Opinion No. 57-203

August 15, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Hilton A. Dickson, Jr., Assistant Attorney General

TO: Hon. Walter R. Kegel, District Attorney, First Judicial District, County Court House, Santa Fe, New Mexico

QUESTION

QUESTIONS

1. If a sale of cigarettes is made by a wholesaler to a person who holds both a wholesaler's and a retailer's license, under the terms of Section 72-14-4, N.M.S.A., 1953 Compilation, as amended, but who sells only at retail, does such transaction entitle the parties hereto to the advantages granted under Section 49-3-5, N.M.S.A., 1953 Compilation?

2. Is a corporation formed by a group of retailers for the purpose of purchasing goods, wares, merchandise, etc., for sale by its retail members at retail, a "wholesaler" within the meaning of Section 49-3-2, N.M.S.A, 1953 Compilation, so that a sale of cigarettes by a wholesaler to such corporation would be a sale of cigarettes by one wholesaler to another wholesaler of cigarettes in order to grant to such transaction the advantages provided in Section 49-3-5, N.M.S.A., 1953 Compilation?

3. If a wholesaler of cigarettes makes a sale of cigarettes to another wholesaler of cigarettes, qualified as such within the purview of Sections 49-3-2 (d) and 49-3-5, both N.M.S.A., 1953 Compilation, and the buying wholesaler makes sales of cigarettes for delivery other than at his place of business, must he add his cost of delivery to his "cost to wholesaler" as required by Section 49-3-2 (i), N.M.S.A., 1953 Compilation, even though he elects under Section 49-3-5 to use the "basic cost" of the wholesaler from whom he purchased the cigarettes? ("Basic cost" is defined in § 49-3-2 (h), N.M.S.A., 1953 Compilation.)

CONCLUSIONS

1. No.

2. No.

3. Yes.

OPINION

ANALYSIS

Under the laws of the State of New Mexico, the same person may be a distributor, a wholesaler, and a retailer, by the terms of Chapter 72, Article 14, N.M.S.A., 1953 Compilation. However, in order to answer your questions it is necessary to interpret the Cigarette Fair Trade Practices Act. Sections 49-3-1 through 49-3-13, N.M.S.A., 1953 Comp., provide, in part, as follows:

Section 49-3-2 (d):

"A 'wholesaler' shall mean and include any person who acquires cigarettes for purposes of sale to retailers or to other persons **for purposes of resale."** (Emphasis supplied.)

Section 49-3-2 (i):

"(1) 'Cost to wholesaler' shall mean the **basic cost** of the cigarettes involved to the wholesaler plus the cost of doing business by the wholesaler, and must include, without limitation, labor costs (including salaries of executives and officers), rent, depreciation, selling costs, maintenance of equipment, delivery costs, all types of licenses, taxes, insurance and advertising. (2) In the absence of proof of a lesser or higher cost of doing business by the wholesaler making the sale, the cost of doing business by the wholesaler shall be presumed to be two per centum (2%) of the basic cost of the said cigarettes to the wholesaler, plus cartage to the retail outlet, if performed or paid for by the wholesaler, which cartage cost, in the absence of proof of a lesser or higher cost, shall be presumed to be three-fourths of one per centum (3/4 of 1%) of the basic cost of the said cigarettes to the wholesaler." (Emphasis supplied.)

Section 49-3-5:

"When one wholesaler sells cigarettes to any other wholesaler, the former shall not be required to include in his selling price to the latter, the cost to the wholesaler, as defined by section 2 of this act, but the latter wholesaler, upon resale to a retailer, shall be subject to the provisions of the said section, Provided, however, that such latter wholesaler may, at his option, use as his basic cost of the cigarettes so sold, the basic cost of the wholesaler from whom he shall have purchased the same."

It is to be noted that your question refers to a wholesaler of cigarettes who sells cigarettes to the holder of both a wholesaler's and retailer's license to sell cigarettes, but who, in fact, sells only at retail. Under the provisions of Section 49-3-5, when one wholesaler sells cigarettes to any other wholesaler, the former gains certain advantages and the purchaser also gains certain advantages, both provided for in that section. However, the term "wholesaler" as used in the act is limited to the specific meaning set out in the act itself, and a wholesaler as quoted above is limited to a person who **acquires** cigarettes for the purpose of sale to retailers or to persons for **purpose of resale.** The purchasing wholesaler in your question does not acquire the cigarettes for that purpose, but rather solely for the purpose of selling for consumption. The language

of the Statute is so clear and unequivocable as not to lend itself to any interpretation other than that, since the purchasing wholesaler who also holds a retailer's license and whose sole purpose in purchasing at wholesale is to take advantage of the provisions of Section 49-3-5 supra, it does not fall within the purview of that Section, and therefore such transaction is not entitled to the advantages of said Section, and the selling wholesaler must add to his "basic cost" of cigarettes his "cost to wholesaler" which is defined in Section 49-3-2 (i) supra when he sells to the wholesaler-retailer who sells only at retail.

With reference to question number 2 above, it is true that ordinarily corporations are to be distinguished from their stockholders, that is, the members who compose the corporation. How ever, in the case of Mennen Co. v. Federal Trade Commission (C.C.A. 2, 1923), 228 Fed. 774, cert. denied, 262 U.S. 759, although it did reverse the order of the Federal Trade Commission to cease and desist, for other reasons the Court said in discussing this particular question:

"In conclusion it ought perhaps to be said that we have not been unmindful of the fact that the Mennen Company in classifying purchasers into two groups, those of wholesalers and retailers, placed in the group of retailers a class of mutual or co-operative corporations which purchased in large quantities the Mennen products. These mutual or co-operative corporations, it is admitted, consist solely of the retailers in the same line of trade; the stock being held exclusively by retailers. The fact that these individuals, admitted by the counsel for the Federal Trade Commission to be retailers, see fit for their own convenience to organize themselves into a corporation which they constitute their agent for purchasing purposes, does not change their character, or the character of their purchases, and convert them into wholesalers.

"Whether a buyer is a wholesaler or not does not depend upon the quantity he buys. It is not the character of his buying, but the character of his selling, which marks him as a wholesaler, as this court pointed out in **Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.,** supra (277 Fed. 46). A wholesaler does not sell to the ultimate consumer. Mutual or co-operative concerns are buying for themselves to sell to ultimate consumers, and not to other 'jobbers' or to other 'retailers.' The nature of the transaction herein involved is not altered by the fact that they make their purchases through the agency of their corporation. **For some purposes a corporation is distinct from the members who compose it. But that distinction is a fiction of the law, and the courts disregard the fiction whenever the fiction is urged to an intent and purpose which is not within its reason and policy. And in such a case as this the fiction cannot be invoked. The important fact is that the members of the corporation are all retailers who buy for themselves to sell to the ultimate consumer.** The Mennen Company is within its rights in classifying them as retailers." (Emphasis supplied.)

Following the obvious intent of the Court in the statement supra, it is my opinion that a corporation composed of an association of retailers such as you refer to in your question number 2 must be considered in the light of the business of its members,

which is retail business, and the fact that the corporation purchases cigarettes for distribution to its members would not bring it within the classification of a wholesaler, but the purchase would have to be considered as purchases of cigarettes for sale at retail, and therefore such purchases would not fall within the purview of § 49-3-5 supra, and the conclusion here must be the same as the conclusion reached in answer to your question number 1.

With reference to your third question, it is my opinion that the purchasing wholesaler of cigarettes who makes sales for delivery at points other than at his place of business must add his costs of delivery, as required by § 49-3-2 (i) supra, whether or not he elects under § 49-3-5 to use the "basic cost" of the wholesaler from whom he purchased the cigarettes. The only advantage that such purchasing wholesaler secures by the election is that he is allowed to use the "basic cost" of the wholesaler from whom he purchases and the "basic cost" of cigarettes is defined in § 49-3-2 (h) N.M.S.A., 1953 Comp., which provides as follows:

"'Basic cost of cigarettes' shall mean whichever of the two following amounts is lower, namely, (1) the invoice cost of cigarettes to the retailer or wholesaler, as the case may be; or (2) the lowest replacement cost of cigarettes to the retailer or wholesaler, as the case may be, within thirty days prior to the date of sale, in the quantity last purchased (whether within or before the said thirty-day period), less, in either of said two cases, all trade discounts except customary discounts for cash, plus the full face value of any stamps which may be required by any cigarette tax act of this state now in effect or hereafter enacted, if not already included by the manufacturer in his list price."

It is to be noted that the purchasing wholesaler is not granted the privilege of using the "cost to wholesaler" of the wholesaler from whom he purchased, as provided in § 49-3-2 (i) supra, and therefore must use his own "cost to wholesaler." It is in such costs that the cost of delivery of cigarettes must be added, even though the formula is used.

It is hoped that this opinion fully answers your questions as stated.