

Opinion No. 63-116

September 11, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Howard E. Babcock, Jr. Chief, Division of Liquor Control Bureau of Revenue Santa Fe, New Mexico

QUESTION

QUESTIONS

1. Is it legal for distillers to grant cash discounts to wholesalers, and for wholesalers to grant cash discounts to retailers?
2. If the practice of granting such discounts is legal,
 - a. **must** the discounts be treated as a reduction in price, and, thus, be passed on to the consumer in the form of a reduced price?
 - b. **may** the discounts be treated as a reduction in price, and, thus, be passed on to the consumer in the form of reduction in price?
3. Does the Chief of the Division of Liquor Control have any power to regulate the practice of giving discounts, and if so, to what extent?

CONCLUSIONS

1. Yes.
2. (a) No.
(b) No.
3. See Analysis.

OPINION

{*263} ANALYSIS

The beginning point from which the ultimate price of any alcoholic beverage is determined is the cost of that alcoholic beverage to the New Mexico wholesaler by whom it is handled, that is, the selling price to the wholesaler from the distiller. The cost of various kinds of alcoholic beverages to wholesalers, and to retailers, is defined by statute. Generally speaking, cost is determined by adding all applicable taxes, cost of

liquor delivered to the wholesaler or retailer, plus the required markup. The wholesaler, or retailer, is prohibited from selling his goods below the cost thus determined. Obviously, if the selling price of the goods to the wholesaler is lowered, then the ultimate price to the consumer is lowered because the required percentage markup will be applied to a lower starting figure. The various statutes defining cost of spirituous liquors, or beer, or wine, to wholesalers or retailers read substantially the same, and we will quote two sections of the statutes as examples:

Section 46-9-11 (5), N.M.S.A., 1953 Compilation, reads as follows:

"cost of spirituous liquor to wholesaler" includes the cost of the state excise tax required by the laws of this state on spirituous liquors before sale or other disposition thereof by a wholesaler and which was in effect on July 1, 1962; and in the case of spirituous liquors blended, rectified, compounded, bottled or packed within the state, the actual cost of the labels, stoppers, corks, caps, seals, ornaments, containers, bottles and packages used, delivered to the town in which are located the licensed premises of the bottling wholesaler, the federal gallonage and excise taxes paid on account of such spirituous liquors, the gallonage, production or other excise taxes paid to states in which such spirituous liquor was manufactured, processed or handled prior to its arrival in this state, the federal rectifying tax, if any, the cost of the federal strip stamps required by law to be affixed to bottles and containers of spirituous liquors and which ever is the lower of the following: (a) the purchase price of the spirituous liquors delivered to the town in which the wholesaler's wholesale house, from which any questioned sale is made, is located, when the invoice is dated not more than sixty days prior to the sale of such spirituous liquors by the wholesaler; or (b) the replacement cost of such spirituous liquors delivered to the town in which the wholesaler's house, from which any questioned sale is made, is located, in the quantity last purchased by such wholesaler, **exclusive of all discounts, rebates, free goods, services, concessions, or forbearances having the effect of reducing the prices** and plus (both in case of (a) and (b) a mark-up, amounting to not less than the minimum cost of operation in the handling of spirituous liquors at wholesale by the most efficient wholesale liquor dealer, which mark-up, in the absence of satisfactory proof to the contrary, made by the wholesaler before the sale to the chief of division (sic) in accordance with reasonable rules and regulations to be made by him, shall be twelve and five-tenths percent. (Emphasis added).

{*264} Section 46-9-11 (7), N.M.S.A., 1953 Compilation, reads:

"cost of spirituous liquor to retailer" or "cost of wine to retailer" means whichever of the following is lower: (a) the purchase price of the spirituous liquor or wine at the licensed place of business of the retailer when the invoice is dated not more than sixty days prior to the sale of such spirituous liquor or wine; or (b) the replacement cost of the spirituous liquor or wine delivered to the licensed place of business of the retailer at the time of the sale in the quantity last purchased by the retailer, **exclusive of all discounts, rebates, free goods, services, concessions, or forbearances having the effect of reducing the prices thereof**, and plus (both in the case of (a) and (b) a mark-up amounting to not

less than the minimum cost of operation in the handling of spirituous liquors and wine by the most efficient retailer, which mark-up, in the absence of satisfactory proof to the contrary made by the retailer before the sale to the chief of division (sic) in accordance with reasonable rules and regulations to be prescribed by him, shall be thirty-eight and eight-tenths percent." (Emphasis added)

These statutes expressly mention discounts to both wholesalers and retailers, as shown by the underlined portions above. This is an express legislative recognition of the common trade practice of giving such discounts. What the legislature has recognized, and not prohibited, cannot be prohibited by us. The conclusion is inescapable, then, that discounts from distillers to wholesalers, and from wholesalers to retailers are legal.

From the statements at a hearing held in this matter on July 24, 1963, it was made clear that the discount system is not intended to, and does not, reach to the consumer. Customarily the discount is passed on to the retailer, and is retained by him. In practice, the ultimate price of the liquor is not affected in any way by the discount. The question is whether the discount should, or must, be treated as a reduction in price, which would result in a lower price to the consumer. By the express statutory provisions quoted above, the "cost" of any particular alcoholic beverage must be computed **exclusive of any discounts having the effect of reducing the price**. This office cannot overlook the mandatory formula prescribed in the statute, and must necessarily conclude that discounts cannot be treated as a reduction in price, and cannot be passed on to the consumer.

A knowledge of the discount system suggests the reason for not allowing discounts to be treated as a reduction in price. Usually, a certain amount of alcoholic beverages must be purchased before a discount in any amount can be obtained, and the discount goes up as the volume purchased goes up. A well-capitalized retailer, for example, can always avail himself of a discount, and can usually purchase in large enough quantities to enable him to take advantage of the additional graduated discount. If he were allowed to treat these discounts as a reduction in price, he would be allowed to sell at a lower price than the smaller retailer could possibly meet, since both retailers are required to base their mark-up on cost. This would place the smaller retailer at a disastrous trade disadvantage, and the disparity between the small retailer and the large retailer would be accentuated in a vicious cycle. By requiring both retailers to use the same selling price, without regard to discounts, there is no trade disadvantage, and the small retailer {265} is protected. It is true that, because all retailers retain the amount of the discounts, the large retailer retains more money and is placed in an increasingly advantageous cash position, but the statute at least denies the large retailer the right to retain the discount and also to sell at a lower price that is illegal for the small retailer to match.

Your last question is whether, and to what extent, discounts are subject to regulation by the Chief of the Division of Liquor Control. As you know, under Section 46-2-3, N.M.S.A., 1953 Compilation, the Chief of Division has all the powers necessary to effectuate the purposes of the liquor laws. With respect to his power over trade

practices, and with particular reference to discounts, we quote the following from Section 46-9-8, N.M.S.A., 1953 Compilation:

"It shall be unlawful for any importer, distiller, brewer, rectifier, winer, nonresident licensee, or any kind or class of wholesale licensee, directly or indirectly, or through an affiliate:

. . . (b) Tied house: To induce, through any of the following means, any wholesale liquor dealer, retail liquor dealer, dispenser or club engaged in the sale of any kind or class of alcoholic liquors to purchase any such products from such person to the exclusion in whole or in part of alcoholic liquors sold or offered for sale by other persons: . . .

(3) By furnishing, giving, renting, lending or selling to any wholesale liquor dealer, retail liquor dealer, dispenser to club any equipment, fixtures, signs, supplies, **money**, services or other thing of value subject to such exceptions as the chief of division of liquor control shall by regulation prescribe, having due regard for public health and welfare, the quantity and value of the articles involved and established trade customs not contrary to the public interest and the purposes of this subsection; or

(4) By paying or crediting the wholesale liquor dealer, retail liquor dealer, dispenser or club for any advertising, display or distribution services . . ."

It is at once apparent that the acts described in subparagraphs (3) and (4) above are prohibited only if they tend to induce the purchaser to buy from the seller exclusively, that is, to induce a "tied house". The law seeks to prohibit the monopolistic "tied house", not to prohibit discounts as such. However, there is legislative recognition that discounts and the other enumerated practices can have the effect of producing a tied house.

In view of the broad powers of the Chief of the Division of Liquor Control to effectuate the state's liquor policy, it is our opinion that he possesses the power to promulgate reasonable regulations governing discounts.

This interpretation permits flexibility in dealing with trade practices, and allows continuing inquiry into existing and projected trade practices.

By: Norman S. Thayer

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