

1 House BILL NO. 681
2 INTRODUCED BY Waldron

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT TO EXCLUDE RETAILERS
5 FROM MANY OF THE PROVISIONS OF THE MONTANA CIGARETTE SALES
6 ACT AND TO TRANSFER THE ADMINISTRATION OF THAT ACT FROM THE
7 DEPARTMENT OF REVENUE TO THE DEPARTMENT OF BUSINESS
8 REGULATION; AMENDING SECTIONS 51-303, 51-304, 51-306,
9 51-307, 51-308, 51-310, 51-311, 51-312, AND 51-314, R.C.M.
10 1947."
11

12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
13 Section 1. Section 51-303, R.C.M. 1947, is amended to
14 read as follows:

15 "51-303. Definitions. When used in this act, the
16 following words and phrases shall have the meaning ascribed
17 to them in this section, except where the context clearly
18 indicates a different meaning: (1) "Person" shall mean and
19 include any individual, firm, association, company,
20 partnership, corporation for profit or nonprofit
21 corporation, joint stock company, club, agency, syndicate,
22 co-operative, municipal corporation or other political
23 subdivision of this state, trust, receiver, trustee,
24 fiduciary and conservator.

25 (2) "Wholesaler" shall include any person who:

1 (a) purchases cigarettes directly from the
2 manufacturer; or

3 (b) purchases cigarettes from any other person who
4 purchases from the manufacturer and who acquires such
5 cigarettes solely for the purpose of bona fide resale to
6 retail dealers; or

7 (c) services retail outlets by the maintenance of an
8 established place of business for the purchase of
9 cigarettes, including, but not limited to, the maintenance
10 of warehousing facilities for the storage and distribution
11 of cigarettes.

12 Nothing contained herein shall prevent a person from
13 qualifying in different capacities as both "wholesaler" and
14 "retailer" under the applicable provisions of this act.

15 (3) "Retailer" shall mean and include any person who
16 operates a store, stand, booth or concession for the purpose
17 of making sales of cigarettes at retail.

18 (4) "Administrative agency" or "department" shall mean
19 the ~~state department of revenue of Montana~~ business
20 regulation and, where the meaning of the context so
21 requires, all deputies and employees duly authorized by such
22 ~~board~~ department.

23 (5) "Cigarettes" shall mean any roll for smoking made
24 wholly or in part of tobacco, irrespective of size or shape
25 and whether or not such tobacco is flavored, adulterated or

1 mixed with any other ingredient, the wrapper or cover of
2 which is made of paper or any other substance or material
3 except tobacco.

4 ~~(6) "Sale" shall mean any transfer for a~~
5 ~~consideration, exchange, barter, gift, offer for sale and~~
6 ~~distribution, in any manner, or by any means whatever.~~

7 ~~(7)~~ (6) "Sell at wholesale," "sale at wholesale" and
8 "wholesale" sales shall mean and include any bona fide
9 transfer of title to cigarettes for a valuable
10 consideration, made in the ordinary course of trade or in
11 the usual conduct of the wholesaler's business, to a
12 retailer for the purpose of resale.

13 ~~(8) "Sell at retail," "sale at retail" and "retail~~
14 ~~sales" shall mean and include any transfer of title to~~
15 ~~cigarettes for a valuable consideration, made in the~~
16 ~~ordinary course of trade or usual conduct of the seller's~~
17 ~~business, to the purchaser for consumption or use.~~

18 ~~(9)~~ (7) "Basic cost of cigarettes" shall mean the
19 invoice cost of cigarettes to the ~~retailer or wholesaler, as~~
20 ~~the case may be,~~ or the replacement cost of cigarettes to
21 the ~~retailer or wholesaler, as the case may be,~~ in the
22 quantity last purchased, whichever is lower.

23 ~~(10)~~ (8) (a) The term "cost to the wholesaler" shall
24 mean the "basic cost of cigarettes" to the wholesaler plus
25 the "cost of doing business by the wholesaler," as evidenced

1 by the standards and methods of accounting regularly
2 employed by the said wholesaler in his determination of
3 costs for income tax reporting purposes for the total
4 operation of his establishment and shall include within said
5 costs, without limitation, labor costs (including salaries
6 of executives and officers), rent, depreciation, selling
7 costs, maintenance of equipment, delivery costs, all types
8 of licenses, business taxes, insurance and advertising. The
9 cost of doing business by a wholesaler shall also include
10 any rebates, patronage dividends or concessions no matter
11 how defined, and any and all other indirect or overhead
12 costs with respect to the operation of the establishment of
13 the said wholesaler, expressed as a percentage and applied
14 to the "basic cost of cigarettes."

15 (b) In the absence of the filing with the department
16 of proof which the department declares to be satisfactory of
17 a lesser or higher cost of doing business by the wholesaler
18 making the sale, the "cost of doing business by the
19 wholesaler" shall be presumed to be five per centum (5%) of
20 the "basic cost of cigarettes" to the wholesaler, plus
21 cartage to the retail outlet, if performed or paid for by
22 the wholesaler, which cartage cost, in the absence of the
23 filing with the department of satisfactory proof of a lesser
24 or higher cost, shall be considered to be three-fourths of
25 one per centum (3/4 of 1%) of the "basic cost of cigarettes"

1 to the wholesaler.

2 ~~(1) (a) The term "cost to the retailer" shall mean~~
 3 ~~the "basic cost of cigarettes" to the retailer plus the~~
 4 ~~"cost of doing business by the retailer" as evidenced by the~~
 5 ~~standards and methods of accounting regularly employed by~~
 6 ~~the said retailer in his determination of costs for income~~
 7 ~~tax reporting purposes for the total operation of his~~
 8 ~~establishment and shall include within said costs, without~~
 9 ~~limitation, labor costs, (including salaries of executives~~
 10 ~~and officers), rent, depreciation, selling costs,~~
 11 ~~maintenance of equipment, delivery costs, all types of~~
 12 ~~licenses, business taxes, insurance, and advertising,~~
 13 ~~including any rebates or concession no matter how defined,~~
 14 ~~and any and all other indirect or overhead costs with~~
 15 ~~respect to the operation of the establishment of the said~~
 16 ~~retailer, expressed as a percentage and applied to the~~
 17 ~~"basic costs of cigarettes"; provided, however, that any~~
 18 ~~retailer who purchases from the manufacturer or from any~~
 19 ~~other person at or at less than or about the price normally~~
 20 ~~and usually charged for purchases in wholesale quantities~~
 21 ~~shall, in determining "cost to the retailer," pursuant to~~
 22 ~~this subsection, add the "cost of doing business by the~~
 23 ~~wholesaler," as determined in subparagraph 4 (b) of this~~
 24 ~~act, to the "basic cost of cigarettes" to said retailer, as~~
 25 ~~well as the "cost of doing business by the retailer."~~

1 ~~(b) In the absence of the filing with the department~~
 2 ~~of satisfactory proof of a lesser or higher cost of doing~~
 3 ~~business by the retailer making the sale, the "cost of doing~~
 4 ~~business by the retailer" shall be presumed to be ten per~~
 5 ~~centum (10%) of the "basic cost of cigarettes" to the~~
 6 ~~retailer.~~

7 ~~(c) In the absence of the filing with the department~~
 8 ~~of satisfactory proof of a lesser or higher cost of doing~~
 9 ~~business, the "cost of doing business by the retailer," who,~~
 10 ~~in connection with the retailer's purchase, received not~~
 11 ~~only the discounts ordinarily allowed upon purchases by a~~
 12 ~~retailer, but also, in whole or part, the discounts~~
 13 ~~ordinarily allowed upon purchases by a wholesaler, shall be~~
 14 ~~presumed to be ten per centum (10%) of the sum of the "basic~~
 15 ~~cost of cigarettes" and the "cost of doing business by the~~
 16 ~~wholesaler."~~

17 ~~(12) (9) "Business day" shall mean any day other than a~~
 18 ~~Sunday or a legal holiday."~~

19 Section 2. Section 51-304, R.C.M. 1947, is amended to
 20 read as follows:

21 "51-304. Practices declared unlawful — penalty —
 22 prima facie evidence of unlawful intent. It shall be
 23 unlawful and a violation of this act:

24 (1) For any ~~retailer~~ or wholesaler with intent to
 25 injure a competitor or substantially lessen competition;

1 (a) To advertise, offer to sell or sell, at ~~retail or~~
2 wholesale, cigarettes at less than cost to such ~~a retailer~~
3 ~~or wholesaler, as the case may be.~~

4 (b) To offer a rebate in price, to give a rebate in
5 price, to offer a concession of any kind, or to give a
6 concession of any kind or nature whatever in connection with
7 the sale of cigarettes if such rebate or concession offered
8 or given in connection with the sale of cigarettes is not
9 offered or given by the wholesaler ~~or retailer~~ in the same
10 ratio with respect to all other merchandise as to which such
11 rebate or concession may lawfully be given which is sold by
12 said wholesaler ~~or retailer~~ in the ordinary course of his
13 trade or business.

14 (2) For any retailer:

15 (a) To induce or attempt to induce or to procure or
16 attempt to procure the purchase of cigarettes at a price
17 less than "cost to the wholesaler," as defined in this act.

18 (b) To induce or attempt to induce or to procure or
19 attempt to procure any rebate or concession of any kind or
20 nature whatever in connection with the purchase of
21 cigarettes.

22 (3) Any retailer or wholesaler who violates the
23 provisions of this section shall be guilty of a misdemeanor
24 and shall be prosecuted and punished by a fine of not more
25 than five hundred dollars (\$500) for each such offense. Any

1 individual who, as a director, officer, partner, member or
2 agent of any person violating the provisions of this act,
3 assists or aids, directly or indirectly, in such violation,
4 shall, equally with the person for whom he acts, be
5 responsible therefor and subject to the punishment and
6 penalties set forth herein.

7 (4) Evidence of advertisement, offering to sell or
8 sale of cigarettes by any ~~retailer or~~ wholesaler at less
9 than cost to him, or evidence of any offer of a rebate in
10 price, or the giving of a rebate in price, or an offer of a
11 concession, or the giving of a concession of any kind or
12 nature whatever in connection with the sale of cigarettes if
13 such rebate or concession offered or given in connection
14 with the sale of cigarettes is not offered or given by the
15 wholesaler ~~or retailer~~ in the same ratio with respect to all
16 other merchandise as to which such rebate or concession may
17 lawfully be given which is sold by said wholesaler ~~or~~
18 ~~retailer~~ in the ordinary course of his trade or business, or
19 the inducing or attempt to induce, or the procuring or the
20 attempt to procure the purchase of cigarettes at a price
21 less than cost to the wholesaler ~~or the retailer~~, shall be
22 prima facie evidence of intent to injure competitors or
23 substantially lessen competition."

24 Section 3. Section 51-306, R.C.M. 1947, is amended to
25 read as follows:

1 "51-306. Combination sales. In all advertisements,
 2 offers for sale or sales involving two or more items, at
 3 least one of which items is cigarettes, at a combined price,
 4 and in all advertisements, offers for sale or sales
 5 involving the giving of any gift or concession of any kind
 6 whatever (whether it be coupons or otherwise) if such rebate
 7 or concession offered or given in connection with the sale
 8 of cigarettes is not offered or given by the wholesaler ~~or~~
 9 ~~retailer~~ in the same ratio with respect to all other
 10 merchandise as to which such rebate or concession may
 11 lawfully be given which is sold by said wholesaler ~~or~~
 12 ~~retailer~~ in the ordinary course of his trade or business,
 13 the ~~retailer's or~~ wholesaler's combined selling price shall
 14 not be below the ~~"cost to the retailer"~~ or the "cost to the
 15 wholesaler," ~~respectively,~~ of the total costs of all
 16 articles, products, commodities, gifts and concessions
 17 included in such transactions."

18 Section 4. Section 51-307, R.C.M. 1947, is amended to
 19 read as follows:

20 "51-307. Exceptions. The provisions of this act shall
 21 not apply to ~~sales at retail or~~ sales at wholesale made
 22 (a) as an isolated transaction and not in the usual course
 23 of business; (b) where cigarettes are advertised, offered
 24 for sale, or sold in bona fide clearance sales for the
 25 purpose of discontinuing trade in such cigarettes and said

1 advertising, offer to sell, or sale, shall state the reason
 2 thereof and the quantity of such cigarettes advertised,
 3 offered for sale, or sold as imperfect or damaged, and said
 4 advertising, offer to sell, or sale, shall state the reason
 5 therefor and the quantity of such cigarettes advertised,
 6 offered for sale, or to be sold; (c) where cigarettes are
 7 sold upon the final liquidation of a business; or (d) where
 8 cigarettes are advertised, offered for sale, or sold by any
 9 fiduciary or other officer acting under the order or
 10 direction of any court."

11 Section 5. Section 51-308, R.C.M. 1947, is amended to
 12 read as follows:

13 "51-308. Sales to meet competition. (a) ~~Any retailer~~
 14 ~~may advertise, offer to sell, or sell cigarettes at a price~~
 15 ~~made in good faith to meet the price of a competitor who is~~
 16 ~~selling the same article at cost to him as a retailer as~~
 17 ~~prescribed in this act.~~ Any wholesaler may advertise, offer
 18 to sell, or sell cigarettes at a price made in good faith to
 19 meet the price of a competitor who is rendering the same
 20 type of service and is selling the same article at cost to
 21 him as a wholesaler, as prescribed in this act. The price
 22 of cigarettes advertised, offered for sale, or sold under
 23 the exceptions specified in section 6 [51-307] shall not be
 24 considered the price of a competitor and shall not be used
 25 as a basis for establishing prices below cost, nor shall the

1 price established at a bankrupt sale be considered the price
2 of a competitor within the purview of this section.

3 (b) In the absence of proof of the "price of a
4 competitor," under this section, the ~~"lowest cost to the
5 retailer," or the "lowest cost to the wholesaler," as the
6 case may be,~~ determined by any "cost survey," made pursuant
7 to section 11 [51-312] of this act, may be considered to be
8 the "price of a competitor," within the meaning of this
9 section."

10 Section 6. Section 51-310, R.C.M. 1947, is amended to
11 read as follows:

12 "51-310. Evidence to be considered as bearing on bona
13 fides of cost. (a) In determining ~~"cost to the retailer"~~
14 ~~and~~ "cost to the wholesaler," the ~~board~~ department or a
15 court shall receive and consider as bearing on the bona
16 fides of such cost, evidence tending to show that any person
17 complained against under any of the provisions of this act
18 purchased cigarettes, with respect to the sale of which
19 complaint is made, at a fictitious price, or upon terms, or
20 in such a manner, or under such invoices, as to conceal the
21 true cost, discounts or terms of purchase, and shall also
22 receive and consider as bearing on the bona fides of such
23 cost, evidence of the normal, customary and prevailing terms
24 and discounts in connection with other sales of a similar
25 nature in the trade area or state.

1 (b) Merchandise given gratis, or payment made to a
2 retailer or wholesaler by the manufacturer thereof for
3 display, or advertising, or promotion purposes or otherwise,
4 shall not be considered in determining the cost of
5 cigarettes to the retailer or wholesaler."

6 Section 7. Section 51-311, R.C.M. 1947, is amended to
7 read as follows:

8 "51-311. Cigarettes purchased outside ordinary trade
9 channels. In establishing the cost of cigarettes to the
10 ~~retailer or~~ wholesaler, the invoice cost of said cigarettes
11 purchased at a forced, bankrupt or closeout sale, or other
12 sale outside of the ordinary channels of trade, may not be
13 used as a basis for justifying a price lower than one based
14 upon the replacement cost of the cigarettes to the ~~retailer~~
15 ~~or~~ wholesaler in the quantity last purchased, through the
16 ordinary channels of trade."

17 Section 8. Section 51-312, R.C.M. 1947, is amended to
18 read as follows:

19 "51-312. Cost survey. Where a cost survey pursuant to
20 cost accounting practices, including those defined in
21 section 2 [51-303] (10) (a), has been made by the board, or
22 by a trade association or other industry group, for the
23 trading area in which the offense is committed, to establish
24 ~~the lowest "cost to the retailer" and the lowest "cost to~~
25 ~~the wholesaler,"~~ said cost survey shall be considered to be

1 competent evidence for use in proving the cost to the person
2 complained against within the provisions of this act."

3 Section 9. Section 51-314, R.C.M. 1947, is amended to
4 read as follows:

5 "51-314. Powers of board department. (a) In addition
6 to the penalties and rights imposed and set forth in
7 ~~sections 3-[51-304]~~ and ~~42-[51-313]~~ of this act, the board
8 department shall enforce the provisions of this act. The
9 board department shall have the power to adopt, amend and
10 repeal rules and regulations necessary to enforce and
11 administer the provisions of this act. The board department
12 is given full power and authority to revoke or suspend the
13 license or permit of any wholesale ~~or-retail~~ cigarette
14 dealer in the state of Montana upon sufficient cause
15 appearing of the violation of this act or upon the failure
16 of such licensee or permittee to comply with any of the
17 provisions of this act.

18 (b) No license or licenses shall be suspended or
19 revoked except upon notice to the licensee, and after a
20 hearing prescribed by ~~said-board~~ the department at its
21 principal office. The board department, upon a finding by it
22 that the licensee has failed to comply with any provisions
23 of this act or any rule or regulation promulgated
24 thereunder, shall, in the case of the first offender,
25 suspend the license or licenses of the said licensee for a

1 period of not less than five (5) nor more than twenty (20)
2 consecutive business days, and, in the case of a second or
3 plural offender, shall suspend said license or licenses for
4 a period of not less than twenty (20) consecutive business
5 days nor more than twelve (12) months, and, in the event the
6 board department finds the offender has been guilty of
7 willful and persistent violations, he may revoke such
8 licensee's license or licenses.

9 (c) Any person whose license or licenses have been so
10 revoked may apply to the board department at the expiration
11 of one year for a reinstatement of his license or licenses.
12 Such license or licenses may be reinstated by the board
13 department if it shall appear to the satisfaction of said
14 board department that the licensee will comply with the
15 provisions of this act and the rules and regulations
16 promulgated thereunder.

17 (d) No person whose license has been suspended or
18 revoked shall sell cigarettes or permit cigarettes to be
19 sold during the period of such suspension or revocation on
20 the premises occupied by him or upon other premises
21 controlled by him or others or in any other manner or form
22 whatever. Nor shall any disciplinary proceedings or action
23 be barred or abated by the expiration, transfer, surrender,
24 continuance, renewal or extension of any license issued
25 under the provisions of the "cigarette tax law," as provided

1 in articles of Title 84, chapter 44 56 ~~of the Revised Codes~~
2 ~~of Montana, 1947.~~

3 Any determination by the ~~board~~ department and any order
4 of suspension or revocation of a license or licenses
5 thereunder, or refusal to reinstate a license or licensee
6 after revocation, shall be reviewable by the court in a
7 proper case and in proceedings as provided by the procedural
8 law of this jurisdiction."

-End-