

the provisions of this act, and that the provisions of Title 11 (Civil Service) shall be construed to extend to all the officers and employees of the commission with the exception of the members of the commission, the general manager, secretary, counsel and engineers. I have also noted the provision in the second paragraph of Section 8 that in any employments, the commission shall give preference, wherever possible, but in its absolute discretion, to the persons employed by the owner of the property so acquired by the municipality, having in mind the fitness of such employees for the performance of the duties to be assigned to them, etc.

There is nothing in this section which indicates that the Civil Service Commission shall blanket into the civil service the employees of the former Society, but as the provisions of Title 11 by the express language of the statute shall be construed to extend to all the employees other than those specifically excluded, I conclude that they are in the classified service subject to the jurisdiction of your commission.

I am also of opinion that all employees appointed after May 2, 1946, the effective date of the act in question, are subject to the jurisdiction of your commission.

Very truly yours,

THEODORE D. PARSONS,  
*Attorney General,*

By: THEODORE BACKES,  
*Deputy Attorney General.*

TB:B

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APRIL 11, 1949.

HONORABLE JOHN J. DICKERSON,  
*State Treasurer,*  
State House,  
Trenton, N. J.

FORMAL OPINION—1949. No. 29.

DEAR TREASURER:

I acknowledge receipt of your inquiry in which you inform me that B, a licensed cigarette distributor in this State, has requested a ruling from the Cigarette Tax Bureau as to the following proposal:

B intends to enter into a contract with N, a corporation operating on a co-operative plan, whereby the N corporation, through its employees, would solicit the cigarette business of its member drug stores and transmit the orders for same to B who would deliver directly to the retail stores and assume the credit risk thereon. N has never previously engaged in the business of selling or arranging for the sale of cigarettes to its member stores.

The plan contemplates the payment of a commission in the sum of 2½% to the N corporation on all purchases made by the member stores. I am further informed that N distributes, in the usual course of its business practice, 65% of its net profits to its co-operative members, which distribution is predicated on a formula which takes into consideration the proportionate purchases made by each store. However, in this

particular instance, as I understand it, no direct distribution would be made on the basis of cigarette purchases. Your letter of inquiry aforementioned states that:

"This 2½% would not be available to member drug stores for patronage dividends, but would be devoted exclusively to operational costs, thereby accruing indirectly to the member drug stores."

The foregoing resolves itself into a query as to whether or not the proposed plan is in violation of the Unfair Cigarette Sales Act, Chapter 188, P. L. 1948. Based on the facts herein contained, it is my opinion that the said plan is in violation of the said Act.

Section 3 of the Act aforementioned provides that:

"It shall be unlawful for any retailer or wholesaler, \* \* \* to sell, \* \* \* cigarettes at less than cost to such retailer or wholesaler, as the case may be. \* \* \*"

Section 5a provides:

"The term 'cost to the wholesaler' shall mean the 'basic cost of cigarettes' to the wholesaler plus the 'cost of doing business by the wholesaler' as evidenced by the standards and methods of accounting regularly employed by him in his allocation of overhead costs and expenses, paid or incurred \* \* \*"

In the absence of proof of a lesser or higher cost of doing business by the wholesaler making the sale, it is provided in Section 5b, that the "cost of doing business by the wholesaler" shall be 3½% of the "basic cost of cigarettes" plus ¾ of 1% for cartage. No proof of "cost to the wholesaler," as provided in Section 5a, has been presented to the department.

Had the plan contemplated the allowance of a rebate directly to the retail dealer by the wholesaler, there would, of course, be no question concerning the invalidity of the transaction. That practice strikes at the very foundation of the Act. In the instant case, it would appear that the identical result is being accomplished by the circuitous route of paying the rebate to a third party intermediary for the ultimate benefit of the retailer. That which is directly prohibited by statute may not be accomplished lawfully by indirection. The fact that the N corporation would use the commission monies for general operational costs, and would not distribute the same to its member stores based on purchases made, is not of prime importance, because it must be obvious that the use of such monies by the N corporation for its intended purposes must necessarily release for ultimate distribution to its member stores a corresponding sum which they otherwise would not have received. Under the proposal, retailers would be purchasing cigarettes at below the established wholesale cost, or conversely stated, the plan results in a sale by the wholesaler at below the cost set forth in the Act.

Very truly yours,

THEODORE D. PARSONS,  
*Attorney General,*

By: MAX EISENSTEIN,  
*Deputy Attorney General.*