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ATTORNEY GENERAL OPINION NO. 83- 165

Thomas J. Kennedy
Director
Alcoholic Beverage Control Division
Kansas Department of Revenue
700 Jackson Street, 2nd Floor
Topeka, Kansas 66603

Re: Intoxicating Liquors and Beverages -- Licensing and Regulation of Clubs -- Eligible Parties; Limited Partnerships

Synopsis: K.S.A. 41-2623(e) requires that all the members of a partnership be individually qualified to obtain a license before the partnership itself can secure a license. However, subsection (f) of the same statute exempts stockholders of a corporation who own 5% or less of the corporate stock from any requirements. In that the limited partners of a partnership organized under K.S.A. 56-122 et seq. (the Kansas Limited Partnership Act) have the attributes of shareholders in a corporation rather than partners in a general partnership, the requirements of subsection (f) of K.S.A. 41-2623 should be applied as to such partners in the granting of a license to a limited partnership. Cited herein: K.S.A. 41-2623, 56-125, 56-126, 56-128, 56-131.

* * *

Dear Mr. Kennedy:

As Director of the Alcoholic Beverage Control Division of the Kansas Department of Revenue, you request our opinion on a question concerning the licensing of private clubs under K.S.A. 41-2601, et seq. Specifically, you inquire regarding the treatment of limited partnerships which seek a private club license under K.S.A. 41-2623. Under this statute, different standards exist for determining the eligibility of

partnerships and corporations for such licenses. Since a limited partnership has attributes of both a partnership and a corporation, you inquire as to which procedure should be followed in determining its eligibility.

As you note, K.S.A. 41-2623 sets forth the basic qualifications for those persons who wish to obtain a Class "B" private club license (Class "A" licenses are available to only a limited number of entities and are not-for-profit, and so do not enter into either your inquiry or this opinion). You paraphrase the requirements of K.S.A. 41-2623 as follows:

> "1. Residence in the same county as the club premises, both currently and for one (1) year preceding the date of the application;
>
> "2. Residence in Kansas for at least five (5) years preceding the date of the application;
>
> "3. No beneficial interest in any other club or in any other aspect of the liquor business (with certain exceptions); and
>
> "4. Other requirements common to all classes of liquor licenses."

K.S.A. 41-2623(3) states that a "copartnership" cannot obtain a license unless all of the partners are qualified as individuals. K.S.A. 41-2623(f) exempts all officers, directors, managers and stockholders of any Kansas corporation from the residence and citizenship requirements [the latter is found in K.S.A. 41-311(a)], and by implication exempts any stockholder who owns five percent or less of the common or preferred stock from all requirements.

Kansas has adopted the provisions of the Uniform Limited Partnership Act, K.S.A. 56-122 et seq., which set forth the steps which must be taken to establish and maintain a limited partnership. Like a corporation, a limited partnership is strictly a creation of statute, and so differs from a general partnership which has its roots in common law. State v. Williams, 196 Kan. 274 (1966). The role of the limited partner is strictly limited by the Act, which provides variously that: A limited partner cannot contribute services, only cash or other property (K.S.A. 56-125); a limited partner's surname may not appear in the partnership's name (K.S.A. 56-126); and the rights of a limited partner are the same as those of a general partner only as to access to partnership books and financial affairs, and in the area of dissolution. (K.S.A. 56-131). By implication, a limited partner cannot become

involved in the business affairs of the partnership without sacrificing the protection from liability which such status otherwise confers. See, e.g., Columbia Land and Cattle Co. v. Daly, 46 Kan. 504 (1891); K.S.A. 56-128.

In view of the above differences between a general and a limited partner, courts have tended to view limited partners in a different light. In Ruzicka v. Rager, 305 N.Y. 191, 111 N.E.2d 878, 39 ALR 2d 288 (1953), the court stated:

> "Statutes permitting limited partnerships are intended to encourage investment in business enterprise by affording to a limited partner a position analogous to that of a corporate shareholder. Due to the quasi-corporate aspects of a limited partnership and the quasi-shareholder status of a limited partner in that his liability is restricted to the amount of his investment and his voice in partnership affairs is negligible, it seems proper that in a suit by a limited partnership, the individual partners, whether general or limited, ought not to be subject to counterclaims against them upon causes of action unrelated to partnership affairs." 39 A.L.R. 2d at 293.

A more detailed discussion of the legal status of a limited partner is found in Klebanow v. New York Produce Exchange, 344 F.2d 294 (2nd Cir. 1965), where at page 297 the court found as follows:

> "A limited partner, barred from using his name in the firm title, said to lack 'property rights' in partnership assets, and presumed to have priority over other partners in the distribution of assets, does have some resemblance to a creditor. (Citations omitted.)
>
> "However, in the main, a limited partner is more like a shareholder, often expecting a share of the profits, subordinated to general creditors, having some control over direction of the enterprise by his veto on the admission of new partners, and able to examine books and 'have on demand true and full information of all things affecting the partnership * *' See N.Y. Partnership Law §§ 98,99,112. That the limited partner is immune to personal liability for partnership debts save for his original investment, is not thought to be an 'owner' of partnership

> property, and does not manage the business may distinguish him from general partners but strengthens his resemblance to the stockholder; and even as to his preference in dissolution, he resembles the preferred stockholder."

See also Lynn v. Cohen, 359 F. Supp. 565 (S.D.N.Y. 1973), 60 Am.Jur.2d Partnership, §371 (1972).

In view of the above authorities, it is our conclusion that a limited partner should be treated as a corporate shareholder, and not as a general partner, for the purposes of licensure under K.S.A. 41-2623. A limited partner's relationship to the business which is run by the partnership is as remote as that of a stockholder in a corporation, i.e., he or she is entitled to a share of the proceeds, but has no actual control of the operations. To treat each limited partner as a general partner, and so require them to meet the requirements of K.S.A. 41-2623, would be a distortion of the legal realities which are present in a limited partnership. Therefore, any limited partner who has an investment equal to five percent or less of the partnership may be treated as would a stockholder with such an interest under K.S.A. 41-2623(f). Holders of more than five percent interest should be subject to the residency and citizenship requirements, as are stockholders who own interests of this size.

In conclusion, K.S.A. 41-2623(e) requires that all the members of a partnership be individually qualified to obtain a license before the partnership itself can secure a license. However, subsection (f) of the same statute exempts stockholders of a corporation who own 5% or less of the corporate stock from any requirements. In that the limited partners of a partnership organized under K.S.A. 56-122 et seq. (the Kansas Limited Partnership Act) have the attributes of shareholders in a corporation rather than partners in a general partnership, the requirements of subsection (f) of K.S.A. 41-2623 should be applied as to such partners in the granting of a license to a limited partnership.

Very truly yours,

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