
COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-12654

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

v.

ALCOHOLIC BEVERAGES CONTROL COMMISSION,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT FOR SUFFOLK
COUNTY

**BRIEF OF APPELLEE MASSACHUSETTS FINE WINE & SPIRITS, LLC
D/B/A TOTAL WINE & MORE**

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THOMAS R. KILEY (BBO # 271460)
MEREDITH G. FIERRO (BBO #696295)
COSGROVE, EISENBERG AND KILEY, P.C.
One International Place
Boston, MA 02110
(617) 439-7775
tkiley@ceklaw.net
mfierro@ceklaw.net

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STATEMENT OF THE ISSUES

Massachusetts alcohol wholesalers commonly offer cumulative quantity discounts ("CQDs") to alcohol retailers that purchase a prescribed amount of qualifying product(s) during a promotional period. Appellee Massachusetts Fine Wine and Spirits, LLC ("Total Wine"), a licensed retailer of alcoholic beverages for off-premises consumption, chose to pass on the benefit of earned CQDs to its customers by discounting the retail price of the qualifying product. The final retail price was never less than Total Wine's net cost, as documented on invoices issued by wholesalers.

The Alcoholic Beverages Control Commission ("ABCC") determined that Total Wine's practice violated 204 CMR § 2.04(1), which prohibits licensees from selling or offering to sell "any alcoholic beverages at a price less than invoiced cost," where "cost" means the "net cost appearing on the invoice for said alcoholic beverage." The ABCC announced for the first time that it interpreted the phrase "invoiced cost" to mean only the cost printed on an initial invoice received by a retailer at the time of delivery. Because this interpretation excludes any

CQDs documented in subsequent invoices, it does not reflect Total Wine's "net cost" for the products.

The issue on appeal is whether the Superior Court erred in holding that the ABCC's application of this novel interpretation was "arbitrary and capricious" and an error of law.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is an appeal from a judgment of the Suffolk Superior Court granting Total Wine's motion for judgment on the pleadings and denying the ABCC's motion for judgment on the pleadings.

II. PROCEEDINGS BEFORE THE ABCC

In late 2015, soon after Total Wine opened its first Massachusetts store, the ABCC received anonymous complaints believed to be from Total Wine's competitors that Total Wine was selling alcoholic beverages below its "invoiced cost" in violation of 204 CMR § 2.04(1). RA I:85, 192. As a result of the complaints, the ABCC investigated the matter. RA I:85. Total Wine fully cooperated with the ABCC's investigation and produced records demonstrating that

its prices were at all times above its net cost for those goods, as reflected on the invoices from the wholesalers. RA I:85, 128-129.

Nevertheless, the ABCC's investigative unit charged Total Wine with violating 204 CMR § 2.04(1) over two time periods at its Natick store and the latter of those two time periods at its Everett location. RA I: 76, 78. The basis for the charges was that Total Wine had calculated the "invoiced cost" of qualifying products to include CQDs printed on invoices that Total Wine had not received at the time it offered the beverages for sale.¹ RA I:126. The Chief Investigator for the ABCC conceded that "[i]f the quantity discount had been indicated and reflected to have been in effect on the invoice when the product arrived. . . there would not have been a violation." RA I:128-129.

After separate² but consecutively held adjudicatory hearings for each of the alleged

¹ The ABCC's interpretation of the regulation has morphed over the course of the proceedings so that the basis for the violation is now that the CQDs were not listed on the initial invoice issued upon delivery. See ABCC Br. 13.

² The hearing notices are at RA I:11-12, 13-14, 15-16, respectively. A transcription of the first hearing is

violations, the ABCC found that Total Wine had violated the regulation on three occasions. RA I:84-89, 93-97, 102-107. In its decisions, the ABCC announced for the first time since the regulation was promulgated that it "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." RA I:88, 97, 106.

Because subsequently issued invoices lowered Total Wine's actual cost and that reduction was passed on to customers, the ABCC concluded that Total Wine had violated the regulation by selling alcoholic beverages "at prices less than the costs appearing on the original invoices before the wholesalers issued subsequent invoices reflecting credit adjustments."

Id. As a sanction for the violations, the ABCC suspended Total Wine's Natick store license for eleven days and its Everett store license for eight days. RA I:91-92, 100-101.

at RA I:114-205, the second at 207-221, and the third at 223-256. Each hearing incorporated the evidence presented in the others, as well as the arguments concerning the ABCC's interpretation of the regulation.

III. PROCEEDINGS BEFORE THE SUPERIOR COURT

On January 30, 2017, Total Wine filed a complaint for judicial review under G.L. c. 30A, § 14, and requested declaratory relief under G.L. c. 231A, § 1, in Suffolk Superior Court. RA I:7-20. Total Wine also filed an emergency motion to stay suspension of its liquor licenses pending judicial review. RA I:5. The motion was heard on February 3, 2017. Id.

On February 6, 2017, the Superior Court (Wilkins, J.) granted Total Wine's motion for a stay of the suspensions, holding that it had a substantial likelihood of success on the merits. RA II: 274-287. After quoting the regulation, the court observed that although the ABCC's decision interpreted "invoiced cost" as referring only to the first invoice for a product, the ABCC had agreed an amended invoice could also qualify. RA II:275. The court also highlighted that the ABCC had never before brought a proceeding against any retailer on the theory advanced against Total Wine. RA II:275.

"Purely as a matter of construction of the regulatory text, without more," the court accepted the ABCC's interpretation. RA II:278. Nevertheless, the court characterized the interpretation as an

"overbroad," "blunt instrument" because it resulted in sanctions where there was no below-cost sale and no predatory pricing. RA II:281. Moreover, the interpretation was significantly "anti-consumer" because it guaranteed that consumers would not benefit from a pass-through of the volume discount until and unless a wholesaler chose to issue a single invoice reflecting all discounts. Id. Considering these factors, the court concluded that Total Wine was likely to prevail on the basis of antitrust preemption because the ABCC's interpretation of the regulation resulted in a form of "vertical price-fixing" prohibited by federal antitrust laws. RA II: 281-283.

On July 27, 2017, a different Superior Court judge (Gordon, J.) allowed Total Wine's motion for judgment on the pleadings and denied the ABCC's cross-motion. RA III: 110-125. The court held that the ABCC's "starchy" interpretation of the regulation was arbitrary and capricious because it was "inconsistent with well-established principles of statutory construction" and had no rational connection to "the underlying legislative purpose of the regulation." RA III:125. By limiting the invoiced cost to the cost on the initial invoice, the ABCC "requires retailers

to disregard other pricing information that is no less integral to the calculation of the true net cost of an alcoholic product." RA III:118. This ignores "the substantive realities of transactions between alcoholic beverage wholesalers and their retail merchants." RA III:118-119.

The court also rejected the ABCC's post administrative hearing argument that its statutory authority to regulate minimum prices supports its construction of the regulation. RA III:121-122.

"[N]othing in the Commission's decision in this case suggests that Total Wine's prices were below minimum prices approved under G. L. c. 138, § 25C."

RA III:121. Indeed, "counsel for the Commission conceded that had the CQD's appeared on Total Wine's original invoices, the prices at issue would not have violated Section 2.04(1)." Id. Rather, "[t]he putative problem under Section 2.04 identified by the ABCC in this case was simply the sequencing of the invoice paperwork, and not the substance of the product pricing itself." RA III:121-122.

The court emphasized that this case did not involve predatory pricing and instead reflected "only a salutary effort by a retailer to pass along savings

derived from volume purchasing at the wholesale level to its consumers." RA III: 117. "That is something the law should promote rather than punish." Id.

The court entered judgment on July 27, 2017. RA III:126. On September 22, 2017, the ABCC filed its notice of appeal. RA III:127-128.

STATEMENT OF THE FACTS

Total Wine sells alcohol to consumers for off-premises consumption under G.L. c. 138, § 15. RA I:7-8. Total Wine's first location opened in Natick in November 2015; a second location in Everett followed six months later, in May 2016.³ RA I:8.

As a newcomer to the Massachusetts alcohol beverage retail market, Total Wine sought to offer competitive prices on certain popular brands to attract customers and promote its new locations. RA I:184. To that end, Total Wine participated in cumulative quantity discount ("CQD") promotions offered by various suppliers, which were conveyed through the suppliers' wholesalers - in this case, Horizon Beverage Company ("Horizon") and Martignetti

³ Since this litigation has commenced, Total Wine has opened additional stores in Danvers and Shrewsbury.

Companies (Martignetti").⁴ RA I:137-140. Many other retailers, such as Kappy's, take advantage of the same quantity discount programs. RA II:65-74. Kappy's prices on four of the covered products were identical to those contemporaneously offered by Total Wine, but unlike Total Wine, Kappy's was not cited.⁵ RA II:65-74.

A CQD is a per-case discount for purchasing a prescribed number of qualifying products over the course of a promotional period.⁶ RA I:37-38. For example, Horizon, which is the exclusive distributor of Bacardi products in the United States, offered a CQD from its rum supplier: "Buy 22 cases of Bacardi Superior, Gold, Select, Oakheart 1.75-liter. Receive \$12 credit on every case purchased, November through December. Credits will be issued automatically."

RA I:137.

⁴ Under the three tier system of alcohol distribution, manufacturers or suppliers sell alcoholic products to wholesalers, wholesalers then sell and deliver those products to retailers, and retailers sell them to consumers.

⁵ Total Wine was cited for selling Bacardi 1.75 liter for \$17.99, Dewars 1.75 liter for \$27.99, Skyy Vodka for \$16.99, and Absolut Vodka 1.75 for \$24.99. RA I:35-37. In the record, there are photographs of these alcoholic beverages being sold for the exact same price at Kappy's. RA II:65-74.

⁶ A CQD is a "standard pricing offering" in the industry. RA I:185.

A CQD may be communicated to each retailer separately or broadly advertised to all retailers in the Beverage Journal, which is a periodic compendium of all products sold in the Massachusetts along with their supplier and wholesale prices. RA I:163, 238. As ABCC Chief Investigator Mahony asserted, "every licensee in the [C]ommonwealth who was buying that amount knew they were getting [a CQD], because it was in the beverage journal. It was out there publicly. You knew, if you got to a certain level, you were going to get a discount." RA I:248.

Typically, to communicate these offers to Total Wine, the wholesalers would email information about the CQD to a member of Total Wine's supply chain team, the unit within Total Wine responsible for product purchasing. RA I:163. Total Wine would then decide whether to participate in the promoted discount and, if so, would communicate its agreement to the wholesalers. RA I:171.

Upon delivery of the products, the wholesalers would present an invoice to Total Wine reflecting the gross cost of the delivered products. RA I:176. The invoice typically stated that a 1% prompt payment discount would apply to the purchase if the invoice

was paid by a certain date. RA I:181. Total Wine's policy was to pay the invoice at the time of delivery, less the prompt payment discount. RA I:177.

At the end of the CQD promotional period, the wholesalers would issue another invoice - referred to as a credit invoice - reflecting CQDs that Total Wine had earned by purchasing the requisite number of qualifying products.⁷ RA I:173-174, 365-355. Although the credits were applied to Total Wine's next purchase (which could be for any number of products), the discount was only earned on the products that Total Wine purchased to qualify for the CQD. RA I:177.

After Total Wine satisfied the purchasing requirements of a CQD, Total Wine would factor the earned CQD into its calculation of the retail price for qualifying products. Total Wine's supply chain team first calculated the "cost" Total Wine paid per bottle, and then the retail team would set the purchase price at some greater amount so as not to violate Massachusetts's prohibition on sales below

⁷ The Vice President of Market Management and Supply Chair for Total Wine testified that the credit invoice issued by Horizon is the same document used for other invoices but with "Credit Adjustment" stamped at the top. RA I:173, 269. Chief Investigator Mahony also referred to the document as a "credit invoice." RA I:227.

cost. RA I:131, 157-158. See G.L. c. 138, § 25C. Total Wine calculated its "cost" by determining the gross cost, less "all discounts offered from the wholesalers" and actually earned by Total Wine, as reflected on the credit invoices. RA I:132.

For example, to determine the cost of Bacardi Superior 1.75-liter, Total Wine started with the wholesale price, or gross cost, of \$19.99 per bottle. RA I:133. Then, Total Wine deducted 1% for prompt payment, reducing the cost to \$19.79. RA I:133-134. Finally, once Total Wine purchased a sufficient quantity of Bacardi Superior to satisfy the supplier's CQD, it deducted the CQD per-bottle discount (e.g., \$2 per bottle), yielding a net cost of \$17.79 per bottle. RA I:134.

To be clear, Total Wine did not apply the CQD to any qualifying product until it had purchased and received the requisite amount of that product. RA I: 165-166, 218. With respect to the 2015 charges involving the Natick store, those purchases occurred before the store opened. RA I:139. Following testimony to that effect, the parties actually stipulated that Total Wine had purchased the prescribed amount of qualifying products to earn all

of the CQDs associated with any of the alleged violations before it set the retail prices for any of those products. RA I:155.

As expressed by the ABCC's Chief Investigator, the problem with Total Wine's practice was that Horizon and Martignetti CQDs were reflected on the credit invoices, as opposed to the delivery invoices. RA I:228. Had the wholesalers printed the CQDs on the initial invoice, as opposed to the credit invoice, the parties "would not be here." RA I:228. The timing of when credit invoices were issued, however, was entirely controlled by the wholesalers and bore no relationship to the true or final "invoiced cost." RA I:172.

SUMMARY OF THE ARGUMENT

The ABCC appeals a decision by the Superior Court that rejected its interpretation of 204 CMR § 2.04(1). Appellee Total Wine's brief provides several different reasons why the Superior Court's decision should be upheld. To begin, the Superior Court correctly found that the ABCC's interpretation of § 2.04(1) was unreasonable because it would insert an arbitrary timing element into the regulation. Br. 21-23. In arriving at its interpretation, the ABCC ignored key

words in the regulation, as well as the contractual relationships between the parties. Br. 23-27.

Further, the Superior Court properly set aside the ABCC's unreasonable interpretation because it does not further any statutory purpose. Br. 29-35. It does not prevent anti-competitive practices, its ostensible purpose, because it deals with sequence of billing rather than the substance of billing. Br. 29-31. It is not necessary, as required by the statute, and administrative convenience is not a substitute for statutory purpose. Br. 31-34. Deference to the ABCC's interpretation is unwarranted because it was articulated for the first time in the adjudicatory proceeding against Total Wine. Br. 34-36. The ABCC's attempt to label the CQDs as credits or gifts should also be rejected because it is an abrupt departure from past interpretation and contrary to the facts in the record. Br. 37-39.

Although the Superior Court did not reach the issue, its decision can additionally be upheld on federal preemption grounds because the ABCC's interpretation conflicts with the Sherman Act, as another Superior Court judge found in his decision granting Total Wine's motion to stay. Br. 40-44.

Finally, the arguments advanced by the Massachusetts Package Store Association in an amicus brief provide no basis for reversal because they were not advanced by the parties and are not based on facts in the record. Br. 44-46.

ARGUMENT

I. THE COURT CORRECTLY SET ASIDE THE ABCC'S INTERPRETATION OF 204 CMR § 2.04(1) BECAUSE IT IS UNREASONABLE.

This Court may set aside an agency decision that is, among other things, "[b]ased upon an error of law," "[a]rbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law." G.L. c. 30A, § 14(7)(c) & (g). Although "an agency's *reasonable* interpretation of its own regulations, if *consistently applied*, receives respect from a court, that principle is one of deference, not abdication." Crawford v. City of Cambridge, 25 Mass. App. Ct. 47, 49 (1987) (emphasis added). The ABCC is no different than any other agency. While an interpretation of the ABCC may be due some weight, "the ultimate responsibility for interpreting [G.L. c. 138] rests with [the] court." M.H. Gordon & Son v. Alcoholic Beverages Control Comm'n, 371 Mass. 584, 589 (1976); see Heublein Inc. v. Capital Distributing Co. Inc.,

434 Mass. 698, 705 (invalidating ABCC's legal interpretation of G.L. c. 138 § 25E). Accordingly, "courts will not hesitate to overrule agency interpretations when those interpretations are arbitrary, unreasonable, or inconsistent with the plain terms of the regulation itself." Crawford, 25 Mass. App. Ct. at 49.

The regulation at issue, 204 CMR § 2.04(1), provides the following:

No holder of a license issued under M.G.L. c. 138, § 15 shall sell or offer to sell any alcoholic beverages at a price less than invoiced cost. Cost is defined as net cost appearing on the invoice for said alcoholic beverage. The use of any device, promotion or scheme which results in the sale of alcoholic beverages at less than invoiced cost is prohibited.

In its decisions sanctioning Total Wine, the ABCC announced that it interprets "invoiced cost" to mean only the cost "printed on the invoice issued by a supplier to the § 15 retailer at the time of purchase of the alcoholic beverages," excluding the cost documented on any subsequent invoices.⁸ RA I:88, 97, 106. For several reasons, the Superior Court properly rejected the ABCC's interpretation.

⁸ Nevertheless, the ABCC has agreed that amended invoices satisfy the regulation. RA II:275.

First, the ABCC's interpretation adds requirements that do not exist in the regulation. The ABCC interprets § 2.04(1) to require the cost to be listed on a single invoice because the definition of "cost" refers to "the invoice." ABCC Br. 13-14. Its reliance on the singular form of the word "invoice" contradicts legislated rules of statutory construction.⁹ "Words importing the singular number may extend and be applied to several persons or things." G.L. c. 4, § 6. Cf. Denson v. Superintendent, Souza-Baranowski Corr. Ctr., No. 15-P-139 (January 29, 2016) (pursuant to Rule 1:28) ("[A]lthough it is true (as the plaintiff argues), that the regulation refers to 'an' individual, that does not mean that the offense cannot lie where more than one individual is involved.").

The ABCC also adds a requirement that the invoice is issued "at the time of purchase." RA I:88. But

⁹ "Principles governing statutory construction and application also apply to regulations." Biogen IDEC MA, Inc. v. Treasurer & Receiver Gen., 454 Mass. 174, 190 (2009). See Johnson v. Comm'r of Pub. Welfare, 414 Mass. 572, 578 (1993) ("Rules of statutory interpretation [are] relevant to interpreting regulations."); Consolidated Cigar Corp. v. Dep't of Pub. Health, 372 Mass. 844, 854 (1977) ("Courts are bound to test the regulations by the same standard [that] would apply to a statute.").

the regulation does not refer to "the invoiced cost at the time of purchase." In fact, the regulation contains no requirement whatsoever about the timing of invoices.¹⁰ And according to the ABCC's Chief Investigator, Total Wine would not have violated the regulation by resetting its pricing "once it received the credit invoices," which occurred well after the time of purchase.¹¹ RA I:198. If Total Wine would not violate the regulation by applying the CQD after it received the credit invoice at the end of the promotional period, then the invoice is not required to be issued at the time of purchase.

¹⁰ Nor does the Liquor Control Act contain such a requirement, as one of the ABCC's commissioners has recognized:

COMMISSIONER 2: Does the statute speak to that, in terms of it has to be in black and white on an invoice, prior to them setting the price?

MAHONY: I think invoice cost would be self-explanatory - absolutely.

COMMISSIONER 2: Well, uh, uh, I - I disagree with you there.

This portion of the hearing transcript is attached in the addendum to this brief because the transcript pages originally numbered 24 and 25 were omitted from the appendix produced by the ABCC.

¹¹ Chief Mahony testified that "[t]he memorandum states that 'This means that the investigators did not find Total Wine in violation, once it received the credit invoices.' That's correct. That is absolutely correct." RA I:198.

Second, the ABCC's interpretation ignores the modifiers "net" and "invoiced." See Matter of Civil Investigative Demand Addressed to Yankee Milk, Inc., 372 Mass. 353, 358 (1977) "[E]very word in a statute should be given meaning."). The dictionary definition of the adjective "net" is "[c]haracterizing that which is left after deductions." Balletine's Law Dictionary 846 (3d Ed. 1969). Thus, the "net cost" of an alcoholic beverage product includes all discounts.¹² Because the ABCC's interpretation would ignore discounts applicable to the calculation in favor of the gross cost of the product, it renders the regulation's use of the word "net" meaningless. Cf. Commonwealth v. Wimer, 480 Mass. 1, 6 (2018) ("As the board's interpretation renders the word 'subsequent' superfluous, we decline to defer to it.").

The ABCC's interpretation also disregards the use of the word "invoiced" to modify the noun "cost." The ABCC asserts that "invoiced cost" means the cost listed on the invoice issued at the time of purchase,

¹² As demonstrated by the email communications with wholesalers, the industry has also taken the position that cumulative quantity discounts affect net cost. See, e.g., RA I:285 ("If you get to 300 (54 more cases) you will get a \$2.00 case credit additional on all 1.5L which would net to \$46.00 case.")

but § 2.04(1) defines "cost" as "net cost appearing on the invoice for [the] alcoholic beverage." "Invoiced cost" must mean more than "cost." Neither "invoice" nor "invoiced" is not defined in the regulation, and no contention has been made that they are technical terms with settled technical meaning.¹³

Courts "derive the words' usual and accepted meaning from sources presumably known to the [regulation]'s enactors, *such as their use in other legal contexts and dictionary definitions.*"

Commonwealth v. Escobar, 479 Mass. 225, 228

(2018) (emphasis added). The dictionary definition of the verb "invoice" is "to make a written account or invoice of, as goods or property with their prices." Webster's New Universal Unabridged Dictionary 967 (2d Ed. 1983). Thus, "invoiced" logically refers broadly to any written account reflecting what is due to be paid to the retailer's supplier (as opposed to overhead costs).

This construction of "invoiced cost" accords with the larger legal context of Massachusetts law

¹³ See Commonwealth v. Sudler, 17-P-442 (2018) ("[T]echnical terms or those that have acquired a particular meaning within the law should be read in a manner that is consistent with that meaning.").

prohibiting sales below cost. In the context of the cigarette excise law, Chapter 64C, which also prohibits below cost sales, the Supreme Judicial Court has determined that "invoice cost" means "what the purchaser pays apart from the excise." Harvey Payne, Inc. v. Slate Co., 345 Mass. 488, 493 (1963). The Court held that because it is clear that "[t]he tax must be passed on to the consumer," the excise is excluded from the "invoice cost" regardless of whether a manufacturer or wholesaler lists it on invoices.

Id.

In addition, in the context of G.L. c. 138, § 25D, the Supreme Judicial Court has stated that "[p]rice means the actual amount paid to the supplier for goods furnished to the buyer." M.H. Gordon, 371 Mass. at 591 (citations omitted). The Court further provided that the price should "reflect all discounts, rebates, and other allowances given to the purchasers [so that]. . . [w]hen computed, the resulting figure is the actual amount paid." Id.

Here, the actual amount that Total Wine paid Horizon and Martignetti for the products included the CQDs. RA I:128-129. The ABCC previously took this position in a price discrimination case, contending

that "the terms of credit that are extended to a buyer can reasonably be viewed as a component of the amount paid by the buyer and received by the seller." Miller Brewing Co. v. Alcoholic Beverages Control Comm'n, 56 Mass. App. Ct. 801, 806 (2002). The CQDs are part of the "invoiced cost" of the alcoholic beverages because they were reflected on documents provided by wholesalers, i.e. credit invoices.¹⁴ RA I:127.

Because the ABCC's interpretation would exclude CQDs unless they were on the initial invoice provided upon delivery, the "invoiced cost" does not reflect the actual amount that Total Wine paid for the products.

Third, the ABCC's interpretation of §.2.04(1) is contrary to basic principles of contract law.

"In interpreting a contract, the objective is to construe the contract as a whole, in a reasonable and practical way, consistent with its language, background, and purpose." Weiler v. PortfolioScope Inc., 83 Mass. App. Ct. 216, 222 (2013). The parties' intent "must be gathered from a fair construction of the contract as a whole and not by special emphasis upon any one part." MacDonald v. Hawker, 11 Mass.

¹⁴ The credit invoices provided a written account of goods with a credit towards the price on those goods. RA I:269.