



STATE BOARD OF EQUALIZATION STAFF LEGISLATIVE BILL ANALYSIS

Date Amended:	07/02/02	Bill No:	SB 1766
Tax:	Cigarette	Author:	Ortiz
Board Position:	Support	Related Bills:	SB 2082 (Bowen)

BILL SUMMARY

Among its provisions, this bill would require that every retail sale of cigarettes in California be a vendor-assisted, face-to-face sale, unless all applicable taxes due on the sale are paid or the seller includes a prominent notice on the package indicating that the purchaser is responsible for any applicable California taxes on the cigarettes.

ANALYSIS

Current Law

Under current law, Section 30101 of the Cigarette and Tobacco Products Tax Law imposes an excise tax of 6 mills (or 12 cents per package of 20) on each cigarette distributed. In addition, Section 30123 and 30131.2 impose a surtax of 12 ½ mills (25 cents per package of 20) and 25 mills (50 cents per package of 20), respectively, on each cigarette distributed. The current total tax on cigarettes is 43 ½ mills per cigarette (87 cents per package of 20). This excise tax is imposed upon each cigarette distribution, which is basically defined as the first sale of untaxed cigarettes in this state.

Chapter 10A of Title 15 of the United States Code (also known as the Jenkins Act) requires any person that sells or transfers cigarettes for profit in interstate commerce and ships the cigarettes into a state that imposes a tax on cigarettes to file by the 10th of each calendar month a copy of the invoice for each and every shipment of cigarettes made during the previous calendar month in that state. This information is required to show the name and address of the person to whom the shipment was made, the brand, and the quantity of shipment. Any person who violates these provisions shall be guilty of a misdemeanor and shall be subject to a fine of not more than \$1,000, or imprisoned not more than 6 months, or both.

Current law imposes a sales or use tax on the sale or purchase of tangible personal property in this state (including cigarettes). When a person sells cigarettes at retail in this state, the sales tax applies. The seller is responsible for this tax and must pay it to the state. When the sales tax does not apply, the use tax does. For example, when a person buys cigarettes from a point outside this state for the use or consumption in this state, the use tax is the applicable tax. If the out-of-state seller has nexus within the state, the seller is required to collect the use tax from the purchaser at the time of sale. If the seller does not collect the use tax, or if the seller does not have nexus in this state, the purchaser is required to pay the use tax directly to the Board of Equalization.

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.

Proposed Law

Vendor sales

This bill would add Division 8.6 (commencing with Section 22965) to the Business and Professions Code to provide that no person may engage in a retail sale of cigarettes in California unless the sale is a vendor-assisted, face-to-face sale.

This bill defines a “face-to-face sale” to mean a sale in which the purchaser is in the physical presence of the seller or the seller’s employee or agent at the time of the sale. A face-to-face sale would not include any transaction conducted by mail order, the Internet, telephone, or any other anonymous transaction method in which the buyer is not in the seller’s physical presence. However, this section would not prohibit any lawful sale of a tobacco product that occurs by means of a vending machine.

Non-face-to-face sales

This bill also provides that a person may engage in a non-face-to-face sale of a cigarette to a person in California provided that the seller complies with either of the following conditions:

- All applicable California taxes on the cigarettes have been paid.
- The seller includes on the outside of the shipping container for any cigarettes shipped to a resident in California from any source in the United States, an externally visible and easily legible notice located on the same side of the shipping container as the address to which the package is delivered stating the following:

If these cigarettes have been shipped to you from a seller located outside of the state in which you reside, the seller has reported pursuant to federal law the sale of these cigarettes to your state tax collection agency, including your name and address. You are legally responsible for all applicable unpaid state taxes on these cigarettes.

Penalties

This bill provides that the Attorney General or a city attorney, county counsel, or district attorney may bring a civil action to enforce the proposed section against any person, firm, corporation, or other entity that violates the provisions of the proposed section. This bill also provides that in addition to any other remedies provided by law, the court shall assess a civil penalty ranging from \$1,000 to \$10,000 based on the number of violations within a specified period of time.

This bill also provides that all the provisions are severable, and if any provision of this bill is found to be invalid, that invalidity would not affect other provisions of this bill.

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Background

Because of the state excise tax imposed on cigarettes and the sales tax due on the sale of cigarettes, many consumers have turned to the Internet as a way of obtaining cigarettes from out-of-state sellers who do not charge the California taxes. To help track down the purchasers of cigarettes from out-of-state sellers, the Board utilizes information required to be provided by the Jenkins Act (requires the sellers to provide the name and address of the purchasers to the Board) to bill consumers for the taxes due.

COMMENTS

- 1. Sponsor and Purpose.** This bill is sponsored by the author to facilitate the collection of taxes on cigarettes sold to residents of California over the Internet or by mail order.
- 2. Summary of July 2nd amendments.** Amendments to this bill replaced the term tobacco products with cigarettes, removed the requirements that a seller verify the purchaser's age through valid government identification in non-face-to-face sales, and removed the two carton minimum purchase requirement. Additional amendments provided specific wording of the statement that a seller must place on a shipping container containing cigarettes and the inclusion of civil penalties for the violation of these provisions.
- 3. Internet purchases.** As efforts increase in this state to stop the illegal sale of cigarettes and tobacco products to minors, minors may find it more difficult to purchase cigarettes from traditional locations such as liquor stores and gas station mini-marts. This may lead to minors turning to the Internet as a means of acquiring cigarettes since the retailer is not likely to verify the age of the purchaser. This can lead to additional tax avoidance since the Internet retailer is unlikely to collect the California taxes due and the minor purchasing cigarettes is unlikely to self-report the California taxes due.
- 4. The Jenkins Act.** The Jenkins Act requires any person that sells or transfers cigarettes for profit in interstate commerce and ships the cigarettes into a state that imposes a tax on cigarettes to file by the 10th of each calendar month a copy of the invoice for each and every shipment of cigarettes made during the previous calendar month in that state. Many consumers who shop on the Internet may not be aware of these provisions and think they are successfully avoiding the tax by purchasing cigarettes from out-of-state sellers over the Internet. The Board utilizes the information required to be provided by the Jenkins Act to bill consumers for the taxes due. Unfortunately, some cigarette retailers do not comply with the provisions of the Jenkins Act. Since the Jenkins Act is a federal statute, the Board requires the assistance of federal law enforcement agencies to enforce the provisions of the Jenkins Act. Also, the provisions of the Jenkins Act apply only to the sale of cigarettes, not tobacco products.

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5. **Enforcement.** This bill would make several requirements of any person who sells tobacco products to consumers in this state. However, some of these retailers are located outside California and have no business presence in this state. Without a presence in this state, the state would have a difficult time enforcing the provisions of this bill.
6. **Penalty provisions.** This bill provides that the Attorney General, a city attorney, county counsel, or district attorney may bring a civil action to enforce the provisions of this bill against any person, firm, corporation, or other entity that violates the provisions of this bill. This bill also provides a schedule of civil penalties ranging from \$1,000 to \$10,000, depending on the frequency of violations.
7. **Related legislation.** Senate Bill 2082 (Bowen) would require any person who advertises on the Internet to sell cigarettes in California and is subject to the provisions of the Jenkins Act to conspicuously disclose that a purchaser who buys cigarettes that are shipped into California is responsible for paying the state excise tax and the state use tax and to show in the advertisement the amount of these taxes that would be due. This bill would also require the person selling or transferring the cigarettes to provide to the Board of Equalization a copy of the invoice for each shipment made into California. The Board voted to support SB 2082.

COST ESTIMATE

Any costs associated with the provisions of this bill are expected to be absorbable.

REVENUE ESTIMATE

The provisions of this bill may have a positive impact on the state excise tax collected on sales of cigarettes and tobacco products and also on use tax collected on cigarettes and tobacco products purchased from out-of-state retailers. However, the Board has no way of measuring the potential impact these provisions may have, and therefore, cannot provide an estimate at this time.

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