

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, section 475 (not subdivided), subdivision (1) of section 1142, and section 1250 (not subdivided) of the Tax Law, and Part RR-1 of Chapter 57 of the Laws of 2008, the Commissioner of Taxation and Finance hereby makes and adopts as an emergency measure and proposes to make and adopt as a permanent rule the following amendments to the Cigarette Tax Regulations and the Cigarette Marketing Standards Regulations, as published in Article 1 and Article 2, respectively, of Subchapter I of Chapter I of Title 20 and the Sales and Use Tax Regulations, as published in Subchapter A of Chapter IV of Title 20 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

Section 1. Subdivision (a) of section 70.1 of such regulations is amended to read as follows:

(a) Except as otherwise provided in this Subchapter or the Tax Law, all cigarettes:

(1) possessed in New York State by any person for sale; or

(2) used in New York State by any person, are subject to the cigarette tax imposed pursuant to article 20 of such law. The cigarette tax is imposed at the rate of [75 cents] \$2.75 for each [10] 20 cigarettes or fraction thereof. Provided, however, if a package of cigarettes contains more than 20 cigarettes, the rate of tax on those cigarettes in excess of 20 is [37½] 68¾ cents for each five cigarettes or fraction thereof. Accordingly, a package of 20 cigarettes is subject to a tax of [\$1.50] \$2.75, while a package of 25 cigarettes is subject to a tax of [\$1.87½] \$3.4375.

Section 2. Paragraph (2) of subdivision (a) of section 74.1 of such regulations is amended to read as follows:

(2) The tax on the possession of cigarettes for sale is imposed at the rate of [75 cents] \$2.75 for each [10] 20 cigarettes or fraction thereof. If a package of cigarettes contains more than 20 cigarettes, the rate of tax on those cigarettes in excess of 20 is [37½] 68¾ cents for each five cigarettes or fraction thereof.

Section 3. Subparagraph (i) of paragraph (2) of subdivision (b) of section 74.2 of such regulations is amended to read as follows:

(i) The department will furnish State of New York cigarette stamps in [1.50] \$2.75 and [\$1.87½] \$3.4375 denominations or the equivalent thereof. In addition, joint stamps of a distinctive color and design will be furnished in [3.00] \$4.25 ([1.50] \$2.75 State tax plus \$1.50 city tax per package of 20 cigarettes) and [3.755] \$5.3175 ([\$1.87½] \$3.4375 State tax plus \$1.88 city tax per package of 25 cigarettes) denominations, or the equivalent thereof, for use on packages of cigarettes to be sold in the City of New York. Such stamps will be of an adhesive and/or heat transfer nature. (Stamps will also reflect prepayment of sales tax on cigarettes imposed under section 1103 of the Tax Law.)

Section 4. The introductory paragraph of paragraph (1) of subdivision (b) of section 74.3 of such regulations is amended to read as follows:

(1) As compensation for an agent's services and expenses in affixing stamps showing payment of tax in the amount of [75 cents] \$2.75 for each [10] 20 cigarettes, or fraction thereof, plus for packages in excess of 20 cigarettes, [37½] 68¾ cents for each additional five cigarettes or fraction thereof, each agent is allowed commissions computed on the par value thereof. In the case of stamps representing payment of State tax only, and in the case of joint stamps showing payment of both State tax and New York City tax, the "par value" for purposes of this paragraph shall be deemed to mean the face value of such stamps representing payment of State cigarette tax only at the rate imposed by law. The rates of such commissions are as follows:

Section 5. Paragraph (1) of subdivision (b) of section 74.5 of such regulations is amended to read as follows:

(1) The tax on cigarettes used in the State is imposed at the rate of [75 cents] \$2.75 for each [10] 20 cigarettes or fraction thereof. If a package of cigarettes contains more than 20 cigarettes, the rate of tax on those cigarettes in excess of 20 is [37½] 68¾ cents for each five cigarettes or fraction thereof.

Section 6. Section 79.3 is renumbered to be section 79.4 and a new section 79.3 is added to read as follows:

Section 79.3 Tax due on inventory based on increased cigarette tax. (Tax Law, Sections 471 and 475).

(a) Effective June 3, 2008, amendments made by Part RR-1 of Chapter 57 of the Laws of 2008 to section 471 of article 20 of the Tax Law increased the tax on cigarettes possessed in New York State by any person for sale from \$1.50 to \$2.75 for each 20 cigarettes or fraction thereof. Provided, however, if a package of cigarettes contains more than 20 cigarettes, the rate of tax on those cigarettes in excess of 20 increased from 37½ cents to 68¾ cents for each five cigarettes or fraction thereof.

(b) Every dealer of cigarettes, including agents licensed to purchase and affix stamps, shall take a physical inventory of all cigarettes possessed in this State as of the close of business on June 2, 2008. In addition, every dealer who is a licensed agent shall take a physical inventory of all unaffixed cigarette tax stamps possessed as of the close of business on such date. Because it may be impossible to take a physical inventory of cigarettes 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 as of the close of business on June 2, 2008, cigarettes 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 August 20, 2008, 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 of all cigarettes and unaffixed stamps possessed as of the June 2, 2008, close of business 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 amount of tax for all cigarettes in such inventory which are contained in packages bearing stamps evidencing tax payment at the rates in effect prior to June 3, 2008, and for all unaffixed cigarette tax stamps in such inventory evidencing tax payment at such rates. The additional amount of tax shall be paid at the rate of \$1.25 for each 20 cigarettes or fraction thereof unless cigarettes are contained in packages of more than 20, in which case the additional amount of tax for those cigarettes in excess of 20 shall be at the rate of 3 1/4 cents for each five cigarettes or fraction thereof (\$1.5625 per package of 25 cigarettes). Such tax shall be paid regardless of whether the affixed or unaffixed stamps show payment of the New York State tax or both the New York State and City of New York taxes.

(ii) Notwithstanding any other provision of this Title to the contrary, a dealer who has additional amount of tax due on inventory based on the increased cigarette tax may elect to pay such tax in two installments. The first installment is due with the filing of the return on or before August 20, 2008, and shall not be less than 25 percent of the entire additional amount of tax due. Provided, however, in no event shall such installment be less than \$500 or the entire additional amount of cigarette tax due, if less than \$500. Thus a dealer having an additional amount of tax due on inventory based on the increased cigarette tax of \$400 would be liable for the full payment on August 20, 2008; a dealer having such a liability of \$1,000 would be liable for a first installment of at least \$500; and a dealer having such a liability of \$10,000 would be liable for a first

installment of at least \$2,500 ($\$10,000 \times 25$ percent). The second and final installment must be paid to the department on or before December 22, 2008, 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 amount of tax due on inventory may be jeopardized by delay, the department may require such payment at any time prior to December 22, 2008. (See subdivision (d) of this section for sanctions concerning untimely installments.)

(2) The additional amount of tax due on inventory based on the increased cigarette tax and any applicable installment should be paid by check or money order, payable to NYS Cigarette Tax.

(d)(1) Failure to file a return on cigarette and cigarette tax stamp inventory or to pay the additional amount of tax due thereon, or failure to comply with any provision of this section may result in civil or criminal sanctions, or both.

(2) In the case of any dealer who elects to pay the additional amount of tax due in installments, as described in subdivision (c) of this section, if the required first installment is not properly paid on or before August 20, 2008, the entire additional amount of tax shall be due and owing, and any civil penalty and interest imposed pursuant to section 481 of the Tax Law and Part 78 of this Title 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 December 22, 2008, any civil penalty and interest so imposed will accrue from such date on the unpaid balance.

Section 7. Paragraph (4) of subdivision (a) of section 80.2 of such regulations is amended to read as follows:

(4) [Illustration.] "Illustration." This illustration is fundamental to this Article and will be referred to throughout in further explanation of the cigarette marketing standards. For illustration purposes only, the basic cost of cigarettes is assumed to be [~~\$55~~] \$68.00 per carton, computed as follows:

Invoice cost (per carton), less all trade discounts except discounts for cash.....	[\$25.00]	<u>\$25.50</u>
New York State cigarette tax.....	[15.00]	<u>27.50</u>
New York City cigarette tax.....		+ 15.00
Basic cost of cigarettes.....	[\$55.00]	<u>\$68.00</u>

Section 8. Paragraph (2) of subdivision (e) of section 82.2 of such regulations is amended to read as follows:

(2)(i) Agent's sales to other agents (illustrated). A licensed cigarette agent may not sell cigarettes in New York State to any other agent at a price which is less than the basic cost of cigarettes or, using the example in section 80.2 of this Title, [~~\$55~~] \$68.00 per carton. (See section 74.3(a)(3) of this Title for rules pertaining to custom stamping.)

(ii) Agent's sales to CMSA wholesale dealers (illustrated). In the absence of substantiating a lesser actual cost of doing business, a licensed cigarette agent may not sell cigarettes in New York State to any CMSA wholesale dealer at a price which is less than the basic cost of cigarettes plus $\frac{7}{8}$ percent of such basic cost plus 2 cents per package of 20 cigarettes and in the case of a package containing more than 20 cigarettes, 2 cents and one-half of a cent for each five cigarettes in excess of 20 cigarettes (the presumed cost of doing business by the agent with respect to such sales) or, using the example in section 80.2 of this Title, [~~\$55.69~~] \$68.80 per carton computed as follows:

Basic cost of cigarettes.....	[\$55.00]	<u>\$68.00</u>
Presumed cost of doing business		

Percentage mark-up (.875% of [\$55.00] <u>\$68.00</u>).....	[.48125]	+	<u>.595</u>
2 cents/package of 20 cigarettes multiplied by 10 packages/carton.....		+	.20
Cost of the agent for sales to CSMA wholesale dealers (rounded to next higher cent).....	[\$55.69]		<u>\$68.80</u>

(iii) Agent’s sales to chain stores (illustrated). A licensed cigarette agent may not sell cigarettes in New York State to a chain store having 15 or more retail outlets, excluding vending machine operators, where such cigarettes are delivered to a central warehouse owned and operated by such chain store and which are then delivered by the chain store to its retail outlets, at a price which is less than the basic cost of cigarettes or, using the example in section 80.2 of this Title, [\$55.00] \$68.00 per carton. In the case of other chain stores and in the absence of substantiating a lesser actual cost of doing business, a licensed cigarette agent may not sell cigarettes in New York State to such a chain store at a price which is less than the basic cost of cigarettes plus 1½ percent of such basic cost plus 2 cents per package of 20 cigarettes and in the case of a package containing more than 20 cigarettes, 2 cents and one-half of a cent for each five cigarettes in excess of 20 cigarettes (the presumed cost of doing business by the agent with respect to such sales) or, using the example in section 80.2 of this Title, [\$56.03] \$69.22 per carton computed as follows:

Basic cost of cigarettes.....	[\$55.00]		<u>\$68.00</u>
Presumed cost of doing business			
Percentage mark-up (1.5% of [\$55.00] <u>\$68.00</u>).....	[.825]	+	<u>1.02</u>
2 cents/package of 20 cigarettes multiplied by 10 packages/carton		+	.20
Cost of the agent for sales to chain stores [(rounded to next higher cent)].....	[\$56.03]		<u>\$69.22</u>

(iv) Agent’s sales to CMSA retail dealers (illustrated). In the absence of substantiating a lesser actual cost of doing business, a licensed cigarette agent may not sell cigarettes in New York State to any CSMA retail dealer at a price which is less than the basic cost of cigarettes plus 3⅞ percent of such basic cost plus 2 cents

per package of 20 cigarettes and in the case of a package containing more than 20 cigarettes, 2 cents and one-half of a cent for each five cigarettes in excess of 20 cigarettes (the presumed cost of doing business by the agent with respect to such sales) or, using the example in section 80.2 of this Title, [\$57.34] \$70.84 per carton computed as follows:

Basic cost of cigarettes.....	[\$55.00]		<u>\$68.00</u>
Presumed cost of doing business			
Percentage mark-up (3.875% of [\$55.00] <u>\$68.00</u>).....	[\$2.13125]	+	<u>\$2.635</u>
2 cents/package of 20 cigarettes multiplied by 10 packages/carton.....		+	.20
Cost of the agent for sales to CMSA retail dealers (rounded to next higher cent).....	[57.34]		<u>\$70.84</u>

(v) Agent’s sales to consumers (illustrated). A licensed cigarette agent may not sell cigarettes in New York State at retail, or to any person who cannot prove its status as other than a consumer, at a price which is less than the cost of the CMSA retail dealer or, using the example in section 80.2 of this Title, [\$61.35] \$75.80 per carton. See section 82.5 of this Part.

Section 9. Paragraphs (2) and (3) of subdivision (f) of section 82.3 of such regulations are amended to read as follows:

(2) Purchases by the CMSA wholesale dealer (illustrated). A CMSA wholesale dealer may not purchase cigarettes in New York State at a price which is less than the cost of the agent with respect to sales to CMSA wholesale dealers or, using the cited example in section 82.2 of this Part, [\$55.69] \$68.80 per carton.

(3)(i) CMSA wholesale dealer's sales to other CMSA wholesale dealers (illustrated). A CMSA wholesale dealer may not sell cigarettes in New York State to any other CMSA wholesale dealer at a price which is less than the cost of the agent with respect to sales to CMSA wholesale dealers or, using the cited example in section 82.2 of this Part, [\$55.69] \$68.80 per carton.

(ii) CMSA wholesale dealer's sales to chain stores (illustrated). In the absence of substantiating a lesser actual cost of doing business, a CMSA wholesale dealer may not sell cigarettes in New York State to any chain store at a price which is less than the basic cost of cigarettes plus the cost of doing business by the agent with respect to sales to CMSA wholesale dealers plus $\frac{5}{8}$ percent of the basic cost (the presumed cost of doing business by the CMSA wholesale dealer with respect to such sales) or, using the cited example in section 82.2 of this Part, [~~\$56.03~~] \$69.22 per carton. Such amount is computed as follows:

Basic cost of cigarettes.....	[\$55.00]		<u>\$68.80</u>
Agent's presumed cost of doing business			
Percentage mark-up (.875% of [\$55.00] <u>\$68.80</u>).....	[.48125]	+	<u>.595</u>
2 cents/package of 20 cigarettes multiplied by 10 packages/carton.....		+	.20
Wholesaler's presumed cost of doing business (.625% of [\$55.00] <u>\$68.00</u>).....	[.34357]	+	<u>.425</u>
Cost of the CMSA wholesale dealer for sales to chain stores [(rounded to next higher cent)].....	[\$56.03]		<u>\$69.22</u>

(iii) CMSA wholesale dealer's sales to CMSA retail dealers (illustrated). In the absence of substantiating a lesser actual cost of doing business, a CMSA wholesale dealer may not sell cigarettes in New York State to any CMSA retail dealer at a price which is less than the basic cost of cigarettes plus the cost of doing business by the agent with respect to sales to CMSA wholesale dealers plus 3 percent of the basic cost (the presumed cost of doing business by the CMSA wholesale dealer with respect to such sales) or, using the cited example in section 82.2 of this Part, [~~\$57.34~~] \$70.84 per carton. Such amount is computed as follows:

Basic cost of cigarettes.....	[\$55.00]		<u>\$68.00</u>
Agent's presumed cost of doing business			
Percentage mark-up (.875% of [\$55.00] <u>\$68.00</u>).....	[.48125]	+	.595

2 cents/package of 20 cigarettes multiplied by 10 packages/carton.....	+	.20	
Wholesaler's presumed cost of doing business (3% of [\$55.00] <u>\$68.00</u>).....	[1.65]	+	<u>2.04</u>
Cost of the CMSA wholesale dealer for sales to CMSA retail dealers (rounded to next higher cent).....	[\$57.34]		<u>\$70.84</u>

(iv) CMSA wholesale dealer's sales to consumers (illustrated). A CMSA wholesale dealer may not sell cigarettes in New York State at retail, or to any person who cannot prove its status as other than a consumer, at a price which is less than the cost of the CMSA retail dealer or, using the cited example in section 82.2 of this Part, [\$61.35] \$75.80 per carton. See section 82.5 of this Part.

Section 10. Paragraph (2) of subdivision (a) of section 82.4 of the regulations is amended to read as follows:

(2) to induce or attempt to induce or to procure or attempt to procure any rebate or concession of any kind or nature whatsoever in connection with the purchase of cigarettes (see Part [344] 84 of this Title for rebates and concessions).

Section 11. Paragraphs (2) and (3) of subdivision (d) of section 82.4 of such regulations are amended to read as follows:

(2) Purchases by a chain store (illustrated). A chain store may not purchase cigarettes in New York State at a price which is less than the cost of the agent or the cost of the CMSA wholesale dealer, with respect to sales to chain stores [or, using]. Using the cited examples in sections 82.2 and 82.3 of this Part, [\$55.00 or \$56.03] a chain store having 15 or more retail outlets, excluding vending machine operators, where such cigarettes are delivered to a central warehouse owned and operated by such chain store and which are then delivered by the chain store to its retail outlets may not purchase cigarettes from an agent for less than \$68.00 a

carton. Other chain stores may not purchase cigarettes from an agent or a CMSA wholesale dealer for less than \$69.22 per carton[, as the case may be].

(3) Sales by chain stores (illustrated). A chain store may not sell cigarettes in New York State at a price which is less than the cost of the CMSA retail dealer or, using the cited examples in sections 82.2 and 82.3 of this Part, [~~\$61.35~~] \$75.80 per carton. See section 82.5 of this Part.

Section 12. Paragraph (1) of subdivision (c) of section 82.5 of such regulations is amended to read as follows:

(c)(1) A CMSA retail dealer may not purchase cigarettes in New York State at a price which is less than the cost of the agent with respect to sales to CMSA retail dealers, if purchased from an agent, or at a price which is less than the cost of the CMSA wholesale dealer with respect to sales to CMSA retail dealers, if purchased from a CMSA wholesale dealer. A CMSA retail dealer who wishes to purchase cigarettes at a price which is less than the cost of the CMSA retail dealer, must furnish its supplier with a [properly completed New York State sales tax resale certificate (see section 532.4 of this Title)] valid copy of its New York State certificate of registration as a retail dealer. Just as the supplier must have knowledge of its purchaser, so too must a CMSA retail dealer have knowledge of its supplier. A CMSA retail dealer must be capable of demonstrating to the satisfaction of the Department of Taxation and Finance that it purchased cigarettes at a price which was not less than the cost of the agent or the cost of the CMSA wholesale dealer, as the case may be, with respect to sales to CMSA retail dealers. In doing so, the CMSA retail dealer may ultimately need to call upon its supplier to help establish such costs.

Section 13. Paragraphs (2) and (3) of subdivision (e) of section 82.5 of such regulations are amended to read as follows:

(2) Purchases by a CMSA retail dealer (illustrated). A CMSA retail dealer may not purchase cigarettes in New York State at a price which is less than the cost of the agent or the cost of the CMSA wholesale dealer, with respect to sales to CMSA retail dealers or, using the cited examples in sections 82.2 and 82.3 of this Part, [\$57.34] \$70.84 per carton.

(3) Sales by CMSA retail dealers (illustrated). In the absence of substantiating a lesser actual cost of doing business, a CMSA retail dealer, including an agent, a CMSA wholesale dealer, a chain store or any other person with respect to their sales of cigarettes to consumers, may not sell cigarettes in New York State at a price which is less than the basic cost of cigarettes plus the cost of doing business by the agent with respect to sales to CMSA retail dealers plus seven percent of the sum of the basic cost plus the cost of doing business by the agent (the presumed cost of doing business by the CMSA retail dealer) or, using the cited examples in sections 82.2 and 82.3 of this Part, [\$61.35] \$75.80 per carton. Such amount is computed as follows:

Basic cost of cigarettes.....	[\$55.00]		<u>\$68.00</u>
Agent's presumed cost of doing business			
Percentage mark-up (3.875% of [\$55.00] <u>\$68.00</u>).....	[2.13125]	+	<u>2.635</u>
2 cents/package of 20 cigarettes multiplied by 10 packages/carton.....		+	.20
Retailer's presumed cost of doing business			
(7% of: ([\$55.00] <u>\$68.00</u> + (3.875% of [\$55.00] <u>\$68.00</u>) + .20).....	[4.0131875]	+	<u>4.95845</u>
Cost of the CMSA retail dealer (rounded to next higher cent).....	[\$61.35]		<u>\$75.80</u>

Section 14. Example 2 of subdivision (b) of section 526.5 of such regulations is REPEALED, and Example 3 of such subdivision is renumbered to be Example 2.

Section 15. Subparagraph (ii) of paragraph (1) of subdivision (b) of section 526.5 of such regulations is amended to read as follows:

(ii) Also included in the receipts on which sales tax is computed are the State excise taxes imposed on consumers of cigarettes pursuant to article 20 of the Tax Law and the cigarette tax imposed by chapter 13 of title 11 of the Administrative Code of the City of New York.

Section 16. The introduction of paragraph (2) of subdivision (b) of section 526.5 of such regulations is amended to read as follows:

(2) Exclusions. With the exception of the [State excise tax] taxes imposed on consumers of cigarettes (see subparagraph (1)(ii) of this subdivision) and except as otherwise provided by law, excise taxes [which] that are imposed on the consumer are excluded from the receipts on which sales tax is computed. Among these taxes, by way of example and not by way of limitation, are:

Section 17. Subparagraph (iii) of paragraph (2) of subdivision (b) of section 526.5 of such regulations is REPEALED, and subparagraph (iv) of such paragraph is renumbered to be subparagraph (iii).

Section 18. This rule shall take effect on June 3, 2008; provided, however, section 6 shall take effect on the date the Notice of Emergency Adoption and Proposal is filed with the Department of State.

Dated: Albany, New York
May 27, 2008

Robert L. Megna
Commissioner of Taxation and Finance