

CHAPTER 76. UNFAIR SALES OF CIGARETTES

- Sec.
76.1. Dealer's cost of doing business.
76.2. Combination sales and inducements.
76.3. Promotional sales plans.

Authority

The provisions of this Chapter 76 issued under section 6 of the Fiscal Code (72 P. S. § 6); section 1291 of the Tax Reform Code of 1971 (72 P. S. § 8291); and sections 209-A, 214-A, 215-A and 227-A of the act of April 9, 1929 (P. L. 343, No. 176) (72 P. S. §§ 209-A, 214-A, 215-A and 227-A), unless otherwise noted.

Source

The provisions of this Chapter 76 adopted February 13, 1998, effective February 14, 1998, 28 Pa.B. 979, unless otherwise noted.

§ 76.1. Dealer's cost of doing business.**(a) Cigarette stamping agent.**

(1) The cost of doing business for a cigarette stamping agent is presumed to be the basic cost of cigarettes to the cigarette stamping agent for sales to wholesalers.

(2) Except as provided in subsection (e), a cigarette stamping agent may not sell cigarettes to a wholesaler at less than the cost of the stamping agent.

(b) Wholesaler.

(1) The cost of doing business for a wholesaler is presumed to be 4% of the basic cost of cigarettes to the wholesaler for sales to retailers.

(2) Except as provided in subsection (e), a wholesaler may not sell cigarettes to a retailer at less than the cost of the wholesaler.

(c) Retailer.

(1) The cost of doing business for a retailer is presumed to be 6% of the basic cost of cigarettes to the retailer for sales to the ultimate consumer.

(2) Except as provided in subsection (e), a retailer may not sell cigarettes to the ultimate consumer at less than the cost of the retailer.

(d) Application to lower dealer's cost of doing business.

(1) A dealer who wishes to lower its cost of doing business shall submit an application to the Department.

(2) An application for permission to sell at less than a dealer's presumed cost of doing business shall contain:

(i) A copy of the dealer's most recently filed Federal and State Income Tax return forms, including all associated schedules and attachments.

(ii) A nonrefundable fee of \$200 to cover the Department's costs of administering the application, including the review and audit of the petitioning dealer's financial statements. If the Department determines that a field audit is necessary to approve or disapprove a request, an hourly rate, as

established by the Department, will be charged to the dealer requesting approval for time spent in preparing the field audit. This amount will be in addition to the \$200 nonrefundable fee.

(e) *Review and determination.*

(1) The Department will review and evaluate the information provided by the cigarette dealer and will determine whether the dealer's cost of doing business is lower than the presumed cost of doing business in effect at that time.

(2) The Department's approval of a dealer's application to sell at less than the presumptive cost of doing business is valid for 12 months from the effective date of the approval or until the effective date of the approval of a subsequent dealer's application, whichever occurs first.

(3) If a dealer with permission to sell at less than the presumptive cost of doing business fails to submit a new application that is approved by the Department by the expiration of the 12-month period, the permission previously given to the dealer will be automatically revoked on the last day of the 12-month period.

(4) The Department's approval of a petitioning cigarette stamping agent, wholesaler or retailer's lower cost of doing business will apply to all dealers throughout this Commonwealth holding the same licenses as referenced in § 72.1 (relating to licensing of dealers). For example, if the Department approves a particular retailer's request to lower the presumptive 6% cost of doing business to 5%, all Pennsylvania retailers would also be permitted to use 5% as their cost of doing business.

(5) In determining whether an applicant/dealer's cost of doing business is lower than the presumed cost of doing business for that particular type of dealer, the Department will divide the applicant's operating expenses for the applicable 12-month period by the applicant's total cost of doing business for that same period.

Example. Wholesaler is in the business of selling cigarettes, candy and various food items to retailers throughout the United States. In its application to sell cigarettes to retailers at a price lower than the 4% presumptive cost of doing business markup, Wholesaler provides the following financial information for the year ending 12/31/XX:

Total cost of goods sold	\$ 575 million
Total cost of doing business	\$ 650 million

The Wholesaler's operating expenses equal \$75 million, which is its total cost of doing business less its total cost of goods sold. This amount is then divided by Wholesaler's total cost of doing business (\$75 million/\$650 million), which equals approximately 11.53%. This percentage represents the wholesaler's actual percentage cost of doing business. Because this percentage is greater than the 4% pre-

sumptive cost of doing business markup, the Wholesaler is unable to show that it can sell its cigarettes at a lower cost of doing business and the Department would deny its application.

(6) In determining a dealer's actual cost of doing business, the Department will determine the amount of the constructive cost of property or services upon which the dealer's actual cost of doing business is calculated when the Department determines that the dealer's financial records are not indicative of the true value of property or services received by the dealer.

(i) The constructive cost of the dealer's receipt of property or services shall be the cost which would be charged in an arms-length transaction.

(ii) If the purchase of property or services occurs between a parent and a subsidiary, affiliate or controlled corporation, there shall be a rebuttable presumption that because of the common interest the transaction was not at arms-length.

Notes of Decisions

Interpretation

The regulations are a correct interpretation of the express provisions of the statute. The Department of Revenue was correct in examining the total costs of all products as opposed to examining only those costs related to cigarettes. *Associated Wholesalers, Inc. v. Department of Revenue*, 780 A.2d 759 (Pa. Cmwlth. 2001), appeal denied 808 A.2d 573 (Pa. 2002).

§ 76.2. Combination sales and inducements.

Except for in § 76.3 (relating to promotional sales plans), a dealer may not:

(1) Sell cigarettes in combination with other noncigarette merchandise if the total sales price for the cigarettes and all other noncigarette items included in the sale is less than the sum of the cost to the dealer of the cigarettes and noncigarette items. The dealer's invoice shall contain a description of the cigarette and noncigarette merchandise, including its selling price or its wholesale value.

(2) Give cigarettes free of charge, except in the case of specially-packaged manufacturers' samples that are designated on the package as not to be sold in accordance with § 71.8 (relating to sample cigarettes).

(3) Make a rebate, advertising allowance or other concession in connection with the sale of cigarettes whereby the cigarettes are in effect sold below their cost to the dealer.

(4) Make secret extensions to certain purchasers of special services or privileges in connection with the sale of cigarettes that are not extended to all purchasers upon like terms and conditions.

§ 76.3. Promotional sales plans.

(a) Only cigarette manufacturers may sponsor or initiate a promotional sales plan that lowers the price of cigarettes below the cost of the dealer.

(b) Every dealer on whose premises a manufacturer's promotional sales plan is being conducted shall obtain a written statement from the manufacturer which describes the promotional sales plan and indicates the plan's duration.

(c) When a manufacturer's promotional sales plan involves the affixation of coupons to a retailer's inventory of cigarettes, the retailer shall receive payment from the manufacturer representing the value of the coupons prior to the retailer's customers' purchase of the coupon-affixed cigarettes. The retailer shall also retain documentation showing the manufacturer's payment of the coupons' value. For example, if the cost of the retailer for a package of cigarettes is \$2 and a 50¢ coupon is affixed to the package, the retailer may accept the coupon, sell the package of cigarettes for \$1.50 and be in compliance with the act and the code only if the retailer possesses evidence that the manufacturer prepaid the value of the 50¢ coupon to the retailer prior to the retailer's sale of the package of cigarettes.

(d) Retailers may redeem manufacturer-issued coupons issued to the general public that reduce the retail purchase price of cigarettes below the cost of the retailer as long as the manufacturer reimburses the retailer for the redeemed coupon and the retailer maintains documentation showing the sale of the cigarettes to its customers and the manufacturer's subsequent reimbursement. For example, if the cost of the retailer is \$18 per carton of cigarettes and the retailer sells the carton for \$18, the retailer may accept a \$1 coupon that reduces the cost of the retailer to \$17 and not be in violation of the code or act. However, the retailer may not sell the carton at \$17 unless the retail customer tenders a valid \$1 manufacturer coupon.

(e) A dealer participating in a manufacturer's promotional sales plan which is not evidenced by a coupon and which occurs subsequent to the dealer's purchase of cigarettes from that manufacturer is in violation of the code.

(f) A dealer may sponsor or initiate a promotional sales plan if the plan does not result in the sale of cigarettes at a price below the cost of that dealer.

Cross References

This section cited in 61 Pa. Code § 76.2 (relating to combination sales and inducements).

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