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Directive 92-4: Prohibited Marketing and Sales Programs

FACTS: Wholesale, Inc., is a corporation engaged in the business of selling grocery items, including cigarettes, to retailers in Massachusetts. Wholesale, Inc., offers two marketing and sales programs to its retail customers. The first program is based on sales volume giving its retail customers a discount on grocery items, excluding cigarettes, if such customers' gross purchases exceed a dollar threshold for the previous calendar month. The dollar threshold includes purchases of cigarettes.

The second program is based on marketing activities and sales volume requiring customers to participate in various marketing programs such as allowing prominent stand up displays of Wholesale, Inc.'s products. In addition, the customers' gross purchases must exceed certain dollar thresholds for the previous calendar month. If the customer satisfies these requirements, an "advertising reimbursement" is given in the form of cash, with the amount of such reimbursement dependent on the volume of purchases. The dollar threshold includes purchases of cigarettes.

ISSUE: Are Wholesale, Inc.'s marketing and sales programs in violation of the fair pricing provisions of G.L. c. 64C, §§ 13 - 21?

DIRECTIVE: Yes, Wholesale, Inc.'s marketing and sales programs violate the fair pricing provisions by linking the purchase of cigarettes to pricing discounts and rebates.

DISCUSSION OF LAW:

Any person selling cigarettes in the Commonwealth must be licensed by the Department of Revenue ("Department"). G.L. c. 64C, § 2. Cigarette prices are regulated by the Department under the fair pricing provisions of the cigarette excise statute. G.L. c. 64C, §§ 13 - 21. Generally, licensees are not allowed to sell at a price below the minimum presumptive cost without prior permission from the Department. G.L. c. 64C, §§ 13, 14.

The price paid for cigarettes includes any exchange of consideration between the purchaser and seller. Such consideration can be in the form of cash rebates on prior purchases of cigarettes, reduced prices on items other than cigarettes or gifts of any nature. The consideration need not occur at the time of the sale of cigarettes nor relate exclusively to the sale of cigarettes. Marketing and sales programs violate the statute if the purchase of cigarettes contributes or relates to the availability of consideration in any form, including rebates and discounts.

Therefore, the first sales program is in violation of the statute because cigarette purchases are included in the dollar threshold and thereby contribute to the customer's ability to obtain price discounts on grocery items. The eventual result of such a pricing scheme is to reduce the price of cigarettes by giving consideration in the form of price discounts on grocery items.

The second marketing and sales program is in violation of the statute regardless of the additional required marketing duties and the characterization of the consideration as an "advertising reimbursement" because the purchase of cigarettes contributes to the availability and amount of the consideration.

/s/Mitchell Adams
 Mitchell Adams
 Commissioner of Revenue

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