

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
COMMISSIONER OF TAXATION AND FINANCE
ALBANY, NEW YORK

Pursuant to the authority contained in subdivision First of section 171, and section 475 (not subdivided) of the Tax Law, and Chapter 85 of the Laws of 2002, the Commissioner of Taxation and Finance, at an open meeting held on even date with the signing of this rule, hereby makes and adopts as an emergency measure and proposes to make and adopt as a permanent rule the following amendments to the Tobacco Products Tax Regulations, as published in Article 3 of Subchapter I of Chapter I of Title 20 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

Section 1. Section 89.1 of such regulations is amended to read as follows:

Section 89.1 General. (Tax Law, sections 471-b and 471-c)

Except as otherwise provided in this Subchapter or the Tax Law, all tobacco products:

- (a) possessed in New York State by any person for sale; or
- (b) used in New York State by any person;

are subject to the tobacco products tax imposed pursuant to article 20 of such law. The tobacco products tax is imposed at the rate of [20] 37 percent of the wholesale price of the tobacco product.

Section 2. A new section 89.3 is added to read as follows:

Section 89.3 Additional tobacco products tax on inventory. (Tax Law, sections 471-b, 472, 473-a and 475)

(a) Effective July 2, 2002, by enactment of Chapter 85 of the Laws of 2002, section 471-b of article 20 of the Tax Law increased the tax on tobacco products possessed in New York State by any person for sale from 20 percent to 37 percent of the wholesale price of such products. It is presumed that all tobacco products within this State are subject to

tax until the contrary is established, and the burden of proving that any tobacco products are not taxable shall be upon the person in possession thereof.

(b) Every dealer of tobacco products (whether a wholesale dealer or a retail dealer), including distributors, shall take a physical inventory of all tobacco products possessed in this State as of the close of business on July 1, 2002. Because it may be impossible to take a physical inventory of tobacco products in all vending machines that are on location throughout the State, a dealer may take as many physical inventories of the contents of such machines as is possible with available personnel. For those machines that cannot be physically inventoried on July 1, 2002, tobacco products may be accounted for at one-half of the normal fill capacities of such machines, as reflected in the individual inventory records maintained for such machines.

(c) "Returns and payments." (1)(i) On or before September 20, 2002, every such dealer shall file a return with the Department of Taxation and Finance, on a form prescribed by the department for such purpose, showing the quantity and wholesale price of all such tobacco products possessed as of the July 1, 2002, inventory. Such return must reflect the entire wholesale and/or retail inventories of the dealer within the State, as required by the department, regardless of the number of business locations of the dealer. Except as provided in subparagraph (ii) of this paragraph, every dealer shall pay with the filing of such return an additional tobacco products tax at the rate of 17 percent of the wholesale price of each tobacco product in such inventory upon which the tobacco products tax has been paid at the rate of 20 percent. (See paragraph (2) of this subdivision for information regarding the retail dealer election pertaining to wholesale price.)

(ii) Notwithstanding any other provision of this Title to the contrary, a dealer who has an additional tobacco products tax liability on inventory may elect to pay such tax in two installments. The first installment is due with the filing of the return on or before September 20, 2002 and shall not be less than 25 percent of the entire additional tobacco products tax due. Provided, however, in no event shall such installment be less than \$200 or the entire additional tobacco

products tax due, if less than \$200. Thus, a dealer having an additional tobacco products tax liability on inventory of \$100 would be liable for the full payment on September 20, 2002; a dealer having such a liability of \$440 would be liable for a first installment of at least \$200; and a dealer having such a liability of \$1,000 would be liable for a first installment of at least \$250 ($\$1,000 \times 25$ percent). The second and final installment must be paid to the department on or before January 20, 2003, and must be accompanied by a final payment document prescribed by the department for this purpose. Where the department has cause to believe that the final installment of the additional tobacco products tax on inventory may be jeopardized by delay, the department may require such payment at any time prior to January 20, 2003. (See subdivision (e) of this section for sanctions concerning untimely installments.)

(2) Notwithstanding any other provision of this Title and exclusively for purposes of the additional tobacco products tax on inventory on hand at the close of business on July 1, 2002, a retail dealer may, if the dealer so elects, compute such tax using 50 percent of the price at which the dealer sells the tobacco products at retail in New York State (determined without regard to any State or local sales taxes imposed by article 28 of the Tax Law or pursuant to the authority of article 29 of such law) as the wholesale price.

(3) The additional tobacco products tax on inventory and any applicable installment should be paid by check or money order, payable to the NYS Tobacco Products Tax.

(4) Returns for payment of the additional tobacco products tax on inventory and final payment documents may be obtained from the Department of Taxation and Finance, Taxpayer Contact Center, W.A. Harriman Campus, Albany, New York 12227.

(d) On and after July 2, 2002, every distributor appointed or required to be appointed by the Commissioner of Taxation and Finance (see section 471-b.2 of the Tax Law) shall be liable for the payment of the tax at the rate of 37 percent of the wholesale price on tobacco products imported or caused to be imported into the State, manufactured in the

State or, if authorized by the commissioner, sold, shipped, or delivered to any person in the State by such distributor. However, every dealer shall be liable for such tax on all tobacco products in the dealer's possession upon which the tax has not been paid or assumed by a distributor appointed or required to be appointed by the Commissioner of Taxation and Finance as evidenced by such a distributor's invoice or other proof of payment or assumption of tax.

(e)(1) Failure to file a return on tobacco product inventory or to pay the additional tax due thereon, or failure to comply with any provision of this section or article 20 of the Tax Law may result in civil or criminal sanctions, or both.

(2) In the case of any dealer who elects to pay the additional tobacco products tax liability in installments, as described in subdivision (c) of this section, if the required first installment is not properly paid on or before September 20, 2002, the entire amount of additional tax shall be due and owing, and any civil penalty and interest imposed pursuant to section 481 of the Tax Law will accrue from such date on the entire tax liability that remains unpaid. Where the required first installment is timely paid but any portion of the second and final installment is paid after January 20, 2003, any civil penalty and interest so imposed will accrue from such date on the unpaid balance.

Section 3. This rule shall take effect on July 2, 2002; provided, however, section 2 of the rule concerning the additional tobacco products tax on inventories shall take effect on the date the Notice of Emergency Adoption and Proposal is filed with the Department of State.

Arthur J. Roth
Commissioner of Taxation and Finance

DATED: Albany, New York
June 17, 2002