

# **State of Rhode Island - Division of Taxation**

## **Cigarette Tax**

### **Regulation CIG 91-11**

#### **Minimum Pricing of Cigarettes**

##### **Purpose**

Pursuant to R.I.G.L. section 44-20-8, the tax administrator may suspend or revoke any license under Chapter 20 of Title 44 for failure of the licensee to comply with any provision of Chapter 13 of Title 6 of the General Laws entitled "Unfair Sales Practices." The purpose of this regulation is to promote compliance by requiring licensees who wish to advertise, offer to sell or sell cigarettes at a price that is less than the applicable statutory presumptive cost to show first a lesser actual cost of selling cigarettes.

##### **Definitions**

**Base Cost of Cigarettes:** The invoice cost of the cigarettes to the licensee or the replacement cost of the cigarettes to the licensee within thirty (30) days prior to the date of sale in the quantity last purchased whichever is lower, less all trade discounts except customary discounts for cash. The cigarette excise tax imposed by R.I.G.L. Chapter 20 of Title 44 shall be added to the invoice cost of the cigarettes to the licensee.

**Cartage Cost to the Retail Outlet:** Three-fourths of one percent (3/4%) of the base cost of the cigarettes to the licensee or a lower cost as claimed and proved by the licensee.

**Tax Administrator:** The tax administrator or his/her duly authorized representative.

**Licensee:** A licensed distributor or dealer as defined in R.I.G.L.

Chapter 20, Title 44.

**Retail Sale:** Any transfer of title to cigarettes for a valuable consideration made, in the ordinary course of trade, or in the usual prosecution of the seller's business, to the purchaser for consumption or use other than resale of further processing or manufacturing. This term includes any such transfer of cigarettes where title is retained by the seller as security for the payment of the purchase price.

**Retailer/Dealer:** Every person, co-partnership, corporation or association engaged in the business of making sales of cigarettes at retail within this state; provided, that in the case of a retailer/dealer making sales both at retail and at wholesale, such term shall be applied only to the retail portion of such business.

**Retailer/Dealer's Actual Cost of Selling Cigarettes:** The base cost of the cigarettes to the retailer/dealer plus the retailer/dealer's overhead costs and expenses.

**Retailer/Dealer's Overhead Costs and Expenses:** The amounts attributable to the sale of cigarettes, as evidenced by the standards and methods of accounting regularly employed by the retailer/dealer in the allocation of overhead costs and expenses, paid or incurred, including, without limitation, labor, salaries of executives and officers, rent, depreciation, selling costs, maintenance of equipment, delivery costs, all types of license fees, taxes, insurance and advertising.

**Retailer/Dealer's Presumptive Cost of Selling Cigarettes:** One hundred and six percent (106%) of the base cost of the cigarettes to the retailer plus freight charges not otherwise included in the base cost of the cigarettes plus cartage cost to the retail outlet if performed or paid for by the retailer/dealer.

**Wholesaler/Distributor:** Every person, co-partnership, corporation or association engaged in the business of making sales of cigarettes at wholesale within this state; provided, that in the case of a wholesaler engaged in the business of making sales both at wholesale and at retail, such term shall be applied only to the wholesale portion of such business.

**Wholesaler/Distributor's Actual Cost of Selling Cigarettes:** The base cost of the cigarettes to the wholesaler/distributor plus the wholesaler/distributor's overhead costs and expenses.

**Wholesaler/Distributor's Overhead Costs and Expenses:** The amounts attributable to the sale of cigarettes as evidenced by the standards and methods of accounting regularly employed by the wholesaler/distributor in the allocation of overhead costs and expenses paid or incurred, including, without limitation, labor, salaries of executives and officers, rent, depreciation, selling costs, maintenance of equipment, delivery costs, all types of license fees, taxes, insurance and advertising.

**Wholesaler/Distributor's Presumptive Cost of Selling Cigarettes:** One hundred and two percent (102%) of the base cost of the cigarettes to the wholesaler/distributor plus freight charges not otherwise included in the cost of the cigarettes plus cartage cost to the retail outlet if performed or paid for by the wholesaler/distributor.

#### **Sales by Wholesalers/Distributors to Other Wholesalers/Distributors**

When one wholesaler/distributor sells cigarettes to any wholesaler/distributor, the former shall not be required to include in his selling price to the latter, "wholesaler/distributor presumptive cost of selling cigarettes" except that no such sale shall be made at a price less than the "base cost of cigarettes," but the latter wholesaler/distributor upon resale to a retailer/dealer or for consumption or use, shall be deemed to be the wholesaler/distributor governed by the definitions of this regulation.

In the case of sales at retail by a wholesaler, the cost to the wholesaler with respect to such sales shall be presumed to be the same as the cost to the retailer.

#### **General Rule**

No licensee shall advertise, offer to sell, or sell cigarettes at a price that is less than the applicable presumptive cost without obtaining the tax administrator's prior written approval. The tax administrator may periodically announce the retailers' and wholesalers' presumptive cost. The tax

administrator may suspend or revoke any license if the licensee advertises, offers to sell, or sells cigarettes at less than the applicable presumptive cost without the tax administrator's prior written approval.

#### Prior Approval Required to Advertise, Offer to Sell, or Sell Cigarettes at Prices Below Presumptive Cost

General: Any licensee who wishes to advertise, offer to sell, or sell cigarettes at a price that is less than the applicable presumptive cost must receive the tax administrator's prior written approval.

Request for Prior Approval Hearing: A licensee who wishes to request a prior approval hearing with the tax administrator should write to the following address:

Tax Administrator  
RI Division of Taxation  
One Capitol Hill  
Providence, RI 02908-5800

The request should include the licensee's name, address, telephone number if available, and a Power of Attorney for the licensee's representative, if any.

Notification of Prior Approval Hearing Date: The tax administrator will notify a licensee who has made a request for a prior approval hearing of the time and the place of the hearing by certified mail.

Scope of Prior Approval Hearing: The scope of the prior approval hearing is limited to a presentation of evidence by the licensee that the actual cost of selling cigarettes is lower than the applicable presumptive cost of selling cigarettes. The licensee has the burden of proof. If the licensee shows by a preponderance of the evidence that the actual cost is less than the applicable presumptive cost, the tax administrator will approve the licensee's request to advertise, offer to sell, or sell cigarettes below the applicable presumptive cost.

#### Factors in Determining Approval to Sell Below Applicable Presumptive Cost:

The tax administrator will look at the following information to decide whether the licensee's actual cost is less than the applicable presumptive cost:

1. An accounting of the licensee's cost of doing business using the standards and methods of accounting regularly employed in the licensee's business in the allocation of overhead costs and expenses which are attributable to the sale of cigarettes. The factors that must be taken into account in arriving at a licensee's overhead costs and expenses, which are paid or incurred, include but are not limited to: labor, salaries of executives and officers, rent, depreciation, selling costs, maintenance of equipment, delivery costs, all types of license fees, taxes, insurance and advertising costs;
2. The licensee's previous taxable year's corporate, partnership, or individual income tax returns;
3. All written statements and records required to be retained under Chapter 20 of Title 44; and

4. Any other documents or evidence that would support a finding that the licensee's actual cost is lower than the applicable presumptive cost.

**Conduct of Prior Approval Hearing:** The conduct of the prior approval hearing shall be governed by the Regulation Re: Administrative Hearing Procedures, promulgated by the tax administrator.

**Notification of Prior Approval Determination:** After the prior approval hearing the tax administrator will notify the licensee by certified mail, return receipt requested, whether the request to sell cigarettes at a price lower than the applicable presumptive cost has been approved.

**Effective Date of Approval:** The tax administrator's approval of the licensee's request to advertise, offer to sell, or sell cigarettes below applicable presumptive cost will take effect on the date shown on the notice.

**Term of Tax Administrator's Approval:** The tax administrator's approval of the licensee's request to advertise, offer to sell, or sell cigarettes below the presumptive cost is valid for a period of one year from the effective date of the approval provided that the licensee's costs do not increase during that period, or until the licensee is notified otherwise, whichever is earlier.

**Denial of Approval-Appeal:** A decision by the tax administrator denying the licensee's request to advertise, offer to sell, or sell cigarettes at prices below the applicable presumptive cost may be appealed to the District Court within thirty (30) days of the notice of denial.

**Effect of Failure to Obtain Prior Approval:** If any licensee advertises, offers to sell, or sells cigarettes at a price that is less than the applicable presumptive cost without the tax administrator's prior written approval, the tax administrator may, after notice and an opportunity for a hearing, suspend or revoke the licensee's license.

**Exceptions to Prior Approval Requirement:** In any of the following circumstances the tax administrator's prior written approval is not required for a licensee to advertise, offer to sell, or sell cigarettes at a price that is less than the applicable presumptive cost:

1. The cigarettes are advertised, offered for sale, or sold in an isolated transaction and not in the usual course of business;
2. The cigarettes are advertised, offered for sale, or sold in a bona fide clearance sale for the purpose of discontinuing trade in cigarettes, and the advertising, offer to sell, or sale states the reason therefor and the quantity of such cigarettes advertised, offered for sale, or sold;
3. The cigarettes are advertised, offered for sale, or sold as imperfect or damaged, and the advertising, offer to sell, or sale states the reason therefor and the quantity of such cigarettes advertised, offered for sale, or sold;
4. The cigarettes are sold upon the complete final liquidation of a business;
5. The cigarettes are advertised, offered for sale, or sold by any fiduciary or other officer acting under the order or direction of any court;
6. The cigarettes are advertised, offered for sale, or sold for charitable purposes or to relief agencies.

**Suspension or Revocation of License for Advertising, Offering to Sell, or Selling Cigarettes at Prices Below Applicable Presumptive Cost Without the Tax Administrator's Prior Written Approval**

General: If the tax administrator determines that a licensee has advertised, offered to sell, or sold cigarettes at prices below the applicable presumptive cost without the tax administrator's prior approval, after affording the licensee an opportunity for a hearing, the tax administrator may suspend or revoke any license.

Written Notification of Violation and Notice to Show Cause: If the tax administrator receives information that a licensee is advertising, offering to sell, or selling cigarettes at prices below the applicable presumptive cost, the tax administrator will notify the licensee by certified mail, return receipt requested, or by hand delivering the notice that the advertising, offering for sale, or sale of cigarettes below the applicable presumptive cost without prior approval is a violation of the provisions of CIG 91-11 and that the licensee is required to show cause why its license should not be suspended or revoked for failure to comply with the provisions of Chapter 13 of Title 6.

The licensee shall be given at least five (5) days notice of the time and place of hearing requiring it to show cause why its license should not be suspended or revoked.

Testimony and Summonses: If the tax administrator receives information that a licensee is advertising, offering to sell, or selling cigarettes below the applicable presumptive cost without the tax administrator's prior written approval, the tax administrator may take testimony and proofs under oath and issue summonses and require the attendance and testimony of witnesses and the production of books, papers, records, and other data, as provided under R.I.G.L. 44-20-46.

Contents of Notification of Violation and Notice to Show Cause: The notification of violation and Notice to Show Cause will include the following information:

1. That the tax administrator has received information that the licensee has advertised, offered to sell, or sold cigarettes at below the applicable presumptive cost without the tax administrator's prior approval, in violation of the provisions of CIG 91-11;
2. That the tax administrator intends to suspend or revoke the licensee's license or licenses for said violation;
3. That the tax administrator will provide the licensee an opportunity for a hearing on the date and place stated in said notice;
4. That if the licensee fails to appear the hearing will go forward in its absence;
5. The person and address within the Division of Taxation whom the licensee may contact for additional information;
6. A citation to the applicable statutes and this regulation, CIG 91-11; and
7. Any additional information the tax administrator considers appropriate.

Effect of Licensee's Failure to Appear to Show Cause: If a licensee fails to appear after having been notified of the hearing to show cause, the tax administrator may take testimony and proof under oath and render a decision thereon.

Scope of Show Cause Hearing: The scope of the show cause hearing is limited to a determination of whether:

1. The licensee has requested and obtained the prior written approval of the tax administrator as set forth herein to sell below the applicable presumptive cost; and

2. The licensee has demonstrated that no advertisements, offers to sell, or sales were made at prices below the applicable presumptive cost.

Licensee's Records to be Submitted at Show Cause Hearing: A licensee must submit each record required to be kept by Chapter 20 of Title 44 for each transaction in question, including, without limitation, written statements containing the name and address of both the seller and the purchaser, dates of delivery, quantities of cigarettes, trade names or brands thereof, and the prices paid for each brand of cigarettes purchased.

Effective Date of Suspension or Revocation: The tax administrator's determination to suspend or revoke a licensee's license will take effect on the date written on the notice under the hearing "Effective Date of Suspension or Revocation."

Appeal of Suspension or Revocation Determination

Appeal to the District Court: Any licensee aggrieved by a suspension or revocation may appeal to the District Court within thirty (30) days after written notice of the tax administrator's determination is mailed or hand delivered to the licensee.

Reinstatement of License

The tax administrator will not issue a new license to a licensee after a suspension or revocation of a license unless the tax administrator is satisfied that the licensee will comply with the provisions of Chapter 13 of Title 6 with all pertinent rules and regulations thereunder.

R. GARY CLARK TAX ADMINISTRATOR

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