

May 28, 1982

SIDNEY GLASER, *Director*
 Division of Taxation
 West State and Willow Streets
 Trenton, New Jersey 08625

FORMAL OPINION NO. 2—1982

Dear Director Glaser:

You have asked for an opinion as to whether there is any impediment under the Motor Fuel Act to a motor fuel retail dealer establishing one price for gasoline for credit card customers and another lesser price for gasoline for cash customers. For the following reasons it is our opinion that there is no impediment to a motor fuel retail dealer establishing two separate prices for the sale of gasoline, provided any discount to cash sale customers approximates the measurable value of economic benefit accruing to the retailer from the sale being conducted by cash rather than on credit.

Your inquiry has been occasioned by recent decisions made by certain producer-distributors of motor fuels to allocate the cost of credit sales to credit card customers only, rather than allocating such costs among all customers as had been the practice in the past. Most major fuel oil distributors maintain an extensive credit card program whereby card holders may utilize credit cards to purchase motor fuels and other products. In the past, a motor fuel retailer was not charged a fee for participating in the credit card program. Retailers have sold motor fuel to consumers at a single price. In effect, cash consumers have subsidized the cost of extending credit to those consumers who qualify for credit card purchases. Costs of administration of the credit card program have risen in the past decade. As a consequence, it is proposed that a motor fuel retail dealer will be charged a credit card processing fee on each credit card transaction. This would presumably reflect the cost of extending credit and administering the credit card program. Each motor fuel retailer will pass its additional cost on to its credit card customers and, at the same time, offer a cash discount to those consumers who elect to pay cash for a motor fuel or other products. We are further informed that the typical cash discount provided to a cash customer would approximate the retail dealer's saving of the credit card costs imposed by the distributor if the customer had purchased by credit card.

The New Jersey statute regulating the retail pricing of motor fuel is the Motor Fuel Act, N.J.S.A. 56:6-1 *et seq.* To achieve the legislative purpose to prevent fraudulent and unfair practices in the retailing of motor fuel, the Act requires the conspicuous posting on pumps of the selling price of motor fuel, including taxes; requires that the posted prices remain in effect for 24 hours; and "a retail dealer shall not sell at any other price than the price, including tax, so posted." N.J.S.A. 56:6-2(a). Section (e), most pertinent to your inquiry, then provides that

No rebates, allowances, concessions or benefits shall be given, directly or indirectly, so as to permit any person to obtain motor

fuels from a retail dealer below the posted price or a net price lower than the posted price applicable at the time of the sale.

Clearly, if the difference in price charged to a credit card and to a cash customer constitutes either a rebate, allowance or concession, the proposal would be interdicted by the statute.

This provision of the Motor Fuel Act forbidding a retail gasoline dealer from giving a rebate or a concession to his customers has been subject to judicial interpretation. *Sperry and Hutchinson Co. v. Margetts*, 15 N.J. 203 (1954); *Glaser v. Downs*, 126 N.J. Super. 10 (App. Div. 1973) *cert. den.* 64 N.J. 513 (1974). In *Sperry and Hutchinson*, trading stamps were given by retailers to cash customers at the rate of one stamp for each 10¢ of purchased motor fuel. The court held that the offering of a cash discount "is not within the letter of the statutory interdiction; nor would be inimical to the reason and spirit of the act." The court specifically held that the statutory prohibition of "rebates, allowances, concessions or benefits" did not prohibit the true cash discount. The court stated:

The avowed purpose of this statutory regulation is the prevention, in the public interest, of fraudulent and unfair practices in the retailing of motor fuel. But there is no suggestion in the enactment itself of a design to outlaw the true cash discount as a means to this end. Indeed, its omission from the category of forbidden acts and conduct contained in subdivision (e) makes reasonably clear an intention *contra*. Compare R.S. 56:4-7(a), where the Legislature expressly distinguished between 'trade discounts' and 'cash discounts.' Certain it is that, quite apart from power, we cannot assume from the nature of the expressed policy that the Legislature had in view the interdiction of this well established and commonly known general trade practice of a discount for cash, available to all alike. [*Sperry, Id.* at 208, 209.]

It is important to note, that the crucial ingredient of the court's decision was its conclusion that a true cash discount is a discount equated to the value to the dealer of an immediate cash payment:

[T]he discount is measured by the economic worth to the merchant of the prompt use of the money and the corresponding reduction in working capital requirements, and the avoidance of the expense of maintaining credit facilities and the inevitable laws from bad debts. [*Id.* at 207.]

The Supreme Court reasoned that a discount based on the value of an immediate cash payment "is a term of payment merely, not a price adjustment; it is a mode of financing, not a reduction in the price . . . it does not in any real sense work an inequality of price within the intentment of subdivision (e)." *Id.* at 207, 208*

It is our judgment that the instant proposal does not differ in any material way from the "cash discount" approved by the Supreme Court in *Sperry*. A dealer may sell motor fuel to his cash customers at a lower

price either through a direct reduction in the price at the time of sale or by providing customers with redeemable trading stamps. In both instances, the discount is consistent with the act provided that the customer's payment in cash has a definite and measurable economic value to the retail dealer. In this case, we are informed that the retail dealer would save a credit card fee which he would pay to the distributor if the customer purchased by credit card. On the other hand, if the difference in price amounts to more than a genuine cash discount, the proposal would clearly be in contravention of the statutory prohibition against rebates and allowances.

The Director of Taxation has been authorized to promulgate rules and regulations as he may deem necessary to properly implement the Motor Fuel Act. N.J.S.A. 56:6-6. The director may suspend or revoke the license held by any retail dealer for a violation of any of the provisions of the act. N.J.S.A. 56:6-14. Also, the grant of express power to the Director is attended by such incidental authority as is fairly and reasonably necessary to make it effective. See *Cammarata v. Essex County Park Comm'n.*, 26 N.J. 404, 411 (1958). In light of the need to establish a genuine cash discount to approximate the economic benefit to the retail dealer of providing a discount to cash customers, the Director may adopt rules and regulations to define the parameters of an appropriate cash discount in the motor fuel industry. The Director should consider all of the relevant data from major producers or distributors of motor fuels in this state, including the existing trade customs in the industry. Also, the Director may adopt regulations relating to the manner of providing discounts and their conspicuous disclosure, including the posting of price signs. See N.J.S.A. 56:6-2.1 to 2.5. For example, the Director should determine whether the retail dealer should reduce the price at the time of payment to reflect the cash discount or, alternatively, whether the retail dealer should compute the discount into the "metered" price and sell the gasoline at cash-only pumps.

In conclusion, it is our opinion that there is no statutory impediment under the Motor Fuel Act to a motor fuel retail dealer establishing one price for the sale of gasoline to its credit customers and a separate lower price to its cash customers, provided a discount would approximate the economic value to the retailer of providing a discount to his cash customers.

Very truly yours,
 IRWIN I. KIMMELMAN
Attorney General

* In *Glaser v. Downs, supra*, the Appellate Division of the Superior Court held that the giving of three trading stamps for each purchase of 10¢ of motor fuel did fall within the statutory prohibition. Therefore, while acknowledging the general propriety of the providing of cash discounts, the court concluded a triple stamp program exceeded the permissible cash discount in the trade.