

**LETTER OPINION
2002-L-58**

October 15, 2002

Mr. James T. Odegard
Grand Forks County State's Attorney
PO Box 5607
Grand Forks, ND 58206-5607

Dear Mr. Odegard:

Thank you for your letter asking whether an alcoholic beverage retailer who owns and operates more than one retail store may purchase a large shipment of liquor and distribute the shipment to more than one store under the same ownership.

The State of North Dakota licenses both alcoholic beverage retailers and alcoholic beverage wholesalers. N.D.C.C. chs. 5-02 and 5-03. Neither chapter defines the terms "retail" or "wholesale" with regard to alcoholic beverages. Where words are not given a particular definition, they are to be understood in their ordinary sense. N.D.C.C. § 1-02-02. In applying this rule in a different situation, the North Dakota Supreme Court defined "retail" as the sale of goods or articles individually or in small quantities directly to the consumer, in contrast to "wholesale" which is the sale of goods in relatively large quantities and usually at lower prices than at retail; especially selling to retailers for resale to consumers. Atlas Ready-Mix of Minot v. White Properties Inc., 306 N.W.2d 212, 217 (N.D. 1981). This office has previously applied the definitions of retail and wholesale in that case to the alcoholic beverage trade. Letter to Representative Lynn Aas (Aug. 15, 1990). This office has also explained the distinction between wholesale and retail:

In its plain and usual meaning, "wholesale" is a term which accurately imports a selling of goods in gross to retailers who sell to consumers. A "wholesaler" is one who sells in bulk to another who intends to resell the articles purchased.

Letter to State Treasurer Walter Christenson (Sept. 18, 1975).

The definitions of "retail" and "wholesale" both require that a sale be made. No sale is being made when a single entity transfers goods between separate store locations.

Longstanding guidance offered by this office has adopted this position. In response to a letter from a retailer seeking to open a second location and asking whether one retail location could be stocked from the other in order to take advantage of volume discounts, this office stated:

Provided both bars are located and licensed in the state of North Dakota, and are owned by the same legal entity, we see no problem with state law in following the procedure you suggest. We would, however, suggest you check with local licensing authorities to determine if there is any problem with local ordinances.

Letter to Robert Messner (May 18, 1976). However, if a retailer were to purchase or obtain alcoholic beverages from another retailer, then the selling retailer would be wholesaling to the purchasing retailer. Letter to State Treasurer Robert Hanson (Oct. 29, 1986).¹ Wholesaling alcoholic beverages without a license from the State Tax Commissioner is a class B misdemeanor. N.D.C.C. § 5-03-01.

It logically follows that if two or more retail outlets are exchanging alcoholic beverage inventory, the outlets must be under the same ownership or they are wholesaling without a license.² This issue must be examined with particular scrutiny in the case of corporations. A corporation may be created only by the authority of the sovereign government and, as the creation of the state, is endowed only with the faculties that the state bestows and is subject to the conditions imposed by the state. Asbury Hospital v. Cass County, 7 N.W.2d 438, 449 (N.D. 1943). As a general rule, a corporation's existence will not be disregarded as a legal entity, but its existence will be disregarded if the legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime. Family Center Drug Store v. North Dakota State Bd. of Pharmacy, 181 N.W.2d 738, 745 (N.D. 1970). See also, Schriock v. Schriock, 128 N.W.2d 852, 866 (N.D. 1964). A separate corporate identity may not be disregarded for purposes of alcohol shipments between the corporations even where one of the corporations is completely owned by the other corporation involved in the transaction. In re A-1 Liquor Distributors, 269 S.W.2d 785, 789 (Tenn. App. 1953).

Therefore, it is my opinion that alcoholic beverage inventory may be moved between two or more alcoholic beverage retailers only where those retailers are under the same ownership. Further, this same ownership is not determined merely by the name under

¹ Further, "[a]ll alcoholic beverages purchased by a North Dakota licensed retailer for the purpose of resale must be purchased only from a North Dakota licensed wholesaler." N.D.A.C. § 10-08-03-01.

² Retailers are prohibited from having a financial interest in a wholesaler and wholesalers are prohibited from having a financial interest in a retailer. N.D.C.C. § 5-01-11. Therefore, a retailer cannot also lawfully obtain a wholesale license.

LETTER OPINION 2002-L-58

October 15, 2002

Page 3

which the retailer is doing business but involves an examination of the actual underlying facts. In this examination, separate corporate identities are not to be disregarded even where those corporations are owed by the same person or persons.

Sincerely,

Wayne Stenehjem
Attorney General

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