion Request Form
November 2019

ALCOHOLIC BEVERAGE CONTROL
COMMONWEALTH OF KENTUCKY
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
500 Mero Street 2NE33
Frankfort, KY 40601
502-564-4850 phone
502-564-1442 fax
http://abc.ky.gov

Date received

AOR NO.: _____

FOR ABC USE ONLY

ADVISORY OPINION REQUEST FORM

Attach additional pages as necessary and any documentation, research, or other evidence that you request the Department to consider.

Name of Requestor (individual or business entity): Hargadon Law Group LLC on behalf of H&A Financing & Service Corp.

Address: 111 Church Street, Suite 100

City: Lexington State: KY County: Fayette

Zip Code: 40507 Phone Number: 859.509.0194

Email: jhargadon@hargadonlawgroup.com

The above individual or business entity requests an: ☑ Advisory opinion ☐ Reconsideration request

If this is a reconsideration request or comment, the application Advisory opinion number: N/A

Question or issue to be addressed: See attached Advisory Opinion Letter

Applicable statutes, regulations, ordinances, or other authority: KRS 243.020(1); KRS 244.240(1); KRS 244.604(1) 804 KAR 4:015 Section 1(4)

Proposed response, comment, or basis for reconsideration request: N/A

To your knowledge, is the question for which you request an advisory opinion or reconsideration pending before, under investigation by, or recently decided by a court or government entity? ☐ Yes ☑ No

If yes, please identify the court or government agency, any case or proceeding number, and filing dates of the proceeding or investigation N/A.

Signature of Requestor or Requestor's Agent Jason L Hargadon Date May 20, 2022

Signer's Name and title if requestor is a business entity Jason L. Hargadon, Attorney Date May 20, 2022

HARGADON LAW GROUP, LLC
111 CHURCH STREET, SUITE 100
LEXINGTON, KENTUCKY 40507

JASON L. HARGADON
MEMBER

May 20, 2022

Administrator
Department of Alcoholic Beverage Control
500 Mero Street 2NE33
Frankfort, KY 40601

Re: *Advisory Opinion Request – Capital Lease Agreement - Warehouse Receipts*

Dear Administrator:

On behalf of H&A Finance & Services Corp ("H&A"), the Kentucky Department of Alcoholic Beverage Control ("ABC") is requested to advise H&A regarding any limitation or restriction under Kentucky statutes and regulations on the financing of Warehouse Receipts evidencing Distilled Spirits by way of a Capital Lease Agreement. H&A also seeks advice regarding any limitations or restrictions on the Lessor's ability to sell the Warehouse Receipts upon a bona fide default by the Lessee under the lease agreement (the foregoing arrangement being collectively, the "Financial Transaction"). Capitalized terms used herein without definition shall have the same meaning ascribed to such terms in KRS 241 to 244.

Definitions

"Barrel" shall mean a 53 gallon oak barrel.

"Capital Lease Agreement" is a financial transaction whereby the Lessor has agreed that the ownership of the Equipment will be transferred to the Lessee when the lease period is over in exchange for periodic payments.

"Distributor" shall be defined pursuant to KRS 244.604(1).

"Equipment" shall mean both the Barrel and the Distilled Spirits within the Barrel. The ownership of the Equipment would be evidenced by a Warehouse Receipt.

"Financial Transaction" shall mean financing the Equipment through a Capital Lease Agreement.

"Lessee" shall mean the party receiving the leased Equipment, who has the option to purchase the Equipment for a nominal amount at the end of the lease.

"Lessor" shall mean the owner of the leased Equipment.

"Warehouse Receipt" shall mean a type of documentation used to evidence ownership of a particular commodity stored within an approved facility.

"Wholesaler" shall be defined in 804 KAR 4:015 Section 1(4).

Background Information – Financial Transaction

H&A, as Lessor, seeks to enter into a Capital Lease Agreement in which it will lease Equipment to the Lessor in exchange for periodic payments. The Equipment will be stored at a licensed Distillery pursuant to a Barrel Storage Agreement, and the Lessor will maintain ownership of the Equipment until the end of the lease. The Warehouse Receipt will be held by the Lessor until the purchase of the Equipment by the Lessee at the end of the lease. The Lessor may sell the Capital Lease Agreement to a bank or other financial institution in which case the bank or financial institution will be the Lessor and the Warehouse Receipt will be amended to reflect this new ownership.

If the Lessee defaults under the terms of the Capital Lease Agreement, the Lessor intends to sell the Equipment to a third-party under the terms of the Agreement.

The Lessor's activities will be limited to financing and it will not engage in the manufacture, storage, sale, purchase, or transport of the Equipment. However, if there is a default, it will sell the Equipment to recover the purchase price plus fees and costs in accordance with the Capital Lease Agreement.

The sale and delivery of Warehouse Receipts may be made at wholesale and from licensed premises only by licensed distillers, rectifiers and wineries. Although Kentucky law does not prohibit the purchase or sale of Warehouse Receipts by any person, Kentucky law does not authorize the owner of a Warehouse Receipt to accept delivery of any Distilled Spirits unless the owner is a person who is permitted by law (licensed distillers, rectifies and wineries) to receive the Distilled Spirits. Therefore, the right to take possession of a bourbon barrel is severely limited.

Advisory Opinion

It is respectfully requested that the ABC staff concur in the following views in connection with the Financial Transaction:

1. On the basis of the facts above, would the ABC staff concur that the Lessor's (unlicensed) conduct does not violate KRS 243.020(1)?
2. On the basis of the facts above, would the Lessor fall within the definition of a "Distributor" under KRS 244.604(1)?
3. On the basis of the facts above, would the Lessor fall within the definition of a "Wholesaler" under 804 KAR 4:015 Section 1(4)?
4. On the basis of the facts above, would the ABC staff concur that the Lessor's conduct does not violate KRS 244.240(1)?
5. On the basis of the facts above, would the ABC staff concur that the Lessor does not require to be Licensed under KRS 241 to 244?
6. On the basis of the facts above, would the ABC staff concur that the Lessor is not prohibited from selling the Equipment to a third party upon a bona fide default under the Capital Lease Agreement?

Relevant Authority

KRS 243.020(1)

KRS 244.240(1)

KRS 244.604(1)

804 KAR 4:015 Section 1(4)

We would appreciate your prompt consideration of these matters. If for any reason you feel that you are unable to recommend "no-action," we request the opportunity to discuss the issues described herein prior to your issuance of an official response.

If you should have any questions in connection with this letter, please do not hesitate to contact me at (859) 509-0194.

Regards,

Jason L Hargadon

Jason Hargadon