

The Cash Problem: Differential Pricing for Alcoholic Beverages

By: Steven M. Hogan and Hanna C. Karimipour

Who wants to deal with loose change at a bar? Hardly anyone. These days, most people pay their tabs with debit or credit cards, which eliminates the problem of fiddling with spare change on your way out of the tavern.

As we know, business owners who accept payment by credit or debit cards have to pay a fee to their banking institutions (or other vendors) in order to process card payments. This extra charge is something many business owners would like to avoid by encouraging cash payments by customers. A problem quickly arises when bar owners try to encourage cash payments; the problem of loose change.

The obvious solution would be to charge “whole dollar” prices for cash customers, tax inclusive, while charging higher prices to card customers who will normally not care if tax is added onto the bill. To accomplish this, the bar owner would need to charge a lower price to cash customers that would allow the added tax to result in a “whole dollar” number. For example, a total charge that could be paid in full with a \$5.00 bill.

Can a bar owner offer differential pricing like this while complying with Florida’s sales and use tax laws? The authors posit that the answer is “yes,” so long as the business has a point of sale system that can accurately track the prices charged and the amount of tax collected on each transaction.

A. It’s All About Differential Pricing

As a matter of general law, it is permissible to charge customers different prices based on their method of payment. Specifically, section 501.0117, Florida Statutes, allows for lower prices to be charged to customers that pay in cash (§ 501.0117(1), Fla. Stat.). This “cash discount” complies with the statute when it is offered to “all prospective customers.” *Id.*

Section 501.0117(1) contains other language that prohibits “surcharges” on credit card transactions. Despite this language, the Federal Appeals Court for the Eleventh Circuit has held that provision unconstitutional. *Dana’s R.R. Supply v. Att’y Gen. Fla.*, 807 F.3d 1235, 1245-46 (11th Cir. 2015), *cert. denied*, 137 S.Ct. 1452 (2017). The basis for the decision was that, as the statute allowed cash discounts but banned “surcharges,” the statute was really regulating commercial speech (i.e., what the price difference was called), and that such regulation violated the First Amendment to the U.S. Constitution. *Id.*

Given the language of section 501.0117, and the decision in *Dana’s R.R. Supply*, it is clear that Florida businesses can charge different prices to customers that pay in cash as opposed to those that pay with credit cards.

B. Setting Up the Plan

It’s one thing to say that differential pricing is allowed. The rubber meets the road, however, in how such a plan is implemented.

The first step could be for the bar owner to post “whole dollar” prices for its drinks on its price lists. The price lists, whether posted in “public view” or on detailed menus customers can review individually, could note the tax will be added onto the “whole dollar” price for customers paying with credit cards.¹

The price lists could also note the “whole dollar” price includes the tax amount for customers paying with cash. It would be advisable for the bar owner to have a “breakdown” list of each individual price available for customers to review showing the sale price and applicable tax charged to cash customers and credit card customers. The general format of this breakdown can be summarized as follows:

- Whole Dollar Price: \$5.00
- Cash Customer Pays: \$5.00
(Sale Price: \$4.65; Tax at 7.5%: \$0.35; Total: \$5.00)²
- Credit card Customer Pays: \$5.38
(Sale Price: \$5.00; Tax at 7.5%: \$0.38; Total: \$5.38)³

In this manner, the cash customer would pay less than the customer that pays with a credit card in the manner contemplated by section 501.0117.

C. Is the Plan Legal?

Is this plan permissible under Florida’s sales and use tax laws? The authors posit that the answer is “yes,” so long as the bar owner’s point of sale (“POS”) system can accurately track the different sale prices charged to cash customers and credit card customers and can produce receipts that show the exact prices and tax amounts charged in each transaction.

The sales tax imposed under chapter 212, Florida Statutes, is levied on the exercise of the privilege of selling products at retail, here, alcoholic beverages (§ 212.05(1), Fla. Stat.). The tax is an excise tax on the

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privilege of selling those products and is measured by the amount of “compensation received” for the products sold. *Gaulden v. Kirk*, 47 So. 2d 567, 574 (Fla. 1950).

The “compensation received” by the bar owner is the “sale price” that it charges. § 212.02(16), Fla. Stat. (the “sale price” is the “total amount paid for tangible personal property.”).

The applicable tax is added onto the “sale price” in each transaction in a granular manner, as measured by each taxable sale. § 212.05(1)(a)1.a., Fla. Stat. (sales tax is levied on “each taxable transaction”; the tax is computed on the sale price of “each taxable sale” for the purpose of “remitting the amount of tax due [to] the state”).

As a dealer, the bar owner is required to, “as far as practicable, add the amount of the tax imposed under [chapter 212] to the sale price, and the amount of the tax shall be separately stated as Florida tax on any charge ticket, sales slip, invoice, or other tangible evidence of sale.” § 212.07(2), Fla. Stat. (emphasis added).

The Department’s rules for sellers of alcoholic beverages follow the requirement of section 212.07(2). The general rule, as under chapter 212, is that the dealer must add the sales tax to the price of each sale. Fla. Admin. Code r. 12A-1.057(1) (state sales tax), 12A-15.012(1) (a) (discretionary surtax).

An alternative method of calculating the tax is provided by the rules for dealers that find it “impractical” to separately record the sale price and applicable tax for each beverage sold. Fla. Admin. Code r. 12A-1.057(3), 12A-15.012(1)(b). Where the dealer’s POS system can separately itemize the sale price and applicable tax, the alternative method should not be used. *See Rowe’s Supermarkets, LLC v. Dept. of Rev.*, DOAH Case No. 12-

0698 ¶¶ 76, 75 (Recommended Order July 31, 2012; No exceptions filed; Final Order filed Jan. 10, 2014, DOR 2014-001).

Here, the bar owner would comply with section 212.07(2) and the Department’s rules through its POS system. Each customer would receive a receipt that show the actual sale price charged to them based on their status as a cash customer or credit card customer. The receipt would show the amount of tax charged based on that sale price.

If the bar owner’s POS system could granularly track the actual sale price and tax charged on each transaction, the differential pricing plan would comply with the requirements of chapter 212 and the Department’s rules.

Conclusion

Though no court has addressed this issue, and the Department has not issued binding guidance on this point, the authors are of the opinion a differential pricing plan following the points set forth herein is permissible under Florida law. Let’s raise a toast to less loose change and more flexibility for Florida bar owners.

About the Authors

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Endnotes:

1. A “whole dollar” price means a price that is rounded to the nearest increment of \$1.00.
2. This breakdown is calculated based on the Department’s sales tax bracket for 7.5% sales tax jurisdictions, as detailed on Form DR-2X (Revised Dec. 2018).
3. This breakdown is calculated based on the same bracket as indicated above in Note 2.





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