arithmetically perfect adjustment. "It is well-recognized that absolute equality in taxation is a practical impossibility and that the Legislature in setting up taxing procedures is not held to a standard of perfection". *Totowa v. Passaic County Bd. of Taxation*, 5 N.J. 454, 464 (1950); cf. *Berkeley Heights Tp. v. Div., etc., Dept. Taxation*, 68 N.J. Super. 364, 369 (App. Div. 1961), *certif. denied* 36 N.J. 138 (1961). Moreover, the State has the right to determine, as it has by these statutes, the manner in which its own subdivisions for local self-government shall share in revenues for their respective public purposes. *State v. Lanza, supra; City of Passaic v. Passaic County Bd. of Taxation*, 31 N.J. 413 (1960).

We advise you, therefore, that under N.J.S.A. 58:20-5 and N.J.S.A. 58:21-6, municipalities receiving payments from the State of New Jersey may not retain these receipts exclusively for local municipal purposes but must pay an apportioned share thereof to the county and school districts in accordance with the general tax rate of the municipality for the tax year immediately preceding the year in which any such payment is received.

Very truly yours,
ARTHUR J. SILLS
Attorney General

By: ALAN B. HANDLER
Deputy Attorney General

1. L. 1956, c. 60, §1 *et seq.*; N.J.S.A. 58:20-1 *et seq.*, as amended L. 1957, c. 215, §1 *et seq.*
2. L. 1958, c. 33, §1 *et seq.*; N.J.S.A. 58:21-1 *et seq.*

May 6, 1964

MR. JOSEPH P. LORDI, *Director*
Division of Alcoholic Beverage Control
Department of Law and Public Safety
1100 Raymond Boulevard
Newark, New Jersey

FORMAL OPINION 1964 - NO. 3

Dear Director Lordi:

We have been asked for an interpretation of Chapter 152, Laws of 1962, as it applies to specific situations hereinafter described. Chapter 152 generally limits the direct or indirect ownership of alcoholic beverage retail licenses to no more than two per person.

The first question posed is whether a landlord who is the owner of more than two alcoholic beverage retail licenses may make a lease with a tenant who operates a retail liquor store with rent based in part upon a percentage of gross sales. The question is whether such a lease gives the landlord a beneficial interest in an additional license contrary to the provisions of Chapter 152.

The second question posed is whether a corporation which is the holder of an alcoholic beverage retail license acquired prior to the effective date of Chapter 152 may thereafter purchase and retire the shares of stock held by some stockholders having a 50% interest in the corporation, thereby giving the remaining group of stockholders complete control of the corporation.

Subject to the qualifications expressed below, for the reasons hereinafter stated we find in general that neither of these transactions is prohibited by Chapter 152, Laws of 1962.

Section 1 of the Act provides that after the effective date of the Act, with certain exceptions, no person shall acquire a beneficial interest in more than two alcoholic beverage retail licenses. The same section provides that no person who holds a beneficial interest in more than two such licenses on the effective date of the Act shall be required to give up his interest in any or all of such licenses.

Section 2 of the Act provides that the Act shall not apply to the acquisition of "an additional license or licenses or an interest therein" when such license is issued in connection with a hotel containing at least 50 sleeping rooms.

Certain other exceptions and limitations are set forth in the remainder of the Act. For example, section 6 provides generally that nothing in the Act shall affect the right of any person having a beneficial interest in a retail license or licenses to hold or acquire an interest of not more than 10% of any corporation whose shares of stock are publicly traded.

The constitutionality of the Act has been upheld in *Grand Union v. Sills*, 81 N.J. Super. 65 (Law Div. 1963), appeal pending. In the course of that opinion the purpose of the Act was explained as follows, at 67:

> "Briefly put, the statute in question limits the number of retail alcoholic beverage licenses that may be held by any one person to two. The curb is prospective only. Plaintiffs and those similarly situated will not be disturbed in their present multiple license holdings, but they are prohibited from acquiring additional licenses."

The first question is whether a landlord who is the owner of more than two alcoholic beverage retail licenses may enter into a "gross sales lease" with a tenant who operates a retail liquor store without thereby acquiring a "beneficial interest" in another license contrary to the statutes. A specific lease proposal has not been submitted. Therefore, it is necessary to answer this question in a general manner.

"Percentage leases" are those in which the amount of rent is based on a percentage of gross sales, or gross or net profits of the lessee's business, usually with a stipulated minimum. Percentage leases are used frequently in order to fix the landlord's return in proportion to the value of the store's location, and to adjust for fluctuations in economic conditions and dollar values. Note: "The Percentage Lease—Its Functions and Drafting Problems", 61 *Harv. L. Rev.* 317, 318 (1948); *Silverstein v. Keane*, 19 N.J. 1, 12 (1955). For examples of such leases, see also *Farber v. Shell Oil Co.*, 47 N.J. Super. 48 (App. Div. 1957) and *Plassmeyer v. Brenta*, 24 N.J. Super. 322 (App. Div. 1953).

Leases calling for the payment of rent based upon gross receipts have been commonly used in the past in connection with licensed premises subject to the jurisdiction of the Division of Alcoholic Beverage Control. In fact, the Division has previously considered whether such leases give a landlord an interest in the license. This ques-

tion has arisen because N.J.S.A. 33:1-26 contains a provision which has been part of the Alcoholic Beverage Law since 1933:

> "Any person who shall exercise or attempt to exercise, or hold himself out as authorized to exercise, the rights and privileges of a license except the licensee and then only with respect to the licensed premises, shall be guilty of a misdemeanor."

The same section of the law contains the following provision:

> "No person who would fail to qualify as a licensee under this chapter shall be knowingly employed by or connected in any business capacity whatsoever with a licensee***."

Accordingly, licensing officials have always sought to determine whether any person other than the licensee has an interest in the license. See: *The Boss Co., Inc. v. Board of Commissioners of Atlantic City,* 40 N.J. 379, 388 (1963). In *Matter of Club Parsippany, Inc.*, Bulletin 411, Item 8, decided June 20, 1940, Acting Commissioner E.W. Garrett considered a lease which provided that the licensee should pay as rent 10% of the annual gross receipts from the sale of alcoholic beverages up to $15,000, and 15% of all gross receipts in excess of that sum, but in no event less than $1200 per year. The Acting Commissioner held that because of this arrangement the landlord "is so interested in the license applied for and the business to be conducted thereunder that its interest must be disclosed" by the applicant for the license. The Acting Commissioner said:

> "Normally, rental agreements provide for the payment of a fixed sum by the tenant to the landlord. Such agreements give the landlord no interest (within the contemplation of Question 28) in the licensed business since the rent is due and payable without reference to the receipts of the business. Hence applicants who lease premises, paying a fixed rent, need not disclose in answer to Question 28 the rental agreement as an interest of the landlord.
>
> "On the other hand, where the rent is computed with reference to the receipts of the licensed business, disclosure of the arrangement must be made so that the issuing authority may determine whether the leasing agreement is *bona fide*, or a mere subterfuge to conceal either an actual partnership of the landlord and tenant in the licensed business or a situation where the tenant is a mere front for the landlord."

See also *Weston & Co., et al. v. Municipal Board of A.B.C. of Newark, et al.*, Bulletin 719, Item 2, decided June 28, 1946 where it was held that a sub-landlord does not have an unlawful interest in the licensed business by virtue of his receipt of 4% of the gross sales in consideration for the sub-lease.

An agreement to pay by way of rent, salary or otherwise a portion or percentage of the gross or net profits or income from the licensed business must be disclosed in response to Question 31 of the application for municipal retail licenses, as promulgated in Bulletin 996 dated January 4, 1954. On a number of occasions since that time the Division of Alcoholic Beverage Control has stated in reply to inquiries that

the payment of a substantial percentage of receipts by way of rent due a landlord would in effect give the landlord an interest in the licensed business in violation of N.J.S.A. 33:1-26. The Division has taken the position, however, that if the leasing arrangement is *bona fide* and not a subterfuge to conceal a partnership of the landlord and tenant, or an arrangement whereby the tenant is a mere "front" for the landlord, an agreement to pay as rent a reasonable percentage, generally not more than 6% of the gross receipts, would not be considered unlawful.

The mere receipt of a share of gross sales, "unless coupled with such factors as sharing the losses, right of control, community of interest, and the use of partnership terms in the instrument" will not create a partnership. Note, *supra,* 61 *Harv. L. Rev.,* at 320, fn. 21. This has been the law of New Jersey since the decision in *Perrine v. Hankinson,* 11 N.J.L. 181 (Sup. Ct. 1829), which held that an agreement to pay as rent a portion of the profits of a farm and tavern did not constitute the parties partners so as to disable one from suing the other at common law. *See* also: *Austin, Nichols & Co. v. Neil,* 62 N.J.L. 462 (sup. Ct. 1898); *United States ex rel. Kessler et al. v. Mercur Corp. et al.,* 83 F. 2d 178, 182 (2 Cir. 1936); *Annotation,* "Lease or tenancy agreement as creating partnership relationship between lessor and lessee," 131 A.L.R. 508, 536 (1941).

In the *United States ex rel. Kessler* case, *supra,* the court reviewed several cases which held that the sharing of gross receipts did not convert a landlord-tenant relationship into a partnership or joint venture. In other cases cited therein, however, courts had found that various factors, such as control over earnings and the treatment of assets as jointly owned property, justified treating the relationship as one of joint venture rather than of landlord-tenant. But it is not necessary to find that a partnership or joint venture relationship exists before determining that Chapter 152 has been violated. Other elements short of a partnership or joint venture may combine to establish the acquisition by the landlord of a beneficial interest in a new license contrary to the provisions of Chapter 152.

As stated above, by virtue of N.J.S.A. 33:1-26, a liquor license in New Jersey must be free "from any device which would subject it to the control of persons other than the licensee." *The Boss Co., Inc. v. Board of Commissioners of Atlantic City, supra,* 40 N.J. at 388. *See* also: *Mannion v. Greenbrook Hotel, Inc.,* 138 N.J. Eq. 518, 520 (E. & A. 1946); *Lachow v. Alper,* 130 N.J. Eq. 588, 590 (Chan. 1942); *Walsh v. Bradley,* 121 N.J. Eq. 359, 360 (Chan. 1937). Similarly, where a lease entitles the landlord to a share of gross receipts the relationship of the parties and all conditions of the transaction should be scrutinized to determine whether a normal, arms-length landlord-tenant relationship has been established or whether the landlord's interest or control has been carried so far as to give him a beneficial interest in an additional license contrary to the proscription of Chapter 152.

There are many factors that could be considered. These include the extent of participation in gross receipts, pre-existing relationships of the parties, whether or not the landlord has any right to control the manner of conducting the business and how the lease compares with other leases for similar premises. In an arms-length transaction it would be expected that a fluctuating rent provision would be of benefit to the tenant as well as the landlord under varying conditions. However, if the percentage lease provides a minimum, inflexible, guaranteed rent equal to the full fair rental value of the property, the lease would give the landlord additional rent if gross receipts are high but gives the tenant no relief if business is bad. *See:* Note, "The Percentage Lease", *supra,* 61 *Harv. L. Rev.* at 323, fn. 36. Thus, if the landlord is guaranteed what would clearly be considered the maximum fair rental value of the

property, any additional rent by way of a percentage of gross receipts might be considered a share in the value of the licensed business.

Without seeing a specific lease and knowing all the facts of the transaction, we can go no further than to indicate the care with which each leasing arrangement must be examined by the Division. It would not be unreasonable for the Division to establish, as has been done in the past, a standard that limits the share in gross receipts that can be paid to the lessor, even where the relationship of the parties suggest no intent to use the lease arrangement as a means of evading the effect of Chapter 152, Laws of 1962.

If the rental agreement, considered as a whole, represents an acceptable landlord-tenant arrangement, not entered into for the purpose of circumventing the provisions of Chapter 152, such an agreement would not constitute a "beneficial interest" within the meaning of the statute. The test should be whether the agreement represents solely a reasonable method of compensating the landlord for the use of the premises or whether it is a device whereby the landlord can also derive benefits equivalent to a participation in the business conducted therein.

The second question involves a corporation which is the holder of a number of alcoholic beverage retail licenses acquired prior to August 3, 1962, the effective date of the aforesaid Act. The shares of the corporation are held by two families, each family having 50% of the outstanding stock. The corporation now proposes to purchase and retire all shares of stock held by one of the families if such a transaction is permissible under the law. This would result in the remaining family members becoming the sole stockholders of the corporation.

In the instant situation, the corporation does not contemplate acquiring additional licenses or interests in additional licenses. It merely proposes to redistribute among some of the existing stockholders the extent of ownership of its stock, and, indirectly, of the licenses already held by it, through the repurchase of outstanding shares of stock. The proposed action does not constitute the acquisition of an additional license by the corporation; nor is it the acquisition by any stockholder of a beneficial interest in a new or different license not held by the corporation on the effective date of the Act. Therefore, this transaction is not prohibited by the Act. This opinion in no way attempts to deal with the situation that would exist if a person holds not more than 10% of a publicly traded corporation and thereafter seeks to increase his stockholdings in that corporation above the 10% level.

Therefore, you are advised that where a closed corporation, before the effective date of the Act, was the holder of two or more licenses, the Act does not prevent the corporation from buying and retiring the shares of stock held by some of the stockholders even if the effect is to increase the control by the remaining stockholders of the outstanding shares of stock of the corporation.

Very truly yours,
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