

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 1456 Session of
1993

INTRODUCED BY TRELLO, COY, PETRONE, DeLUCA, VEON, LESCOVITZ,
COLAIZZO, VAN HORNE, DEMPSEY, OLASZ, CESSAR, TANGRETTI,
BOYES, ROBERTS, COLAFELLA, WOZNIAK, KENNEY, JOSEPHS, STABACK,
STETLER, DERMODY, PRESTON AND KASUNIC, APRIL 27, 1993

REFERRED TO COMMITTEE ON FINANCE, APRIL 27, 1993

AN ACT

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

32 The General Assembly of the Commonwealth of Pennsylvania

1 hereby enacts as follows:

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

4 ARTICLE II-A

5 CIGARETTE SALES AND LICENSING

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

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

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

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

16 (4) To promote fair competition.

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

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

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

30 "Cigarettes" shall mean and include any roll for smoking made

1 wholly or in part of tobacco, irrespective of size or shape, and
2 whether or not such tobacco is flavored, adulterated or mixed
3 with any other ingredient, the wrapper or cover of which is made
4 of paper or any other substance or material, excepting tobacco,
5 and shall not include cigars.

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

10 "Cigarette Tax Act" shall mean Article XII of the act of
11 March 4, 1971 (P.L.6, No.2), known as the "Tax Reform Code of
12 1971."

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

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

28 "Cost of the Retailer" shall mean the basic cost of
29 cigarettes to the retailer plus the cost of doing business by
30 the retailer in excess of the basic cost of cigarettes,

1 expressed as a percentage and applied to the basic cost of
2 cigarettes. In the absence of filing of satisfactory proof of a
3 lesser or higher cost of doing business by the retailer making
4 the sale, the cost of doing business by the retailer shall be
5 presumed to be six per centum of the basic cost of cigarettes to
6 the retailer. When a retailer establishes a lesser cost of doing
7 business than the presumptive six per centum cost of doing
8 business, such lesser cost of doing business may be used to
9 compute the cost of the retailer for a period of time no greater
10 than twelve months, at the end of which time the cost to the
11 retailer shall be computed using the presumptive six per centum
12 cost of doing business, unless the retailer again establishes a
13 lesser cost of doing business. Any fractional part of a cent in
14 such cost per carton shall be rounded off to the next higher
15 cent. In the case of any person who purchases cigarettes for
16 sale at retail from any manufacturer of cigarettes without
17 resort to a wholesaler as such, such person shall be deemed, for
18 the purposes of this article, to be engaged in the sale of
19 cigarettes as a stamping agent, wholesaler and retailer and as
20 such, shall be subject to all mark-up provisions of this
21 article, in the order named.

22 "Cost of the Stamping Agent" shall mean the basic cost of
23 cigarettes plus the cost of doing business by the cigarette
24 stamping agent in excess of the basic cost of cigarettes,
25 expressed as a percentage and applied to the basic cost of
26 cigarettes. Any fractional part of a cent in the such cost per
27 carton of cigarettes shall be rounded off to the next higher
28 cent. In the case of sales at retail by cigarette stamping
29 agents, the cost of the cigarette stamping agent shall be the
30 same as the cost of the retailer. There shall be determined a

1 separate cost of the cigarette stamping agent for sales to
2 wholesale dealers and for sales to retail dealers. In the
3 absence of filing of satisfactory proof of a lesser cost of
4 doing business of the cigarette stamping agent making the sale,
5 the cost of doing business shall be presumed to be the basic
6 cost of cigarettes for sales to wholesale dealers and four per
7 centum of the basic cost of cigarettes with respect to sales to
8 retail dealers. When a cigarette stamping agent establishes a
9 lesser cost of doing business than the presumptive costs
10 contained herein, such lesser cost of doing business may be used
11 to compute the cost of the cigarette stamping agent for a period
12 of time no greater than twelve months, at the end of which time
13 the cost of the cigarette stamping agent shall be computed using
14 the presumptive costs contained herein, unless the cigarette
15 stamping agent again establishes a lesser cost of doing
16 business.

17 "Cost of the Wholesaler" shall mean the basic cost of
18 cigarettes to the wholesaler plus the cost of doing business by
19 the wholesaler in excess of the basic cost of cigarettes,
20 expressed as a percentage and applied to the basic cost of
21 cigarettes. Any fractional part of a cent in the cost to the
22 wholesaler per carton of cigarettes shall be rounded off to the
23 next higher cent. There shall be determined a separate cost of
24 the wholesaler for sale to retail dealers. In the absence of
25 filing satisfactory proof of a lesser cost of doing business by
26 the wholesaler with respect to sales to retail dealers the cost
27 of doing business shall be presumed to be four per centum of the
28 basic cost of cigarettes. When a wholesaler establishes a lesser
29 cost of doing business than the presumptive cost of doing
30 business, such lesser cost of doing business may be used to

1 compute the cost of the wholesaler for a period of time no
2 greater than twelve months, at the end of which time the cost of
3 the wholesaler shall be computed using the presumptive four per
4 centum cost of doing business, unless the wholesaler again
5 establishes a lesser cost of doing business.

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

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

15 "Franchisee" shall mean any person engaged in the sale of
16 cigarettes who is granted the right to engage in the business of
17 offering, selling or distributing goods or services under a
18 marketing plan or system prescribed in substantial part by the
19 grantor of that right, for which a direct or indirect fee is
20 paid, and whose franchisor franchises five or more retail
21 outlets in this Commonwealth through which cigarettes are sold.

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

1 "Retailer" shall mean:

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

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

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

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

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

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

29 "Wholesaler" shall mean and include:

30 (a) Any person who, in the usual course of business,

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

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

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

30 Section 203-A. Licensing of Cigarette Dealers.--(a) No

1 person, unless all of his sales of cigarettes are exempt from
2 Pennsylvania cigarette tax, shall sell, transfer or deliver any
3 cigarettes within this Commonwealth without first obtaining the
4 proper license pursuant to the provisions of this article.

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

13 Section 204-A. Licensing of Cigarette Stamping Agents.--(a)
14 The department may license as its agent for a one-year period
15 and may renew the license for further periods of one year, if
16 the agent is and remains of good moral character who shall meet
17 the requirements imposed by the following provisions for the
18 privilege of operating as a cigarette stamping agency:

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

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

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

30 (4) The applicant, or any shareholder controlling more than

1 ten per centum of the stock if the applicant is a corporation or
2 any officer or director if the applicant is a corporation, shall
3 not have been convicted of any crime involving moral turpitude.

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

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

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

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

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

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

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

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

29 (3) The applicant, or any shareholder controlling more than
30 ten per centum of the stock if the applicant is a corporation or

1 any officer or director if the applicant is a corporation, shall
2 not have been convicted of any crime involving moral turpitude.

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

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

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

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

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

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

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

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

1 price.

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

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

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

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

18 (b) Whenever any applicant for license or renewal thereof is
19 aggrieved by the determination of the department, he may file a
20 complaint with the board, assigning specifically his reasons for
21 believing that the department acted improperly. The complaint
22 shall be filed within thirty days after notice by the department
23 of its determination of his application. Whenever the department
24 determines that a violation of this article has occurred, it may
25 file a complaint with the board assigning specifically its
26 reasons for believing that the provisions of this article have
27 been violated. The complaint shall be filed by the department
28 within thirty days after final determination of those facts
29 which give rise to its belief that the provisions of this
30 article have been violated. Upon receipt of the complaint, the

1 board, if it determines that the complaint raises an issue of
2 fact shall, within thirty days after receipt of the complaint,
3 issue a citation directing the applicant, dealer or department,
4 as the case may be, to appear at a hearing scheduled by the
5 board within thirty days. The board shall afford the aggrieved
6 party an opportunity to be heard at the hearing, which shall be
7 conducted in accordance with the provisions of 2 Pa.C.S.
8 (relating to administrative law and procedure).

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

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

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

30 (b) Upon approval of the application and payment of the

1 fees, the department shall issue the proper license which must
2 be conspicuously displayed at the place for which issued.

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

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

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

16 (b) After the expiration date of the license, or sooner if
17 the license is suspended, surrendered or revoked, it shall be
18 illegal for any dealer to engage directly or indirectly in the
19 business heretofore conducted by him for which the license was
20 issued. Any licensee who shall, after the expiration date of the
21 license, engage in the business theretofore conducted by him
22 either by way of purchase, sale, stamping, distribution or in
23 any other manner directly or indirectly engaged in the business
24 of dealing with cigarettes for profit shall be in violation of
25 this article and be subject to the penalties provided herein.

26 Section 212-A. Duplicate License.--(a) Whenever any license
27 is defaced, destroyed or lost, the department may issue a
28 duplicate to the holder of the defaced, destroyed or lost
29 license upon submission of a duplicate license application.

30 Except as provided in subsection (b), at the time of making any

1 application for a duplicate license, the applicant shall pay to
2 the department a fee of five dollars (\$5). The duplicate license
3 application shall be in such form and contain such information
4 as the department shall prescribe and shall set forth truthfully
5 and accurately the information called for on the form.

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

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

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

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

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

28 Section 216-A. Examination of Records, Equipment and
29 Premises.--(a) The department is hereby authorized to examine
30 the books and records, the inventory of cigarettes and the

1 premises and equipment of any dealer in order to determine
2 compliance with the provisions of this article and to verify the
3 accuracy of the payment of the tax imposed by the "Cigarette Tax
4 Act." Every such person is hereby directed and required to give
5 to the department or its duly authorized representative the
6 means, facilities and opportunity for such examinations.

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

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

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

21 (2) For any wholesaler:

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

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

1 (3) For any retail dealer:

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

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

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

29 Section 218-A. Combinations Sales; Inducements.--In all
30 advertisements, offers for sale or sales involving two or more

1 items, at least one of which items is cigarettes, at a combined
2 price, and in all advertisements, offers for sale or sales
3 involving the giving of any gift or concession of any kind
4 whatsoever, whether it be coupons or otherwise, the portion of
5 the dealer's combined selling price relating to cigarettes shall
6 not be below the cost of the stamper, cost of the retailer or
7 the cost of the wholesaler, as the case may be. Other
8 merchandise offered for sale as a tie-in with the cigarettes
9 shall not be sold at less than the cost of the other
10 merchandise; nor shall the gift or concession of the other items
11 advertised or offered for sale be used as an inducement to
12 purchase cigarettes; nor shall any payment, openly or in secret,
13 of any rebates, refunds, commission or unearned discounts,
14 whether in the form of money or otherwise, or secret extensions
15 to certain purchasers of special services or privileges not
16 extended to all purchasers upon like terms and conditions be
17 made or offered as an inducement to purchase cigarettes.

18 Section 219-A. Sales by Wholesaler to Wholesaler.--When one
19 wholesaler sells cigarettes to another wholesaler, the former
20 shall not be required to include in the selling price the cost
21 of the wholesaler as defined in this article, but the latter
22 wholesaler, upon the resale of such cigarettes to a retailer,
23 shall be subject in all respects to the provisions of this
24 article: Provided, however, That such latter wholesaler may, at
25 his option, use as his basic cost of the cigarettes so sold the
26 basic cost of the wholesaler from whom he shall have purchased
27 the same.

28 Section 220-A. Sales; Exceptions.--The provisions of this
29 article shall not apply to sales of cigarettes a dealer made (i)
30 in an isolated transaction and not in the usual course of

1 business; (ii) where cigarettes are advertised, offered for
2 sale or sold in good faith clearance sales for the purpose of
3 discontinuing trade in such cigarettes and such advertising,
4 offer to sell or sale shall state the reason thereof and the
5 quantity of such cigarettes advertised, offered for sale or to
6 be sold; (iii) where cigarettes are advertised, offered for sale
7 or sold as imperfect or damaged and such advertising, offer to
8 sell or sale shall state the reason therefor and the quantity of
9 such cigarettes advertised, offered for sale or to be sold; (iv)
10 where cigarettes are sold upon the final liquidation of a
11 business; or (v) where cigarettes are advertised, offered for
12 sale or sold by any fiduciary or other officer acting under the
13 order or direction of any court.

14 Section 221-A. Advertising of Certain Sales; Good Faith.--

15 (a) Any retailer may advertise, offer to sell or sell
16 cigarettes at a price made in good faith to meet the price of a
17 competitor who is selling the same article at cost to him as a
18 retailer. Any wholesaler may advertise, offer to sell or sell
19 cigarettes at a price made in good faith to meet the price of a
20 competitor, if the competitor is rendering the same type of
21 service, has been approved by the department to sell cigarettes
22 at a price different from the presumptive minimum and is not
23 selling the same article below cost to him as a wholesaler. The
24 price of cigarettes advertised, offered for sale or sold under
25 the exceptions specified in this article shall not be considered
26 the price of a competitor and shall not be used as a basis for
27 establishing prices below cost, nor shall the price established
28 at a bankrupt sale be considered the price of a competitor,
29 within the purview of this section.

30 (b) In the absence of proof of the cost of a competitor

1 under this section, the lowest cost of the stamping agent or the
2 lowest cost of the wholesaler, as the case may be, determined by
3 any cost survey made in the same trading area pursuant to the
4 provisions of this article, may be deemed the cost of such
5 competitor, within the meaning of this section.

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

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

23 (b) Merchandise given gratis or payment made to a stamping
24 agent, retailer or wholesaler by a cigarette manufacturer for
25 display or advertising or promotion purposes, or otherwise,
26 shall not be considered in determining the cost of cigarettes to
27 the cigarette dealer if such practice is customary in the trade
28 and offered to all dealers on an equal or proportional basis.

29 Section 224-A. Sales Outside Ordinary Channels of Business;
30 Effect.--In establishing the cost of cigarettes to the stamper,

1 retailer or wholesaler, the invoice cost of such cigarettes
2 purchased at a forced bankrupt or closeout sale or other sale
3 outside of the ordinary channels of trade may not be used as a
4 basis for justifying a price lower than one based upon the
5 replacement cost of the cigarettes to the stamper, retailer or
6 wholesaler within thirty days prior to the date of sale in the
7 quantity last purchased through the ordinary channels of trade.

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

22 Section 226-A. Remedies.--(a) In the case of any violation
23 or threatened violation of this article, the department or any
24 person injured by the violation or who shall suffer injury from
25 the threatened violation, may maintain an action in any court of
26 competent jurisdiction to prevent, restrain or enjoin such
27 violation or threatened violation. If in such action a violation
28 or threatened violation of this article shall be established,
29 the court shall enjoin and restrain or otherwise prohibit such
30 violation or threatened violation and in addition thereto the

1 court shall assess in favor of the plaintiff and against the
2 defendant the costs of suit, including reasonable attorney fees.
3 In any such action it shall not be necessary that actual damages
4 to the plaintiff be alleged or proved, but where alleged and
5 proved by a plaintiff other than the department, the plaintiff
6 in the action shall be entitled to recover from the defendant
7 the actual damages sustained by him in addition to such
8 injunctive relief and costs of suit and reasonable attorney
9 fees.

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

14 Section 227-A. Administration Powers and Duties.--(a) The
15 administration of this article is hereby vested in the
16 department. The department shall adopt rules and regulations for
17 the enforcement of this article and may from time to time make
18 or cause to be made one or more cost surveys to establish the
19 lowest cost of the cigarette stamping agent, the lowest cost of
20 the retailer and the lowest cost of the wholesaler, as defined
21 in this article for the Commonwealth or such trading area or
22 areas therein as it shall define. Any such survey made or caused
23 to be made by the department may be used for the purposes
24 specified in this article. If the survey is conducted in
25 connection with a cigarette dealer's request to sell at a price
26 different from the presumptive minimum, the cigarette dealer
27 shall pay for the survey. Regulations shall provide a procedure
28 for dealers to prove a cost different from the State presumptive
29 costs, including proof of lower costs, filing of petitions, cost
30 allocation, data to be submitted and guidelines necessary to

1 implement this article. Authorization to sell below the
2 presumptive minimum prices shall be in writing published in the
3 Pennsylvania Bulletin, and otherwise in conformance with the
4 requirements of this article, and shall contain a statement that
5 the authorization is effective forty-five days after the
6 issuance of the writing and is valid for twelve months
7 therefrom. Authorization by the department for a dealer to sell
8 cigarettes below the established presumptive minimum prices
9 shall be stated as a percentage and be applied to all levels of
10 cigarette prices in the percentage allowed, and this percentage
11 shall also be applied to any new presumptive minimum prices
12 established by the department during the effective period of the
13 dealer's authorization. The department may impose such fees as
14 may be necessary to cover the costs incurred in administering
15 this section, including review and audit of petitioning dealer's
16 audited financial statement. On the effective date of this
17 article and until such time as a dealer receives authorization
18 from the department, in accordance with its regulations, to sell
19 cigarettes at a price different from the presumptive minimum
20 prices established pursuant to this article, the last dealer
21 request to have been authorized by the department shall continue
22 in effect.

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

28 Section 228-A. Sales Without License.--(a) Any dealer or
29 other person who shall, without being the holder of a proper
30 unexpired dealer's license or vending machine license properly

1 affixed as required by this article, engage in the business of
2 purchasing, selling, stamping, distributing or in any other
3 manner directly or indirectly engaging in the business of
4 dealing with cigarettes for profit shall be in violation of this
5 article, and upon conviction in a summary proceeding, shall be
6 sentenced to pay a fine of not less than two hundred fifty
7 dollars (\$250) nor more than one thousand dollars (\$1,000),
8 costs of prosecution or to suffer imprisonment for a term of not
9 more than thirty days, or both, at the discretion of the court.

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

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

20 (b) In addition to the provisions of subsection (a), upon
21 adjudication of a first violation, the cigarette dealer shall be
22 fined not less than two thousand five hundred dollars (\$2,500)
23 nor more than five thousand dollars (\$5,000). For subsequent
24 violations, the agent, wholesaler or retailer shall, upon
25 adjudication thereof, be fined not less than five thousand
26 dollars (\$5,000) nor more than fifteen thousand dollars
27 (\$15,000).

28 (c) A person who violates section 208-A(b), 214-A, 215-A or
29 216-A shall be subject to a civil penalty not to exceed three
30 hundred dollars (\$300) but shall not be subject to subsections

1 (a) and (b).

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

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

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

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

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

20 The definitions of "bureau," "retailer" and "wholesaler" in
21 section 1201 and sections 1221, 1222, 1223, 1224, 1225, 1226,
22 1227, 1228, 1229, 1230, 1231, 1235, 1236, 1241, 1242, 1243, 1261
23 and 1271 of the act of March 4, 1971 (P.L.6, No.2), known as the
24 Tax Reform Code of 1971.

25 Section 4. This act shall take effect immediately.