ISSUED OCTOBER 29, 2001

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

NORMAN C. and ROSA LEE DELEUZE dba ZD Wines 8383 Silverado Trail Napa, CA 94558, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7515 File: 02-198864 Reg: 98044234 Administrative Law Judge at the Dept. Hearing: Michael B. Dorais Date and Place of the Appeals Board Hearing: May 24, 2001 San Francisco, CA Redeliberation August 17, 2001

Norman C. and Rosa Lee Deleuze, doing business as ZD Wines (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which concluded that their payments to the printer of a catalog belonging to an off-sale licensee, for a wine product advertisement in that catalog, violated §25502,

[1]The decision of the Department, dated September 23, 1999, is set forth in the appendix.

subdivision (a)(2), of the Business and Professions Code.[2]

Appearances on appeal include appellants Norman C. and Rosa Lee Deleuze, appearing through their counsel, James M. Seff and J. Daniel Davis, and the Department of Alcoholic Beverage Control, appearing through its counsel, David Sakamoto

FACTS AND PROCEDURAL HISTORY

This case is one of a number of similar cases initiated by the Department which challenge the legality of winegrower payments for advertisements in a retailer catalog distributed to consumers in the Los Angeles area.[3] The Department contends that such payments violated Business and Professions Code §25502, subdivision (a)(2). That section provides, in pertinent part, as follows:

> "(a) No manufacturer, winegrower, manufacturer's agent, California winegrower's agent, rectifier, distiller, bottler, importer, or wholesaler, or any officer, director, or agent of any such person, shall, except as authorized by this division:
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> " ...
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> " (2) Furnish, give, or lend any money or other thing of value, directly or indirectly, to, or guarantee the repayment of any loan or the fulfillment of any financial obligation of, any person engaged in operating, owning, or

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[2] Unless otherwise stated, all statutory references are to the Business and Professions Code.

[3] Although appellants' opening brief is subtitled "Lead Case in Consolidated Cases," we have not seen a formal order consolidating this case with others containing similar charges. The record does contain a "Stipulation and Accusation List" as an enclosure to a letter from J. Daniel Davis, one of appellants' attorneys, identifying by license and registration number eighteen winegrower licensees, including appellants, against whom, presumably, similar accusations have been filed. An agreement has apparently been reached between the parties that the result in this case will govern all the remaining cases. (See RT 9).

maintaining any off-sale licensed premises."

An administrative hearing was held on July 14, 1999. At that hearing the parties stipulated to the facts regarding the transactions at issue. The stipulated facts, set forth in the decision as Finding of Fact III, are as follows:

"1. Norman C. Deleuze and Rosa Lee Deleuze doing business as ZD Wines ("Respondents") hold a winegrower's license.

2. Mel-Jen, a California corporation doing business as Wally's ("Wally's"), holds an off-sale general retail license at 2107-09 Westwood Boulevard, Los Angeles, California.

3. George Rice & Sons ("George Rice") is a printer and holds no alcoholic beverage license.

4. George Rice contracted with Wally's to produce a holiday gift catalog ("Wally's catalog") in 1995 and 1996.

5. Respondent paid George Rice $650 for a wine advertisement placed in the 1995 Wally's catalog and $750 for a wine advertisement placed in the 1996 Wally's catalog.

6. The Wally's catalog contained exclusively products carried by Wally's.

7. The Wally's catalogs were distributed to over 125,000 consumers in the Los Angeles area.

8. The Wally's catalogs contained Wally's phone number, fax number and address, information about the products and how to order them exclusively from Wally's.

9. In April, 1996, George Rice placed $7,164.03 in Wally's US Postal Service Account."[4]

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[4] We do not understand the significance to the Department's position that the printer deposited a sum of money in appellant's Postal Service Account. Without knowing (and the stipulation does not inform us) how many advertisers there were in total, or how much of the deposit could be correlated to payments by the winegrowers for advertisements, or of other elements of the arrangement between the licensee and the printer, we can only speculate as to what the deposited funds represent, or what relevance they might have. In this regard, we

Following the hearing, Chief Administrative Law Judge Michael B. Dorais ("the ALJ") issued his proposed decision, which concluded that §25502, subdivision (a)(2), had been violated, and the Department adopted the proposed decision.

In its decision, the Department concluded that "it is clear from the facts established by stipulation between the parties that the payments by Respondents to George Rice and Son, Inc., were indirect payments to Wally's, the sponsor of the catalogs, and the only retail outlet mentioned in the two catalogs." The decision rejected appellants' argument that §25502, subdivision (a)(2), applies only to unilateral transfers of a thing of value from a winegrower to a retailer when no reciprocal consideration is transferred to the winegrower from the retailer. The decision also declined to follow a 1937 Attorney General opinion relied upon by appellants, because it omitted any discussion of the statute's use of the term "furnish." Construing the term "furnish" to mean "supply or provide," the decision concluded that the payments to the catalog printer were clearly within the meaning of that term as used in §25502, subdivision (a)(2).

The decision expressed its agreement with the argument of Department counsel that §25503.3, subdivision (b), which permits supplier advertising in a retail trade association publication so long as the publication does not advertise on behalf of, or directly benefit any individual licensee, was enacted as an exception

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note that there is no claim by the Department that the amounts paid for the advertisements were not within the normal range of charges for comparable advertisements in comparable publications. Or, stated conversely, it appears that the Department's position is that it is irrelevant whether they were.

to §25502, subdivision (a)(2), rejecting appellant's contention that it was really directed at laws relating to fair trade and price posting.

This timely appeal followed.

DISCUSSION

This case presents to the Board the difficult and interesting question whether a statute which prohibits appellants from furnishing, giving, or lending money or any other thing of value, directly or indirectly, to a retailer, makes illegal the purchase by appellants of advertising in a retailer catalog featuring the products solely of that retailer.

Appellants deny that the purchase of an advertisement is a gift or a loan or the furnishing of a thing of value. They say that it is, instead, simply a payment in exchange for an advertisement. If the Department's theory is correct, appellants contend, then any purchase from a retail licensee would be prohibited, ranging from such mundane items as bread, toothpaste and onions to such things as a hotel stay, a professional tennis lesson at a resort, or dinner at a restaurant.

Appellants point out that §25502, subdivision (a)(2), does not say in so many words that a supplier cannot purchase advertising space from a retailer, or that a supplier cannot pay money to a retailer in return for goods or services. They read the section as simply saying that "a supplier cannot transfer money to a retailer and get nothing in exchange."

Appellants rely upon an opinion rendered by the Attorney General of the State of California in 1937, addressing a closely similar factual situation.

The Department argues that it does not make sense to read §25502,

subdivision (a)(2), to permit a winegrower to advertise in a publication benefitting a single retailer, as in this case, when the Legislature thought it necessary, in order to permit a winegrower to advertise in a retailer trade association publication, to enact §25503.3, subdivision (b),

The Department contends that the word "furnish" as used in the statute means to provide or supply, so that when appellants paid money to the printer, they were furnishing, indirectly, a thing of value to the retailer, in violation of the statute. Appellants say, instead, that they were simply doing what had been assumed to be legal at least since the opinion of the Attorney General was rendered, more than 60 years ago.

The 1937 opinion was provided to the State Board of Equalization (the predecessor to the Department of Alcoholic Beverage Control). In that opinion, the Attorney General concluded that paragraph (b) of section 54 of the Alcoholic Beverage Control Act would not be violated by the placement of advertising in a magazine of a club which held an on-sale license, where the magazine was circulated to the members and friends of the club at their homes or offices. The opinion quotes the language of then section 54, paragraph (b), and states:

> "As to paragraph (b), it is my opinion that the provisions of this paragraph would not prohibit such advertising. The only word used therein which could possibly create a doubt is the word 'giving' and this I construe to mean donating without consideration. When so construed it would not cover a transaction, as here, where there is a bona fide purchase of advertising space."

Appellants now argue that this opinion "drives a stake through the heart of the Decision's theory," since there is no substantive difference between the text

of the statute as it read in 1937, when the opinion of the Attorney General was rendered and the text of the provision as it now reads.[5] Appellants cite Christmat, Inc. v. County of Los Angeles (1971) 15 Cal.App.3d 590, 595 [93 Cal.Rptr. 325], for the proposition that the opinion of the Attorney General is entitled to great weight as an administrative construction of the statute, and that it must be presumed that it has come to the attention of the Legislature and, if contrary to the legislative intent, some corrective measure would have been adopted.

The Department's decision, although acknowledging that "the Attorney General's views are given great weight," states that "the omission from the Opinion of any discussion of the statute's use of the term 'furnish' precludes determining the present matter based on the Opinion." To the Department, payments to the printer were "clearly encompassed within the ambit of the term 'furnish'" as used in the statute.

Appellants, on the other hand, say that the Attorney General's opinion clearly rejected the interpretation of the word "furnish" urged by the Department when it said that "the only word" used in the statute which could possibly create a doubt is the word "giving," which it construed to mean "donating without consideration."

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[5] Although we are concerned in this appeal with the application of §25502, subdivision (a)(2), to an *off-sale* licensee, it should be noted that §25500, subdivision (a)(2), uses identical language in its application to *on-sale* licensees. It is the language of that section which most closely corresponds with the statute which was the subject of the Attorney General's opinion. However, we do not believe that there is any distinction in the application of these sections whether a retailer is on-sale or off-sale.

The absence of any definite legislative history leaves the intended breadth of §25502, subdivision (a), uncertain.

The Department argues that the Attorney General's opinion is not legally binding, and that the Department has consistently interpreted §25502, and the industry has complied with the Department's interpretation, since its enactment in 1955. Further, asserts the Department's brief, the Department has been unable to find any examples of the Attorney General's opinion having been followed by the Board of Equalization or the industry prior to the creation of the Department. It follows, the Department argues, that the "historic and consistent" construction by the Department is entitled to great weight and deference.

Presumably, the Department expects the Board to take what it says on faith, since it has cited no examples of instances where it has interpreted §25502 in the manner it says. Similarly, the absence of any examples of the Attorney General's opinion having been followed proves no more than that the Board of Equalization may not have seen fit to challenge anyone on the issue. Stated another way, the Board of Equalization's silence on the question could simply reflect acquiescence in the Attorney General's opinion.

The Department argues that appellants, along with other suppliers who purchased advertising in the catalog collectively and effectively "furnished" Wally's a free Christmas/holiday catalog and underwrote a portion of its mailing costs, and, in so doing, furnished it a thing of value. As the Department puts it, "if a holiday catalog is not a thing of value furnished to Wally's, it is hard to imagine anything that might be other than a direct cash bribe."

The Department's characterization of the transaction as the "collective" furnishing of a free catalog is overly broad. There is nothing in the stipulation of facts which accompanied this appeal to suggest that appellant's decision to place an advertisement in the catalog was contingent upon, or in concert with, a similar decision by any other winegrower. Were this the case, we would imagine that the Department would have so advised this Board.

Appellants argue, on the other hand, that the Department's construction of §25502, subdivision (a)(2), "would lead to the absurd prohibition of all supplier purchases from licensed retailers." (App.Br., at page 13.) They say that the Department's statement that it will exercise its discretion not to consider a regular commercial transaction unrelated to the sale or distribution of alcoholic beverages as a violation opens the door to subjective enforcement of the law, and that, even under the Department's representation of "reasonable enforcement," things such as the rental of a conference room, the purchase of a round of golf, or a dinner for business entertainment could be outlawed as "related to the sale or distribution of alcoholic beverages."

While there is something to be said for the Department's arguments based on the "tied house" legislation discussed in California Beer Wholesalers Association, Inc. v. Alcoholic Beverage Control Appeals Board (1971) 5 Cal.3d 402-407-408 [96 Cal.Rptr. 297], we have not been convinced. We think the interpretation the Department has placed on the transactions at issue is unreasonably restrictive. To our mind, the law as interpreted by the Attorney General decades ago remains unchanged.

ORDER

The decision of the Department is reversed and the case is remanded to the Department for such further proceedings as may be necessary in light of the comments herein.[6]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[6] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.