

[CORPORATE BEVERAGE DISTRIBUTOR],

Petitioner

v.

DECISION

MAINE REVENUE SERVICES,

Respondent

### I. Background

[Corporate Beverage Distributor] (hereinafter [the “Distributor”]) appeals from Maine Revenue Services’ (“MRS’s”) decision on reconsideration dated [date], which upheld an assessment of abandoned beverage container deposits against it, including interest and penalties, for a total amount of \$[amount]. The Appeals Office held an appeals conference in this matter on [date] . . . .

The issues raised by [the Distributor] on appeal are: (1) whether the beverage container deposit statute, 32 M.R.S. §§ 1861–1873, as applied in this case, is unconstitutional; (2) whether [the Distributor] is not liable for the assessed abandoned deposits [on the ground that] it has already reported those amounts as income and paid Maine and federal income taxes on them; (3) whether MRS can assess interest and penalties on abandoned deposits pursuant to 36 M.R.S. §§ 186 and 187-B . . . ; (4) whether the amount of abandoned deposits, interest, and penalties assessed against [the Distributor] for the period [year 1] through [year 4] is incorrect; and (5) whether the assessed penalties and interest should be waived or abated. [The Distributor] has the burden of proof to show that it is not liable for the amounts assessed against it. 36 M.R.S. § 151-D(10)(F).

This appeal is taken pursuant to 36 M.R.S. § 151-D, which is part of the general administrative provisions of Title 36 that govern taxation. The assessment at issue, however, was made pursuant to Chapter 28 of Title 32, which controls the redemption of beverage containers and is popularly known as “the bottle bill.” Because of the somewhat complex interplay of these two areas of law, some background explanation of the history and operation of the beverage container deposit and refund system created by Chapter 28 is appropriate.

[1. History of the “Bottle Bill”]

The bottle bill originally took effect on January 1, 1978, following its passage by referendum on November 2, 1976. Its purpose was to address and remedy the problem of large numbers of empty disposable beverage containers littering the roadsides and causing costly additional waste to be placed in the municipal waste stream.<sup>1</sup> It was designed to accomplish those purposes by providing an incentive for consumers to return empty beverage containers to beverage retailers rather than throw them away.<sup>2</sup> To create that incentive, the bottle bill required that every beverage manufacturer or distributor doing business in Maine charge the retailers they supplied a minimum deposit amount for each nonrefillable beverage container.<sup>3</sup> A beverage manufacturer or distributor required to charge a deposit is called an “Initiator of Deposit” (hereinafter “IOD”).<sup>4</sup> The beverage retailers, in turn, then recouped the deposit paid to the IOD by charging that same amount to their customers, the ultimate consumers of the beverages.

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<sup>1</sup> See 32 M.R.S. § 1861(1).

<sup>2</sup> See 32 M.R.S. § 1861(2).

<sup>3</sup> See 32 M.R.S. § 1863-A.

<sup>4</sup> The term “Initiator of Deposit” is defined as “a manufacturer, distributor or other person who initiates a deposit on a beverage container under section 1863-A.” *Id.* § 1862(8-A).

In theory, once the beverage was consumed, the consumer returned the empty beverage container to the retailer or a beverage container redemption center and received a refund of the deposit amount. The IODs picked up the empty containers from the retailers and redemption centers and reimbursed them for the deposit refunds they had paid out to the consumers who returned the containers, together with a statutorily mandated handling fee. The IODs then sold the empty containers to recyclers, thus diverting the returned containers from Maine's municipal waste stream. In practice, not all empty beverage containers were returned for a deposit refund. Thus, the IODs paid out less in deposit refunds than they took in. As originally enacted, the bottle bill did not address the ownership of the deposits on unreturned beverage containers. In the absence of any statutory provision regarding ownership of unclaimed deposits, the IODs retained them, treating any surplus deposit amounts as business income.

In 1991, the Legislature amended the statute to require IODs to place their beverage deposit receipts in a separate deposit transaction fund which was to be held in trust for the purchaser of the beverage or the State of Maine.<sup>5</sup> The 1991 amendments provided that any beverage deposit held by an IOD for more than 60 days was presumed abandoned by the consumer and that it became the property of the State of Maine.<sup>6</sup> IODs were required to file a quarterly report to the State of Maine of all transactions affecting their deposit transaction funds and to make payment to the State of 50% of all unclaimed deposits. If in a particular quarter the refund amount paid by an IOD to retailers or redemption centers exceeded the amount in the IOD's deposit transaction fund, the State of Maine would pay the difference to the IOD.

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<sup>5</sup> P.L. 1991, ch. 591, § R-3 (effective July 1, 1991) enacting 32 M.R.S. § 1866(7).

<sup>6</sup> *Id.* § R-4 (effective July 1, 1991) enacting 32 M.R.S. § 1866-A.

In 1995, the Legislature repealed the abandoned deposit reporting and payment requirements of the statute, once again allowing IODs to retain any unclaimed deposits.<sup>7</sup> Then, in 2003, the Legislature amended the bottle bill to: (1) increase the handling fee paid to retailers and redemption centers; (2) authorize beverage manufacturers and distributors to enter into commingling agreements (described below); (3) restore a limited version of the abandoned deposit reporting and payment provisions repealed in 1995, but require monthly, rather than quarterly, reporting to the assessor “in a form prescribed by the [State Tax] Assessor” 32 M.R.S. § 1866-E(2); and (4) make MRS responsible for administering and enforcing the abandoned deposit reporting and payment provisions.<sup>8</sup>

The 2003 revision of the law defined a “commingling agreement” as “an agreement between 2 or more initiators of deposit allowing the beverage containers for which they have initiated deposits to be commingled by dealers and redemption centers, as described in section 1866-D.” 32 M.R.S. § 1862(2-A). Commingling agreements improve the efficiency of the beverage container redemption system by eliminating the sorting of containers by IODs and allowing redemption centers to automate the sorting process. Without a commingling agreement, empty containers must be sorted not only by material (i.e., glass, aluminum, etc.) and product group, but also by IOD. With a commingling agreement, empty beverage containers from any one of the IODs that are parties to the agreement may be returned to any IOD belonging to the agreement, thus reducing the number of necessary sorts and allowing retailers and redemption centers to automate the sorting process. The greater the number of any particular beverage container covered by a commingling agreement, the greater the gain in efficiency of the redemption process.

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<sup>7</sup> P.L. 1995, ch. 395, §§ P-1 – P-3 (effective December 31, 1995).

<sup>8</sup> P.L. 2003, ch. 499 (effective September 13, 2003).

In addition to authorizing IODs to enter into commingling agreements, the 2003 revisions both reinstated the requirement that IODs report and pay abandoned deposits to the State, and provided that “[t]he [reporting and payment of abandoned deposits] provisions of this section apply only to those beverage containers that are not subject to a commingling agreement pursuant to section 1866-D.” 32 M.R.S. § 1866-E. The same amendments also both increased the handling fee paid to dealers and redemption centers by 1/2¢ per container which is mandated by section 1866(4), and allowed IODs that entered into a “qualified” commingling agreement to reduce the mandated handling fee such IODs must “pay the dealer or redemption center . . . by 1/2¢ for any returned container . . .” 32 M.R.S. § 1866(4)(C). A commingling agreement is “qualified” for the purposes of paragraph C of section 1866(4) if “the department [of Agriculture] determines that 50% or more of the beverage containers of like product group, material and size for which deposits are being initiated in the State are covered by the commingling agreement.” *Id.* The combined result of these changes was to provide incentives for IODs to enter into commingling agreements as authorized by the statute.

At the following legislative session, the Legislature enacted additional enforcement and phase-in provisions. The enforcement changes were that: (1) monthly abandoned deposit reports must be treated as tax returns under Title 36; (2) abandoned deposit amounts collected by the [State Tax] Assessor must be treated as a tax; and (3) the tax administration provisions of chapter 7 of Title 36 apply to administration of abandoned deposit reports and payments. A phase-in provision was also added to extend the time to July 1, 2004, for IODs to obtain a determination by the Department of Agriculture that a commingling agreement was “qualified” for purposes of 32 M.R.S. § 1866(4)(C).<sup>9</sup>

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<sup>9</sup> See P.L. 2003, ch. 700, §§ 2, 3, and 4 (emergency, effective May 11, 2004).

## II. Facts

[The Distributor] was originally created as a limited liability company on [date], and subsequently converted to a corporation on [date]. It has been in the beverage distribution business in Maine since [date], selling beverages at wholesale to restaurants and retail stores. As a beverage distributor, [the Distributor] was an IOD subject to the requirements of Maine's beverage container deposit statute. In addition, not having entered into a commingling agreement, it was also required to file monthly IOD returns and pay over abandoned deposits to MRS pursuant to 32 M.R.S. § 1866-E.

In [year 1], MRS informed [the Distributor] that it was required to file monthly IOD returns unless it was a party to a commingling agreement. In December of [year 1], [the Distributor] filed its first IOD return. That return incorrectly reported and paid to MRS abandoned deposits in the amount of \$[amount]. In January of [year 2], [the Distributor] received a notice from MRS informing it that it had incorrectly completed the IOD return and made an overpayment of [abandoned deposits].

As a result of receiving that notice, [the Distributor's Representative] called MRS and spoke with an MRS employee. That employee assisted [the Representative], over the telephone, in filling out a corrected IOD return, going through the return line by line. [According to the Distributor's Representative,] . . . MRS would not refund [the Distributor's] overpayment, but would instead credit the overpayment against any future abandoned deposit payments due from [the Distributor].<sup>10</sup>

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<sup>10</sup> A state agency may not refund overpayments of tax except pursuant to specific statutory authorization. *See Drummond v. Maine Employment Sec. Com.*, 157 Me. 404, 173 A.2d 353 (1961). MRS is authorized to reimburse IODs only in restricted circumstances that do not apply to the overpayment in this case. *See* 32 M.R.S. § 1866-E(5)

[The Distributor's Representative] contends that the MRS employee never advised that [the Distributor's] returns had to be filed using the IOD return form prescribed by MRS. [The Representative] does not remember whether, during [year 2] and [year 3], [the Distributor] filed its returns on MRS's IOD return forms or used a spreadsheet reporting what were believed to be the relevant numbers. In addition, [the Representative] states that during [year 2] and [year 3], if [the Distributor's Representative] determined that no payment was due MRS that particular month, [the Distributor] often did not file a return. Finally, prior to [year 3], [the Distributor] included the statutory handling fee it paid to retailers and redemption centers in the refund amounts it reported as paid from its deposit transaction fund, resulting in [the Distributor] underreporting and underpaying any abandoned deposit amounts due MRS.<sup>11</sup>

By sworn affidavit, [the Distributor's Representative] testified that [the Distributor] had identified and wished to join a certain "qualified" commingling agreement [(the "Commingling Group" or the "Group")], but had not been able to contact anyone with the [Group]. . . . While attending a public hearing on a bill to allow certain distributors who enter into a commingling agreement to pay the same reduced handling fee as those IODs that were parties to a "qualified" commingling agreement,<sup>12</sup> [the Distributor's Representative] spoke with the [Commingling Group's] legislative representative. According to [the Distributor's Representative], the [Commingling Group's] representative advised that the proposed revision to paragraph C of section 1866(4) was unnecessary because [the Distributor] and any other small beverage distributor could join the existing "qualified" commingling agreement. [The Distributor's

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<sup>11</sup> Since "[a]mounts in the [deposit transaction] fund may not be used to pay the handling fees required by this chapter," they were not includible on the monthly report of transactions affecting IOD's deposit transaction fund. *Id.* § 1866-E(1).

<sup>12</sup> That revision to paragraph C of section 1866(4) was enacted. *See* P. L. 2011, ch. 429, § 2 (effective July 1, 2012).

Representative] says that when asked how much it would cost [the Distributor] to join the commingling agreement, the [Group's] representative advised that the cost was "whatever amount [the Distributor] could not afford to pay."

In February [year 4], [the Distributor's Representative] spoke with an MRS employee who worked with him to correct all of Distributor's previously filed returns. The result was a determination that beginning with the month of December [year 2], [the Distributor] owed, but did not remit, payment of various abandoned deposit amounts to the State of Maine. MRS credited [the Distributor's] earlier overpayment against its liability beginning with December [year 2]. Its overpayment credit was exhausted in March [year 3], resulting in an unpaid abandoned deposit balance due MRS for that month.

MRS then issued 15 monthly assessments against [the Distributor], [including] failure-to-file and failure-to-pay penalties. MRS has admitted that, of the 15 monthly assessments issued by it, 4 contained errors [attributable to unrecognized] overpayment credits.

Although [the Distributor] essentially agreed with the amounts MRS determined the corrected returns would have reported as due,<sup>13</sup> it has neither made payment of those amounts, nor made an arrangement with MRS to pay those amounts. Rather, it disputes its liability for those amounts and the related interest and penalties that were assessed against it.

Following issuance of the assessments at issue, [the Distributor] paid two bills, from the company it contracts with to pick up its empty containers, for refunded deposits in the amounts of \$[refunded deposit 1] and \$[refunded deposit 2]. MRS agrees that these payments are for the period at issue and should be considered in calculating [the Distributor's] abandoned deposit liability.

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<sup>13</sup> Its disagreement concerned rounding of amounts.



### III. Law and Analysis

#### 1. Constitutionality of the beverage container deposit statute.

[The Distributor's] primary argument on appeal is that the statute's commingling and abandoned deposit reporting and payment provisions, as applied to it, violated its equal protection and due process rights under the United States and Maine Constitutions. There are, generally, three types of equal protection claims. The first type is that a statute is discriminatory on its face. The second type is that the neutral application of a facially neutral statute results in a disparate impact. The third type is unequal application of a facially neutral statute.

[The Distributor's] equal protection claim falls into the third type listed. It reasons that: (1) section 1866(4)(C)'s definition of a "qualified" commingling agreement as an agreement which covers at least 50% of a particular type of beverage container sold in Maine allows for no more than one "qualified" commingling agreement covering beverage containers; (2) by allowing for only one "qualified" commingling agreement the law creates two classes of IODs: those that are parties to the "qualified" commingling agreement and those that are not; (3) the IODs that were parties to the existing "qualified" commingling agreement for beverage containers refused to allow [the Distributor] to become a party to that agreement (despite the fact the statute requires the parties to allow any other IOD to join the agreement upon the same terms as the original parties to the agreement, thus making the statute facially neutral);<sup>14</sup> (4) the denial of its request to become a party to the "qualified" commingling agreement resulted in [the Distributor] remaining subject to the law's abandoned deposit reporting and payment provisions, as well as requiring it to pay the increased statutory handling fee, while the IODs in the

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<sup>14</sup> "An initiator of deposit that enters into a commingling agreement pursuant to this section shall permit any other initiator of deposit to become a party to that agreement on the same terms and conditions as the original agreement." 32 M.R.S. § 1866-D

[Commingling Group] were neither required to report nor pay over abandoned deposits nor were they required to pay the increased handling fee; and therefore (5) the statute, as applied to [the Distributor], is unconstitutional by denying it the equal protection of the law.

As the United States Supreme Court has held, the unlawful application “of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.” *Snowden v. Hughes*, 321 U.S. 1, 8, 88 L.Ed. 497, 503, 64 S. Ct, 397, 401 (1944). Therefore, to succeed in its claim that the parties to the “qualified” commingling agreement, by denying [the Distributor] admission to the agreement in violation of section 1866-D, violated its right to equal protection under the law, [the Distributor] must prove: (1) that it applied to join the “qualified” commingling agreement; (2) the parties to the agreement, in violation of section 1866-D, denied its application; and (3) that they did so with discriminatory intent.

A similar equal protection claim was considered by the Maine Law Court in *Cottle Enterprises, Inc. v. Town of Farmington*, 1997 ME 78, 693 A.2d 330. The *Cottle* case involved a real estate development company, Cottle, which claimed that the Town of Farmington violated its equal protection rights because the Town, pursuant to a sewer hookup moratorium, would not allow it more than 2 sewer hook-up permits per year, but granted 25 sewer hook-up permits per year to the subsequent owner of the development property. The Law Court rejected Cottle’s argument, because “the Town never denied Cottle anything because it did not apply to the Town for [any of] the necessary sewer hook-up permits,” and because “Cottle does not allege, much less demonstrate, that the purported disparate treatment was intentional.” *Id.* ¶ 17.

[The Distributor's] equal protection claim fails for the same reason the plaintiff's claim failed in *Cottle*. It has not shown that it ever actually applied for admission to the "qualified" commingling agreement. [The Distributor's Representative's] testimony that [the Distributor] was unable to contact the [Commingling Group] to request admission to the commingling agreement constitutes neither an application to become a party to the agreement, nor a denial of such an application. The fact that the [Commingling Group's] legislative representative at a public hearing represented that the cost for [the Distributor] to join the existing "qualified" commingling agreement was "whatever amount [the Distributor] could not afford to pay" also constitutes neither an application to join the commingling agreement, nor a denial of such an application. [The Distributor] has not presented any evidence to show that the [Group's] legislative representative possessed the power or authority to determine whether [the Distributor] could join the agreement. Thus, we find that [the Distributor] never made an actual application to join the [Commingling Group].

Likewise, because there was no application, there was no showing of intentional discrimination by denying that application. The burden of proving intentional discrimination in the application of the statute is a heavy one that requires greater proof than a report of a casual conversation. *See B & B Coastal Enters. Inc. v. Demers*, 276 F. Supp. 2d 155, 171 (D. Me. 2003) (characterizing the burden of proving intentional discrimination in equal protection cases as "onerous").

[The Distributor's] argument that the 2003 amendments to the bottle bill violated its due process rights fails for the same reason as its equal protection claim. Because [the Distributor] failed to show that it ever applied for admission to the "qualified" commingling agreement, it has not shown any violation of its due process rights.

2. [The Distributor's] liability for abandoned deposits.

[The Distributor's] next argument is that it is not liable for the assessed abandoned deposits because it has already paid taxes on the abandoned deposits by claiming the abandoned deposits as income on its federal and state income tax returns.

The deposits at issue are charged and collected solely because the law requires it. Property rights in the deposits are thus determined in accordance with the statute requiring them.<sup>15</sup> Beverage container deposits are not part of the consideration paid by the purchaser to the seller for the beverage. The law explicitly provides that all deposit amounts received by an IOD that is not a party to a commingling agreement are held by the IOD “on behalf of consumers who have purchased products in refundable nonrefillable beverage containers and on behalf of the State . . . [and] amounts in the fund *may not be regarded as income of the initiator.*” 32 M.R.S. § 1866-E(1) (emphasis added). Therefore, the deposits do not become the property of the seller by virtue of the sale of the beverage.

Contrary to [the Distributor's] assertion that the language of section 1866-E(1) suggests that abandoned deposits may be income under subsections 3 and 4, those subsections provide that only the *interest* earned on deposits held in the deposit transaction fund may be considered income. The deposits themselves are, as the plain language of section 1866-E(1) clearly states,<sup>16</sup> not income of the IOD. The erroneous retention and payment of Maine and federal income tax on those deposits neither offsets the IOD's liability for abandoned deposits, nor does it exempt the IOD from application of the statute's abandoned deposit reporting and payment provisions.

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<sup>15</sup> See *Massachusetts Wholesalers of Malt Beverages, Inc. v. Commonwealth*, 414 Mass. 411, 415-16, 609 N.E.2d 67, 69-70 (1993) (holding that since no deposit was charged prior to enactment of bottle bill, any property rights in deposits are governed by bottle bill and thus the amendment to require payment of abandoned deposits to the Commonwealth did not effect a taking of a beverage distributor's property.)

<sup>16</sup> “[A]mounts in the fund may not be regarded as income of the initiator . . . .” 32 M.R.S. § 1866-E(1).

Any correction of a possible overpayment of Maine and federal income tax should be made by filing amended returns seeking a refund of the overpayment amount.

3. MRS' power to assess penalties and interest pursuant to Title 36.

The next issue raised by [the Distributor] is whether MRS improperly assessed interest and penalties against it pursuant to Title 36,<sup>17</sup> as it contends that abandoned deposits are neither a tax as defined by 36 M.R.S. § 111(5), nor income, a fee, a fine, a debt, or a penalty owed to the State, and therefore not subject to the interest and penalty provisions of Title 36.

The bottle bill, in Title 32, section 1866-E, however, provides that all abandoned deposit “[a]mounts collected by the assessor pursuant to this subsection *must be treated by the assessor as a tax*, as that term is defined by Title 36, section 111, subsection 5 . . . .” *Id.* § 1866-E(4) (emphasis added). In addition, [Maine tax law] defines the term “tax” as including not only “the total amount required to be paid , withheld and paid over or collected and paid over with respect to estimated or actual tax liability under this Title[,] . . . [but] also means *any fee, fine, penalty or other debt owed to the State provided for by law* if that fee, fine penalty or other debt is *subject to collection by the assessor pursuant to statute . . . .*” 36 M.R.S. § 111(5) (emphasis added). Because abandoned deposits are clearly a debt owed to the State, and collectible by the assessor, the Board concludes, contrary to [the Distributor’s] assertion, that abandoned deposits are a tax, as broadly defined in section 111(5).

Finally, [Maine’s bottle bill law] explicitly provides that “[t]he uniform tax administration provisions of Title 36, chapter 7 [(including the interest and failure to file and

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<sup>17</sup> Distributor also alleges that since the abandoned deposits are not a tax, its due process rights have somehow been violated, without ever clearly articulating how this may have occurred. Distributor was given reconsideration of the assessments by MRS and has been afforded this *de novo* appeal of MRS’s decision on reconsideration. Consequently, Distributor has not met its burden of proof to show any due process violation.

failure to pay penalty provisions)] apply to the State Tax Assessor’s administration of the reports and payments required by this section.” 32 M.R.S. § 1866-E(5-A).

In view of the fact that Title 32: (1) specifically charges the Assessor with the duty to collect abandoned deposits; (2) requires the Assessor to treat the IODs’ monthly reports as tax returns; and (3) specifically incorporates the general administration provisions of Title 36, including imposition of penalties and interest, the Board concludes that MRS properly imposed both penalties and interest in this matter.

4. Incorrect assessment amount.

The fourth argument advanced by [the Distributor] is that the abandoned deposit, interest, and penalty amounts assessed are incorrect. [The Distributor] agreed with MRS that the assessed abandoned deposit amount correctly reflected the amounts that would have been shown as due on its returns as corrected (without conceding liability for those amounts), with minor differences due to disagreement on rounding, prior to the issuance of the assessments at issue. However, following the issuance of the assessments, [the Distributor] paid additional deposit refunds to retailers/redemption centers for the period covered by the assessment and these amounts were not considered in calculation of the amount assessed. MRS agrees that those amounts should be considered in calculation of the amount owed and has already adjusted the assessment accordingly.

5. Waiver or abatement of penalties and interest.

[The Distributor’s] fifth argument is that the Board should waive or abate the assessed failure-to-file and failure-to-pay penalties, as MRS allegedly provided it with inaccurate information resulting in its inability to complete and file accurate IOD returns. Section 187-B(7) of Title 36 requires the assessor to “waive or abate . . . [failure-to-file and failure-to-pay

penalties] if grounds constituting reasonable cause are established by the taxpayer . . . .” Section 187-B(7) also provides that “[r]easonable cause includes . . . [that t]he failure to file or pay resulted directly from erroneous information provided by [MRS] . . . .” *Id.* § 187-B(7)(A).

[The Distributor] inaccurately reported the refund values paid from its deposit transaction fund resulting in underreporting and underpayment of abandoned deposits.

. . . .

[Based on the evidence presented, it appears that [the Distributor’s Representative] inferred, because the erroneously calculated refund value amount [the Distributor] reported was accepted by MRS, that the method used to calculate it was correct. Such an inference is not “erroneous information provided by” MRS to [the Distributor]. In addition, [the Distributor] did not make its erroneous calculation of refund value in reliance upon information provided to it by MRS. Rather, [the Distributor], on its own, adopted the incorrect calculation methodology. Thus, [the Distributor] has failed to prove that its erroneous calculation of refund values “resulted directly from erroneous information provided by [MRS].”

The only erroneous information MRS may have provided [the Distributor] is the statement in its Instructional Bulletin that “[t]he Professions and Occupations Law (MRSA 32 § 1866-E) requires initiators of deposit that have not entered into a *qualified* commingling agreement to establish a Deposit Transaction Fund and file a monthly report with the State Tax Assessor.” Sales, Fuel and Special Tax Division, Instructional Bulletin, “Initiators of Deposit” p. 1 (emphasis added). While it is not entirely clear, due to section 1866-E(7)’s phase-in provision, section 1866-E appears to exempt from its provisions IODs that are a party to *any* commingling agreement, not just those IODs that are a party to a “qualified” commingling agreement. Compare the first sentence of section 1866-E which reads: “[t]he provisions of this

section apply only to those beverage containers that are not subject to a commingling agreement pursuant to section 1866-D[,]” with the final sentence of subsection 7 of section 1866-E which reads: “[o]n July 1, 2004, an [IOD] shall turn over to the State Tax Assessor the abandoned deposit amounts that have accrued since March 1, 2004 for all beverage containers that are not covered by a qualified commingling agreement, as described in section 1866, as of July 1, 2004.” 32 M.R.S. § 1866-E(7). This comparison strongly indicates that the Legislature clearly distinguished between the two types of commingling agreements, and that the phase-in provisions specifically applied only to the period between March 1, 2004, and July 1, 2004, and therefore did not effect a permanent change in the exemption created by section 1866-E.

Even if [the Distributor] derived its possibly mistaken impression that it had to be a party to a “qualified” commingling agreement in order to be exempt from section 1866-E’s reporting and payment provisions from the potentially incorrect information in MRS’s Instructional Bulletin, that conclusion should have led [the Distributor] to believe that it was required to file and pay. Thus, [the Distributor’s] failure to timely file and pay cannot have “resulted directly from erroneous information provided by” MRS.

[The Distributor] also argues that reasonable cause exists to waive or abate the assessed penalties as MRS failed to provide it with either the necessary IOD return forms, or with the information that would allow a reasonable person to locate those forms. That assertion is incorrect, as MRS apparently mailed pre-printed IOD return forms to [the Distributor] on a monthly basis which indicated the period covered by the form and the due date for filing the form with MRS.<sup>18</sup> In addition, MRS had a copy of that form available, along with directions for

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<sup>18</sup> This finding is based upon completed IOD return forms signed by [the Distributor’s Representative] and filed by IOD, which, from the information printed thereon, appear to have been pre-printed and provided to IOD by MRS on a monthly basis.



completing it, and a guidance document on the subject of abandoned deposits, posted on its website throughout the period at issue. The Board declines to waive or abate penalties on either basis.

Finally, [the Distributor] argues that interest should be waived or abated for the same reasons it argued that penalties should be waived or abated. Interest may be waived or abated only “[i]f the failure to pay a tax when required is explained to the satisfaction of the assessor . . . .” 36 M.R.S. § 186. [The Distributor’s] explanation of its failure to correctly prepare, and timely file, IOD returns does not constitute a satisfactory explanation of its failure to pay the abandoned deposits when due. In addition, although [the Distributor] has agreed with MRS on the amount its corrected returns would show as due, it has neither paid, nor made arrangements to pay, that amount. The Board declines to waive or abate interest on this basis.

#### IV. Summary of Decision

The assessments of abandoned deposits, interest, and penalties, for the period December 1, [year 2] through April 30, [year 4], are hereby upheld, after being adjusted by: (1) cancelling the penalty and interest amounts assessed for the months of December [year 2] through February [year 3], as detailed above; (2) by reducing the assessment for March [year 3] as also detailed above; and (3) by allowing credits of \$[amount] for the additional deposit refunds [the Distributor] paid as described above. The adjusted assessments, plus interest accrued through [date], resulted in a total amount then due of \$[amount].<sup>19</sup> Additional interest has accrued through the date of this decision, and [the Distributor] should contact MRS to request the updated amount due pursuant to this decision.

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<sup>19</sup> Per MRS spreadsheet submitted [date].

The Board may, in limited circumstances, reconsider its decision on any appeal. If either party wishes to request reconsideration, that party must file a written request with the Board within 20 days of receiving this decision. Contact the Appeals Office at 207-287-2864 or see the Board's rules, available at <http://www.maine.gov/boardoftaxappeals/lawsrules/>, for more information on when the Board may grant reconsideration. If no request for reconsideration is filed within 20 days of the date of this proposed decision, it will become the Board's final administrative action. If either party wishes to appeal the Board's decision in this matter to the Maine Superior Court, that party must do so within 60 days of receiving this decision. During the 60 day period in which an appeal may be filed with the Superior Court, [the Distributor] may contact Maine Revenue Services at 207-624-9725 for the amount of tax that is currently due, together with any interest or penalties owed. After that 60 day period has expired, Maine Revenue Services will contact [the Distributor] with an updated amount of tax and any interest or penalties due at that time.

Issued by the Board: May 14, 2014.