

Opinion No. 69-70

July 3, 1969

BY: OPINION OF JAMES A. MALONEY, Attorney General Gary O'Dowd, Deputy Attorney General

TO: Franklin Jones, Commissioner of Revenue, Bureau of Revenue, State Capitol Building, Santa Fe, New Mexico

QUESTIONS

FACTS

A manufacturer of cigarettes is promoting a brand of its cigarettes by offering a full package of twenty cigarettes of this brand to each customer purchasing a full carton of the brand. The free package is affixed to the carton on the display counter. The manufacturer is assuming the full cost of the free package of cigarettes.

QUESTIONS

1. Is the manufacturer of cigarettes in violation of any part of the Cigarette Fair Trade Practices Act, Section 49-3-1 to 49-3-13, N.M.S.A., 1953 Compilation if he provides a retailer with additional cigarettes at no cost to the retailer when the free cigarettes are attached to a fair traded carton of cigarettes?
2. Is the retailer of cigarettes in violation of any part of the Cigarette Fair Trade Practices Act, Section 49-3-1 to 49-3-13, N.M.S.A., 1953 Compilation, if he sells cigarettes at fair traded prices and gives "free merchandise" with the purchase?
3. Would the above described manufacturer be considered as a "wholesaler" within the definition of Section 49-31-2 (d), N.M.S.A., 1953 Compilation?

CONCLUSIONS

1. No.
2. See Analysis.
3. No.

OPINION

{*106} ANALYSIS

Section 49-3-3 of the Cigarette Fair Trade Practices Act provides as follows:

"49-3-3. Sales at less than cost -- Penalty. -- (a) It shall be unlawful for any retailer or wholesaler, with intent to injure competitor or destroy or substantially lessen competition, to advertise, offer to sell, or sell, at retail or wholesale, cigarettes at less than cost to such retailer or wholesaler, as the case may be, as defined in this act [49-3-1 to 49-3-13]. Any retailer or wholesaler who violates the provision of this section shall be guilty of a misdemeanor and be punishable by fine of not more than five hundred dollars (\$ 500).

(b) Evidence of advertisement, offering to sell, or sale of cigarettes by any retailer or wholesaler at less than cost to him as defined by this act shall be prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition. (Emphasis added).

It must first be determined if a cigarette manufacturer can be classified as a wholesaler or retailer under the Cigarette Fair Trade Practices Act.

"Wholesaler" is defined in the Cigarette Fair Trade Practices Act as "any person who **acquires** cigarettes for purposes of sale to retailers or to other persons for purposes of sale." Since the manufacturer "manufactures" rather than "acquires" cigarettes, it is our opinion that the above described manufacturer cannot be considered as a "wholesaler" within the definition of Section 49-3-2 (d), N.M.S.A., 1953 Compilation. The answer to the third question is therefore No.

"Retailer" is defined in Section 49-3-2 (e) of the Cigarette Fair Trade Practices Act as "any person (which includes corporations) who is engaged in this state in the business of selling cigarettes at retail. "Sell at retail", "sale at retail" and "retail sales" includes "any sale for consumption or use made in the ordinary course of trade or usual conduct of the seller's business. Section 49-3-2 (c) of the Cigarette Fair Trade Practices Act defines "sale" and "sell" as including any gift and any distribution in any manner or by any means whatsoever. Thus the above described manufacturer must be classified as a retailer of cigarettes when in the regular course of its business it makes gifts of cigarettes to promote his product. See **Besser Company v. Bureau of Revenue**, 74 N.M. 377, 394 P.2d 141 (1964) for a discussion of what constitutes "engaging in business".

It has already been pointed out that it is unlawful under Section 49-3-3, supra, for a retailer to offer for sale or to sell cigarettes "at less than cost" to a retailer. Since the term "sale" includes "gift" or other "distribution", it could be concluded that the above described manufacturer is in violation of Section 49-3-3 of the Cigarette Fair Trade Practices Act when it offers free cigarettes to those purchasing one of its brands. The question arises as to whether the manufacturer is selling at "less than cost" as that phrase is used in the Cigarette Fair Trade Practices Act.

{*107} In **Farmington Dowel Products Co. v. Forster Mfg. Co.**, 136 A.2d 542 (Me., 1957), the Supreme Judicial Court of Maine thoroughly discussed and defined the phrase "at less than cost" as that phrase is used in Maine's Unfair Sales Act. Forster

Manufacturing Company, a manufacturer, was allegedly advertising, offering to sell and selling below cost. Under Maine's Unfair Sales Act, like New Mexico's Cigarette Fair Trade Practices Act, proof of sales below cost constitutes prima facie evidence of an intent to injure competitors and destroy competition. The Court therefore had to decide what constituted a sale below cost. The Court began with the general rule that statutes in derogation of the common law must be strictly construed. Thus we cannot constitutionally infer that the Legislature intended to change common law principles beyond what is clearly expressed by the statute.

In order to ascertain what is clearly expressed by the phrase "at less than cost", the Maine Supreme Judicial Court reviewed statutes of other states and noted that those statutes which are recognized as applying to producers and manufacturers include a definition of production cost. In California the term "cost" is defined as including the cost of raw materials, labor and all overhead expenses of the producer. "Distribution cost" is defined as invoice or replacement cost plus the cost of doing business by the vendor. It was concluded that if the Maine Unfair Sales Act were to be applied to producers and manufacturers, the cost definition would be too vague, uncertain and conjectural when so applied to satisfy the constitutional requirements of due process of law.

Section 49-3-2 of the New Mexico Cigarette Fair Trade Practices Act defines "cost to wholesaler" and cost to the retailer". Although it could be argued that a manufacturer comes within the definition of "cost to the retailer" as used in Section 49-3-2, we must conclude that such a cost definition would be too vague, uncertain and conjectural when so applied to satisfy the constitutional requirements of due process of law.

In the second question we are asked if the retailer of cigarettes is in violation of the Cigarette Fair Trade Practices Act when he sells cigarettes at fair traded prices and gives "free merchandise" with the purchase. A "retailer" in this instance refers to a retailer store owner receiving cigarettes from the manufacturer free of cost.

Section 49-3-4, N.M.S.A., 1953 Compilation of the Cigarette Fair Trade Practices Act provides as follows:

"49-3-4. Combination sales. -- In all advertisements, offers for sale or sales involving two or more items, at least one of which items is cigarettes, at a combined price, and in all advertisements, offers for sale, or sales, involving the giving of any gift or concession of any kind whatsoever (whether it be coupons or otherwise), the retailer's or wholesaler's combined selling price **shall not be below the cost to the retailer or the cost to the wholesaler, respectively**, of the total of all articles, products, commodities, gifts and concessions included in such transactions, except that if any such articles, products, commodities, gifts or concessions, shall not be cigarettes, the basic cost thereof shall be determined in like manner as provided in subdivision "h" of section 2 [49-3-2]. (Emphasis added).

Section 49-3-2 (J) defines "cost to the retailer" as:

". . . the basic cost of the cigarettes involved to the retailer plus the cost of doing business by the retailer, and must include, without limitation, labor (including salaries of executives and officers), rent, depreciation, selling costs, maintenance of equipment, delivery {*108} 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 retailer making the sale, the cost of doing business by the said retailer shall be presumed to be eight per centum (8%) of the basic cost of cigarettes of the said retailer."

It is assumed that the retailer is charging the basic cost of the carton of cigarettes. The free package in no way increases the basic cost. The retailer must also charge the cost of doing business for selling the cigarettes. It is presumed that the cost of doing business is 8 percent of the basic cost. Since the basic cost is zero, it is difficult to argue that the retailer is selling below cost. Proof can be made that the retailer's cost of doing business is above the 8 percent statutory presumption, however, we believe that it would be difficult if not impossible to prove that the attachment of a package of cigarettes by the manufacturers to a carton of cigarettes on the display counter increases the retailers cost of doing business beyond the statutory presumption of 8 percent. It must therefore be concluded that a retailer does not violate the provisions of the Cigarette Fair Trade Practices Act when he allows the manufacturers to give free merchandise with the sale.