

N.D.A.G. Letter to Kloubec (Nov. 18, 1991)

November 18, 1991

Rep. Richard Kloubec
District 51
3233 16th Avenue S
Fargo, ND 58103

Dear Representative Kloubec:

Thank you for your October 3, 1991, letter concerning North Dakota Admin. Code § 84-02-01-11. Specifically, your concern is whether N.D. Admin. Code § 84-02-01-11 constitutes a reasonable rule in conformity with the provisions of the statutes administered by the State Treasurer.

N.D. Admin. Code § 84-02-01-11 was amended in 1989 in accordance with N.D.C.C. ch. 28-32. That amendment provided:

84-02-01-11. Commercial credit for liquor. The normal commercial credit between liquor wholesalers and retailers is thirty days. Any wholesaler receiving a check from a retailer which is returned by the bank due to insufficient funds which was given for merchandise received more than thirty days prior to the return of the check shall immediately notify the retailer. If the check is not made good within forty-eight hours, the wholesaler shall notify the wholesaler's competitors and the state treasurer. Any wholesaler having an unpaid retail account for merchandise received which is in excess of thirty days shall notify the wholesaler's competitors and the state treasurer. No sale shall be made by any wholesaler to the a retailer retail account who has and/or had possession of such merchandise until said delinquent account is paid in full and permitted by the state treasurer. A retail account shall not be deemed delinquent for any alleged sale in any instance where there exists a bona fide dispute between the licensee and the wholesaler as to the amount owing as a result of the alleged sale.

On December 5, 1989, I determined that N.D. Admin. Code § 84-02-01-11 was in compliance with N.D.C.C. § 28-32-02 and approved that section as to its legality. However, I understand that you are specifically concerned with the fact that the rule does not clearly identify who determines whether a "bona fide dispute" exists, that the retailer is not afforded any prior notice that it would be placed on a "sanctioned blacklist", and that the potential for abuse inherent in the administrative rule is more likely to cause the financial demise of a retailer, than be advantageous from the standpoint of tax collection. I will address your concerns in the order in which they have been raised.

N.D. Admin. Code § 84-02-01-11 provides, in part, that "[a] retail account shall not be

deemed to be delinquent for any alleged sale in any instance where there exists a bona fide dispute between the licensee and the wholesaler as to the amount owing as a result of the alleged sale." Apparently, you believe that the determination of a "bona fide dispute" is left to the sole discretion of the wholesaler thus providing little protection to the retailer. However, by implication, I believe that the entity who determines the presence of a "bona fide dispute" under N.D. Admin. Code § 84-02-01-11 would be the State Treasurer. If the retailer believed in good faith that a "bona fide dispute" existed as to an account between the retailer and wholesaler and that dispute could not be resolved in 30 days, the retailer could bring that issue to the attention of the State Treasurer. Without determining the merits of the disputed account, the State Treasurer could determine the existence of a "bona fide dispute" and permit the wholesaler's competitors to do business with that retailer. Accordingly, this type of intervention by the State Treasurer provides some protection to the retailer.

Your second concern is that the retailer is not afforded any prior notice before being placed on a "sanctioned blacklist." However, by operation of state and federal law, the retailer is provided such notice. N.D. Admin. Code § 84-02-01-11 provides that "[t]he normal commercial credit between liquor wholesalers and retailers is thirty days." N.D.C.C. § 5-01-11 provides that "[t]he state treasurer may determine by regulation the definition of 'normal commercial credits.'" 27 CFR § 6.65 (1991) provides that "[i]ndustry members are prohibited from inducing the purchases of a retailer by the extension of credit to the retailer for a period of time in excess of 30 days from the date of delivery." Thus, a wholesaler is precluded by law from extending credit to retailers beyond 30 days. Once a retailer receives a wholesaler's invoice, that retailer knows that the invoice must be paid within 30 days. This 30 days period provides the retailer with ample opportunity to raise any good faith defense to the payment of that invoice. If such a defense is raised, I do not believe that a wholesaler could in good faith declare that account to be delinquent. However, any defense would have to be raised in accordance with reasonable commercial practices. In any case, it is incumbent upon the retailer to take appropriate action within 30 days from the receipt of the wholesaler's invoice. If any account is not paid within 30 days, the retailer knows or should know that its account is delinquent which would prevent any wholesaler from making sales to that retailer.

Your third concern centers on the potential for abuse inherent in N.D. Admin. Code § 84-02-01-11. It should be noted that there are only five wholesale liquor licenses in the state of North Dakota that are regulated under N.D. Admin. Code § 84-02-01-11. Accordingly, a wholesaler intending to abuse N.D. Admin. Code § 84-02-01-11 is not likely to escape attention if such abuse is reported to the State Treasurer. Again, the State Treasurer is in a position to intervene in such a matter and to permit a wholesaler's competitors to sell to a retailer on the determination of any abuse or the existence of a bona-fide dispute. Thus, the potential for abuse is minimal, and, if present, is subject to resolution by the State Treasurer.

In short, under federal and state law, liquor retailers are not permitted to have unpaid accounts over 30 days. Because delinquent accounts can impact state revenues and efficient collection of the wholesale liquor tax (N.D.C.C. § 5-03-04, 07), it is my opinion, as

previously determined on December 5, 1989, that N.D. Admin. Code § 84-02-01-11 constitutes a reasonable rule in conformity with the provisions of the statutes administered by the State Treasurer.

For your information, I understand the State Treasurer has recently met with North Dakota Beverage Retailers Association representatives. As a result, procedural modifications will be instituted that make the regulation provided for under N.D. Admin. Code § 84-02-01-11 more timely and efficient. This office has offered its assistance to the State Treasurer in order to promulgate these procedural modifications.

I trust that this answers your inquiry.

Sincerely,

Nicholas J. Spaeth

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cc: Bob Hanson, State Treasurer