

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-M-85 (8.3)M
Tobacco Products Tax
January 1990

Subject: Tobacco Products Tax (Criminal Penalties)

Chapter 61 of the New York State Laws of 1989 made amendments to Article 37 of the Tax Law, Crimes and Other Offenses, Seizures and Forfeitures, effective July 1, 1989. This memorandum summarizes the Article 37 amendments made by Chapter 61 relating to the excise tax on tobacco products. Tobacco products are defined as: Any cigar or roll for smoking, other than a cigarette, made in whole or in part of tobacco, and any tobacco other than cigarettes, intended for consumption by smoking, chewing, or as snuff.

Criminal Penalties with Respect to Article 20, Tobacco Products Tax

The criminal penalties listed below do not apply to:

- 1) common or contract carriers while engaged in lawfully transporting tobacco products;
- 2) warehousemen while engaged in lawfully storing tobacco products;
- 3) any employee of the carrier or warehouseman acting within the scope of employment;
- 4) public officers or employees in the performance of their official duties requiring possession or control of tobacco products;
- 5) temporary, incidental possession by employees or agents of persons lawfully entitled to possession; and
- 6) persons whose possession is for the purpose of aiding police officers in performing their duties.

Misdemeanors

The following violations became misdemeanors effective July 1, 1989:

a) Any person who willfully attempts in any manner to evade or defeat the tobacco products tax or payment thereof is guilty of a misdemeanor (section 1814(a)(1) of the Tax Law).

b) Any person who willfully fails to file a return or report or pay the tax when due is guilty of a misdemeanor (section 1814(b) of the Tax Law).

c) Any person who willfully makes and subscribes a fraudulent return, report, statement or other document required under Article 20 which the person does not believe to be true and correct as to every material matter is guilty of a misdemeanor. Note that omission of any material matter with intent to deceive constitutes delivery or disclosure of a document known to be false or fraudulent (sections 1814(c)(1) and 1814(c)(3) of the Tax Law).

d) Any person who willfully delivers or discloses a fraudulent list, return, report, account, statement or other document known by that person to be false or fraudulent as to any material matter is guilty of a misdemeanor. Note that omission of any material matter with intent to deceive constitutes delivery or disclosure of a document known to be false or fraudulent (sections 1814(c)(2) and 1814(c)(3) of the Tax Law).

e) Any dealer, other than an appointed distributor, who knowingly transports or has in his custody, possession or under his control more than 500 cigars or more than 10 pounds of tobacco upon which the tobacco products tax has not been assumed or paid by an appointed distributor or other person treated as a distributor pursuant to section 471-d of the Tax Law is guilty of a misdemeanor punishable by a fine of not more than \$5,000 or by imprisonment not to exceed 30 days (section 1814(j)(1) of the Tax Law).

f) Any person, other than a dealer or an appointed distributor, who knowingly transports or has in his custody, possession or under his control more than 750 cigars or more than 15 pounds of tobacco upon which the tobacco products tax has not been assumed or paid by an appointed distributor or other person treated as a distributor pursuant to section 471-d of the Tax Law is guilty of a misdemeanor punishable by a fine of not more than \$5,000 or by imprisonment not to exceed 30 days (section 1814(j)(2) of the Tax Law).

g) Any person, other than an appointed distributor, who knowingly transports or has in his custody or possession or under his control 2,500 cigars or more or 50 pounds of tobacco or more upon which the tobacco products tax has not been assumed or paid by an appointed distributor or other person treated as a distributor pursuant to section 471-d of the Tax Law is guilty of a misdemeanor (section 1814(j)(3) of the Tax Law).

h) For purposes of section 1814(j), such person knowingly transports or has in his custody, possession or under his control tobacco or cigars on which the tobacco products excise tax has not

been assumed or paid by an appointed distributor where such person has knowledge of the requirement of the excise tax on tobacco products and, where to his knowledge, such tax has not been assumed or paid on such tobacco products by an appointed distributor (section 1814(j)(4) of the Tax Law).

i) Any person who, while not appointed as a distributor, imports or causes to be imported into the state more than 50 cigars or more than 1 pound of tobacco, for sale within the state, or produces, manufacturers or compounds tobacco products within the state is guilty of a misdemeanor punishable by a fine of not more than \$5,000 or by imprisonment not to exceed 30 days. Any person who, while not appointed as a distributor, imports or causes to be imported into the state, for sale, 1,000 cigars or more or 500 pounds of tobacco or more within any 90-day period, is guilty of a misdemeanor. The possession or transportation within this state by any person, other than an appointed tobacco products distributor, at any one time of 750 or more cigars or 15 pounds or more of tobacco is presumptive evidence that such tobacco products are possessed or transported for the purpose of sale and are subject to the tobacco products excise tax. With respect to such possession or transportation, any provisions of Article 20 providing for a time period during which the tobacco products excise tax may be paid does not apply (section 1814-a of the Tax Law).

j) Any person who commits any other willful act or omission in violation of any other provision of Article 20 is guilty of a misdemeanor (section 1814(h) of the Tax Law).

Felonies

The following violations became Class E felonies effective July 1, 1989:

a) Any person who willfully attempts in any manner to evade or defeat the tobacco products tax or payment thereof on 22,000 cigars or more or on 440 pounds of tobacco or more or who has previously been convicted two or more times under section 1814(a)(1) of the Tax Law is guilty of a Class E Felony (section 1814(a)(2) of the Tax Law).

b) Any person who has twice been convicted under section 1814(3) is guilty of a Class E felony for any subsequent conviction of section 1814 (section 1814(j)(3) of the Tax Law).

c) Any person who has twice been convicted under section 1814-a is guilty of a Class E felony for any subsequent conviction of section 1814-a (section 1814-a of the Tax Law).

Seizures and Forfeitures

Seizure and Forfeiture of Tobacco Products

If a police officer or a peace officer discovers more than 500 cigars or 10 pounds of tobacco being imported or caused to be imported for sale in New York State by a person not appointed as a distributor of tobacco products, the police or peace officer is authorized to seize and take possession of the tobacco products. The tobacco products seized by the police or peace officer shall be turned over to the commissioner of Taxation and Finance and shall be forfeited to the state. The Commissioner may, within a reasonable time thereafter, upon publication of a notice 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 the forfeited tobacco products at public sale and pay the proceeds into the State Treasury to the credit of the general fund. Such tobacco products may be sold only to appointed distributors of tobacco products and the notice must contain a provision to this effect (section 1846-a(a) of the Tax Law).

Instead, the Commissioner, upon reasonable notice by mail or otherwise, may permit the person from whom the tobacco products were seized to redeem the tobacco products by payment of 1) the tax due, 2) a penalty of 50% of the tax due, 3) interest on the tax due compounded daily at the rate(s) set by the Commissioner (determined without regard to any extension of time for filing or paying) and 4) the costs incurred in such proceeding. The total payment may not be less than \$5. Such seizure and sale or redemption shall not be deemed to relieve the person from whom the tobacco products were seized from fine or imprisonment, as provided for in Article 37 of the Tax Law, for violation of any provision of Article 20 of the Tax Law (section 1846-a(b) of the Tax Law).

In the alternative, the Commissioner may transfer the tobacco products to the Department of Correctional Services for sale to or use by inmates in such institutions, if he concludes that the proceeds from the public sale will be less than the reasonably estimated price that the Department of Correctional Services would have to pay for such tobacco products (section 1846-a(c) of the Tax Law).

Seizure and Forfeiture of Vehicles or Other Means of Transportation

Any police officer or peace officer may seize a vehicle or other means of transportation used to import, for sale, more than 500 cigars or 10 pounds of tobacco by a person not appointed as a

distributor of tobacco products, other than a vehicle or other means of transportation used by any person as a common carrier in transaction of business as a common carrier, and such vehicle or other means of transportation shall be subject to forfeiture (section 1847(b) of the Tax Law).

The police or peace officer must deliver the seized property to the district attorney of the county where the seizure was made, (except that in the cities of New York, Yonkers or Buffalo the police or peace officer must deliver the seized property to the police department of such city) together with a report of all facts and circumstances of the seizure (section 1847(c) of the Tax Law).

The district attorney of the county where the seizure was made (or the corporation counsel of the city if the seizure was made in the cities of New York, Yonkers or Buffalo) is required to inquire into the facts of the seizure and, if it appears probable that a forfeiture has been incurred, must cause proceedings to be commenced in state supreme court at any time after 30 days from the date of seizure to declare such a forfeiture, unless, upon examination, the district attorney or corporation counsel decides that the proceedings cannot probably be sustained or that the ends of justice do not require that such proceedings be instituted or prosecuted, in which case? the district attorney or corporation counsel must cause the seized property to be returned to its owner (section 1847(d) of the Tax Law).

The notice of the institution of the forfeiture proceedings must be served either 1) personally on the owner of the seized property or 2) by registered mail to the owner's last known address and by publication of a notice once a week for two successive weeks in a newspaper published or circulated in the county where the seizure was made (section 1847(e) of the Tax Law).

Forfeiture shall not be adjudged where the owner establishes by a preponderance of the evidence that 1) the use of the seized property was not intentional on the part of the owner, 2) the seized property was used by any person other than an owner, while the seized property was unlawfully in the possession of a person who acquired possession in violation of the criminal laws of the United States or of any state or 3) forfeiture is not warranted or would not serve the ends of justice, taking into consideration the factors specified in Section 1311(4)(d) CPLR (section 1847(f) of the Tax Law).

The district attorney or the police department, after a judicial determination of forfeiture, shall 1) retain the seized property for its official use, 2) transfer the seized property to the

Department of Taxation and Finance for its official use or 3) sell the forfeited property at public sale after having published notice of such impending sale for at least 5 successive days before the day of sale in a newspaper published or circulated in the county where the seizure was made. The net proceeds of public sale, after deduction of the lawful expenses incurred, shall be paid into the general fund of the county where the seizure was made except that the net proceeds of the sale of property seized in the cities of New York, Yonkers or Buffalo shall be paid into the general fund of the city where the seizure was made (section 1847 (g) of the Tax Law).

Any person interested in property that has been seized and declared forfeited may apply to a justice of the supreme court, on serving a notice of petition and petition on the appropriate district attorney, police department or corporate counsel, for the recovery of the forfeited property. The justice of the supreme court may restore the forfeited property upon terms deemed reasonable and just if the petitioner establishes any of the affirmative defenses set forth in section 1847(f) of the Tax Law and that the petitioner was without personal or actual knowledge of the forfeiture proceeding. If the petition is filed after a public sale of the forfeited property, any judgment in favor of the petitioner is limited to the net proceeds of the sale, after deduction of the lawful expenses and costs incurred by the district attorney, police department, or corporation counsel (section 1847(h) of the Tax Law).

A suit or action under this section for wrongful seizure must be commenced within two years after the time the property was seized (section 1847(i) of the Tax Law).