

## **Enforcement Provisions Regarding the Sale, Shipment, and Possession of Cigarettes and Tobacco Products in New York State**

Chapter 262 of the Laws of 2000 created new restrictions regarding the shipment of cigarettes to persons located in New York State, created civil and criminal penalties for violations of these restrictions, and added new and strengthened existing civil and criminal penalties relating to the sale and possession of cigarettes and tobacco products. The restrictions on shipments of cigarettes to persons in New York, and the penalties for violating these restrictions, were added to the Public Health Law as new section 1399-ll. The remaining provisions of Chapter 262 of the Laws of 2000 were added to various sections of the Tax Law and the administrative code of the city of New York.

As a result of litigation brought by certain tobacco sellers, the United States District Court for the Southern District of New York entered an Order that declared Public Health Law section 1399-ll (governing certain sales of cigarettes in New York State) unconstitutional and permanently enjoined its enforcement. Consequently, the enforcement of Chapter 262 of the Laws of 2000, as it applies to section 1399-ll of the Public Health Law, was held in abeyance pending the appeal of that Order. However, the remaining amendments to the Tax Law added by Chapter 262 of the Laws of 2000 were not affected by the District Court's Order and became effective November 14, 2000 (see page 3 of this memorandum for an explanation of these amendments).

On February 13, 2003, the United States Court of Appeals, Second Circuit, reversed the district court ruling. In its ruling, the Second Circuit held that banning direct shipment of cigarettes to New York consumers did not discriminate against interstate commerce. The Court concluded the law "neither impedes nor obstructs" the flow of cigarettes in interstate commerce. An order and judgment lifting the injunction was docketed on May 5, 2003.

Immediately below is the explanation of the amendments to the Public Health Law enacted by Chapter 262 of the Laws of 2000. Following that explanation is a restatement of the registration and penalty provision amendments to the Tax Law enacted by Chapter 262 of the Laws of 2000.

This memorandum supercedes TSB-M-00(4)M, which was issued prior to the District Court Order.

### **Provisions relating to the sale and shipment of cigarettes**

The Public Health Law provides that it is unlawful for any person engaged in the business of selling cigarettes in New York State or any other state to ship, or cause to be shipped, any cigarettes to a person in New York, unless that person is:

- a licensed or registered cigarette agent, wholesale dealer, or retail dealer;

- an export warehouse proprietor or a person operating a customs bonded warehouse; or
- an officer, employee or agent of the federal or New York State government, or a political subdivision of either (acting in an official capacity).

For purposes of determining whether a person is a licensed or registered cigarette agent, wholesale dealer, or retail dealer, the Tax Department maintains a listing of all currently licensed and registered cigarette agents, wholesale dealers, and retail dealers. The listing, which is updated periodically, is available on the Internet at the Tax Department's Web site [Agents, Wholesale Dealers and Retail Dealers List](#). If a dealer or transporter prefers, he or she may call the Tax Department during normal business hours at (518) 485-7652 and a Department employee will search the listing to determine whether an individual or business is listed therein as a licensed or registered agent, wholesale dealer, or retail dealer.

The first violation of the above provisions is punishable as a class A misdemeanor, and a second or subsequent violation is punishable as a class E felony. In addition to the criminal penalty, the New York State Commissioner of Health may impose a civil fine, not to exceed \$5,000, for each violation.

When a person engaged in the business of selling cigarettes ships, or causes to be shipped, any cigarettes to any person in this state other than in the cigarette manufacturer's original shipping container or wrapping, the container or wrapping must be plainly and visibly marked with the word **cigarettes**. The New York State Commissioner of Health may impose a civil fine, not to exceed \$5,000, for each violation of the packaging provision. This is in addition to the penalties for selling or shipping cigarettes to unlicensed or unregistered persons.

Police officers and certain peace officers are authorized to seize cigarettes that have been or are being shipped or transported in violation of these provisions, and the cigarettes seized are subject to forfeiture.

It is unlawful for common or contract carriers to knowingly transport cigarettes to any person in New York State whom the common or contract carrier reasonably believes is not a licensed or registered person described above. Where cigarettes are transported to a home or residence, it is presumed that the carrier knew that the delivery was not being made to a licensed or registered agent, wholesale dealer, or retail dealer. In addition to carriers, it is generally unlawful for any other person to knowingly transport cigarettes to other than such licensed or registered dealers. However, persons other than common or contract carriers may transport up to 800 cigarettes (4 cartons) at any one time to any person in New York State without violating this law.

The first violation of the above provisions is punishable as a class A misdemeanor, and a second or subsequent violation is punishable as a class E felony. In addition to the criminal penalty, the New York State Commissioner of Health may impose a civil fine, not to exceed \$5,000, for each violation.

Police officers and certain peace officers are authorized to seize cigarettes that have been or are being shipped or transported in violation of these provisions, and the cigarettes seized are subject to forfeiture.

### **Registration restrictions and requirements, additional penalties for certain retail sales, and clarifying amendments**

Effective November 14, 2000, registration requirements were expanded, penalties for the sale of cigarettes by unregistered retail dealers were increased, and certain Tax Law provisions were clarified as follows:

- The Commissioner may revoke a retail dealer's registration or refuse an application for retail dealer registration where the applicant's or retail dealer's place of business is at the same premises as that of another retail dealer whose registration has been revoked and such revocation is still in effect, unless the applicant or retail dealer provides the Commissioner with adequate documentation demonstrating that the premises or business was acquired in an arm's length transaction. Arm's length transaction means a sale in good faith and for valuable consideration that reflects the fair market value in the open market between two informed and willing parties, neither under any compulsion to participate in the transaction. A sale between relatives, related companies, or partners is presumed not to be at arm's length.
- The penalty for any retail dealer who sells cigarettes or tobacco products while not registered or while a registration is suspended or revoked is a fine of at least \$500, but not more than \$2,000, for a first violation. The penalty for a second or subsequent violation within three years following a prior violation is a fine of at least \$1,000 but not more than \$3,500.
- The penalty for any vending machine owners and/or operators who sell cigarettes while not registered or while a registration is suspended or revoked is a fine of at least \$75, but not more than \$200, for a first violation. The penalty for a second or subsequent violation within three years following a prior violation is a fine of at least \$200, but not more than \$600.
- The Tax Law now makes it clear that a cigarette stamping agent cannot sell cigarettes, and a tobacco products distributor cannot sell tobacco products, to an unlicensed wholesale dealer or to a wholesale dealer whose license has been suspended or revoked, or to a retail dealer who is not registered or whose registration has been suspended or revoked. In addition, wholesale dealers cannot sell cigarettes or tobacco products to a retail dealer who is not registered or whose registration has been suspended or revoked, and retail dealers cannot sell cigarettes or tobacco products unless they hold a valid retail dealer registration.

- The Tax Law now makes it clear that the Division of the Lottery may suspend or revoke any lottery agent license that was issued for a specific location to a cigarette retailer whose registration as a retail cigarette dealer for that location is suspended or revoked.

### **Civil and criminal penalties for bootlegging**

Effective November 14, 2000, the following civil and criminal penalties were added or strengthened as a further deterrent to those who contemplate bootlegging untaxed cigarettes or tobacco products:

- The civil penalty for possession of unstamped or unlawfully stamped cigarettes is a maximum fine of \$150 for each carton (200 cigarettes) in excess of five cartons.
- The fine for possessing other tobacco products (i.e., not cigarettes) on which the tax has not been paid or assumed by a distributor or tobacco products dealer is a maximum of \$75 for each 50 cigars or one pound of tobacco, or fraction thereof, in excess of 250 cigars or five pounds of tobacco, and a fine of up to \$150 for each 50 cigars or pound of tobacco, or fraction thereof, in excess of 500 cigars or 10 pounds of tobacco, not to exceed \$7,500 in the aggregate. This penalty, when imposed on untaxed tobacco products in the possession or under the control of a tobacco products dealer or distributor appointed by the Commissioner, is a maximum fine of \$75 for each 50 cigars or one pound of tobacco, or fraction thereof, in excess of 50 cigars or one pound of tobacco, and a maximum fine of \$150 for each 50 cigars or pound of tobacco, or fraction thereof, in excess of 250 cigars or five pounds of tobacco not to exceed \$15,000 in the aggregate. These penalties may be imposed in addition to any other penalty imposed under Article 20 of the Tax Law.
- In lieu of the penalties described in the above two paragraphs, the Commissioner is authorized to impose alternative penalties for the knowing possession or control of unstamped or unlawfully stamped cigarettes. These alternative penalties are a fine of: (i) at least \$30, but not more than \$200, for each 200 cigarettes in excess of 1,000 up to 5,000 cigarettes; (ii) at least \$75, but not more than \$200, for each 200 cigarettes in excess of 5,000 up to 20,000 cigarettes; and (iii) at least \$100, but not more than \$200, for each 200 cigarettes in excess of 20,000 cigarettes.
- The Commissioner is also authorized to impose alternative penalties for the knowing possession or control of tobacco products on which the tax has not been paid or assumed by a tobacco products distributor or dealer. These alternative penalties are fines of: (i) at least \$25, but not more than \$100, for each 50 cigars or one pound of tobacco, or fraction thereof, in excess of 250 cigars or five pounds of tobacco; and (ii) at least \$50, but not more than \$200, for each 50 cigars or pound of tobacco, or fraction thereof, in excess of 500 cigars or 10 pounds of tobacco.
- Any person, other than an agent licensed by the Commissioner, who in violation of Article 20 of the Tax Law, possesses or transports for the purpose of sale any

unstamped or unlawfully stamped packages of cigarettes, or who sells or offers for sale unstamped or unlawfully stamped packages of cigarettes is guilty of a misdemeanor. A person who is found guilty of violating this provision a second or subsequent time within five years is guilty of a class E felony.

- Any person, other than an agent licensed by the Commissioner, who, in violation of Article 20 of the Tax Law, willfully possesses or transports for sale or willfully sells or offers for sale 30,000 or more cigarettes in unstamped or unlawfully stamped packages is guilty of a class D felony.
- The penalties that may be levied by the New York City Commissioner of Finance for violations of the cigarette tax imposed by the Administrative Code of the City of New York correspond to the bootlegging penalties that are outlined immediately above for cigarettes.