S T A T E O F N E W Y O R K

6644

I N S E N A T E

January 21, 2010

Introduced by Sen. DUANE -- read twice and ordered printed, and when printed to be committed to the Committee on Investigations and Government Operations

AN ACT to amend the tax law and the state finance law, in relation to imposing a state excise tax on sweetened beverage manufacturers

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Subdivision 1 of section 171-a of the tax law, as amended by section 1 of part R of chapter 60 of the laws of 2004, is amended to read as follows:

1. All taxes, interest, penalties and fees collected or received by the commissioner or the commissioner's duly authorized agent under articles nine (except section one hundred eighty-two-a thereof and except as otherwise provided in section two hundred five thereof), nine-A, twelve-A (except as otherwise provided in section two hundred eighty-four-d thereof), TEN, thirteen, thirteen-A (except as otherwise provided in section three hundred twelve thereof), eighteen, nineteen, twenty (except as otherwise provided in section four hundred eighty-two thereof), twenty-one, twenty-two, twenty-six, twenty-six-B, twenty-eight (except as otherwise provided in section eleven hundred two [or], eleven hundred three thereof), twenty-eight-A, thirty-one (except as otherwise provided in section fourteen hundred twenty-one thereof), thirty-two, thirty-three and thirty-three-A of this chapter shall be deposited daily in one account with such responsible banks, banking houses or trust companies as may be designated by the comptroller, to the credit of the comptroller. Such an account may be established in one or more of such depositories. Such deposits shall be kept separate and apart from all other money in the possession of the comptroller. The comptroller shall require adequate security from all such depositories. Of the total revenue collected or received under such articles of this chapter, the comptroller shall retain in the comptroller's hands such amount as the commissioner may determine to be necessary for refunds or reimbursements under such articles of this chapter [and article ten thereof] out of which amount the comptroller shall pay any refunds or reimbursements to

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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which taxpayers shall be entitled under the provisions of such articles of this chapter [and article ten thereof]. The commissioner and the comptroller shall maintain a system of accounts showing the amount of revenue collected or received from each of the taxes imposed by such articles. The comptroller, after reserving the amount to pay such refunds or reimbursements, shall, on or before the tenth day of each month, pay into the state treasury to the credit of the general fund all revenue deposited under this section during the preceding calendar month and remaining to the comptroller's credit on the last day of such preceding month, (i) except that the comptroller shall pay to the state department of social services that amount of overpayments of tax imposed by article twenty-two of this chapter and the interest on such amount which is certified to the comptroller by the commissioner as the amount to be credited against past-due support pursuant to subdivision six of section one hundred seventy-one-c of this [chapter] ARTICLE, (ii) and except that the comptroller shall pay to the New York state higher education services corporation and the state university of New York or the city university of New York respectively that amount of overpayments of tax imposed by article twenty-two of this chapter and the interest on such amount which is certified to the comptroller by the commissioner as the amount to be credited against the amount of defaults in repayment of guaranteed student loans and state university loans or city university loans pursuant to subdivision five of section one hundred seventy-one-d and subdivision six of section one hundred seventy-one-e of this [chapter] ARTICLE, (iii) and except further that, notwithstanding any law, the comptroller shall credit to the revenue arrearage account, pursuant to section ninety-one-a of the state finance law, that amount of overpayment of tax imposed by article nine, nine-A, twenty-two, thirty, thirty-A, thirty-B, thirty-two or thirty-three of this chapter, and any interest thereon, which is certified to the comptroller by the commissioner as the amount to be credited against a past-due legally enforceable debt owed to a state agency pursuant to paragraph (a) of subdivision six of section one hundred seventy-one-f of this article, provided, however, [he] THE COMPTROLLER shall credit to the special offset fiduciary account, pursuant to section ninety-one-c of the state finance law, any such amount creditable as a liability as set forth in paragraph (b) of subdivision six of section one hundred seventy-one-f of this article, (iv) and except further that the comptroller shall pay to the city of New York that amount of overpayment of tax imposed by article nine, nine-A, twenty-two, thirty, thirty-A, thirty-B, thirty-two, or thirty-three of this chapter and any interest thereon that is certified to the comptroller by the commissioner as the amount to be credited against city of New York tax warrant judgment debt pursuant to section one hundred seventy-one-l of this article, (v) and except further that the comptroller shall pay to a non-obligated spouse that amount of overpayment of tax imposed by article twenty-two of this chapter and the interest on such amount which has been credited pursuant to section one hundred seventy-one-c, one hundred seventy-one-d, one hundred seventy-one-e, one hundred seventy-one-f or one hundred seventy-one-l of this article and which is certified to the comptroller by the commissioner as the amount due such non-obligated spouse pursuant to paragraph six of subsection (b) of section six hundred fifty-one of this chapter; and (vi) the comptroller shall deduct a like amount which the comptroller shall pay into the treasury to the credit of the general fund from amounts subsequently payable to the department of social services, the state university of New York, the city university of New York, or the

higher education services corporation, or the revenue arrearage account or special offset fiduciary account pursuant to section ninety-one-a or ninety-one-c of the state finance law, as the case may be, whichever had been credited the amount originally withheld from such overpayment, and (vii) with respect to amounts originally withheld from such overpayment pursuant to section one hundred seventy-one-l of this article and paid to the city of New York, the comptroller shall collect a like amount from the city of New York.

S 2. The tax law is amended by adding a new article 10 to read as follows:

ARTICLE 10

POINT OF MANUFACTURER EXCISE TAX ON SWEETENED BEVERAGES

SECTION 220. DEFINITIONS.
221. IMPOSITION OF EXCISE TAX.
222. PAYMENT OF EXCISE TAX.
223. EXEMPTIONS.

S 220. DEFINITIONS. FOR PURPOSES OF THIS ARTICLE, THE TERM:

1. "BOTTLE" MEANS ANY CLOSED OR SEALED GLASS, METAL, PAPER, PLASTIC, OR ANY OTHER TYPE OF CONTAINER REGARDLESS OF THE SIZE OR SHAPE OF SUCH CONTAINER.

2. "BOTTLED SOFT DRINKS" MEANS ANY AND ALL NONALCOHOLIC BEVERAGES, WHETHER CARBONATED OR NOT, SUCH AS SODA WATER, GINGER ALE, ALL DRINKS COMMONLY REFERRED TO AS COLA, LIME, LEMON, LEMON-LIME AND OTHER FLAVORED DRINKS, FRUIT JUICE WHEN ANY PLAIN OR CARBONATED WATER, FLAVORING OR SYRUP IS ADDED, OR ANY AND ALL PREPARATIONS COMMONLY REFERRED TO AS "SOFT DRINKS" OF WHATEVER KIND, WHICH ARE CLOSED AND SEALED IN GLASS, PAPER, OR ANY OTHER TYPE OF CONTAINER, ENVELOPE, PACKAGE, OR BOTTLE, WHETHER MANUFACTURED WITH OR WITHOUT THE USE OF ANY SYRUP. THE TERM "BOTTLED SOFT DRINKS" SHALL NOT INCLUDE FLUID MILK TO WHICH NO FLAVORING HAS BEEN ADDED, OR NATURAL UNDILUTED FRUIT JUICE OR VEGETABLE JUICE.

3. "DISTRIBUTOR, MANUFACTURER, OR WHOLESALE DEALER" MEANS ANY PERSON WHO RECEIVES, STORES, MANUFACTURES, BOTTLES OR SELLS BOTTLED SOFT DRINKS, SOFT DRINK SYRUPS, SIMPLE SYRUPS, OR POWDERS OR BASE PRODUCTS FOR MIXING, COMPOUNDING OR MAKING SOFT DRINKS FOR SALE TO RETAIL DEALERS, OTHER MANUFACTURERS, WHOLESALE DEALERS OR DISTRIBUTORS FOR RESALE PURPOSES.

4. "INFANT OR TODDLER FORMULA" MEANS ANY PRODUCT, WHETHER SOLD IN LIQUID OR POWDER FORM, THAT IS INTENDED BY ITS MANUFACTURER FOR CONSUMPTION BY INFANTS OR TODDLERS THAT IS COMMONLY REFERRED TO AS INFANT OR TODDLER FORMULA.

5. "MILK" MEANS NATURAL LIQUID MILK REGARDLESS OF ANIMAL SOURCE OR BUTTERFAT CONTENT; OR NATURAL MILK CONCENTRATE, WHETHER OR NOT RECONSTITUTED, REGARDLESS OF ANIMAL SOURCE OR BUTTERFAT CONTENT OR DEHYDRATED NATURAL MILK WHETHER OR NOT RECONSTITUTED.

6. "MILK PRODUCT" MEANS ANY LIQUID THAT HAS MILK AS THE PREDOMINANT INGREDIENT BY WEIGHT IN ACCORDANCE WITH THE REGULATIONS OF THE UNITED STATES FOOD AND DRUG ADMINISTRATION.

7. "MILK SUBSTITUTE" MEANS ANY LIQUID THAT IS SOY-BASED AND IS INTENDED BY ITS MANUFACTURER AS A SUBSTITUTE FOR MILK.

8. "NATURAL UNDILUTED FRUIT JUICE" MEANS THE LIQUID RESULTING FROM THE PRESSING OF FRUIT WITH OR WITHOUT SWEETENER BEING ADDED, OR THE LIQUID RESULTING FROM THE RECONSTITUTION OF NATURAL FRUIT JUICE CONCENTRATE BY THE RESTORATION OF WATER TO DEHYDRATED NATURAL FRUIT JUICE WITH OR WITHOUT SWEETENER BEING ADDED.

9. "NATURAL UNDILUTED VEGETABLE JUICE" MEANS THE LIQUID RESULTING FROM THE PRESSING OF VEGETABLES WITH OR WITHOUT SWEETENER BEING ADDED OR THE

LIQUID RESULTING FROM THE RECONSTITUTION OF NATURAL VEGETABLE JUICE CONCENTRATE BY THE RESTORATION OF WATER TO DEHYDRATED NATURAL VEGETABLE JUICE WITH OR WITHOUT SWEETENER BEING ADDED.

10. "NON-ALCOHOLIC BEVERAGE" MEANS AND INCLUDES ALL BEVERAGES NOT SUBJECT TO TAX UNDER ARTICLE EIGHTEEN OF THIS CHAPTER.

11. "PLACE OF BUSINESS" MEANS ANY PLACE WHERE SOFT DRINKS, SYRUPS, SIMPLE SYRUPS, POWDER OR BASE PRODUCTS ARE MANUFACTURED OR ANY PLACE WHERE BOTTLED SOFT DRINKS, SOFT DRINK SYRUP, SIMPLE SYRUP, SOFT DRINK POWDER OR OTHER SOFT DRINK BASE PRODUCT OR ANY OTHER ITEM ASSESSED UNDER THIS ARTICLE ARE RECEIVED.

12. "POWDER", "BASE PRODUCT" OR "OTHER BASE" MEANS A SOLID MIXTURE OF BASIC INGREDIENTS USED IN MAKING, MIXING OR COMPOUNDING SOFT DRINKS BY MIXING THE POWDER OR OTHER BASE WITH WATER, ICE, SYRUP, HIGH FRUCTOSE CORN SYRUP, OR SIMPLE SYRUP, FRUITS, VEGETABLES, FRUIT JUICE, VEGETABLE JUICE, OR ANY OTHER PRODUCT SUITABLE TO MAKE A SOFT DRINK.

13. "RETAILER" OR "RETAIL DEALER" MEANS ANY PERSON OTHER THAN A MANUFACTURER, DISTRIBUTOR OR WHOLESALER, WHO RECEIVES, STORES, MIXES, COMPOUNDS OR MANUFACTURES ANY SOFT DRINK AND SELLS OR OTHERWISE DISPENSES THE SAME TO THE ULTIMATE CONSUMER.

14. "SALE" MEANS THE TRANSFER OF TITLE OR POSSESSION FOR A VALUABLE CONSIDERATION OF TANGIBLE PERSONAL PROPERTY REGARDLESS OF THE MANNER BY WHICH THE TRANSFER IS ACCOMPLISHED. WHEN A RETAILER IS ALSO ACTING AS A WHOLESALER OR DISTRIBUTOR, THE DUTY TO REPORT AND PAY THE EXCISE TAX IMPOSED BY THIS ARTICLE ARISES WHEN THE PROPERTY IS TRANSFERRED TO A RETAIL STORE FOR SALE TO THE ULTIMATE CONSUMER AS REFLECTED BY THE RECORDS OF THE EXCISE TAX PAYER.

15. "SIMPLE SYRUP" MEANS THE MAKING, MIXING, COMPOUNDING, OR MANUFACTURING, BY DISSOLVING SUGAR AND WATER OR ANY OTHER MIXTURES THAT WILL CREATE SIMPLE SYRUP TO WHICH MAY OR MAY NOT BE ADDED CONCENTRATES OR EXTRACTS.

16. "SOFT DRINK" MEANS ANY NONALCOHOLIC BEVERAGE, WHETHER NATURALLY OR ARTIFICIALLY FLAVORED, WHETHER CARBONATED OR NOT, SOLD FOR HUMAN CONSUMPTION INCLUDING, BUT NOT LIMITED TO, SODA WATER, GINGER ALE, ALL DRINKS COMMONLY REFERRED TO AS COLA, LIME, LEMON, LEMON-LIME AND OTHER FLAVORED DRINKS, INCLUDING ANY FRUIT OR VEGETABLE DRINK CONTAINING SEVENTY PERCENT (70%) OR LESS NATURAL FRUIT JUICE, NATURAL VEGETABLE JUICE, AND ALL OTHER DRINKS AND BEVERAGES COMMONLY REFERRED TO AS SOFT DRINKS BUT NOT INCLUDING COFFEE OR TEA UNLESS THE COFFEE OR TEA IS BOTTLED AS A LIQUID FOR SALE.

17. "SYRUP" MEANS THE LIQUID MIXTURE OF BASIC INGREDIENTS USED IN MAKING, MIXING OR COMPOUNDING SOFT DRINKS BY MIXING THE SYRUP WITH WATER, SIMPLE SYRUP, ICE, FRUITS, VEGETABLES, FRUIT JUICE, VEGETABLE JUICE, OR ANY OTHER PRODUCT SUITABLE TO MAKE A COMPLETE SOFT DRINK.

18. "SWEETENER" MEANS SUGAR ONLY, ARTIFICIAL OR NATURAL, WHICH SINGULARLY FLAVORS THE TASTE OF A NATURAL UNDILUTED FRUIT JUICE OR NATURAL UNDILUTED VEGETABLE JUICE.

S 221. IMPOSITION OF EXCISE TAX. 1. ON AND AFTER OCTOBER FIRST, TWO THOUSAND TEN, AN EXCISE TAX IS HEREBY IMPOSED AND SHALL BE PAID BY EVERY DISTRIBUTOR, MANUFACTURER OR WHOLESALE DEALER TO BE CALCULATED AS FOLLOWS:

(A) TEN DOLLARS PER GALLON FOR EACH GALLON OF SOFT DRINK SYRUP OR SIMPLE SYRUP SOLD OR OFFERED FOR SALE IN THE STATE;

(B) ONE DOLLAR AND FIFTY CENTS PER GALLON FOR EACH GALLON OF BOTTLED SOFT DRINKS SOLD OR OFFERED FOR SALE IN THE STATE; OR

(C) ONE DOLLAR AND FIFTY CENTS FOR EACH GALLON OF SOFT DRINK WHICH MAY BE PRODUCED FROM EACH PACKAGE OR CONTAINER BY FOLLOWING THE MANUFACTUR-

ER'S DIRECTIONS IN THE CASE IN WHICH A PACKAGE OR CONTAINER OF POWDER OR OTHER BASE PRODUCT OTHER THAN A SYRUP OR SIMPLE SYRUP IS SOLD OR OFFERED FOR SALE IN THE STATE. THIS EXCISE TAX APPLIES WHEN THE SALE OF THE POWDER OR OTHER BASE IS SOLD TO A RETAILER FOR SALE TO THE ULTIMATE CONSUMER AFTER THE LIQUID SOFT DRINK IS PRODUCED BY THE RETAILER.

2. ANY PERSON MANUFACTURING OR PRODUCING WITHIN THIS STATE ANY BOTTLED SOFT DRINK OR SOFT DRINK SYRUP FOR SALE WITHIN THIS STATE AND ANY DISTRIBUTOR, WHOLESALE DEALER OR RETAIL DEALER OR ANY OTHER PERSON WHO IS THE ORIGINAL CONSIGNEE OF ANY BOTTLED SOFT DRINK OR SOFT DRINK SYRUP MANUFACTURED OR PRODUCED OUTSIDE THIS STATE, OR WHO BRINGS SUCH DRINKS OR SYRUPS INTO THIS STATE, SHALL BE LIABLE FOR THE EXCISE TAX IMPOSED UNDER THIS SECTION. THE EXCISE TAX HEREBY IMPOSED SHALL NOT BE COLLECTED MORE THAN ONCE IN RESPECT TO ANY BOTTLED SOFT DRINK OR SOFT DRINK SYRUP MANUFACTURED, SOLD, USED, OR DISTRIBUTED IN THIS STATE.

S 222. PAYMENT OF EXCISE TAX. THIS EXCISE TAX SHALL BE PAID BY THE DISTRIBUTOR, WHOLESALER, OR MANUFACTURER WHEN THE SYRUP, POWDER OR BASE PRODUCT OR SOFT DRINK IS SOLD. THE EXCISE TAX LEVIED BY THIS ARTICLE SHALL BE SHALL BE PAID BY A RETAILER WHO PURCHASES SYRUPS, POWDER OR BASE PRODUCTS OR SOFT DRINKS FROM AN UNLICENSED DISTRIBUTOR, WHOLESALER OR MANUFACTURER. THESE AFOREMENTIONED PARTIES SUBJECT TO PAY THIS EXCISE TAX SHALL PAY IT MONTHLY TO THE COMPTROLLER IN A FORMAT TO BE SPECIFIED BY THE COMMISSIONER.

S 223. EXEMPTIONS. THE FOLLOWING ARE EXEMPTED FROM THE EXCISE TAX IMPOSED BY THIS ARTICLE:

1. SYRUPS, SIMPLE SYRUPS, POWDER, BASE PRODUCTS, OR SOFT DRINKS SOLD TO THE FEDERAL GOVERNMENT;

2. SYRUPS, SIMPLE SYRUPS, POWDER, BASE PRODUCTS, OR SOFT DRINKS EXPORTED FROM THE STATE BY A DISTRIBUTOR, MANUFACTURER, OR WHOLESALE DEALER;

3. ANY POWDER OR BASE PRODUCT USED IN PREPARING COFFEE OR TEA;

4. ANY FROZEN, FREEZE-DRIED, OR OTHER CONCENTRATE TO WHICH ONLY WATER IS ADDED TO PRODUCE A NONALCOHOLIC BEVERAGE CONTAINING MORE THAN TEN PERCENT NATURAL FRUIT JUICE OR NATURAL VEGETABLE JUICE;

5. ANY NONALCOHOLIC BEVERAGE CONTAINING MORE THAN SEVENTY PERCENT NATURAL FRUIT JUICE OR NATURAL VEGETABLE JUICE;

6. ANY PRODUCT, WHETHER SOLD IN LIQUID OR POWDER FORM, THAT IS INTENDED BY ITS MANUFACTURER FOR CONSUMPTION BY INFANTS AND THAT IS COMMONLY REFERRED TO AS INFANT OR TODDLER FORMULA;

7. WATER TO WHICH NO FLAVORING, WHETHER ARTIFICIAL OR NATURAL, HAS BEEN ADDED AND THAT HAS NOT BEEN ARTIFICIALLY CARBONATED;

8. ANY PRODUCT, WHETHER SOLD IN LIQUID OR POWDER FORM, THAT IS INTENDED BY ITS MANUFACTURER FOR USE AS A DIETARY SUPPLEMENT OR FOR WEIGHT REDUCTION;

9. ANY POWDER OR BASE PRODUCT THAT IS INTENDED BY ITS MANUFACTURER TO BE SOLD AND USED TO DOMESTICALLY MIX SOFT DRINKS BY THE ULTIMATE CONSUMER; AND

10. ANY PRODUCT CONTAINING MILK OR MILK PRODUCTS.

S 3. Subparagraph 15 of paragraph j of subdivision 1 of section 54 of the state finance law, as added by chapter 430 of the laws of 1997, is amended to read as follows:

(15) article twenty-eight of the tax law, EXCEPT TAXES, PENALTIES AND INTEREST IMPOSED BY ARTICLE TEN OF THE TAX LAW;

S 4. Subdivisions (d) and (h) of section 1817 of the tax law, as amended by section 30 of subpart I of part V-1 of chapter 57 of the laws of 2009, are amended to read as follows:

(d) Any person (1) who willfully fails to charge separately [the] ANY tax OR TAXES imposed under article twenty-eight of this chapter or to state ANY such tax OR TAXES separately on any bill, statement, memorandum or receipt issued or employed by [him] SUCH PERSON upon which the tax is required to be stated separately as provided in subdivision (a) of section eleven hundred thirty-two of this chapter; or (2) who shall refer or cause reference to be made to ANY such tax OR TAXES in a form or manner other than that required by such article twenty-eight, shall be guilty of a misdemeanor.

(h) The penalties provided for in this section shall not preclude prosecution pursuant to the penal law with respect to the willful failure of any person to pay over to the state any sales tax imposed by section eleven hundred four, eleven hundred five, eleven hundred seven, eleven hundred eight or eleven hundred nine of this chapter or by any local law adopted by any city or county pursuant to article twenty-nine of this chapter, whenever such person has been required to collect and has collected any such sales tax. In any such prosecution under the penal law, a person who has been required to collect and has collected any such tax shall be deemed to have acted in a fiduciary character with respect to the state or a political subdivision thereof, and the tax OR TAXES collected shall be deemed to have been entrusted to such person by the state or a political subdivision thereof.

S 5. Subdivisions (a) and (b) of section 92-dd of the state finance law, as amended by section 125-c of part C of chapter 58 of the laws of 2009, are amended to read as follows:

(a) On and after April first, two thousand five, such fund shall consist of the revenues heretofore and hereafter collected or required to be deposited pursuant to paragraph (a) of subdivision eighteen of section twenty-eight hundred seven-c, and sections twenty-eight hundred seven-j, twenty-eight hundred seven-s and twenty-eight hundred seven-t of the public health law, subdivisions (b) and (c) of section four hundred eighty-two AND ARTICLE TEN of the tax law and required to be credited to the tobacco control and insurance initiatives pool, subparagraph (O) of paragraph four of subsection (j) of section four thousand three hundred one of the insurance law, section twenty-seven of part A of chapter one of the laws of two thousand two and all other moneys credited or transferred thereto from any other fund or source pursuant to law.

(b) The pool administrator under contract with the commissioner of health pursuant to section twenty-eight hundred seven-y of the public health law shall continue to collect moneys required to be collected or deposited pursuant to paragraph (a) of subdivision eighteen of section twenty-eight hundred seven-c, and sections twenty-eight hundred seven-j, twenty-eight hundred seven-s and twenty-eight hundred seven-t of the public health law, and shall deposit such moneys in the HCRA resources fund. The comptroller shall deposit moneys collected or required to be deposited pursuant to subdivisions (b) and (c) of section four hundred eighty-two AND ARTICLE TEN of the tax law and required to be credited to the tobacco control and insurance initiatives pool, subparagraph (O) of paragraph four of subsection (j) of section four thousand three hundred one of the insurance law, section twenty-seven of part A of chapter one of the laws of two thousand two and all other moneys credited or transferred thereto from any other fund or source pursuant to law in the HCRA resources fund.

S 6. This act shall take effect on the one hundred eightieth day after it shall have become law, and shall apply to sales and charges made,

uses occurring and services rendered on and after such date, in accordance with applicable transitional provisions in the tax law; provided, however, that the amendments to subdivisions (a) and (b) of section 92-dd of the state finance law made by section five of this act shall take effect April 1, 2010.