

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 sections 475 (not subdivided), 482-a, and 488 of the Tax Law, the Commissioner of Taxation and Finance, hereby proposes to make and adopt 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 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

Section 1. Paragraphs (2) and (3) of subdivision (h) of section 70.2 of Article 1 of such regulations is amended to read as follows:

(2) "Wholesale dealer" for purposes of this article means any person who sells cigarettes in New York State to retail dealers or to other persons for purposes of resale. A person who also customarily sells cigarettes to the retail trade is a wholesale dealer even though such person [also sells cigarettes at retail.] may be required to be registered as a retail dealer. See section 70.2(h)(3) of this Part for a definition of "retail dealer." Included in this definition are importers, exporters, manufacturers, agents, jobbers, subjobbers, and all others who sell cigarettes in the State to the retail trade. A wholesale dealer is also any person who owns, operates or maintains one or more cigarette vending machines in, at or upon premises located in this State that are owned or occupied by any other person. Every wholesale dealer must procure a wholesale dealer's license (see Part 72 of this Title). In addition, every wholesale dealer who is engaged in the activity of selling cigarettes in New York State at retail is also required to register as a retail dealer. Also, every vending machine owner/operator described in Part 73 of this Title must register each individual vending machine through which the owner/operator sells cigarettes in this State.

(3) "Retail dealer" for purposes of this article means any person other than a wholesale dealer, who sells cigarettes in New York State. If, however, a wholesale dealer is engaged in the activity of selling cigarettes in New York State at retail, such wholesale dealer is a retail dealer with respect to that activity. A retail dealer is required to register as a retail dealer and to register any individual cigarette vending machines it may own/operate in order to sell cigarettes at retail in this State (see Part 73 of this Title.)

Section 2. Paragraph (2) of subdivision (b) of section 72.1 of Article 1 of such regulations is amended to read as follows:

(2) The department will review the information submitted by the applicant and may for cause refuse to license such applicant in accordance with section 72.2 of this Part. Upon approval of an application for a license as a wholesale dealer, the department will issue, for prominent public display, an individual certificate of license for each of a wholesale dealer's places of business for such wholesale trade, [including any retail places of business, carts, stands, trucks or other merchandising devices] other than individual vending machines, from which the wholesale dealer will be authorized to sell cigarettes. Each certificate shall bear the address of the appropriate place of business, if applicable, and a common wholesale dealer identification number. Each certificate shall also indicate whether or not the licensee qualifies as a cigarette marketing standards wholesale dealer as defined in article 20-A of the Tax Law. Failure to display such certificate(s) will constitute a violation of article 20 of the Tax Law. See Part 73 of this Title for retail dealers and vending machine registrations and section 75.2 of this Title for vending machine identification.

Section 3. Paragraph (3) of subdivision (e) of section 72.1 of Article 1 of such regulations is amended to read as follows:

(3) Where a wholesale dealer of cigarettes is also a retail dealer of cigarettes or a cigarette vending machine owner/operator, such wholesale dealer must also comply with the registration provisions of Part 73 of

this Title.

Section 4. Subdivisions (a) and (b) of section 73.2 of Article 1 of such regulations is amended to read as follows:

(a) In addition to any other penalty imposed by the Tax Law, any retail dealer who violates the provisions of section 480-a of the Tax Law or of this Part shall, after due notice and an opportunity for a hearing, for a first violation be liable for a civil fine not less than \$500 but not to exceed \$[200] 2,000, and for a second or subsequent violation within three years following a prior finding of a violation, be liable for a civil fine not less than \$1,000 but not to exceed \$[500] 3,500.

(b) In addition to any other penalty imposed by the Tax Law, any person who owns or operates one or more vending machines through which cigarettes or tobacco products are sold in this State and who violates the provisions of section 480-a of the Tax Law or of this Part shall, after due notice and an opportunity for a hearing, for a first violation be liable for a civil fine not less than \$75 but not to exceed \$[100] 200, and for a second or subsequent violation within three years following a prior finding of a violation, be liable for a civil fine not less than \$200 but not to exceed \$[300] 600.

Section 5. Section 74.4 of Article 1 of such regulations is amended to read as follows:

Forbidden sales of cigarettes (Tax Law, sections 473, 475, and 481(1)) (a) No licensed cigarette agent shall sell cigarettes in New York State unless proper cigarette stamps have been affixed to individual packages thereof and cancelled, or unless such cigarettes are exempt from tax as provided for in this Title. No agent may sell cigarettes to an unlicensed wholesale dealer, or to a wholesale dealer whose license has been cancelled or suspended pursuant to section 72.3 of this Title. Further, no agent may sell cigarettes to a retail dealer who [has been forbidden to sell cigarettes pursuant to this section] is not registered pursuant to Part 73 of this Title or whose registration has been suspended or revoked pursuant to section 480-a of the Tax Law.

(b) A wholesale dealer may not sell cigarettes in New York State unless proper cigarette tax stamps have been affixed to individual packages thereof and cancelled, or unless such cigarettes are exempt from tax as provided for in this Title. No wholesale dealer may sell cigarettes for purposes of resale or from vending machines in, at or upon premises owned or occupied by another person, unless such dealer has been licensed pursuant to Part 72 of this Title. No wholesale dealer may sell cigarettes for such purposes to an unlicensed wholesale dealer or to a wholesale dealer whose license has been cancelled or suspended. No wholesale dealer may sell cigarettes through vending machines unless such machines are registered pursuant to Part 73 of this Title. A wholesale dealer may not sell cigarettes to a retail dealer who [has been forbidden to sell cigarettes as provided herein] is not registered pursuant to Part 73 of this Title or whose registration has been suspended or revoked pursuant to section 480-a of the Tax Law.

(c) No retail dealer may sell cigarettes in New York State unless proper cigarette tax stamps have been affixed to individual packages thereof and cancelled, or unless such cigarettes are exempt from tax as provided for in this Title. No retail dealer or wholesale dealer may sell cigarettes at retail in the State unless registered or unless sold through registered vending machines pursuant to Part 73 of this Title. Additionally, the Department of Taxation and Finance may for cause forbid a retail dealer to continue selling cigarettes after an opportunity for a hearing has been afforded the dealer. A violation of any provision of article 20 of the Tax Law or any regulation pursuant thereto shall be cause to forbid such retail dealer from continuing to sell cigarettes. The provisions of section 71.7 of this Title shall apply to the provisions of this subdivision, to the extent that such provisions can be made applicable, as if the language had been incorporated into this subdivision and had referred to a notice regarding the proposed prohibition of retail sales of cigarettes.

(d) The Department of Taxation and Finance shall make available for all cigarette agents and wholesale dealers current listings of the names and addresses of every duly licensed cigarette agent and duly licensed

wholesale dealer. Additionally, the department shall make available for such licensees, current listings of all retail dealers [who have been forbidden to sell cigarettes in New York State] whose registration has been suspended or revoked pursuant to section 480-a of the Tax Law.

Section 6. Section 78.4 of Article 1 of such regulations is amended to read as follows:

(a) In addition to any other penalty imposed by the Tax Law [this Part], any person who has in its possession or control, unstamped or unlawfully stamped packages of cigarettes is subject to a penalty of not more than \$[100.00] 150 for each 200 such cigarettes or fraction thereof in excess of [2,000] 1,000 cigarettes. The Department of Taxation and Finance may, in its discretion, remit all or any part of the penalty imposed.

(b) In addition to any other penalty imposed by the Tax Law, but in lieu of the penalties imposed by subsection (a) of this section:

(1) any person who knowingly has in its possession or knowingly has under its control, unstamped or unlawfully stamped packages of cigarettes is subject to a penalty of not less than \$30 but not more than \$200 for each 200 such cigarettes or fraction thereof in excess of 1,000 cigarettes but less than or equal to 5,000 cigarettes;

(2) any person who knowingly has in its possession or knowingly has under its control, unstamped or unlawfully stamped packages of cigarettes is subject to a penalty of not less than \$75 but not more than \$200 for each 200 such cigarettes or fraction thereof in excess of 5,000 cigarettes but less than or equal to 20,000 cigarettes; and

(3) any person who knowingly has in its possession or knowingly has under its control, unstamped or unlawfully stamped packages of cigarettes is subject to a penalty of not less than \$100 but not more than \$200 for each 200 such cigarettes or fraction thereof in excess of 20,000 cigarettes.

(c) [(b)] The penalty imposed pursuant to this section shall be determined, assessed, collected and paid

in the same manner as the taxes imposed by article 20 of the Tax Law. Provided however, such penalty shall not be paid by the use of stamps.

Section 7. Section 82.1 of Article 2 of such regulations is amended to read as follows:

General. (Tax Law, sections 475, 482-a, 483 and 488) (a) While it is recognized that agent, wholesale dealer, chain store and retail dealer activities are not mutually exclusive, the intent and the integrity of the cigarette marketing standards, in lieu of requiring accountability for all individual cigarette transactions made within New York State, necessitate that substantially all of an agent's, CMSA wholesale dealer's, chain stores or CMSA retail dealer's cigarette activities, be activities for which an agent, CMSA wholesale dealer, CMSA retail dealer, or chain store, respectively, is licensed or registered[, or in the case of a CMSA retail dealer, be activities comprising sales of cigarettes to consumers]. That is, a person who wishes to purchase and/or sell cigarettes in this State pursuant to any one section of this Part, shall not conduct secondary cigarette activities in excess of 10 percent of such person's total cigarette activities. Such percentage is to be measured by the number of cartons of cigarettes sold in each calendar quarter. Accordingly:

(1) substantially all ("i.e.", 90 percent or more) of such an agent's cigarette activities must pertain to unstamped packages of cigarettes upon which the agent affixes New York State cigarette tax stamps;

(2) substantially all of such a CMSA wholesale dealer's cigarette activities must pertain to cigarettes sold for purposes of resale;

(3) substantially all of such a chain store's cigarette activities must pertain to cigarettes sold at retail as described in section 80.2(c) of this Title; and

(4) substantially all of such a CMSA retail dealer's cigarette activities must pertain to cigarettes sold to consumers.

(b) A person, other than one purchasing and/or selling cigarettes pursuant to any one section of this Part

in accordance with subdivision (a) of this section ("i.e.," exclusively as an agent, CMSA wholesale dealer, chain store or CMSA retail dealer), who wishes to purchase and/or sell cigarettes in this State in more than one capacity, at a price which is less than the cost of the CMSA retail dealer (as defined in section 82.5 of this Part), may do so with the written consent of the Department of Taxation and Finance. Such person must separately account for all individual cigarette transactions and, in determining such person's costs of doing business, must attribute specific costs to specific sales of cigarettes in each of the capacities in which the person is eligible to conduct business. Such attribution must be to the satisfaction of the department. For example, a person who qualifies as a CMSA wholesale dealer and who makes retail sales of cigarettes in excess of 10 percent may be permitted to purchase and/or sell cigarettes as both a CMSA wholesale dealer and a CMSA retail dealer, provided such person:

(1) can clearly account for its activities in each capacity; [and]

(2) can satisfactorily attribute costs to sales made in each capacity; and

(3) complies with the licensing provisions in Part 72 and the registration provisions in Part 73 of this

Title.

Section 8. Subparagraph (iv) of paragraph (2) of subdivision (d) of section 82.2 of such regulations is amended to read as follows:

(iv) In the case of sales of cigarettes to CMSA retail dealers at a price which is less than the cost of the CMSA retail dealer, the agent must receive from the purchaser a [properly completed New York State sales tax resale certificate (see section 532.4 of this Title)] copy of such purchaser's valid New York State certificate of registration as a retail dealer. Such prices shall not be less than the cost of the agent with respect to sales of cigarettes to CMSA retail dealers.

Section 9. Subparagraph (iii) of paragraph (2) of subdivision (e) of section 82.3 of such regulations is

amended to read as follows:

(iii) In the case of sales of cigarettes to CMSA retail dealers at a price which is less than the cost of the CMSA retail dealer, the CMSA wholesale dealer must receive from the purchaser a [properly completed New York State sales tax resale certificate (see section 532.4 of this Title)] copy of such purchaser's valid New York State certificate of registration as a retail dealer. Such prices shall not be less than the cost of the CMSA wholesale dealer with respect to sales of cigarettes to CMSA retail dealers.

Section 10. Subdivision (a) of section 85.1 of such regulations is amended to read as follows:

(a) The license of any agent or wholesale dealer, or the registration of any retail dealer issued pursuant to article 20 of the Tax Law, or the registration of any chain store issued pursuant to article 20-A of such law, may be suspended or revoked [, and any person may be prohibited from selling cigarettes at retail in New York State,] after due notice and an opportunity for a hearing, for failure to comply with any provisions of such articles or any rules or regulations adopted pursuant thereto.

Section 11. These amendments shall take effect on the date the Notice of Adoption regarding such amendments is published in the "State Register" provided, however, that the amendments in sections 1, 2, and 3 shall take effect 45 days after the date that the Notice of Adoption is published in the "State Register."

Andrew S. Eristoff
Commissioner of Taxation and Finance

DATED: Albany, New York
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