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COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

SUFFOLK, SS.

No. SJC-12654  
Appeals Ct. No. 18-P-0038

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MASSACHUSETTS WINES & SPIRITS, LLC D/B/A TOTAL WINE & MORE,  
*Plaintiff-Appellee,*

v.

ALCOHOLIC BEVERAGES CONTROL COMMISSION,  
*Defendant-Appellant.*

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ON APPEAL FROM A DECISION OF THE SUFFOLK SUPERIOR COURT

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**REPLY BRIEF OF THE ALCOHOLIC BEVERAGES CONTROL  
COMMISSION**

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**I. THE COMMISSION'S INTERPRETATION OF 204 CMR § 2.04(1) IS REASONABLE.**

This appeal focuses upon whether the Commission reasonably interpreted 204 CMR § 2.04(1) as prohibiting a retailer from selling alcoholic beverages at a price lower than the "invoiced cost," meaning the cost that appears on the invoice issued by a supplier to a retailer at the time of purchase or delivery of the alcoholic beverages. Total Wine claims that this interpretation is arbitrary and capricious, because the Commission found Total Wine to be in violation of § 2.04(1) even though it purportedly did not sell alcoholic beverages below the actual net cost. However, the unambiguous language of § 2.04(1) prohibits sales below the "invoiced cost," not below the net cost, and "invoiced cost" is defined as "net cost appearing on the invoice for said alcoholic beverage." *Id.* It is undisputed that Total Wine sold alcoholic beverages at a price below the cost listed on the invoice issued at the time of purchase. Moreover, Total Wine did not receive a discount on the alcoholic beverages at issue, but, instead, it received a credit on future purchases. Because Total Wine sold alcoholic beverages at a price below the net cost that appeared on the invoice, the Commission

merely applied its regulation as written, and its rulings were accordingly correct.

The inclusion of a definition for the term "invoiced cost" in the regulation itself dispenses with the need to rely upon the construction of that term as it appears in other statutes. *Cf.* Pl. Br. at 24-25 (discussing *Harvey Payne, Inc. v. Slate Co.*, 345 Mass. 488, 488 (1963) and G.L. c. 64C). Thus, Total Wine cannot avoid the application of the clear definition provided in § 2.04(1) by referring to a different definition that was used in determining the cigarette excise. *Town of Middleborough v. Hous. Appeals Comm.*, 449 Mass. 514, 525-26 (2007) (administrative agency has broad authority to promulgate definition in regulation in order to effectuate legislative intent).

Moreover, the Commission was entitled to rely upon the cost appearing on the invoice as constituting the net cost because 204 CMR § 2.02 prohibits invoices from containing "any statement which falsely indicates prices, discounts, or terms of sale..." *Id.* Total Wine fails to contend with the implication of this requirement - that the original invoice was required to include any discount. Indeed, Total Wine does not

even cite 2.04 CMR § 2.02 in its brief. Yet that provision explains why the Commission did not contemplate the use of multiple invoices filed at separate times.<sup>1</sup> Instead, the true cost of the beverage must appear in the original invoice. See 2.04 CMR § 2.04(1). Total Wine sold alcoholic beverages below the "invoiced cost" despite the fact that the invoice did not reflect the supposed "discount" derived from the CQD.

Even if § 2.04(1) were read in isolation apart from § 2.02, the Commission's interpretation - requiring that the net cost appear on one invoice - would be reasonable, based upon the clear language of the regulation itself. Moreover, when read in conjunction with § 2.02, the lower court's interpretation of the regulation as allowing the invoiced cost to be calculated based upon multiple invoices becomes untenable. The Commission's

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<sup>1</sup> Total Wine's repeated assertion that the Commission's position is that it would accept multiple invoices if they, in sum, represented the net cost, is incorrect and is not reflected in the Commission's decision: "The Commission interprets 'invoiced cost' in the regulation to be the actual cost to the \$ 15 retailer of the alcoholic beverages as printed on the invoice issued by a supplier to the \$ 15 retailer at the time of purchase of the alcoholic beverages." RA1 88.

inspectors were entitled to rely upon the price appearing on the invoice, because the invoice was required to contain the actual cost paid, including any applicable discounts.

Contrary to Total Wine's argument, the Commission did not ignore the modifiers "net" and "invoiced" as they appear in § 2.04(1). While there is no dispute that the invoices supplied at the time of purchase did not include the Cumulative Quantity Discount ("CQD"), they did include the "list price," and a 1% prompt payment discount. RA1 181, 233. The Commission properly interpreted § 2.04(1) as permitting Total Wine to sell alcoholic beverages at the "net cost appearing on the invoice" - the list price minus the prompt payment discount: "It follows that any offers that do not appear on the invoice issued for the alcoholic beverages being purchased cannot be used in calculating the invoiced cost." RA1 88.

Indeed, while the Commission did take into account every word of the regulation, the lower court's interpretation read the phrase "appearing on the invoice" out of the regulation altogether. *Cf. Souza v. Registrar of Motor Vehicles*, 462 Mass. 227, 233 (2012) (court should construe statute to give



effect to all of its provisions). The Commission's interpretation is straightforward, and the regulation is unambiguous. Total Wine can hardly claim to be surprised that it was subject to enforcement. Cf. Pl. Br. at 34-36; see also Commission's Opening Br. at 27.

**II. TOTAL WINE SOLD THE ALCOHOLIC BEVERAGES AT A PRICE BELOW THE AMOUNT IT PAID TO THE WHOLESALERS.**

Quite apart from Total Wine's failure to list the CQDs on the invoices, there is also no dispute that the CQDs were not a discount on the price of the invoiced beverages, but were instead a credit toward the future purchase of other beverages. RA1 230; Pl. Brief at 15. Yet Total Wine repeatedly claims that the amount it actually paid the wholesaler took into account the CQD. Pl. Br. at 25 ("the actual amount that Total Wine paid Horizon and Martignetti for the products included the CQD"); and 29 ("[Total Wine] sold its products above the actual cost that Total Wine paid the wholesaler") (emphasis in original). In reality, Total Wine paid the net price listed on the original invoice - it did not pay less for the invoiced beverages because of the CQD. RA1. 177. Thus, by setting the retail price for alcoholic beverages based upon the CQD, Total Wine was in violation of

§ 2.04(1), even according to its own interpretation of that provision, because it sold the alcoholic beverages at a price lower than what it actually paid the wholesaler for the shipment covered by the invoice.

Moreover, the type of "credit" provided by the CQDs at issue is simply not the same as the "credit terms" that were permitted in *Miller Brewing Co. v. Alcoholic Beverages Control Comm'n*, 56 Mass. App. Ct. 801 (2002), upon which Total Wine relies. Pl. Br. at 26. In that case, several retailers were provided interest-free credit for several days before paying the price in full for those beverages. *Id.* at 803. That is simply not the same as a "credit" provided towards the *future* purchase of *other* beverages. The "credit" exemplified by the CQDs in this case did not reduce the price paid to the wholesaler.

**III. THE COMMISSION'S INTERPRETATION OF 243 CMR § 204(1) IS WITHIN THE SCOPE OF ITS AUTHORITY.**

Faced with the clear language of § 2.04(1), Total Wine attempts to effectively invalidate the provision by claiming that the Commission's interpretation is beyond the scope of its statutory authority. Pl. Br. at 27-34. However, its argument ignores the broad regulatory power granted to the Commission for

"enforcing and preventing violations of ... [c. 138's] provisions for inspection of the premises and method of carrying on the business of any licensee ... [and] for the proper and orderly conduct of the licensed business." G.L. c. 138, § 24. The "invoiced cost" rule is a reasonable method for enforcing and preventing violations of the minimum-price mandate in G.L. c. 138, § 25C, especially in light of the separate requirement under 204 CMR § 2.02, that the invoice contain accurate pricing information. *Massachusetts Fed'n of Teachers, AFT, AFL-CIO v. Bd. of Educ.*, 436 Mass. 763, 772 (2002) ("a court cannot 'substitute [its] judgment as to the need for a regulation, or the propriety of the means chosen to implement the statutory goals, for that of the agency, so long as the regulation is rationally related to those goals.'"), quoting *American Family Life Assur. Co. v. Commissioner of Ins.*, 388 Mass. 468, 477 (1983).

Moreover, contrary to Total Wine's assertion, the underlying purpose of the minimum price rule is not merely "to prevent anti-competitive practices." Pl. Brief at 29. Indeed, this Court has explicitly rejected the contention that the price-control scheme was enacted as an antitrust measure. *Miller Brewing*

Co., 56 Mass. App. Ct. at 85 (construing G.L. c. 138, § 25A). Instead, § 25C was enacted "in order to promote temperance, to stabilize the business, to avoid price wars, to instill observance of the law, and to protect the public." *Kneeland Liquor, Inc. v. Alcoholic Beverages Control Comm'n*, 345 Mass. 228, 233 (1962). 204 CMR § 2.04(1), furthers these purposes in a clear, practically administrable manner.

**CONCLUSION**

For the foregoing reasons, the Commission requests that the Court reverse the decision below and uphold the decision of the Commission.

Respectfully submitted,  
ALCOHOLIC BEVERAGES CONTROL  
COMMISSION,  
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Date: December 7, 2018

**CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(K)**

I, Samuel Furgang, Assistant Attorney General, hereby certify that the foregoing brief complies with all the rules of court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedures.

/s/ Samuel M. Furgang

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Date: December 7, 2018

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CERTIFICATE OF SERVICE

I, Samuel Furgang, hereby certify under the pains and penalties of perjury, that a true copy of the Reply Brief of the Alcoholic Beverages Control Commission was served December 7, 2018, by efileing, on counsel of record.

/s/ Samuel Furgang  
Samuel Furgang  
Assistant Attorney General