



STATE BOARD OF EQUALIZATION STAFF LEGISLATIVE BILL ANALYSIS

Date Introduced:	03/09/05	Bill No:	AB 1749
Tax:	Cigarette and Tobacco Products Licensing Act	Author:	Assembly Governmental Organization Committee
	Cigarette and Tobacco Products		
Related Bills:			

BILL SUMMARY

This bill contains **Board of Equalization-sponsored provisions** that would accomplish the following:

- Amend Section 22978.4 of the Business and Professions Code to revise the distributor and wholesaler invoicing requirements for the sale of cigarettes or tobacco products.
- Amend Sections 22978.7 and 22979.7 of the Business and Professions Code to clarify the penalty for second or subsequent violations of the Cigarette and Tobacco Products Licensing Act (Act).
- Amend Section 22979.2 of the Business and Professions Code to include imported cigarettes when computing the administration fee for manufacturers and importers that begin operations after January 1, 2004.
- Add Section 30361.5 to the Revenue and Taxation Code to apply excess tax reimbursement to persons that represent amounts as reimbursement for taxes imposed upon the distribution of tobacco products when such amounts are computed upon an amount that is not taxable or is in excess of the tax amount.

ANALYSIS

Revises the distributor and wholesaler invoicing requirements for the sale of cigarettes or tobacco products

Business and Professions Code Section 22978.4

Current Law

Under current law, Section 22978.4 of the Business and Professions Code requires each distributor and each wholesaler to include specified information on each invoice for the sale of cigarettes or tobacco products. This information includes, in part, the name, address, and telephone number of the distributor or wholesaler and the statement "All California cigarette and tobacco product taxes are included in the total amount of this invoice." Failure to comply with the invoicing requirements is a misdemeanor and punishable by a fine not to exceed five thousand dollars (\$5,000), or imprisonment not exceeding one year in a county jail, or both the fine and imprisonment.

This staff analysis is provided to address various administrative, cost, revenue and policy issues; it is not to be construed to reflect or suggest the Board's formal position.

The invoicing provisions currently do not require distributors and wholesalers to include the date the cigarettes or tobacco products were sold on invoices for the sale of such products.

Proposed Law

This bill would amend Section 22978.4 to require distributor and wholesaler invoices for the sale of cigarettes or tobacco products to include the date such products were sold, which would assist Board investigators in verifying a retailer's tax paid product.

The bill would also clarify that such invoices also include either the amount of excise taxes due to the Board or the statement "All California cigarette and tobacco product taxes are included in the total amount of this invoice."

Comment

Including the date on each distributor and wholesaler invoice for the sale of cigarettes and tobacco products would be an important tool to allow Board investigators to match cigarettes and tobacco products on a retailer's shelf to distributor or wholesaler invoices for the purpose of verifying tax paid product.

In addition, some distributors and wholesalers programmed software to show the actual amount of excise tax paid on cigarette and tobacco products for the purpose of showing that tax was paid on such products. This was consistent with the invoicing requirements for cigarettes or tobacco products sold prior to September 27, 2004, when AB 3092 (Ch. 822) amended Section 22978.4 to instead only require the statement "All California cigarette and tobacco product taxes are included in the total amount of this invoice." This change was intended to address an industry concern that it would be impossible to program software to print the exact amount of excise paid for tobacco products that were purchased from multiple sources. Therefore, a distributor or wholesaler should have the option between printing the amount of excise taxes due to the Board or the specified statement required under existing law for purposes of complying with the invoicing requirements. Either option would continue to prove intent to evade if shown on a distributor or wholesaler invoice when such excise tax has not been paid to the state to allow for criminal prosecution.

Clarify the penalty for second or subsequent violations of the Act
Business and Professions Code Sections 22978.7 and 22979.7

Current Law

Under current law, Section 22974.7 of the Business and Professions Code provides that in addition to any other civil or criminal penalty provided by law, upon a finding that a retailer has a second or any subsequent offense of any provision of the Cigarette and Tobacco Products Licensing Act of 2003, the Board may, in addition to revoking or suspending the license or licenses of the retailer, impose a civil penalty in the amount not to exceed the greater of five times the retail value **of the seized** cigarettes or tobacco products, or five thousand dollars (\$5,000).

Sections 22978.7 and 22979.7 are identical to Section 22974.7 with the exception of the amount of civil penalty relating to the civil penalty amount of five times the retail value of the cigarettes or tobacco products **seized**.

Proposed Law

This bill would amend Section 22978.7 and 22979.7 to clarify that in the case of a second or any subsequent offense, the civil penalty would apply to the retail value of the **seized** cigarettes or tobacco products, consistent with Section 22974.7.

Comment

Current Sections 22978.7 and 22979.7 are ambiguous as to what the basis for retail value of cigarettes or tobacco products is to be used to compute the civil penalty. For example, would the civil penalty be computed based on the retail value of cigarettes or tobacco products seized or the retail value of all cigarette or tobacco products inventory?

**Include imported cigarettes when computing the administration fee for
manufacturers and importers that begin operations after January 1, 2004**
Business and Professions Code Section 22979.2

Current Law

Under current law, Section 22979.2 of the Business and Professions Code requires that, **on or before January 1, 2004**, every manufacturer and every importer pay to the Board an administration fee. The amount of the administration fee is one cent (\$0.01) per package of cigarettes (1) manufactured or imported by the manufacturer or the importer and (2) shipped into this state during the 2001 calendar year as reported to the Board.

All manufacturers and all importers that begin operations in the state **after January 1, 2004** are charged a fee commensurate with their respective market share of (1) *cigarettes manufactured or imported by the manufacturer* and (2) sold in this state during the next calendar year as estimated by the Board. The amount of the fee may not be less than that paid by the smallest manufacturer that began operations prior to January 1, 2004, but may not be more than that paid by the eighth largest manufacturer.

Proposed Law

This bill would amend Section 22979.2 to correct an inadvertent drafting error to clarify that cigarettes manufactured or imported by the importer would be used to compute the administration fee for importers that begin operations after January 1, 2004. This would be consistent with the computation of the fee for importers that commence business on or before January 1, 2004.

Comment

The calculation of the administration fee for importers that begin operations after January 1, 2004 is not consistent with the calculation for importers that began operations on or before January 1, 2004. The fee calculation for manufacturers and importers that begin operations after January 1, 2004 does not consider cigarettes manufactured or imported by the importer.

Apply excess tax reimbursement to persons that represent amounts as reimbursement for taxes imposed upon the distribution of tobacco products when such amounts are computed upon an amount that is not taxable or is excess of the tax amount

Revenue and Taxation Code Section 30361.5

Current Law

Under existing Sales and Use Tax Law, when an amount represented by a person to a customer as constituting reimbursement for taxes due is computed upon an amount that is not taxable or is in excess of the taxable amount and is actually paid by the customer to the person, the amount so paid is required to be returned by the person to the customer upon notification by the Board or by the customer that such excess tax has been collected. In the event of his or her failure or refusal to do so, the amount so paid is required to be remitted to the state. Those amounts remitted to the state will be credited by the Board on any amounts due and payable on the same transaction from the person by whom it was paid to this state and the balance, if any, shall constitute an obligation due from the person to this state.

The Cigarette and Tobacco Products Tax Law requires every distributor to pay a tax upon his or her distribution of tobacco products, based on the wholesale cost of these products, at a tax rate determined annually by the Board. Distribution is defined to mean, in part, the sale of untaxed cigarettes or tobacco products in this state. However, tobacco products distributors who import tobacco products manufactured outside of the United States (original importer) are exempt from the excise tax imposed on the distribution of tobacco if such sales are to a licensed distributor. As such, an original importer's distribution of tobacco products to a licensed California distributor is not subject to tax and the purchasing licensed distributor owes the excise tax upon their distribution of the tobacco products based upon the wholesale cost of the product.

Proposed Law

This bill would add Section 30361.5 to conform the tobacco products tax law to other tax and fee programs administered by the Board to allow the state to issue a determination for excess tobacco products tax when any person fails to return that excess tax to the customer or to remit those amounts to the state. Amounts remitted to the state would be credited to amounts due and payable from the purchasing licensed distributor, as specified.

Comment

Notwithstanding the exemption provided, the Board has found a few original importers collecting an amount represented as tobacco products tax from licensed distributors. Although these original importers may believe they are doing a favor by collecting and paying the excise tax, *it does not offset or relieve the purchasing licensed distributor's excise tax liability*. Since the tobacco products taxes are not owed by the original importer, they are eligible to claim and receive a refund of all tobacco products taxes incorrectly paid. However, existing law does not require the original importer to return amounts that were represented as tax to the purchasing licensed distributor. This imposes a hardship on licensed distributors that thought they had paid the excise tax on tobacco products only to discover that they still owe the tax, including interest, and the

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original importer is not willing to return the excess amounts collected that were represented as excise tax.

Currently the Board has twelve appeals cases as a result of audits where tobacco product taxes have been assessed against licensed distributors for their purchases from original importers where the original importer has indicated that taxes are included in the price to the distributor.

In addition, a similar issue exists for manufacturers of tobacco products as existing law provides an exemption for manufacturers where their sales are to licensed distributors.

COST ESTIMATE

The Board would incur insignificant costs to implement the provisions of this bill.

REVENUE ESTIMATE

This bill would not impact state revenues.

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