

SUBSTANCE OF THE PROPOSED RULE

DEPARTMENT OF TAXATION AND FINANCE

Chapters 62 (Part T3) and 63 (Part Z) of the Laws of 2003 require the Commissioner of Taxation and Finance to promulgate rules and regulations necessary to implement the collection of excise taxes and sales and compensating use taxes on retail sales made to non-Indians on New York State Indian reservations. The legislation covers sales of all taxable property and services – including, but not limited to, cigarettes, tobacco products, gasoline, and diesel motor fuel. This proposed rule fulfills this legislative mandate.

Section 1 of the rule conforms section 74.1(c) of the cigarette tax regulations to new section 76.6, as added by Section 6 of the rule, by stating that no tax will be imposed under article 20 of the Tax Law on cigarettes sold to Indian nations or tribes, qualified Indians purchasing cigarettes on their qualified reservations, and reservation cigarette sellers located on qualified reservations, under the circumstances set forth in such new section 76.6.

Section 2 amends section 74.4(a) to reflect the law that a licensed cigarette agent may sell cigarettes within this State for purposes of resale only if the agent is also a licensed wholesale dealer and may sell at retail only if the agent is also a registered retail dealer. Subdivisions (a) and (b) of section 74.4 are amended by Section 2 to provide that nothing in such subdivisions will prohibit agents and wholesale dealers, respectively, from selling stamped packages of cigarettes to an Indian nation or tribe or to a reservation cigarette seller on a qualified reservation, as such terms are defined by new section 76.6, when such cigarettes are to be delivered or brought onto the reservation for sale or resale.

Section 3 conforms section 76.1(a)(1) to new section 76.6 by providing that the tax is not required to be paid on cigarettes sold to Indian nations or tribes, qualified Indians purchasing cigarettes on their qualified reservations, and reservation cigarette sellers located on qualified reservations, under the circumstances set forth in such new section 76.6.

Section 4 amends section 76.1(b)(1) to include a reference to Part 76 to indicate that cigarettes upon which the tax has been paid may be sold for exempt purposes as provided in such Part.

Section 5 adds a new paragraph (3) to subdivision (d) of section 76.1 to reference new section 76.6 of the regulations for documentation requirements applicable to exempt sales of cigarettes on qualified reservations.

Section 6 adds a new section 76.6 to the regulations to address sales of cigarettes on Indian reservations. Section 76.6(a) sets out the following general provisions, in part:

“Qualified Indians ... may purchase cigarettes for such qualified Indians’ own use ... exempt from cigarette tax on their ... qualified reservations. However, ... Indians purchasing cigarettes off their reservations or on another nation’s or tribe’s reservation, and non-Indians making cigarette purchases on an Indian reservation are not exempt from paying ... tax when purchasing cigarettes within this state. Accordingly, all cigarettes sold on an Indian reservation to non-members of the nation or tribe or to non-Indians will be taxed, and evidence of such tax will be by means of an affixed cigarette tax stamp.

“In order to ensure an adequate quantity of cigarettes ... which may be purchased by qualified Indians exempt from ... tax, the Department of Taxation and Finance will provide Indian nations and tribes within this state with Indian tax exemption coupons A reservation cigarette seller will be able to present such ... coupons to a wholesale dealer licensed under article 20 of the Tax Law in order to purchase stamped cigarettes exempt from ... tax. Qualified Indians may purchase cigarettes from a reservation cigarette seller exempt from ... tax even though such cigarettes will have an affixed cigarette tax stamp.”

New section 76.6(b) defines “Indian nation or tribe,” “qualified Indian,” “qualified reservation,” and “reservation cigarette seller.” A “reservation cigarette seller” is “an Indian nation or tribe, one or more members of such tribe, or an entity wholly owned by either or both, which sells cigarettes within the boundaries of a qualified reservation.”

New section 76.6(c) provides that Indian tax exemption coupons will be provided quarterly to the recognized governing body of each nation or tribe. It is anticipated that the nations or tribes will retain the amount of coupons that they will need to purchase tax-free cigarettes for official nation or tribal use and will distribute the remaining coupons to reservation cigarette sellers on the nations' or tribes' qualified reservations so that such sellers can redeem such coupons in order to purchase and provide tax-free cigarettes for the use or consumption by members of the nation or tribe. The amount of coupons will be based upon the probable demand of the qualified Indians on such nation's or tribe's qualified reservation plus the amount needed for official use. Probable demand will be determined by reference to, among other data, the United States average consumption per capita, as compiled for the most recently completed calendar or fiscal year, multiplied by the number of qualified Indians for each such affected nation or tribe. The department will take into consideration any evidence submitted by a nation's or tribe's recognized governing body relating to probable demand. New subdivision (c) also sets forth the basic information that will be contained in the Indian tax exemption coupons.

New section 76.6(d) describes tax exempt purchases. An Indian nation or tribe may purchase cigarettes for its own official use and (under specified circumstances) a reservation cigarette seller may purchase cigarettes for resale on its reservation from a licensed wholesale dealer without payment of the cigarette tax to the extent that they provide the wholesale dealer with Indian tax exemption coupons. A qualified Indian may purchase cigarettes for his or her own use without payment of the cigarette tax, provided that the Indian makes such purchase on his or her qualified reservation. A wholesale dealer shall not collect the cigarette tax from a purchaser to the extent the purchaser gives the wholesale dealer Indian tax exemption coupons entitling the purchaser to make the purchases exempt from the tax.

New section 76.6(e) provides that a licensed wholesale dealer who has Indian tax exemption coupons may file a claim for refund with respect to any cigarette tax previously paid on cigarettes sold without tax because of the acceptance of such coupons.

New section 76.6(f) provides that if any Indian nation or tribe enters into an agreement with New York State regarding the sale and distribution of cigarettes on the nation's or tribe's reservation, the terms of the agreement take precedence over the provisions of the proposed rule.

Section 7 amends section 77.1(a)(1) to include within the scope of the refund provisions, packages of cigarettes that are sold to Indian nations, tribes, and reservation cigarette sellers as set forth in section 76.6 of the regulations.

Section 8 amends section 77.1(b)(3) to except the cigarettes mentioned in Section 7 from the provisions that the cigarette tax stamps affixed to their packages must be obliterated or otherwise made void.

Section 9 amends section 89.1 of the tobacco products tax regulations to provide that when taxable tobacco products have been purchased on or from a qualified reservation, as defined in section 76.6 of the regulations, the purchaser is not relieved of his or her liability to pay the tobacco products tax due, and must file a tobacco products use tax return with the Department of Taxation and Finance, together with a remittance of the tax due, within 24 hours.

Section 10 amends section 412.1(f) of the motor fuel tax regulations to provide that a seller of motor fuel is relieved of the requirement to pass through the motor fuel tax if it receives from the purchaser Indian tax exemption coupons as set forth in new section 414.6 of the regulations, as added by Section 14 of the rule.

Section 11 adds a new paragraph (5) to subdivision (a) of section 414.1 to provide that Indian nations or tribes, qualified Indians, and reservation motor fuel sellers located on qualified reservations, as these terms are

defined by section 414.6, may purchase motor fuel upon which the seller has not passed through the motor fuel tax imposed pursuant to article 12-A of the Tax Law.

Section 12 amends section 414.1(c)(2) to include among the qualifying purchases of motor fuel upon which a seller has not passed through the motor fuel tax, purchases described in new section 414.6. This section is also amended to include, as proof of the exemption, the Indian tax exemption coupons prescribed in section 414.6.

Section 13 adds a new paragraph (3) to subdivision (d) of section 414.1 to reference the documentation requirements for exempt sales of motor fuel on qualified reservations set out in new section 414.6.

Section 14 adds a new section 414.6 to address sales of motor fuel on Indian reservations. The provisions of this section parallel the cigarette tax provisions in new section 76.6 of the regulations, as added by Section 6 of the rule, but pertain to the tax imposed on motor fuel under article 12-A of the Tax Law. The sections also differ in that there are no tax stamps applicable to motor fuel and a “distributor” (rather than a “wholesaler”) registered under article 12-A of the Tax Law who has Indian tax exemption coupons may file claims for refunds or credits with respect any motor fuel tax previously paid, assumed, or passed through to it on motor fuel it sold without passing through the tax because it accepted Indian tax exemption coupons from its purchaser. A distributor must also report motor fuel sold to an Indian nation or tribe or a reservation motor fuel seller in its monthly return and may deduct the quantity so sold in arriving at the net taxable gallonage to the extent the fuel was sold without passing through to such purchasers the tax.

Section 15 amends section 415.1(c)(2) to allow a distributor selling motor fuel to an Indian nation or tribe or to a reservation motor fuel seller without passing through the motor fuel tax to apply for a refund of the tax on these sales on a weekly basis.

Section 16 amends section 416.5(a) to exclude from the civil penalty imposed by section 289-b(1)(e) of the Tax Law a reservation motor fuel seller having in its custody, possession, or under its control any motor fuel that it has purchased in accordance with new section 414.6.

Section 17 adds a new Part 431 to the diesel motor fuel tax regulations to address sales of diesel motor fuel on Indian reservations which is for use in a motor vehicle. The provisions of this Part parallel the motor fuel tax provisions of Sections 14, 15, and 16 of the rule, but pertain to the diesel motor fuel tax imposed under article 12-A of the Tax Law.

Section 18 adds a new Part 451 to the petroleum business tax regulations to address sales of motor fuel and diesel motor fuel on Indian reservations and the taxes imposed under article 13-A of the Tax Law. New section 451.1 incorporates the provisions of new sections 414.6 and 431.1 of the regulations in furtherance of the joint administration of the taxes imposed by articles 12-A and 13-A of the Tax Law.

Section 19 reletters subdivision (g) of section 531.6 of the sales and use tax regulations to be subdivision (i) and adds new subdivisions (g) and (h). New subdivision (g) provides that when taxable property or services have been purchased on or from a qualified reservation, as defined in section 76.6 of the regulations, the purchaser is not relieved of his or her liability to pay the tax due, and such tax must be paid directly to the Department of Taxation and Finance. New subdivision (h) provides that sales and use taxes may be reported and paid with such personal income tax forms or other tax forms as the Commissioner deems appropriate. Purchasers are advised to check the forms and instructions to see which may be applicable to their circumstances. New subdivision (h) is based on Chapter 62 (Part R3) of the Laws of 2003.

Section 20 repeals obsolete subdivision (f) of section 561.1 of the regulations.

Section 21 adds a new subdivision (d) to section 561.17 to incorporate the provisions of new section 414.6 of the regulations concerning sales of motor fuel on qualified Indian reservations into the joint administration provisions concerning the prepayment of sales tax imposed on such fuel pursuant to section 1102 of the Tax Law.

Section 22 adds a new section 562.2 to reference the joint administration provisions of section 1142(11) of the Tax Law and section 561.17 of the regulations and to incorporate the provisions of new section 431.1 of the

regulations concerning sales of diesel motor fuel on qualified Indian reservations into such joint administrative provisions concerning the prepayment of sales tax imposed on such fuel pursuant to section 1102 of the Tax Law.

Section 23 adds a new subdivision (d) to section 564.1 to incorporate the provisions of new sections 76.6 and 76.7 of the regulation concerning sales of cigarettes on qualified Indian reservations into the joint administration provisions concerning the prepayment of sales tax imposed on cigarettes pursuant to section 1103 of the Tax Law.

Section 24 provides that it will take effect on the date that the Notice of Adoption is published in the State Register and will apply to periods commencing on or after December 1, 2003.