STATE OF NEW YORK

3104

2019-2020 Regular Sessions

IN ASSEMBLY

January 28, 2019

Introduced by M. of A. ORTIZ, MALLIOTAKIS, STIRPE -- read once and referred to the Committee on Ways and Means

AN ACT to amend the tax law and the state finance law, in relation to the creation of the cigarette tax enforcement fund; and making an appropriation therefor

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 1 of section 472 of the tax law, as amended by chapter 629 of the laws of 1996, and as further amended by section 104 of part A of chapter 62 of the laws of 2011, is amended to read as follows:

1. The commissioner shall prescribe, prepare and furnish stamps of such denominations and quantities as may be necessary for the payment of the tax on cigarettes imposed by this article, *plus the payment by the agent of a concurrent expense allowance for the cigarette tax enforcement fund established pursuant to section ninety-nine-ff of the state finance law of four cents per stamp which shall be deposited pursuant to subdivision (c) of section four hundred eighty-two of this article,* and may from time to time and as often as he deems advisable provide for the issuance and exclusive use of stamps of a new design and forbid the use of stamps of any other design, in the manner and with the effect provided in section two hundred seventy-four of this chapter. The commissioner shall make provisions for the sale of such stamps at such places and at such times as he may deem necessary and may license agents for such purpose. The commissioner may license dealers in cigarettes, who maintain separate warehousing facilities for the purpose of receiving and distributing cigarettes and conducting their business, who have received commitments from at least two cigarette manufacturers whose aggregate market share is at least forty percent of the New York state cigarette market, and importers, exporters and manufacturers of cigarettes, and other persons within or without the state as agents to buy

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

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or affix stamps to be used in paying the tax herein imposed, but an agent shall at all times have the right to appoint the person in his employ who is to affix the stamps to any cigarettes under the agent's control. The fee for filing such application for an agent's license shall be one thousand five hundred dollars, unless such fee has been paid during the preceding twelve months, in which case, the fee for a new license shall be one thousand dollars. All of the provisions of section four hundred eighty **of this article** relating to wholesale dealers' licenses, including the procedure for suspension, revocation, refusal to license and for hearings, except for paragraphs (c) and (g) of subdivision one of such section, shall be applicable to agents' licenses applied for or granted pursuant to this section, as if such provisions had been set forth in full in this subdivision and had expressly referred to the applicant for, or the holder of, an agent's license. Whenever the commissioner shall sell and deliver to any such agent any such stamps, such agent shall be entitled to receive as compensation for his services and expenses as such agent in selling or affixing such stamps, and to retain out of the moneys to be paid by him for such stamps, a commission on the par value thereof. The commissioner is hereby authorized to prescribe a schedule of commissions, not exceeding five per centum, allowable to such agent for buying and affixing such stamps. Such schedule shall be uniform with respect to the different types of stamps used, and may be on a graduated scale with respect to the number of stamps purchased. The commissioner may, in his discretion, permit an agent to pay for such stamps within thirty days after the date of purchase and may require any such agent to file with the department [~~of taxation and finance~~] a bond issued by a surety company approved by the superintendent of financial services as to solvency and responsibility and authorized to transact business in the state or other security acceptable to the commissioner, in such amount as the commissioner may fix, to secure the payment of any sums due from such agent pursuant to this article. If securities are deposited as security under this subdivision, such securities shall be kept in the custody of the commissioner and may be sold by the commissioner if it becomes necessary so to do in order to recover any sums due from such agent pursuant to this article, but no such sale shall be had until after such agent shall have had opportunity to litigate the validity of any tax if it elects so to do. Upon any such sale, the surplus, if any, above the sums due under this article shall be returned to such agent.

§ 2. Section 482 of the tax law is amended by adding a new subdivision (c) to read as follows:

(c) From the amounts received pursuant to subdivision one of section four hundred seventy-two of this article, the commissioner shall deposit in the cigarette tax enforcement fund established pursuant to section ninety-nine-ff of the state finance law the concurrent expense allowance for the cigarette tax enforcement fund of four cents per stamp.

§ 3. The state finance law is amended by adding a new section 99-ff to read as follows:

§ 99-ff. Cigarette tax enforcement fund. 1. There is hereby created in the joint custody of the state comptroller and the commissioner of taxation and finance an account of the miscellaneous special revenue fund to be known as the "cigarette tax enforcement fund".

2. Notwithstanding any other law, rule or regulation to the contrary, the state comptroller is hereby authorized and directed to receive for deposit to the credit of the cigarette tax enforcement fund monies received from the commissioner of taxation and finance from the concur-

rent expense allowance paid pursuant to subdivision one of section four hundred seventy-two of the tax law, monies received from the commissioner of taxation and finance from the sale of forfeited cigarettes authorized pursuant to section eighteen hundred forty-six of the tax law, and other monies appropriated, credited or transferred thereto from any other fund or source.

3. The proceeds of the cigarette tax enforcement fund shall be used solely to enforce (i) the collection of the cigarette tax imposed by article twenty of the tax law or (ii) the cigarette marketing standards act, as established by article twenty-A of the tax law.

4. Monies in the cigarette tax enforcement fund shall be kept separate and apart and shall not be commingled with any other moneys in the custody of the comptroller and shall only be expended as provided herein.

5. Monies of the fund shall be available to the commissioner of taxation and finance for purposes of carrying out the provisions of subdivision (j) of section eighteen hundred fourteen of the tax law and shall be paid out of the fund on the audit and warrant of the comptroller on vouchers certified or approved by the commissioner of taxation and finance.

6. In the month immediately following the month in which the balance of the fund exceeds six million five hundred thousand dollars, the comptroller shall, upon receipt of a certificate of allocation issued by the director of the division of the budget, transfer six million dollars to the division of state police to support the division's cigarette tax, as imposed by article twenty of the tax law, and the cigarette marketing standards act, as established by article twenty-A of the tax law, enforcement activities. These funds may be apportioned to either the patrol activities or criminal investigation activities programs of the division of state police, may be transferred or suballocated to any other state agency or public authority for their costs associated with the enforcement of the cigarette tax or the cigarette marketing standards act, and may be used to contract with local enforcement agencies for cigarette tax and/or cigarette marketing standards act enforcement activities.

§ 4. Subdivisions (a), (b) and (c) of section 1846 of the tax law, as amended by chapter 556 of the laws of 2011, are amended to read as follows:

(a) Whenever a police officer designated in section 1.20 of the criminal procedure law or a peace officer designated in subdivision four of section 2.10 of such law, acting pursuant to his or her special duties, shall discover any cigarettes subject to tax provided by article twenty of this chapter or by chapter thirteen of title eleven of the administrative code of the city of New York, and upon which the tax has not been paid or the stamps not affixed as required by such article or such chapter thirteen, they are hereby authorized and empowered forthwith to seize and take possession of such cigarettes, together with any vending machine or receptacle in which they are held for sale. Such cigarettes, vending machine or receptacle seized by a police officer or such peace officer shall be turned over to the commissioner. Such seized cigarettes, vending machine or receptacle, not including money contained in such vending machine or receptacle, shall be forfeited to the state. The commissioner may, within a reasonable time thereafter, upon publication of a notice to such effect for at least five successive days, before the day of sale, in a newspaper published or circulated in the county where the seizure was made, sell such forfeited vending machines or receptacles at public sale and pay the proceeds into the state treasury to the credit of the general fund. Notwithstanding any other provision of this section, the commissioner may enter into an agreement with any city of this state which is authorized to impose a tax similar to that imposed by article twenty of this chapter to provide for the disposition between the state and any such city of the proceeds from any such sale. All cigarettes forfeited to the state [~~shall be destroyed or used for law enforcement purposes~~], except [~~that~~] cigarettes that violate, or are suspected of violating, federal trademark laws or import laws shall [~~not be used for law enforcement purposes. If the commissioner determines the cigarettes may not be used for law enforcement purposes~~], upon publication in the state registry, be available for inspection by the manufacturer who shall determine whether such cigarettes are of saleable quality and such cigarettes shall be offered for sale to such manufacturers. Any cigarettes that are either not inspected by the manufacturer within five days of the publication in the state registry or are not purchased by the manufacturer after being determined to be of saleable quality shall, upon publication in the state registry, be offered for sale to agents, as such term is defined in subdivision eleven of section four hundred seventy of this chapter, to a price equaling two dollars and twenty cents per pack of twenty cigarettes. Any such cigarettes that are either not sold within a reasonable period of time after being offered for sale to agents or deemed unsaleable by the manufacturer shall, upon publication in the state registry, be destroyed or used for law enforcement purposes. If the commissioner determines the cigarettes may not be offered for sale to the manufacturers or agents, or used for law enforcement purposes because such cigarettes violate, or are suspected of violating, federal trademark laws or import laws, the commissioner must, within a reasonable time after the forfeiture of such cigarettes, upon publication in the state registry, destroy such forfeited cigarettes. The commissioner may, prior to any destruction of cigarettes, permit the true holder of the trademark rights in the cigarettes to inspect such forfeited cigarettes in order to assist in any investigation regarding such cigarettes. The revenue from all sales of cigarettes made pursuant to this subdivision shall be deposited in the cigarette tax enforcement fund, as established in section ninety-nine-ff of the state finance law.

(b) [~~In the alternative~~] Prior to making forfeited cigarettes available for inspection or purchase by the manufacturer, offering such cigarettes for sale to agents, or using such cigarettes for law enforcement purposes in accordance with subdivision (a) of this section, the tax commission, on reasonable notice by mail or otherwise, may permit the person from whom said cigarettes were seized to redeem the said cigarettes, and any vending machine or receptacle seized therewith, by the payment of the tax due, plus a penalty of fifty per centum thereof, plus interest on the amount of tax due for each month or fraction thereof after such tax became due (determined without regard to any extension of time for filing or paying) at the rate applicable under subparagraph (ii) of paragraph (a) of subdivision one of section four hundred eighty-one of this chapter and the costs incurred in such proceeding, which total payment shall not be less than five dollars; provided, however, that such seizure and sale or redemption shall not be deemed to relieve any person from fine or imprisonment provided for in this article for violation of any provision of article twenty of this chapter.

(c) [~~In the alternative~~] After making forfeited cigarettes available for inspection or purchase by the manufacturer and offering such cigarettes for sale to agents in accordance with subdivision (a) of this section, the tax commission may dispose of any cigarettes seized pursuant to this section, except those that violate, or are suspected of violating, federal trademark laws or import laws, by transferring them to the department of corrections and community supervision for sale to or use by inmates in such institutions.

§ 5. Subdivision (b) of section 483 of the tax law, as amended by chapter 860 of the laws of 1987, subparagraph (A) of paragraph 1 and subparagraph (B) of paragraph 3 as amended by chapter 744 of the laws of 1990, subparagraph (B) of paragraph 1 as amended by chapter 1 of the laws of 1999 and subparagraph (B) of paragraph 2 as amended by chapter 4 of the laws of 1988, is amended to read as follows:

(b) 1. (A) The term "cost of the agent" shall mean the basic cost of cigarettes plus the cost of doing business by the agent as evidenced by the accounting standards and methods regularly employed by said agent in his determination of costs for the purpose of federal income tax reporting for the total operation of his establishment, and must include, without limitation, labor, including salaries of executives and officers, rent, depreciation, selling costs, maintenance of equipment, delivery costs, interest payable, all types of licenses, taxes, insurance and advertising expressed as a percentage and applied to the basic cost of cigarettes. Any fractional part of a cent in the cost to the agent per carton of cigarettes shall be rounded off to the next higher cent. In the case of sales at retail by an agent, the "cost of the agent" shall be the same as the "cost of the retail dealer". In the case of sales of cigarettes to a chain store having fifteen or more retail outlets, excluding vending machine operators, which are delivered to a central warehouse owned and operated by such chain store and which are delivered to its retail outlets by the chain store, the "cost of the agent" shall be presumed to be the basic cost of cigarettes. There shall be determined a separate cost of the agent for sales to wholesale dealers and for sales to retail dealers.

(B) In the absence of the filing with the commissioner of satisfactory proof of a lesser cost of doing business of the agent making the sale, the cost of doing business by the agent shall be presumed to be [~~seven-eighths of one~~] two and one-quarter percent of the basic cost of cigarettes for sales to wholesale dealers plus one cent per package of ten cigarettes, two cents per package of twenty cigarettes and in the case of a package containing more than twenty cigarettes, two cents and one-half of a cent for each five cigarettes in excess of twenty cigarettes, [~~one and one-half~~] five and three-quarter percent of the basic cost of cigarettes for sales to chain stores plus one cent per package of ten cigarettes, two cents per package of twenty cigarettes and in the case of a package containing more than twenty cigarettes, two cents and one-half of a cent for each five cigarettes in excess of twenty cigarettes and [~~three and seven-eighths~~] five and three-quarter percent of the basic cost of cigarettes with respect to sales to retail dealers plus one cent per package of ten cigarettes, two cents per package of twenty cigarettes and in the case of a package containing more than twenty cigarettes, two cents and one-half of a cent for each five cigarettes in excess of twenty cigarettes and the foregoing cents per pack shall be included in the "cost of doing business by the agent" referred to in paragraphs two and three of this subdivision.

2. (A) The term "cost of the wholesale dealer" shall mean the basic cost of cigarettes plus the cost of doing business by the wholesale dealer as evidenced by the accounting standards and methods regularly

employed by said wholesale dealer in his determination of costs for the purpose of federal income tax reporting for the total operation of his establishment, and must include, without limitation, labor, including salaries of executives and officers, rent, depreciation, selling costs, maintenance of equipment, delivery costs, interest payable, all types of licenses, taxes, insurance and advertising expressed as a percentage and applied to the basic cost of cigarettes, plus the cost of doing business by the agent with respect to sales of cigarettes to wholesale dealers. Any fractional part of a cent in the cost to the wholesale dealer per carton of cigarettes shall be rounded off to the next higher cent. In the case of sales at retail by a wholesale dealer, the "cost of the wholesale dealer" shall be the same as the "cost of the retail dealer". There shall be determined a separate cost of the wholesale dealer for sales to chain stores and for sales to retail dealers.

(B) In the absence of the filing with the tax commission of satisfactory proof of a lesser cost of doing business of the wholesale dealer making the sale, the cost of doing business by the wholesale dealer with respect to sales to retail dealers shall be presumed to be three **and one-half** per centum of the basic cost of cigarettes, and with respect to sales to chain stores, [~~five-eighths of one~~] **three and one-half** percent of the basic cost of cigarettes.

3. (A) The term "cost of the retail dealer" shall mean the basic cost of cigarettes plus the cost of doing business by the retail dealer as evidenced by the accounting standards and methods regularly employed by said retail dealer in his determination of costs for the purpose of federal income tax reporting for the total operation of his establishment, and shall include, without limitation, labor, including salaries of executives and officers, rent, depreciation, selling costs, maintenance of equipment, delivery costs, interest payable, all types of licenses, taxes, insurance and advertising expressed as a percentage and applied to the basic cost of cigarettes, plus the cost of doing business by the agent with respect to sales of cigarettes to retail dealers. Any fractional part of a cent in the cost to the retail dealer per package or per carton shall be rounded off to the next higher cent.

(B) In the absence of the filing with the commissioner of taxation and finance of satisfactory proof of a lesser cost of doing business by the retail dealer making the sale, the cost of doing business by the retail dealer shall be presumed to be [~~seven~~] **ten** per centum of the sum of the basic cost of cigarettes plus the cost of doing business by the agent with respect to cigarettes sold to retail dealers.

§ 6. Section 1814 of the tax law is amended by adding a new subdivision (j) to read as follows:

(j) (1) Notwithstanding any provision of law, rule or regulation to the contrary, the commissioner shall establish a program to allow individuals to submit a sworn statement affirming the observation of a violation of article twenty of this chapter and, where the commissioner deems it appropriate, allow for a reward for any such sworn statement. Where enforcement action is taken pursuant to this article or article twenty of this chapter based upon a sworn statement by one or more individuals and where the commissioner determines, in the exercise of his or her discretion, that such sworn statement, either alone or in conjunction with the testimony of the person submitting such sworn statement contributes to the imposition of a civil or criminal penalty upon any person for a violation of this article, or article twenty of this chapter, the commissioner shall offer as a reward to such individual or individuals an amount that, in the aggregate, is five dollars. No peace

officer, police officer or employee of the department, employee of any company under contract with the department, or employee of any governmental entity that, in conjunction with the department, conducts enforcement activity relating to a violation of this article or article twenty of this chapter, shall be entitled to obtain the benefit of any such reward when acting in the discharge of his or her official duties.

(2) All rewards paid pursuant to this section shall be paid from the cigarette tax enforcement fund, as established in section ninety-nine-ff of the state finance law.

§ 7. Beginning the month immediately following the month in which the cigarette tax enforcement fund, as established in section 99-ff of the state finance law, is established, there is hereby appropriated to the division of state police the amount of six million dollars ($6,000,000) from the cigarette tax enforcement fund to support cigarette tax, as imposed by article 20 of the tax law, and cigarette marketing standards act, as established by article 20-A of the tax law, enforcement activities. This appropriation may be apportioned to either the patrol activities or criminal investigation activities programs of the division of state police, may be transferred or suballocated to any other state agency or public authority for their costs associated with the enforcement of the cigarette tax or the cigarette marketing standards act, and may be used to contract with local enforcement agencies for cigarette tax and/or cigarette marketing standards act enforcement activities. No monies shall be available from this appropriation absent a certificate of allocation from the director of the budget.

§ 8. This act shall take effect on the first day of the sales tax quarterly period, as described in subdivision (b) of section 1136 of the tax law, next succeeding the thirtieth day after it shall have become a law and shall apply in accordance with the applicable transitional provisions of sections 1106 and 1217 of the tax law.