

STATE OF OKLAHOMA

1st Session of the 47th Legislature (1999)

CONFERENCE COMMITTEE SUBSTITUTE
FOR ENGROSSED
SENATE BILL 452

By: Fisher of the Senate

and

Tyler of the House

CONFERENCE COMMITTEE SUBSTITUTE

An Act relating to revenue and taxation; amending 68 O.S. 1991, Sections 305, as amended by Section 9, Chapter 278, O.S.L. 1994, 316, 417 and 418 (68 O.S. Supp. 1998, Section 305), which relate to taxation of cigarettes and tobacco products; modifying certain duties of wholesalers, jobbers and warehousemen; prohibiting affixing stamp to or sale, offer for sale or import of certain cigarette or tobacco products; providing that possession of certain cigarettes and tobacco products be prima facie evidence of violation of law; authorizing and providing procedures for seizure of cigarettes and tobacco products stamped in violation of certain provisions; modifying powers and duties of Attorney General; limiting sale of certain cigarettes and tobacco products; requiring remittance of cigarette tax and deposit of certain funds in specified fund; providing penalties; requiring license revocation upon certain punishment; prohibiting licensure of persons whose licenses revoked for certain period; creating revolving fund; providing for deposit thereto and expenditure therefrom; providing for codification; providing an effective date; and declaring an emergency.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 68 O.S. 1991, Section 305, as amended by Section 9, Chapter 278, O.S.L. 1994 (68 O.S. Supp. 1998, Section 305), is amended to read as follows:

Section 305. ~~(a)~~ A. Every wholesaler, jobber, or warehouseman doing business within this state and required to secure a license as provided under Section 304 of this title shall, upon withdrawal from storage, and before making any sale or distribution of cigarettes for consumption thereof, affix or cause the same to have affixed thereto the stamp or stamps as required by Section 301 et seq. of

this ~~article~~ title. It shall be the duty of the wholesaler, jobber, or warehouseman to supply and charge to the retailer the necessary stamps to cover any and all drop shipments of cigarettes billed to the retailer or consumer by the wholesaler, jobber, or warehouseman; and the wholesaler, jobber, or warehouseman shall be liable to the Oklahoma Tax Commission to perform this service.

~~(b)~~ B. Every retailer who has received cigarettes from a manufacturer, wholesaler, jobber, warehouseman or distributor not required to secure a license as provided for under Section 304 of this title, or to affix stamps as required under subsection ~~(a)~~ A of this section, shall, within seventy-two (72) hours, excluding Sundays and holidays, from the time such cigarettes come into ~~his~~ the retailer's possession, and before making any sale or distribution for consumption thereof, affix stamps upon all cigarette packages in the proper denomination and amount, as required by Section 302 of this title.

~~(c)~~ C. Any unlicensed consumer who buys direct from any distributor, jobber, manufacturer, warehouseman, or wholesaler, or other person, within or without this state, any cigarettes in excess of forty (40), at any one time to which are not affixed the stamps required by Section 301 et seq. of this article title shall, before purchasing such cigarettes, secure from the Tax Commission a written license and shall pay therefor an annual fee of Twenty-five Dollars (\$25.00), and ~~he~~ shall immediately, upon the receipt of any unstamped cigarettes, report the same to the Tax Commission on such forms as the Tax Commission may prescribe, and immediately purchase from the Tax Commission proper stamps and attach the same to all such cigarettes received. It shall be unlawful for any person to sell or consume cigarettes on which the tax, as levied by Section 301 et seq. of this article title, has not been paid, and which are not contained in packages to which are securely affixed the stamps

evidencing payment of the tax imposed by Section 301 et seq. of this article title.

D. If, upon examination of invoices or from other investigations, the Tax Commission finds that cigarettes have been sold without stamps affixed as required by Section 301 et seq. of this article title, the Tax Commission shall have the power to require such person to pay to the Tax Commission a sum equal to twice the amount of the tax due. If, under the same circumstances, a person is unable to furnish evidence to the Tax Commission of sufficient stamp purchases to cover unstamped cigarettes purchased ~~by him~~, the prima facie presumption shall arise that such cigarettes were sold without proper stamps being affixed thereto.

~~(d)~~ ~~(1)~~ E. 1. All unstamped cigarettes upon which taxes are imposed by Section 301 et seq. of this article title and all cigarettes stamped, sold, offered for sale, or imported into this state in violation of the provisions of Section 2 of this act which shall be found in the possession, custody, or control of any person, for the purpose of being consumed, sold or transported from one place to another in this state, for the purpose of evading or violating the provisions of Section 301 et seq. of this article title, or with intent to avoid payment of the tax imposed hereunder, and any automobile, truck, conveyance, or other vehicle whatsoever used in the transportation of such cigarettes, and all paraphernalia, equipment or other tangible personal property incident to the use of such purposes, found in the place, building, vehicle or vehicles, where such cigarettes are found, may be seized by any authorized agent of the Tax Commission, or any sheriff, deputy sheriff, Constable or other peace officer within the state, without process; ~~and the~~ . The same shall be, from the time of such seizure, forfeited to the State of Oklahoma, and a proper proceeding filed in a court of competent jurisdiction in the county of seizure,

to maintain such seizure and prosecute ~~said~~ the forfeiture as herein provided.

~~(2)~~ 2. All such cigarettes, vehicles and property so seized, ~~as aforesaid,~~ shall first be listed and appraised by the officer making such seizure and turned over to the county sheriff of the county in which the seizure is made and a receipt therefor taken; ~~and the~~ . The person making such seizure shall immediately make and file a written report thereof, showing the name of the person making such seizure, the place, and the person where, and from whom such property was seized, and an inventory and appraisal thereof, at the usual and ordinary retail price of such articles received, to the Tax Commission, or the Attorney General, in the case of cigarettes stamped, sold, offered for sale, or imported into this state in violation of the provisions of Section 2 of this act. The district attorney of the county in which the seizures are made shall, at the request of the Tax Commission or Attorney General, file in the district court forfeiture proceedings in the name of the State of Oklahoma, as plaintiff, and in the name of the owner or person in possession, as defendant, if known, and if unknown in the name of the property seized. The clerk of the court shall issue summons to the owner or person in whose possession such property was found, directing ~~him~~ the owner or person to answer within ten (10) days. If the property is declared forfeited and ordered sold, notice of the sale shall be posted in five public places in the county not less than ten (10) days before the date of sale; provided, cigarette packages or containers as described in Section 2 of this act shall only be sold for export outside the United States or as otherwise permitted by federal law. The proceeds of ~~said~~ the sale shall be deposited with the clerk of the court, who shall after deducting costs, including the costs of sale, pay the balance to the Tax Commission as cigarette tax collected, or in the case of cigarettes seized as being in violation of the provisions of Section

2 of this act, to the Attorney General. The Attorney General shall remit the amount of cigarette tax, if any be due, including all penalties and interest due, to the Tax Commission as cigarette tax collected and shall deposit the remainder to the revolving fund created in Section 7 of this act.

~~(3)~~ 3. The seizure and sale of ~~said~~ cigarettes shall not relieve the person from whom such cigarettes were seized from any prosecution or the payment of any penalties provided for under Section 301 et seq. of this article title; nor shall it relieve the purchaser thereof from any payment of the regular cigarette tax and the placing of proper stamps thereon before making any sale of ~~said~~ the cigarettes or the personal consumption of the same.

~~(4)~~ 4. The forfeiture provisions of Section 301 et seq. of this article title shall only apply to persons having possession of or transporting cigarettes with intent to barter, sell or give away the same; provided, that such possession of cigarettes in any quantity of five or more cartons of ten packages each shall be prima facie evidence of intent to barter, sell or give away such cigarettes in violation of the provisions of Section 301 et seq. of this article title.

~~(e)~~ F. The Tax Commission shall exchange new stamps for any stamps which are damaged, or for stamps which have been affixed to packages of cigarettes returned to factories, or shipped to other states, or sold to government agencies or state institutions, or for stamps purchased in excess of floor stocks. Application to the Tax Commission for such exchanges must be accompanied by affidavit, damaged stamps, bill of lading covering shipment to factory or other states, or other proof required by the Tax Commission. Any person to whom stamps shall be issued under this paragraph may, upon approval of the Tax Commission, sell such stamps to any wholesaler as defined in Section 301 et seq. of this article title.

~~(f)~~ G. Any person, including distributing agents, wholesalers, jobbers, carriers, warehousemen, retailers and consumers, having possession of unstamped cigarettes in this state shall be liable for the tax on such cigarettes in case the same are lost, stolen or unaccounted for, in transit, storage or otherwise, and in such event a presumption shall exist for the purposes of taxation, that such cigarettes were used and consumed in Oklahoma.

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 305.1 of Title 68, unless there is created a duplication in numbering, reads as follows:

A. It shall be unlawful to affix a stamp to any cigarette package or container or to sell, offer for sale, or import into this state any cigarette package or container:

1. Which bears any label or notice prescribed by the United States Department of Treasury to identify cigarettes intended for export and exempt from tax by the United States pursuant to Section 5704(b) of Title 26 of the United States Code or any notice or label described in Section 290.185 of Title 27 of the United States Code of Federal Regulations;

2. Which is not labeled in conformity with the provisions of the Federal Cigarette Labeling and Advertising Act, or any other federal requirement for the placement of labels, warnings or other information applicable to packages or containers of cigarettes intended for domestic consumption;

3. Upon which all federal taxes due have not been paid or which is not in compliance with all federal trademark and copyright laws; or

4. The packaging of which has been modified or altered by a person other than the manufacturer or person specifically authorized by the manufacturer, including, but not limited to, the placement of a sticker or label to cover information on the package or container.

Possession of more than one thousand cigarettes in packages or containers bearing Oklahoma stamps in violation of this subsection by a person other than an employee of this state or the federal government performing official duties relating to enforcement of the provisions of Section 301 et seq. of this title shall constitute prima facie evidence of a violation of the provisions of this subsection.

B. Except as otherwise provided by law, the Attorney General shall enforce the provisions of this section.

SECTION 3. AMENDATORY 68 O.S. 1991, Section 316, is amended to read as follows:

Section 316. ~~(a)~~ A. Any person, ~~as defined in this article,~~ who shall:

~~(1) sell~~ 1. Sell, offer for sale or present as a prize or gift cigarettes without a stamp being then and there affixed to each individual package;

~~(2) sell~~ 2. Sell cigarettes in quantities less than an individual package;

~~(3) knowingly~~ 3. Knowingly consume, use or smoke any cigarettes upon which a tax is required to be paid without a stamp being affixed upon each individual package;

~~(4) knowingly~~ 4. Knowingly cancel or mutilate any stamp affixed to any individual package of cigarettes for the purpose of concealing any violation of Section 301 et seq. of this article title or with any other fraudulent intent;

~~(5) use~~ 5. Use any artful device or deceptive practice to conceal any violation of Section 301 et seq. of this article title;

~~(6) refuse~~ 6. Refuse to surrender to the Oklahoma Tax Commission upon demand any cigarettes possessed in violation of any provision of Section 301 et seq. of this article title; or

~~(7) make~~ 7. Make a first sale of cigarettes without a stamp being then and there affixed to each individual package;

shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than Two Hundred Dollars (\$200.00), where specific penalties are not otherwise provided.

~~(b)~~ B. Any distributor, wholesale dealer, retail dealer or distributing agent who shall:

~~(1) commit~~ 1. Commit any of the acts specifically enumerated in ~~subdivision (a)~~ subsection A of this section, where such acts are applicable to such person;

~~(2) sell~~ 2. Sell any cigarettes upon which tax is required to be paid by Section 301 et seq. of this article ~~title~~ without at the time of making such sale having a valid license;

~~(3) make~~ 3. Make a first sale of cigarettes without at the time of ~~said~~ first sale having a license posted so as to be easily seen by the public; or

~~(4) fail~~ 4. Fail to deliver an invoice required by law to a purchaser of cigarettes;

shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than Two Hundred Dollars (\$200.00), where specific penalties are not otherwise provided.

~~(c)~~ C. Any distributing agent, ~~as defined in this article,~~ who shall:

~~(1) commit~~ 1. Commit any of the acts specifically enumerated in ~~subdivisions (a) and (b)~~ subsections A and B of this section where such provisions are applicable to such distributing agent; or

~~(2) store~~ 2. Store any unstamped cigarettes in the state or deliver or distribute any unstamped cigarettes within this state, without at the time of ~~said~~ storage or delivery having a valid license posted so as to be easily seen by the public;

shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than Two Hundred Dollars (\$200.00).

D. Any retailer violating the provisions of Section 2 of this act shall:

1. For a first offense, be punished by an administrative fine of not more than One Hundred Dollars (\$100.00);

2. For a second offense, be punished by an administrative fine of not more than One Thousand Dollars (\$1,000.00); and

3. For a third or subsequent offense, be punished by an administrative fine of not more than Five Thousand Dollars (\$5,000.00).

E. Any wholesaler, jobber or warehouseman violating the provisions of Section 2 of this act shall:

1. For a first offense, be punished by an administrative fine of not more than Five Thousand Dollars (\$5,000.00); and

2. For a second or subsequent offense, be punished by an administrative fine of not more than Twenty Thousand Dollars (\$20,000.00).

Administrative fines collected pursuant to the provisions of this subsection shall be deposited to the revolving fund created in Section 7 of this act.

F. The Tax Commission shall immediately revoke the license of a person punished for a violation pursuant to the provisions of paragraph 3 of subsection D of this section or a person punished for a violation pursuant to the provisions of subsection E of this section. A person whose license is so revoked shall not be eligible to receive another license pursuant to the provisions of Section 301 et seq. of this title for a period of ten (10) years.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 403.1 of Title 68, unless there is created a duplication in numbering, reads as follows:

A. It shall be unlawful to affix a stamp to any package or container of tobacco products or to sell, offer for sale, or import into this state any package or container of tobacco products:

1. Which bears any label or notice prescribed by the United States Department of Treasury to identify tobacco products intended

for export and exempt from tax by the United States pursuant to Section 5704(b) of Title 26 of the United States Code or any notice or label described in Section 290.185 of Title 27 of the United States Code of Federal Regulations;

2. Which is not labeled in conformity with the provisions of the Federal Cigarette Labeling and Advertising Act, or any other federal requirement for the placement of labels, warnings or other information applicable to packages or containers of tobacco products intended for domestic consumption;

3. Upon which all federal taxes due have not been paid or which is not in compliance with all federal trademark and copyright laws; or

4. The packaging of which has been modified or altered by a person other than the manufacturer or person specifically authorized by the manufacturer, including, but not limited to, the placement of a sticker or label to cover information on the package or container.

Possession of more than thirty (30) ounces of tobacco products in packages or containers bearing Oklahoma stamps in violation of this subsection by a person other than an employee of this state or the federal government performing official duties relating to enforcement of the provisions of Section 401 et seq. of this title shall constitute prima facie evidence of a violation of the provisions of this subsection.

B. Except as otherwise provided by law, the Attorney General shall enforce the provisions of this section.

SECTION 5. AMENDATORY 68 O.S. 1991, Section 417, is amended to read as follows:

Section 417. ~~(a)~~ A. All unstamped tobacco products upon which a tax is levied by Section 401 et seq. of this article title and all tobacco products stamped, sold, offered for sale, or imported into this state in violation of the provisions of Section 4 of this act, found in the possession, custody or control of any person for the

purpose of being consumed, sold or transported from one place to another in this state, for the purpose of evading or violating the provisions of Section 401 et seq. of this article title, or with intent to avoid payment of the tax imposed thereunder, may be seized by any authorized agent of the Oklahoma Tax Commission, or any sheriff, deputy sheriff or police within the state. Tobacco products from the time of seizure shall be forfeited to the State of Oklahoma. A proper proceeding shall be filed in the district court of the county of seizure, to maintain such seizure and prosecute the forfeiture as herein provided; the provisions of this section shall not apply, however, where the tax on such unstamped tobacco products does not exceed One Dollar (\$1.00).

~~(b)~~ B. All such tobacco products so seized, ~~as aforesaid~~, shall first be listed and appraised by the officer making such seizure and turned over to the sheriff of the county in which the seizure is made, and a receipt taken therefor.

~~(c)~~ C. The person making such seizure shall immediately make and file a written report thereof to the Tax Commission, showing the name of the person making such seizure, the place where seized, the person from whom seized, the property seized and an inventory and appraisement thereof, which inventory shall be based on the usual and ordinary retail price or value of the articles seized, or the Attorney General, in the case of tobacco products stamped, sold, offered for sale, or imported into this state in violation of the provisions of Section 4 of this act. The district attorney of the county in which such seizure is made shall, at the request of the Tax Commission or Attorney General, file in the district court forfeiture proceedings in the name of the State of Oklahoma against the owner or person in possession of the property seized, if known, and if unknown, against the property seized. The clerk of the court shall issue summons to the owner or person in whose possession such property was found. Summons so issued and all procedure thereafter

shall be governed by statutes relating to procedure in civil actions. If personal service cannot be had, or if suit be filed against the property seized, service may be obtained by the posting of notices in five public places within the county. The notice shall direct the owner, or if the owner be unknown, the person in possession of the property seized, to answer the petition filed within twenty (20) days from the date of the posting of such notices. The district attorney shall within three (3) days after the posting of ~~said~~ the notices cause a copy of the same to be mailed to any defendant on whom personal service was not had, addressed to ~~his~~ the defendant's last-known address. If, after a full hearing upon the petition, the court finds that the property seized is forfeited to the State of Oklahoma, the court shall direct to the sheriff to sell ~~said~~ the property at public auction ten (10) days after the posting of notices of ~~said~~ sale in five public places within ~~said~~ the county; provided, tobacco products as described in Section 4 of this act shall only be sold for export outside the United States or as otherwise permitted by federal law. The proceeds of the sale shall be deposited with the clerk of the court who shall, after deducting costs including the cost of the sale, pay same to the Tax Commission as tobacco products tax collected, or in the case of tobacco products seized as being in violation of the provisions of Section 4 of this act, to the Attorney General. The Attorney General shall remit the amount of tobacco products tax, if any be due, including all penalties and interest due, to the Tax Commission as tobacco products tax collected and shall deposit the remainder to the revolving fund created in Section 7 of this act.

~~(d)~~ D. The seizure and sale of such tobacco products shall not relieve the person from whom such tobacco products were seized from prosecution or the payment of penalties. The purchaser of forfeited tobacco products shall pay the regular tobacco products tax and

shall place proper stamps thereon before any of such tobacco products are sold or consumed.

~~(e)~~ E. The forfeiture provisions of Section 401 et seq. of this article title shall only apply to persons having possession of or transporting tobacco products with intent to barter, sell or give away the same.

SECTION 6. AMENDATORY 68 O.S. 1991, Section 418, is amended to read as follows:

Section 418. A. It shall be unlawful for any person to transport, ~~or have in his possession,~~ possess unstamped tobacco products where the tax on such unstamped tobacco products exceeds the sum of One Dollar (\$1.00). ~~Any~~

B. Except as otherwise provided in subsections C and D of this section, any person found guilty of violating the provisions of Section 401 et seq. of this article title shall be deemed guilty of a misdemeanor, and shall upon conviction be punished by a fine of not more than Five Hundred Dollars (\$500.00) or by confinement in the county jail for not to exceed thirty (30) days, or by both such fine and imprisonment.

C. Any retailer violating the provisions of Section 4 of this act shall:

1. For a first offense, be punished by an administrative fine of not more than One Hundred Dollars (\$100.00);

2. For a second offense, punished by an administrative fine of not more than One Thousand Dollars (\$1,000.00); and

3. For a third or subsequent offense, be punished by an administrative fine of not more than Five Thousand Dollars (\$5,000.00).

D. Any wholesaler, distributing agent or dealer violating the provisions of Section 4 of this act shall:

1. For a first offense, be punished by an administrative fine of not more than Five Thousand Dollars (\$5,000.00); and

2. For a second or subsequent offense, be punished by an administrative fine of not more than Twenty Thousand Dollars (\$20,000.00).

Administrative fines collected pursuant to the provisions of this subsection shall be deposited to the revolving fund created in Section 7 of this act.

F. The Oklahoma Tax Commission shall immediately revoke the license of a person punished for a violation pursuant to the provisions of paragraph 3 of subsection C of this section or a person punished for a violation pursuant to the provisions of subsection D of this section. A person whose license is so revoked shall not be eligible to receive another license pursuant to the provisions of Section 301 et seq. of this title for a period of ten (10) years.

SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 305.2 of Title 68, unless there is created a duplication in numbering, reads as follows:

There is hereby created in the State Treasury a revolving fund for the Office of the Attorney General. The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received by the Office of the Attorney General pursuant to the provisions of Sections 305, 316, 417 and 418 of Title 68 of the Oklahoma Statutes. All monies accruing to the credit of the fund are hereby appropriated and may be budgeted and expended by the Office of the Attorney General. Expenditures from the fund shall be made upon warrants issued by the State Treasurer against claims filed as prescribed by law with the Director of State Finance for approval and payment.

SECTION 8. This act shall become effective thirty (30) days after approval of this act by the Governor.

SECTION 9. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby

declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

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