BEAMAN BOTTLING COMPANY, Plaintiff/Appellant, v. JOE B. HUDDLESTON, as Commissioner of Revenue for the State of Tennessee, Defendant/Appellee.	)))))))))	Appeal No. 01-A-01-9512-CH-00567 Davidson Chancery No. 93-1979-III

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Appellate Court Clerk

COURT OF APPEALS OF TENNESSEE

MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CHANCERY COURT FOR DAVIDSON COUNTY

AT NASHVILLE, TENNESSEE

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AFFIRMED AND REMANDED

SAMUEL L. LEWIS, JUDGE

OPINION

Plaintiff, Beaman Bottling Company ("Beaman"), appeals the decision of the chancery court granting summary judgment in favor of defendant, the Commissioner of Revenue for the State of Tennessee ("Commissioner"). On appeal, Beaman claims that the court erred in finding that Beaman was not exempt from the tax imposed by Tennessee Code Annotated section 67-4-402(b), the privilege tax on bottlers and manufactures of soft drinks. The facts out of which this matter arose are as follows.

Beaman is a Tennessee corporation with its principle place of business in Nashville, Tennessee. Beaman manufactures, purchases, sells, and distributes soft drinks. It manufactures soft drinks at its facility in Nashville, Tennessee and stores the product in a warehouse at the facility. It trucks soft drinks directly to its customers from the warehouse. Beaman charges one price to bottlers who purchase in high volume and another price to wholesale customers such as Kroger and other grocery outlets. Beaman calculates the bottlers' price for the soft drinks it manufacturers by adding together the manufacturing costs (ingredients, container, closure or cap, and packaging), manufacturing overhead (labor, equipment costs, administrative expense), and profit. The wholesalers' price is higher than the bottlers' price because Beaman takes into account its distribution costs and profit from sales activity.

In July 1993, Beaman filed suit to obtain a partial refund of the taxes it had paid to the Tennessee Department of Revenue pursuant to Tennessee Code Annotated section 67-4-402(b) for the period of July 1989 to June 1991. Beaman claimed that the statute entitled it to a refund of $711,538.88. In June 1994, Beaman filed

a motion for summary judgment. Following oral argument, the court denied Beaman's motion and held that the statute did not entitle it to a refund. The court dismissed the complaint in September 1995, and Beaman filed a timely notice of appeal.

Beaman has presented two issues. The first is "[w]hether the separate distribution business of a soft drink manufacturer is an 'incidental business' for purposes of Tenn. Code Ann. § 67-4-301," and the second is "[w]hether Tennessee's gross-receipt tax on the privilege of manufacturing soft drinks should include taxes on the separate distribution operation of a soft drink manufacturer?"

We discuss these issues together. Tennessee Code Annotated section 67-4-402(b) imposes the "bottlers and manufacturers of soft drink" tax. That section provides as follows:

> IMPOSITION OF TAX. A person manufacturing or producing and selling within this state any bottled soft drinks and a person importing or causing to be imported bottled soft drinks into this state from outside the state and selling such imported bottled soft drinks within this state shall, for the privilege of engaging in such business, pay to the state for state purposes an amount equal to one and nine-tenths percent (1.9%) of the person's gross receipts derived from such business.

Tenn. Code Ann. § 67-4-402(b)(Supp. 1995). "Such business" for the purpose of determining Beaman's tax liability refers to the business of manufacturing and *selling* bottled soft drinks. Another section defines the term "gross receipts" as follows:

> "Gross receipts," for the purposes of taxes administered under this part, means total receipts before anything is deducted, but does not include receipts from incidental business when such incidental business, if separately carried on, would not be subject to a tax measured by gross receipts under the provisions of this part, part number 2, or parts 4-6 of this chapter . . . .

Id. § 67-4-301(3)(A)(1994). An incidental business is a "business carried on separately and not a part of the business made the subject of privilege taxation. ***Id.*** § 67-4-301(5). Pursuant to

these sections, the gross receipts derived from the business of manufacturing and selling bottled soft drinks is subject to taxation. ***Id.*** 67-4-402(b). That portion of a taxpayer's gross receipts that is derived from an incidental business is exempted from such taxation. ***Id.*** § 67-4-301(3)(A) (1994). It is this exemption that Beaman claims.

The record is clear that Beaman has engaged in the privilege of manufacturing and selling bottled soft drinks within the State of Tennessee. Therefore, Beaman is subject to the privilege tax. Its tax obligation is measured by the gross receipts derived from the business of manufacturing and selling. The gross receipts are its total receipts before anything is deducted.

Beaman argues that its manufacturing business is entirely separate from its distribution business. In support of this argument, Beaman states that its manufacturing and distribution businesses have different employees, equipment, compensation arrangements, and separate pricing structures to account for their different costs. When Beaman sells bottled soft drinks to large customers who do not require distribution, the sale price does not include any distribution expenses, but when it sells soft drinks to Kroger, Red Foods, Giant Foods, or other retailers who require distribution, the sale price includes distribution costs. Beaman argues that because it conducts a distribution business which is separate from its manufacturing and selling business the distribution business is an "incidental business" under section 67-4-301(5) and is exempt from the privilege tax. Thus, Beaman contends that the cost of its distribution business should be deducted from the gross receipts derived from the sale of its soft drinks before the Commissioner calculates Beaman's tax liability.

We think the statute is clear that Beaman's tax base is its gross receipts derived from the sale of the soft drinks it manufactures before *anything is deducted*. Beaman's arguments are premised on a slippery foundation. It argues that Tennessee Code Annotated section 67-4-402(b) taxes only the manufacturing of bottled soft drinks and that anything not a part of the manufacturing process is not subject to taxation. However, the statute is clear that the taxable privilege is the manufacture and *sale* of bottled soft drinks. To merely manufacture soft drinks does not give rise to a taxable event. That is, there is no tax due under the statute until the soft drink is both manufactured and sold.

Beaman ignores the part of the statute that includes the *selling* of bottled soft drinks as a part of the taxable privilege. Beaman would have this court disregard the sale part of the taxable privilege and end the taxable event when the soft drinks are manufactured and bottled. Such an interpretation ignores the plain wording of the statute. The taxable event is defined as engaging in the privilege of manufacturing and *selling* bottled soft drinks within the State of Tennessee. Tenn. Code Ann. § 67-4-402(b)(Supp. 1995).

Beaman relied primarily on ***Kroger Co. v. Tollett***, 608 S.W.2d 846 (Tenn. 1980); however, we are the opinion that its reliance is misplaced. Kroger, unlike Beaman, was not a bottler or a manufacturer. Kroger purchased soft drinks from a foreign manufacturer and imported them into Tennessee. Kroger then resold the soft drinks. ***Id.*** at 847. Kroger was only a distributor of soft drinks manufactured by someone else. Kroger was, however, subject to the privilege tax because it engaged in the privilege of importing and selling soft drinks. The statute imposed the tax on

Kroger instead of the manufacturer who was beyond Tennessee's reach and had not paid the tax. ***Id.*** at 848.

The issue in ***Kroger*** was whether the Commissioner should calculate the tax due based on Kroger's gross receipts from the sale of the soft drinks or by the manufacturer's gross receipts, i.e., Kroger's cost. ***Id.*** Our supreme court held that the state measured the bottler's tax by the gross receipts of the manufacture and sale of bottled soft drinks. This figure was the same as the price Kroger paid for the soft drinks. Because Kroger was acting as a substitute for the bottler, it was liable for the tax. ***Id.*** The only possible application of ***Kroger*** to the instant case is the holding that the Commissioner determines the amount of the tax based on the manufacturer's gross receipts.

Beaman has the difficult burden of proving entitlement to an exemption. It is a burden that neither the facts of this case nor the law will allow Beaman to meet. Tax exemption statutes "must be construed strictly against the taxpayer with the taxpayer bearing the burden of proving entitlement to the exemption." ***Jersey Miniere Zinc Co. v. Jackson***, 774 S.W.2d 928, 930 (Tenn. 1989). Beaman has the burden of establishing that its operations meet the requirements of the statutory definition of incidental business. ***Id.; Shearin v. Woods***, 597 S.W.2d 895, 896 (Tenn. 1980).

> [I]n a suit against the state by a taxpayer claiming an exemption from taxation the burden is on the taxpayer to establish [the] exemption; every presumption is against it and a well-founded doubt is fatal to the claim.

Woods v. General Oils, Inc., 558 S.W.2d 433, 435 (Tenn. 1977).

This provision is an exemption rather than a tax imposing statute as Beaman argues. The statute does not impose on the Commissioner the burden to prove the negative, i.e., that these

receipts are not from an incidental business. If this argument were true, it would create, in effect, a presumption in favor of the taxpayer which would nullify the underlying privilege tax statutes to which the provision applies. We find nothing in the statute to support this argument. The burden is on Beaman to prove that its distribution operation is an incidental business as defined in section 67-4-301(5). If Beaman fails in that effort, its gross receipts are subject to taxation.

Beaman cannot show that a portion of its gross sale receipts is exempt as receipts from an incidental business. "'Incidental business' means a business carried on separately and not a part of the business made the subject of privilege taxation." Tenn. Code Ann. § 67-4-301(5)(1994). Nothing in this record supports Beaman's conclusion that it is conducting a separate distribution business and that such business is not a part of the business of selling the soft drinks it manufactures. We find nothing in the record that specifically identifies those activities Beaman contends are included in the separate distribution business.

The taxable privilege includes manufacturing, selling, and, by necessity, distribution. The record shows that the distribution business is nothing more than Beaman's delivery of its product to a customer as part of the sale. For example, Beaman manufactures soft drinks, sells the soft drinks, and trucks the soft drinks to its customers, that is, distributes the soft drinks. These activities are conducted by the same corporation albeit by different employees.

We have found no decision nor has Beaman cited a decision that provides any guidance on the proper interpretation of "incidental business" as set forth in section 67-4-301(5). However, we are of the opinion that Beaman's analysis is contrary

to the plain language of the statute. The mere fact that Beaman does not use its delivery trucks during the bottling process or that its truck drivers do not operate its bottling machines does not make the distribution of the final product "a business carried on separately and not a part of the business" of manufacturing and selling soft drinks. We are of the opinion that the delivery of the final product is an integral part of the business of manufacturing and selling bottled soft drinks, and as such, it is not an "incidental business."

Beaman also argues that the statute violates the Equal Protection Clause of the United States Constitution. We are of the opinion that the tax imposes an equal burden on similarly situated persons. Moreover, Beaman's equal protection argument is not properly before this court because Beaman did not raise it in its complaint nor in the court below. ***See Irvin v. Binkley***, 577 S.W.2d 677, 679 (Tenn. App. 1978). Nevertheless, even if Beaman had properly raised the claim, it has no merit.

"The test must be whether the statute rests on a reasonable basis and it will not be held discriminatory if there is any possible reason or justification for its passage." ***Genesco, Inc. v. Woods***, 578 S.W.2d 639, 641 (Tenn. 1979)(citation omitted). "'[T]he burden of showing that a classification is unreasonable and arbitrary is placed upon the individual challenging the statute; and if any state of facts can reasonably be conceived to justify the classification or if the unreasonableness of the class is fairly debatable, the statute must be upheld.'" ***Bates v. Alexander***, 749 S.W.2d 742, 743 (Tenn. 1988)(quoting ***Harrison v. Schrader***, 569 S.W.2d 822, 826 (Tenn. 1978)). "Legislation may impose special burdens upon defined classes in order to achieve permissible ends." ***Rinaldi v. Yeager***, 384 U.S. 305, 309, 86 S. Ct.

1497, 1499, 16 L. Ed. 2d 577, 580 (1966); ***Genesco***, 578 S.W.2d at 641. "[T]he Equal Protection Clause does not require absolute equality or precisely equal advantages." ***San Antonio Indep. School Dist. v. Rodriguez,*** 411 U.S. 1, 24, 93 S. Ct. 1278, 1291, 36 L. Ed. 2d 16, 37 (1973); ***Genesco***, 578 S.W.2d at 641. The constitution requires only that there be "some relevance to the purpose for which the classification is made." ***Baxstrom v. Herold***, 383 U.S. 107, 111, 86 S. Ct. 760, 763, 15 L. Ed. 2d 620, 624 (1966); ***Genesco***, 578 S.W.2d at 641. Therefore, Beaman must satisfy a very difficult burden in order to prove that the tax statute violates the equal protection clause.

Here, the statute imposes an equal burden on all manufacturers and all importers of bottled soft drinks. The tax is imposed at the rate of 1.9%. The tax base is the gross receipts derived by the manufacturer from the sale in Tennessee of soft drinks it manufactures. The tax is imposed on the manufacturer whether it is located in Tennessee or elsewhere. The tax is imposed on an importer as a substitute payor for the manufacturer from whom it purchases soft drinks when the manufacturer is beyond the reach of Tennessee's taxing jurisdiction or when the manufacturer has not voluntarily paid the tax. Tenn. Code Ann. § 67-4-402(b)(Supp. 1995). In either event, the tax is measured by the manufacturer's gross receipts.

Here, Beaman is taxed because it manufactures and sells soft drinks. Beaman contends that it is unfairly taxed because its distribution costs are included in its tax base whereas the distribution costs of an importer are not included in the importer's tax base. We think, as the Commissioner points out, Beaman is comparing apples and oranges. Beaman's tax base is its gross receipts from the sale of its soft drinks no matter what

costs are recovered in its sales price because it is the manufacturer. An importer's tax obligation is measured by its acquisition costs for the soft drinks, not by its receipts from their sale. The importer's cost of doing business, other than the price it pays for the soft drinks, is irrelevant for purposes of calculating its tax debt. An importer's tax base is calculated by exactly the same measure as its manufacturer's tax base, that is, by the manufacturer's gross receipts.

Here, Beaman is a manufacturer. It is not merely a distributor of soft drinks bottled by someone else. Beaman does distribute soft drinks bottled by others but those sales are not the subject of this case. Beaman is not being taxed because it distributes soft drinks. It is being taxed because it manufactures and sells the soft drinks it is distributing.

Therefore, we hold that Beaman is not entitled to deduct its distribution costs from its gross receipts prior to calculating its tax obligation. The judgment of the trial court is affirmed, and the cause is remanded to the trial court for further necessary proceedings. Costs on appeal are taxed to the plaintiff/appellant, Beaman Bottling Company.

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SAMUEL L. LEWIS, JUDGE

CONCUR:

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HENRY F. TODD, P.J., M.S.

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WILLIAM C. KOCH, JR., J.