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LIQUOR CONTROL, DEPARTMENT OF—MAY SELL SPIRITUOUS LIQUOR AT RETAIL OR WHOLESALE AT LESS THAN COST—APPROVAL AND CONSENT, BOARD OF LIQUOR CONTROL—PROVISO, SUCH SALE PRICE WILL NOT PREVENT PAYMENT INTO STATE TREASURY OF ONE DOLLAR PER GALLON FOR AGGREGATE GALLONAGE SALES OF SPIRITUOUS LIQUOR SOLD BY DEPARTMENT OF LIQUOR CONTROL—SECTION 6064-10, G. C.

SYLLABUS:

The Department of Liquor Control may, with the approval and consent of the Board of Liquor Control, sell spirituous liquor at retail or wholesale at less than cost, provided such sale price will not prevent payment into the state treasury of one dollar per gallon for the aggregate gallonage sales of spirituous liquor sold by the Department of Liquor Control, as required by Section 6064-10, General Code.

Columbus, Ohio, October 9, 1945

Hon. Robert M. Sohngen, Director, Department of Liquor Control
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“We request your formal opinion as to the legal right of the Board of Liquor Control to fix below cost the wholesale and retail prices at which certain brands of spirituous liquor shall be sold.

At the present time we have an inventory of approximately 130,000 cases of brandy and 137,000 cases of rum. Current sales per week average 500 cases of brandy and 1,300 cases of rum.

In view of this sales experience, brought about by the sudden collapse of the Japanese War, the granting of holidays for the manufacture of alcohol for beverage purposes, and the probability of early release of corn for manufacturing bourbon whiskey, it appears to be necessary to make certain reductions below cost in order to move a portion of this inventory before the market is further depressed.

We would like to have an early decision in this matter for the reason that the months just ahead should offer us an excellent opportunity to sell our apparent over-supply, if prices can be adjusted to meet present market conditions."

Section 6064-8, General Code, setting forth the powers and duties of the Department of Liquor Control, in so far as pertinent, provides as follows :

"The department of liquor control shall have all the powers and duties vested in and imposed upon a department. In addition thereto, the department shall have and exercise the following powers :

3. To put into operation, manage and control a system of state liquor stores for the sale of spirituous liquor at retail and to holders of permits authorizing the sale of such liquor, to be established throughout the state as hereinafter provided; and thereby and by means of such manufacturing plants, distributing and bottling plants, warehouses and other facilities as it may deem expedient in connection therewith, to establish and maintain a state monopoly of the distribution of such liquor and the sale thereof in packages or containers; and for such purpose to manufacture, buy, import, possess, and sell spirituous liquors in the manner provided in the liquor control act and in the regulations adopted and promulgated by the board pursuant to the liquor control act; * * *

9. All other powers expressly or by necessary implication conferred upon the department by any provisions of the liquor control act; and all powers necessary and proper for the exercise or discharge of any power, duty or function expressly conferred or imposed upon the department by any provision of the liquor control act."

In pursuance to the authority above cited in Section 6064-8, subsection 3, "and sell spirituous liquors in the manner provided in the liquor control act and in the regulations adopted and promulgated by the board pursuant to the liquor control act", the Board of Liquor Control enacted its Regulation No. 11, which provides as follows:

"The Department of Liquor Control will sell spirituous liquor at wholesale to all retail dealers holding the proper permits within the State.

The wholesale price shall be computed as follows: to the cost per case delivered at the warehouse, there shall be added a bailment or warehousing charge of seven cents (.07¢) per case.

From this total shall be deducted the increased Federal Tax rate on distilled spirits as covered by the Revenue Acts of 1941 and 1942. The trucking charge of ten and one-half cents (.10½¢) per case and the State Gallonage Tax of one dollar per gallon shall then be added and the resulting sum divided by .845. The increased Federal Taxes deducted above shall be added back and this sum shall be divided by the number of bottles in the case carried to the nearest even cent. The wholesale case price shall be the product of the bottle price, so determined, times the number of bottles in the case."

Section 6064-3, sub-section 2, General Code, provides:

"The board of liquor control shall have the power except as otherwise provided in this section:

2. From time to time to fix the wholesale and retail prices at which the various classes, varieties and brands of spirituous liquor shall be sold by the department. Such retail prices shall be the same at all state liquor stores which may be established pursuant to this act. In fixing selling prices, the department may compute an anticipated gross profit of not to exceed thirty per cent of the retail selling price based on costs, plus the sum required by Section 6064-10 of the General Code to be paid into the state treasury."

Section 6064-10, General Code, in so far as pertinent, provides as follows:

"The department shall by regulation provide for the custody, safe-keeping, and deposit of all moneys received by it or any of its employees or agents on its behalf; but the department shall pay to the treasurer of state all moneys, checks, and drafts received for the department or for the state, at the time and in the manner provided by Sections 24, 24-3, and 24-4, of the General Code, subject to contingent withdrawal in the manner provided by Section 24-5 of the General Code. * * * In any event (a) a sum equal to one dollar for each gallon of spirituous liquor sold by the department during the period covered by the payment shall be paid into the state treasury to the credit of the general revenue fund in the manner provided by law; and (b) all moneys received from permit fees shall be so paid to the treasurer of state and a separate account thereof shall be kept by the department, the auditor of state, and the treasurer of state."

By virtue of the provisions of Section 6064-8, sub-sections 3 and 9, the Department of Liquor Control is given the specific power and duty to put into operation, manage and control a system of state liquor stores

for the sale of spirituous liquor at wholesale and retail, and in pursuance to such authority to do all things which are in furtherance of such powers. A necessary implication of authority conferred is to exercise its best judgment in the sale and merchandising of spirituous liquors acquired by it. The Liquor Control Act does not prescribe that the business of the department must of necessity be conducted for profit alone, its purpose being the establishment of a state monopoly for the sale and distribution of its liquor. Section 6064-10, General Code, in prescribing the custody and deposit of moneys collected by the department, requires only that not less than one dollar for each gallon of liquor sold by the department shall be paid into the treasury thereby establishing an over-all minimum. That section, however, cannot be construed, in my judgment, to require that such sum of one dollar must be added to the wholesale or retail sales price of each gallon of spirituous liquor purchased by the department. It means only that the total amount to be paid into the state treasury shall not be less than one dollar on total gallonage sold.

Section 6064-3, sub-section 2, General Code, authorizes the Board of Liquor Control from time to time to fix the *wholesale and retail prices* at which spirituous liquors shall be sold, and provides that in fixing such selling price the *department may* compute the anticipated gross profit of *not to exceed* thirty per cent, based on cost, plus said one dollar gallonage payment. The legislature, therefore, by Section 6064-10, General Code, has established an over-all minimum payment, and by Section 6064-3, sub-section 2, General Code, a maximum gross profit.

Regulation 11 of the Board of Liquor Control merely establishes the mechanical method of computing the mark-up for establishing wholesale prices and cannot be construed as establishing a mandatory minimum price. The Board of Liquor Control has not by regulation established such mark-up procedure as to retail prices as authorized by Section 6064-8, sub-section 3, General Code.

This practice has to my knowledge been an accepted administrative act, the Department of Liquor Control having been compelled to resort thereto for the purpose of disposing of merchandise which it has found difficult to sell, and in my opinion such practice is permissible.

It is therefore my opinion that the Department of Liquor Control may, with the approval and consent of the Board of Liquor Control, sell

spirituous liquor at retail or wholesale at less than cost, provided such sale price will not prevent payment into the state treasury of one dollar per gallon for the aggregate gallonage sales of spirituous liquor sold by the Department of Liquor Control, as required by Section 6064-10, General Code.

Respectfully,

HUGH S. JENKINS

Attorney General