

FISCAL CODE, THE - AMEND CIGARETTE SALES AND LICENSING

Act of Jul. 2, 1993, P.L. 250, No. 46

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SB 893

AN ACT

Amending the act of April 9, 1929 (P.L.343, No.176), entitled, as amended, "An act relating to the finances of the State government; providing for the settlement, assessment, collection, and lien of taxes, bonus, and all other accounts due the Commonwealth, the collection and recovery of fees and other money or property due or belonging to the Commonwealth, or any agency thereof, including escheated property and the proceeds of its sale, the custody and disbursement or other disposition of funds and securities belonging to or in the possession of the Commonwealth, and the settlement of claims against the Commonwealth, the resettlement of accounts and appeals to the courts, refunds of moneys erroneously paid to the Commonwealth, auditing the accounts of the Commonwealth and all agencies thereof, of all public officers collecting moneys payable to the Commonwealth, or any agency thereof, and all receipts of appropriations from the Commonwealth, authorizing the Commonwealth to issue tax anticipation notes to defray current expenses, implementing the provisions of section 7(a) of Article VIII of the Constitution of Pennsylvania authorizing and restricting the incurring of certain debt and imposing penalties; affecting every department, board, commission, and officer of the State government, every political subdivision of the State, and certain officers of such subdivisions, every person, association, and corporation required to pay, assess, or collect taxes, or to make returns or reports under the laws imposing taxes for State purposes, or to pay license fees or other moneys to the Commonwealth, or any agency thereof, every State depository and every debtor or creditor of the Commonwealth," providing for cigarette sales and licensing; and making repeals.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. The act of April 9, 1929 (P.L.343, No.176) , known as The Fiscal Code, is amended by adding an article to read:

ARTICLE II-A

CIGARETTE SALES AND LICENSING

Section 201-A. Legislative Intent.--It is hereby declared to be in the public interest of this Commonwealth:

(1) To prohibit advertising or offering cigarettes for sale below cost if the intent thereof is to increase the incidence of cigarette usage or to injure, destroy or substantially lessen competition.

(2) To declare such practice to be unfair, deceptive and adverse to the collection of taxes from the sale of cigarettes.

(3) To license cigarette dealers to effect the orderly collection of taxes.

(4) To promote fair competition.

Section 202-A. Definitions.--As used in this article--

"Basic Cost of Cigarettes" shall mean the invoice cost of cigarettes to the dealer, or the replacement cost of cigarettes to the dealer, within thirty days prior to the date of sale in the quantity last purchased, whichever is lower, less all trade discounts and customary discounts for cash, but excluding any special, extraordinary or anticipatory discounts for payment within a shorter period of time than the customary discounts for cash, to which shall be added the full face value of any tax which may be required by law, if not already included in the list price.

"Board" shall mean the Cigarette Licensing, Marketing and Control Board created under section 207-A.

"Cigarettes" shall mean and include any roll for smoking made wholly or in part of tobacco, irrespective of size or shape, and whether or not such tobacco is flavored, adulterated or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other substance or material, excepting tobacco, and shall not include cigars.

"Cigarette Stamping Agent" shall mean any person who is licensed as such by the Department of Revenue for the purpose of affixing cigarette tax stamps to packages of cigarettes and transmitting the proper tax to the Commonwealth.

"Cigarette Tax Act" shall mean Article XII of the act of March 4, 1971 (P.L.6, No.2), known as the "Tax Reform Code of 1971."

"Cigarette Vending Machine" shall mean any mechanical or electrical device from which cigarettes are dispensed for a consideration.

"Cost of Doing Business" shall mean that amount, as evidenced by the standards and methods of accounting regularly employed in the determination of costs for the purpose of Federal income tax reporting, for the total operation of the establishment for the previous twelve-month period and must include, but shall not be limited to, all direct and indirect costs such as product cost, freight charges, labor costs, cost of equipment, rental and maintenance expenses, cigarette licenses, preopening expenses, management fees, costs, rents, depreciation, selling costs, maintenance expenses, interest expenses, delivery costs, all types of licenses, all types of taxes, insurance, advertising and any central and regional administrative expenses.

"Cost of the Retailer" shall mean the basic cost of cigarettes to the retailer plus the cost of doing business by the retailer in excess of the basic cost of cigarettes, expressed as a percentage and applied to the basic cost of cigarettes. In the absence of filing of satisfactory proof of a lesser or higher cost of doing business by the retailer making the sale, the cost of doing business by the retailer shall be presumed to be six per centum of the basic cost of cigarettes to the retailer. When a retailer establishes a lesser cost of doing business than the presumptive six per centum cost of doing business, such lesser cost of doing business may be used to compute the cost of the retailer for a period of time no greater than twelve months, at the end of which time the cost to the retailer shall be computed using the presumptive six per centum cost of doing business, unless the retailer again establishes a lesser cost of doing business. Any fractional part of a cent in such cost per carton shall be rounded off to the next higher cent. In the case of any person who purchases cigarettes for sale at retail from any manufacturer of cigarettes without resort to a wholesaler as such, such person shall be deemed, for the purposes of this article, to be engaged in the sale of

cigarettes as a stamping agent, wholesaler and retailer and as such shall be subject to all mark-up provisions of this article in the order named.

"Cost of the Stamping Agent" shall mean the basic cost of cigarettes plus the cost of doing business by the cigarette stamping agent in excess of the basic cost of cigarettes, expressed as a percentage and applied to the basic cost of cigarettes. Any fractional part of a cent in the cost per carton of cigarettes shall be rounded off to the next higher cent. In the case of sales at retail by cigarette stamping agents, the cost of the cigarette stamping agent shall be the same as the cost of the retailer. There shall be determined a separate cost of the cigarette stamping agent for sales to wholesale dealers and for sales to retail dealers. In the absence of filing of satisfactory proof of a lesser cost of doing business of the cigarette stamping agent making the sale, the cost of doing business shall be presumed to be the basic cost of cigarettes for sales to wholesale dealers and four per centum of the basic cost of cigarettes with respect to sales to retail dealers. When a cigarette stamping agent establishes a lesser cost of doing business than the presumptive costs contained herein, such lesser cost of doing business may be used to compute the cost of the cigarette stamping agent for a period of time no greater than twelve months, at the end of which time the cost of the cigarette stamping agent shall be computed using the presumptive costs contained herein, unless the cigarette stamping agent again establishes a lesser cost of doing business.

"Cost of the Wholesaler" shall mean the basic cost of cigarettes to the wholesaler plus the cost of doing business by the wholesaler in excess of the basic cost of cigarettes, expressed as a percentage and applied to the basic cost of cigarettes. Any fractional part of a cent in the cost to the wholesaler per carton of cigarettes shall be rounded off to the next higher cent. There shall be determined a separate cost of the wholesaler for sale to retail dealers. In the absence of filing satisfactory proof of a lesser cost of doing business by the wholesaler with respect to sales to retail dealers, the cost of doing business shall be presumed to be four per centum of the basic cost of cigarettes. When a wholesaler establishes a lesser cost of doing business than the presumptive cost of doing business, such lesser cost of doing business may be used to compute the cost of the wholesaler for a period of time no greater than twelve months, at the end of which time the cost of the wholesaler shall be computed using the presumptive four per centum cost of doing business, unless the wholesaler again establishes a lesser cost of doing business.

"Dealer" shall mean any cigarette stamping agency, wholesaler or retailer as these terms are more specifically defined herein. When used in this article, the term shall include all of the above-mentioned categories. Nothing contained in this article shall preclude any person from being a cigarette stamping agency, wholesaler or retailer: Provided, That such person meets the requirements for each category of dealer.

"Department" shall mean the Department of Revenue of the Commonwealth.

"Franchisee" shall mean any person engaged in the sale of cigarettes who is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by the grantor of that right, for which a direct or indirect fee is

paid, and whose franchisor franchises five or more retail outlets in this Commonwealth through which cigarettes are sold.

"Person" shall mean any individual, unincorporated association, company, corporation, joint stock company, group, agency, syndicate, trust or trustee, receiver, fiduciary, partnership, conservator and any political subdivision of the Commonwealth or any other state. As applied to a partnership, unincorporated association or other joint venture, the term shall also mean the partners or members thereof and, as applied to a corporation, shall also mean all the officers and directors thereof.

"Retailer" shall mean:

(a) Any person who, in the usual course of business, purchases or receives cigarettes from any source whatsoever for the purpose of sale to the ultimate consumer.

(b) Any person who, in the usual course of business, owns, leases or otherwise operates one or more vending machines for the purpose of sale of cigarettes to the ultimate consumer.

(c) Any person who buys, sells, transfers or deals in cigarettes for profit and is not licensed as a cigarette stamping agency or wholesaler under this article.

"Sale" and "Sell" shall mean any transfer for a consideration, in exchange, as barter, as a gift, as an offer for sale or in distribution, in any manner or by any means whatsoever.

"Secretary" shall mean the Secretary of Revenue of the Commonwealth.

"Vending Machine Operator" shall mean any person who places or services one or more cigarette vending machines whether owned, leased or otherwise operated by him at locations from which cigarettes are sold to the ultimate consumer. The owner or tenant of the premises upon which a vending machine is placed shall not be considered a vending machine operator if his sole remuneration therefrom is a flat rental fee or commission based upon the number or value of cigarettes sold from the machine, unless the owner or tenant actually owns the vending machine or leases the vending machine under an agreement whereby the profits from the sale of the cigarettes directly inure to his benefit.

"Wholesaler" shall mean and include:

(a) Any person who, in the usual course of business, purchases cigarettes from a cigarette stamping agent or other wholesaler and receives, stores, sells and distributes within this Commonwealth at least seventy-five per centum of all such cigarettes purchased by him or her to retail dealers or wholesale dealers or any combination who shall buy the cigarettes from him or her for the purpose of resale to the ultimate consumer: Provided, That such person maintains an established place of business for the receiving, storage and distribution of cigarettes.

(b) Any person who is engaged in the business of distributing cigarettes through vending machines to the ultimate consumer by means of placing the cigarette vending machines, owned or leased by him, in various outlets within this Commonwealth and who pays to the owner or lessee of the premises a commission or rental for the use of the premises: Provided, That such vending machine operator shall operate at least ten vending machines: Provided further, That the vending machine operator meets all the other requirements for licensing of wholesalers under this article, including maintaining an established place of business for the receiving, storage and distribution of cigarettes.

(c) Any person, including a franchisee, who owns and operates no less than five retail outlets in this Commonwealth, having one hundred per centum common ownership, who purchases cigarettes from a cigarette stamping agency or another wholesaler for resale to the ultimate consumer: Provided, That such person maintains complete and accurate records of all purchases and sales in his or her main office and also in the retail outlet.

Section 203-A. Licensing of Cigarette Dealers.--(a) No person, unless all of his sales of cigarettes are exempt from Pennsylvania cigarette tax, shall sell, transfer or deliver any cigarettes within this Commonwealth without first obtaining the proper license pursuant to the provisions of this article.

(b) Every applicant for a dealer's license shall complete and file an application with the department. The application shall be in such form and contain such information as the department by regulation shall prescribe and shall set forth truthfully and accurately the information desired by the department. If the application is approved, the department shall license the dealer for a period of one year and the license may be renewed annually thereafter.

Section 204-A. Licensing of Cigarette Stamping Agents.--(a)

The department may license as its agent for a one-year period and may renew the license for further periods of one year if the agent is and remains of good moral character who shall meet the requirements imposed by the following provisions for the privilege of operating as a cigarette stamping agency:

(1) The applicant is a wholesale dealer licensed by the Commonwealth.

(2) The applicant maintains warehousing facilities, adequate to protect the revenue, for the purpose of receiving, storing and distributing cigarettes and conducting their business and has received commitments from at least two cigarette manufacturers whose aggregate share is at least forty per centum of the Commonwealth's cigarette market.

(3) The applicant is a person of good moral character and of reasonable financial stability and is reasonably experienced in the wholesale cigarette business.

(4) The applicant, or any shareholder controlling more than ten per centum of the stock if the applicant is a corporation or any officer or director if the applicant is a corporation, shall not have been convicted of any crime involving moral turpitude.

(5) The applicant shall have filed all required State tax reports and paid any State taxes not subject to a timely perfected administrative or judicial appeal or subject to a duly authorized deferred payment plan.

(b) The department shall, by regulation, prescribe the form, content and manner of the application.

(c) The cigarette stamping agency license shall be valid for one specific location only.

(d) The department may reject any application for a new or renewal license if it finds that any of the aforementioned requirements have not been met or finds that such applicant or licensee has (i) failed to disclose any material information required; (ii) made any material false statement in his application; or (iii) violated any provisions of this article.

(e) For purposes of this section, a person convicted of committing any felony, any infamous crime or any crime involving moral turpitude shall not be a person of good moral character and shall not be licensed as a cigarette stamping agent.

Section 205-A. Licensing of Wholesalers.--(a) Applicants for a wholesale license or renewal thereof shall meet the following requirements:

(1) The premises on which the applicant proposes to conduct business are adequate to protect the revenue.

(2) The applicant is a person of reasonable financial stability and reasonable business experience.

(3) The applicant, or any shareholder controlling more than ten per centum of the stock if the applicant is a corporation or any officer or director if the applicant is a corporation, shall not have been convicted of any crime involving moral turpitude.

(4) The applicant shall not have failed to disclose any material information required by the department, including information that the applicant has complied with this article by providing a signed statement, under penalty of perjury, of adherence to State presumptive minimum prices or written approval from the department to sell at a specific different price.

(5) The applicant shall not have made any material false statement in his application.

(6) The applicant shall not have violated any provision of this article.

(7) The applicant shall have filed all required State tax reports and paid any State taxes not subject to a timely perfected administrative or judicial appeal or subject to a duly authorized deferred payment plan.

(b) The wholesale dealer's license shall be valid for one specific location only.

Section 206-A. Licensing of Retailers.--Applicants for retail license or renewal thereof shall meet the following requirements:

(1) The premises in which the applicant proposes to conduct business are adequate to protect the revenues.

(2) The applicant shall not have failed to disclose any material information required by the department, including information that the applicant has complied with this article by providing a signed statement, under penalty of perjury, of adherence to State presumptive minimum prices or written approval from the department to sell at a specific different price.

(3) The applicant shall not have any material false statement in the application.

(4) The applicant shall not have violated any provision of this article.

(5) The applicant shall have filed all required State tax reports and paid any State taxes not subject to a timely perfected administrative or judicial appeal or subject to a duly authorized deferred payment plan.

Section 207-A. Cigarette Licensing, Marketing and Control Board.--(a) There is hereby created a Cigarette Licensing, Marketing and Control Board consisting of three members designated by the secretary, one of whom shall be a deputy secretary of the department and one of whom shall be an attorney at law. The board shall take testimony, after proper notices as hereinafter mentioned, and shall make its recommendations in writing to the secretary under the provisions of this article.

(b) Whenever any applicant for license or renewal thereof is aggrieved by the determination of the department, he may file a complaint with the board, assigning specifically his reasons for believing that the department acted improperly. The

complaint shall be filed within thirty days after notice by the department of its determination of his application. Whenever the department determines that a violation of this article has occurred, it may file a complaint with the board assigning specifically its reasons for believing that the provisions of this article have been violated. The complaint shall be filed by the department within thirty days after final determination of those facts which give rise to its belief that the provisions of this article have been violated. Upon receipt of the complaint, the board, if it determines that the complaint raises an issue of fact, shall, within thirty days after receipt of the complaint, issue a citation directing the applicant, dealer or department, as the case may be, to appear at a hearing scheduled by the board within thirty days. The board shall afford the aggrieved party an opportunity to be heard at the hearing, which shall be conducted in accordance with the provisions of 2 Pa.C.S. (relating to administrative law and procedure).

(c) Within thirty days after the termination of the hearing, the board shall make its recommendations to the secretary in writing, and within fifteen days subsequent thereto, the secretary shall render a final decision. Any party aggrieved by the final decision shall have the right of appeal in accordance with the provisions of 2 Pa.C.S.

(d) If any person is aggrieved by an assessment issued by the department for taxes due the Commonwealth, he may file an appeal from the assessment in accordance with the procedures of this article.

Section 208-A. License Fees; Issuance and Posting of License.--(a) At the time of making any application, an applicant for a wholesale cigarette dealer's license shall pay to the department a license fee of five hundred dollars (\$500), an applicant for a retail cigarette dealer's license shall pay to the department a license fee of twenty-five dollars (\$25), an applicant for a vending machine license shall pay to the department a license fee of twenty-five dollars (\$25) and an applicant for a cigarette stamping agency license shall pay to the department a fee of one thousand dollars (\$1,000). Fees shall not be pro-rated.

(b) Upon approval of the application and payment of the fees, the department shall issue the proper license which must be conspicuously displayed at the place for which issued.

Section 209-A. Transfer of Licenses.--The department may permit a dealer, under such conditions as the department may impose by regulation, to transfer a license from one location to another or from one cigarette vending machine to another.

Section 210-A. Disposition of License Fees.--One-half of all fees received by the department under this article shall be restricted for implementation of the enforcement and audit provisions of this article and the Cigarette Tax Act and the remainder shall be paid into the General Fund.

Section 211-A. Expiration of License.--(a) Every license shall expire on the last day of February next succeeding the date upon which it was issued unless sooner suspended, surrendered or revoked.

(b) After the expiration date of the license or sooner if the license is suspended, surrendered or revoked, it shall be illegal for any dealer to engage directly or indirectly in the business heretofore conducted by him for which the license was issued. Any licensee who shall, after the expiration date of the license, engage in the business theretofore conducted by him either by way of purchase, sale, stamping, distribution or

in any other manner directly or indirectly engaged in the business of dealing with cigarettes for profit shall be in violation of this article and be subject to the penalties provided herein.

Section 212-A. Duplicate License.--(a) Whenever any license is defaced, destroyed or lost, the department may issue a duplicate to the holder of the defaced, destroyed or lost license upon submission of a duplicate license application. Except as provided in subsection (b), at the time of making any application for a duplicate license, the applicant shall pay to the department a fee of five dollars (\$5). The duplicate license application shall be in such form and contain such information as the department shall prescribe and shall set forth truthfully and accurately the information called for on the form.

(b) In the event a license is defaced or destroyed in the performance of any duty imposed by this article, the department may, by regulation, waive the fee imposed by subsection (a).

(c) No license shall be issued by the department to any person within one year after rejection of an application, refusal to renew or revocation of an existing license, the period of one year to commence from the date that the license is returned to the department or application is rejected.

Section 213-A. License for Cigarette Vending Machines; Names of Owner and Operator.--Each cigarette vending machine shall have a current license which shall be conspicuously and visibly placed on the machine. There shall be conspicuously and visibly placed on every cigarette vending machine the name and address of the owner and the name and address of the operator.

Section 214-A. Retention of Records.--Every licensed dealer shall keep and maintain for a period of four years such records in such form as the department shall by regulation prescribe. The records shall be maintained at the location for which the license is issued.

Section 215-A. Reports.--Every licensed dealer shall file reports at such times and in such form as the department by regulation may prescribe.

Section 216-A. Examination of Records, Equipment and Premises.--(a) The department is hereby authorized to examine the books and records, the inventory of cigarettes and the premises and equipment of any dealer in order to determine compliance with the provisions of this article and to verify the accuracy of the payment of the tax imposed by the Cigarette Tax Act. Every such person is hereby directed and required to give to the department or its duly authorized representative the means, facilities and opportunity for such examinations.

(b) Any person who prevents or hinders the department or any designated agent thereof from making a full inspection of the premises where cigarettes are sold or stored or prevents or hinders the inspection of invoices, books, records, equipment, inventory or papers required to be kept shall be guilty of a violation of this article and subject to the penalties provided herein.

Section 217-A. Sales at Less Than Cost.--(a) It shall be unlawful:

(1) For any dealer, with intent to injure competitors or destroy or substantially lessen competition or with intent to avoid the collection or paying over of such taxes as may be required by law, to advertise, offer to sell or sell cigarettes at less than cost of such cigarette dealer.

(2) For any wholesaler:

(i) to induce or attempt to induce or to procure or attempt to procure the purchase of cigarettes or to accept cigarettes at a price less than the cost of the cigarette dealer from whom the purchase or acceptance of cigarettes was made; or

(ii) to induce or attempt to induce or to procure or attempt to procure or to accept any unauthorized rebate or concession of any kind or nature whatsoever, other than a rebate or concession authorized by the department, in connection with the purchase of cigarettes.

(3) For any retail dealer:

(i) to induce or attempt to induce or to procure or attempt to procure the purchase of cigarettes or to accept cigarettes at a price less than the cost to the cigarette dealer from whom the purchase or acceptance of cigarettes was made; or

(ii) to induce or attempt to induce or to procure or attempt to procure or to accept any unauthorized rebate or concession of any kind or nature whatsoever, other than a rebate or concession authorized by the department, in connection with the purchase of cigarettes.

(b) Evidence of advertisement offering to sell or sale of cigarettes by any cigarette dealer at less than cost to the dealer or evidence of any offer of a rebate in price or giving of a rebate in price or an offer of a concession or the giving of a concession of any kind or nature whatsoever in connection with the sale of cigarettes or the inducing or attempt to induce or to the procuring or the attempt to procure the purchase of cigarettes at a price less than cost of the cigarette stamping agent, wholesaler or retail dealer shall be prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition or of intent to avoid the collection or paying over of such taxes as may be required by law. Evidence of a final selling cost which is not the invoice cost or an invoice which does not include allowable discounts, rebates, allowances or free or discounted merchandise relating to or in conjunction with the sale of cigarettes when used by the cigarette stamping agent, wholesaler or retailer shall be prima facie evidence of violation of this article.

Section 218-A. Combinations Sales; Inducements.--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 portion of the dealer's combined selling price relating to cigarettes shall not be below the cost of the stamper, cost of the retailer or cost of the wholesaler, as the case may be. Other merchandise offered for sale as a tie-in with the cigarettes shall not be sold at less than the cost of the other merchandise nor shall the gift or concession of the other items advertised or offered for sale be used as an inducement to purchase cigarettes nor shall any payment, openly or in secret, of any rebates, refunds, commission or unearned discounts, whether in the form of money or otherwise, or secret extensions to certain purchasers of special services or privileges not extended to all purchasers upon like terms and conditions be made or offered as an inducement to purchase cigarettes.

Section 219-A. Sales by Wholesaler to Wholesaler.--When one wholesaler sells cigarettes to another wholesaler, the former shall not be required to include in the selling price the cost of the wholesaler as defined in this article, but the latter wholesaler, upon the resale of such cigarettes to a retailer, shall be subject in all respects to the provisions of this

article: 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.

Section 220-A. Sales; Exceptions.--The provisions of this article shall not apply to sales of cigarettes a dealer made (i) in an isolated transaction and not in the usual course of business; (ii) where cigarettes are advertised, offered for sale or sold in good-faith clearance sales for the purpose of discontinuing trade in such cigarettes and such advertising, offer to sell or sale shall state the reason thereof and the quantity of such cigarettes advertised, offered for sale or to be sold; (iii) where cigarettes are advertised, offered for sale or sold as imperfect or damaged and such advertising, offer to sell or sale shall state the reason therefor and the quantity of such cigarettes advertised, offered for sale or to be sold; (iv) where cigarettes are sold upon the final liquidation of a business; or (v) where cigarettes are advertised, offered for sale or sold by any fiduciary or other officer acting under the order or direction of any court.

Section 221-A. Advertising of Certain Sales; Good Faith.--(a) Any retailer may advertise, offer to sell or sell cigarettes at a price made in good faith to meet the price of a competitor who is selling the same article at cost to him as a retailer. Any wholesaler may advertise, offer to sell or sell cigarettes at a price made in good faith to meet the price of a competitor if the competitor is rendering the same type of service, has been approved by the department to sell cigarettes at a price different from the presumptive minimum and is not selling the same article below cost to him as a wholesaler. The price of cigarettes advertised, offered for sale or sold under the exceptions specified in this article shall not be considered the price of a competitor and shall not be used as a basis for establishing prices below cost nor shall the price established at a bankrupt sale be considered the price of a competitor, within the purview of this section.

(b) In the absence of proof of the cost of a competitor under this section, the lowest cost of the stamping agent or the lowest cost of the wholesaler, as the case may be, determined by any cost survey made in the same trading area pursuant to the provisions of this article, may be deemed the cost of such competitor within the meaning of this section.

Section 222-A. Sales Contracts Void.--Any contract, expressed or implied, made by any person in violation of any of the provisions of this article shall be an illegal and void contract and no recovery thereon shall be had.

Section 223-A. Admissible Evidence.--(a) In determining the cost of the stamper, cost of the retailer and cost of the wholesaler, the fact-finder shall receive and consider, as bearing on the good faith of such cost, evidence tending to show that any person complained against under any provision of this article purchased cigarettes with respect to the sale of which complaint is made at a fictitious price or upon terms or in such a manner or under such invoices as to conceal the true cost, discounts or terms of purchase. The fact-finder shall also receive and consider, as bearing on the good faith of such cost, evidence of the normal, customary and prevailing terms and discounts in connection with other sales of a similar nature in the trade area or state.

(b) Merchandise given gratis or payment made to a stamping agent, retailer or wholesaler by a cigarette manufacturer for display or advertising or promotion purposes, or otherwise,

shall not be considered in determining the cost of cigarettes to the cigarette dealer if such practice is customary in the trade and offered to all dealers on an equal or proportional basis.

Section 224-A. Sales Outside Ordinary Channels of Business; Effect.--In establishing the cost of cigarettes to the stamper, retailer or wholesaler, the invoice cost of such cigarettes purchased at a forced bankrupt or closeout sale or other sale outside of the ordinary channels of trade may not be used as a basis for justifying a price lower than one based upon the replacement cost of the cigarettes to the stamper, retailer or wholesaler within thirty days prior to the date of sale in the quantity last purchased through the ordinary channels of trade.

Section 225-A. Cost Survey; Admissibility.--Where a cost survey pursuant to recognized statistical and cost accounting practices has been made for the trading area in which a violation of this article is committed or charged to determine and establish on the basis of actual existing conditions the lowest cost to stampers or wholesalers or lowest cost to retailers within the area, such cost survey shall be deemed competent evidence in any action or proceeding under this article as tending to prove actual cost to the stamper or wholesaler or to the retailer complained against. Any party against whom any such cost survey may be introduced in evidence shall have the right to offer evidence tending to prove any inaccuracy in such cost survey or any state of facts which would impair its probative value.

Section 226-A. Remedies.--(a) In the case of any violation or threatened violation of this article, the department or any person injured by the violation or who shall suffer injury from the threatened violation may maintain an action in any court of competent jurisdiction to prevent, restrain or enjoin such violation or threatened violation. If in such action a violation or threatened violation of this article shall be established, the court shall enjoin and restrain or otherwise prohibit such violation or threatened violation, and in addition thereto the court shall assess in favor of the plaintiff and against the defendant the costs of suit, including reasonable attorney fees. In any such action it shall not be necessary that actual damages to the plaintiff be alleged or proved, but, where alleged and proved by a plaintiff other than the department, the plaintiff in the action shall be entitled to recover from the defendant the actual damages sustained by him in addition to such injunctive relief and costs of suit and reasonable attorney fees.

(b) If no injunctive relief is sought or required, any person injured by a violation of this article may maintain an action for damages and cost of suit in any court of competent jurisdiction.

Section 227-A. Administration Powers and Duties.--(a) The administration of this article is hereby vested in the department. The department shall adopt rules and regulations for the enforcement of this article and may from time to time make or cause to be made one or more cost surveys to establish the lowest cost of the cigarette stamping agent, the lowest cost of the retailer and the lowest cost of the wholesaler, as defined in this article for the Commonwealth or such trading area or areas therein as it shall define. Any such survey made or caused to be made by the department may be used for the purposes specified in this article. If the survey is conducted in connection with a cigarette dealer's request to sell at a price different from the presumptive minimum, the cigarette

dealer shall pay for the survey. Regulations shall provide a procedure for dealers to prove a cost different from the State presumptive costs, including proof of lower costs, filing of petitions, cost allocation, data to be submitted and guidelines necessary to implement this article. Authorization to sell below the presumptive minimum prices shall be in writing published in the Pennsylvania Bulletin and otherwise in conformance with the requirements of this article and shall contain a statement that the authorization is effective forty-five days after the issuance of the writing and is valid for twelve months therefrom. Authorization by the department for a dealer to sell cigarettes below the established presumptive minimum prices shall be stated as a percentage and be applied to all levels of cigarette prices in the percentage allowed, and this percentage shall also be applied to any new presumptive minimum prices established by the department during the effective period of the dealer's authorization. The department may impose such fees as may be necessary to cover the costs incurred in administering this section, including review and audit of petitioning dealer's audited financial statement. On the effective date of this article and until such time as a dealer receives authorization from the department, in accordance with its regulations, to sell cigarettes at a price different from the presumptive minimum prices established pursuant to this article, the last dealer request to have been authorized by the department shall continue in effect.

(b) The department is authorized to jointly administer this article with the act of March 4, 1971 (P.L.6, No.2), known as the "Tax Reform Code of 1971," including joint reporting of information, forms, returns, statements, documents or other information submitted to the department.

Section 228-A. Sales Without License.--(a) Any dealer or other person who shall, without being the holder of a proper unexpired dealer's license or vending machine license properly affixed as required by this article, engage in the business of purchasing, selling, stamping, distributing or in any other manner directly or indirectly engaging in the business of dealing with cigarettes for profit shall be in violation of this article and, upon conviction in a summary proceeding, shall be sentenced to pay a fine of not less than two hundred fifty dollars (\$250) nor more than one thousand dollars (\$1,000), costs of prosecution or to suffer imprisonment for a term of not more than thirty days, or both, at the discretion of the court.

(b) Open display of cigarettes in any manner shall be prima facie evidence that the person displaying such cigarettes is directly or indirectly engaging in the business of dealing with cigarettes for profit.

Section 229-A. Violations.--(a) The license of any cigarette dealer or wholesaler or retailer who violates any of the provisions of this article may be suspended after due notice and opportunity of hearing for a period of not less than five days nor more than thirty days for a first violation and shall be revoked or suspended for any subsequent violation.

(b) In addition to the provisions of subsection (a), upon adjudication of a first violation, the cigarette dealer shall be fined not less than two thousand five hundred dollars (\$2,500) nor more than five thousand dollars (\$5,000). For subsequent violations, the agent, wholesaler or retailer shall, upon adjudication thereof, be fined not less than five thousand dollars (\$5,000) nor more than fifteen thousand dollars (\$15,000).

(c) A person who violates section 208-A(b), 214-A, 215-A or 216-A shall be subject to a civil penalty not to exceed three hundred dollars (\$300) but shall not be subject to subsections (a) and (b).

(d) Notwithstanding any provision of this article to the contrary, the department shall suspend or revoke any license for violation of any provision of the act of March 4, 1971 (P.L.6, No.2), known as the "Tax Reform Code of 1971," concerning contraband cigarettes or counterfeit cigarette stamps.

Section 230-A. Unfair Sales Act Inapplicable.--The provisions of the act of August 11, 1941 (P.L.900, No.344), known as the "Unfair Sales Act," shall not apply to sales of cigarettes covered by the provisions of this article.

Section 2. All licenses issued pursuant to any act repealed hereby shall continue in force and effect in accordance with their term; all licenses issued or renewed after the effective date of this act shall be issued in accordance with the requirements of Article II-A.

Section 3. The following acts and parts of acts are repealed:

Act of May 20, 1949 (P.L.1584, No.478), known as the Unfair Cigarette Sales Act.

The definitions of "bureau," "retailer" and "wholesaler" in section 1201 and sections 1221, 1222, 1223, 1224, 1225, 1226, 1227, 1228, 1229, 1230, 1231, 1235, 1236, 1241, 1242, 1243, 1261 and 1271 of the act of March 4, 1971 (P.L.6, No.2), known as the Tax Reform Code of 1971.

Section 4. This act shall take effect immediately.

APPROVED--The 2nd day of July, A. D. 1993.

MARK L. SINGEL
ACTING GOVERNOR