

Cigarette Manufacturers' Promotional Programs and the Cigarette Marketing Standards Act

The Cigarette Marketing Standards Act (CMSA), Article 20-A of the Tax Law, was enacted in 1985 to stabilize the cigarette industry in New York State and to enable cigarette agents and dealers to compete fairly for sales of cigarettes in the state. The act established minimum resale prices for sales of cigarettes at the wholesale and retail levels. Under the CMSA, it is unlawful for any agent, or wholesale or retail dealer, to intentionally injure competitors or to destroy or substantially lessen competition. It is also unlawful for such parties to intentionally avoid the collection or paying over of taxes or to advertise, offer to sell, or sell cigarettes at a price below their cost plus a statutorily determined minimum percentage markup. The CMSA also includes fines and penalties for violations of these requirements.

Recent inspections by the Tax Department's Office of Tax Enforcement have revealed sales of cigarettes made in conjunction with certain cigarette manufacturers' promotional pricing programs that are in violation of the CMSA. The CMSA provides that payments made to an agent, wholesale dealer or retail dealer, by or on behalf of a manufacturer, for display, advertising, promotional or other purposes cannot be considered in determining the cost of cigarettes to the agent, wholesale dealer or retail dealer.

The cost of cigarettes to the agent is the manufacturer's list price, less all trade discounts, plus the face value of any tax stamps required to be affixed to the packages of cigarettes. A trade discount is the difference between a manufacturer's list price and the price at which the manufacturer actually sells cigarettes. A trade discount is a discount given by a manufacturer of cigarettes to the agent at the time of sale that is separately stated as a trade discount on the invoice or other document of sale. **Payments made under cigarette manufacturers' promotional pricing programs such as "buy-downs" and "master-type" programs are not considered trade discounts and shall not be used to reduce minimum resale prices.**

Generally, under a "buy-down" program, a manufacturer or a manufacturer's representative offers a retail dealer a rebate for sales of a particular brand of cigarettes either for a specific quantity of cigarettes or for the quantity of cigarettes sold over a predetermined period of time. These rebates are not deducted from the manufacturer's list price shown on the invoice, but rather are paid or credited separately subsequent to the sales. Therefore, under the CMSA, any such amounts cannot be used to reduce the minimum resale price of cigarettes.

A "master-type" promotional program is a program sponsored by a manufacturer and is administered through a cigarette agent or wholesale dealer. The agent or dealer agrees to pay the retail dealer a rebate and is later reimbursed by the manufacturer. The agent or dealer may also be paid a fee to administer the program. The payments are not deducted from the manufacturer's list price shown on the invoice from the manufacturer. Therefore, under the CMSA, these payments cannot be used by a dealer to reduce the minimum resale price of cigarettes.

For assistance in determining the minimum wholesale or retail prices of cigarettes, refer to Publication 509, *Agents Minimum Wholesale Cigarette Prices*; Publication 510, *Minimum Retail Cigarette Prices*; and Publication 508, *Cigarette Minimum Price List*, or call the Business Tax Information Center at 1 800 972-1233. For forms and publications call 1 800 462-8100.

Penalties for CMSA violations

For selling cigarettes at less than minimum price, an agent or a wholesale dealer may be subject to civil fines and criminally prosecuted, and a retail dealer may be criminally prosecuted. In addition, an agent or wholesale dealer may be subject to the suspension of his or her license.

Civil penalties

Any *agent or wholesale dealer* who violates the CMSA may be subject to the following penalties:

- For a first violation, the license of the agent or dealer may be suspended for not more than 30 days and/or a fine of up to \$20,000 may be imposed.
- For a second or subsequent violation occurring within three years of the prior violation – where the penalty for the first violation was a fine only, or where the second or subsequent violation was determined to be due to reasonable cause or it is determined that the agent or dealer acted in good faith – the license of the agent or dealer may be suspended for not more than 60 days and/or a fine of up to \$50,000 may be imposed.
- For all other second or subsequent violations occurring within three years of the prior violation, the license of the agent or dealer shall be revoked.

In determining whether to suspend or revoke the license of an agent or dealer, or to impose a fine, the Tax Department must consider the gravity of the violation, the size of the agent's or dealer's business, the amount of the sales in violation of the CMSA, and any history of previous violations. The Department must notify the agent or dealer of the proposed action and provide the agent or dealer an opportunity for hearing.

Criminal penalty

Any wholesale or retail dealer who violates the CMSA may be prosecuted under Article 37 of the Tax Law and, if convicted, would be guilty of a class B misdemeanor.