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SENATE BILL 516

51ST LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2013

INTRODUCED BY

Linda M. Lopez

AN ACT

RELATING TO TOBACCO SALES; REQUIRING THAT CIGARETTE PACKS
STAMPED WITH TAX-CREDIT STAMPS ARE "UNITS SOLD" FOR THE PURPOSE
OF DETERMINING ESCROW PAYMENTS DUE PURSUANT TO THE MASTER
SETTLEMENT AGREEMENT; AMENDING THE CIGARETTE TAX ACT;
INCREASING CIVIL AND CRIMINAL PENALTIES FOR VIOLATIONS OF THE
CIGARETTE TAX ACT AND THE TOBACCO ESCROW FUND ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 6-4-12 NMSA 1978 (being Laws 1999,
Chapter 208, Section 1, as amended) is amended to read:

"6-4-12. DEFINITIONS.--As used in Sections 6-4-12 [~~and~~
~~6-4-13~~] through 6-4-13.1 NMSA 1978:

A. "adjusted for inflation" means increased in
accordance with the formula for inflation adjustment set forth
in Exhibit C to the Master Settlement Agreement;

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1 B. "affiliate" means a person who directly or
2 indirectly owns or controls, is owned or controlled by, or is
3 under common ownership or control with, another person. Solely
4 for purposes of this definition, the terms "owns", "is owned"
5 and "ownership" mean ownership of an equity interest, or the
6 equivalent thereof, of ten percent or more, and the term
7 "person" means an individual, partnership, committee,
8 association, corporation or any other organization or group of
9 persons;

10 C. "allocable share" means "Allocable Share" as
11 that term is defined in the Master Settlement Agreement;

12 D. "cigarette" means any product that contains
13 nicotine, is intended to be burned or heated under ordinary
14 conditions of use, and consists of or contains:

15 (1) any roll of tobacco wrapped in paper or in
16 any substance not containing tobacco;

17 (2) tobacco, in any form, that is functional
18 in the product [~~which~~] and that, because of its appearance, the
19 type of tobacco used in the filler or its packaging and
20 labeling, is likely to be offered to, or purchased by,
21 consumers as a cigarette; or

22 (3) any roll of tobacco wrapped in any
23 substance containing tobacco [~~which~~] that, because of its
24 appearance, the type of tobacco used in the filler or its
25 packaging and labeling, is likely to be offered to, or

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1 purchased by, consumers as a cigarette described in Paragraph
2 (1) of this subsection. The term "cigarette" includes "roll-
3 your-own" (i.e., any tobacco [~~which~~] that, because of its
4 appearance, type, packaging or labeling, is suitable for use
5 and likely to be offered to, or purchased by, consumers as
6 tobacco for making cigarettes). For purposes of this
7 definition of "cigarette", 0.09 ounces of "roll-your-own"
8 tobacco shall constitute one individual "cigarette";

9 E. "Master Settlement Agreement" means the
10 settlement agreement (and related documents) entered into on
11 November 23, 1998 by the state and leading United States
12 tobacco product manufacturers;

13 F. "qualified escrow fund" means an escrow
14 arrangement with a federally chartered or state chartered
15 financial institution having no affiliation with any tobacco
16 product manufacturer and having assets of at least one billion
17 dollars (\$1,000,000,000) where such arrangement requires that
18 such financial institution hold the escrowed funds' principal
19 for the benefit of releasing parties and prohibits the tobacco
20 product manufacturer placing the funds into escrow from using,
21 accessing or directing the use of the funds' principal except
22 as consistent with Subsection B of Section 6-4-13 NMSA 1978;

23 G. "released claims" means "Released Claims" as
24 that term is defined in the Master Settlement Agreement;

25 H. "releasing parties" means "Releasing Parties" as

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1 that term is defined in the Master Settlement Agreement;

2 I. "tobacco product manufacturer" means an entity
3 that, after the date of enactment of this act, directly (and
4 not exclusively through any affiliate):

5 (1) manufactures cigarettes anywhere that such
6 manufacturer intends to be sold in the United States, including
7 cigarettes intended to be sold in the United States through an
8 importer (except where such importer is an original
9 participating manufacturer (as that term is defined in the
10 Master Settlement Agreement) that will be responsible for the
11 payments under the Master Settlement Agreement with respect to
12 such cigarettes as a result of the provisions of Subsection
13 II(mm) of the Master Settlement Agreement and that pays the
14 taxes specified in Subsection II(z) of the Master Settlement
15 Agreement, and provided that the manufacturer of such
16 cigarettes does not market or advertise such cigarettes in the
17 United States);

18 (2) is the first purchaser anywhere for resale
19 in the United States of cigarettes manufactured anywhere that
20 the manufacturer does not intend to be sold in the United
21 States; or

22 (3) becomes a successor of an entity described
23 in Paragraph (1) or (2) of this subsection.

24 The term "tobacco product manufacturer" shall not include
25 an affiliate of a tobacco product manufacturer unless such

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1 affiliate itself falls within Paragraph (1), (2) or (3) of this
2 subsection; and

3 J. "units sold" means the number of individual
4 cigarettes sold in the state by the applicable tobacco product
5 manufacturer, whether directly or through a distributor,
6 retailer or similar intermediary or intermediaries, during the
7 year in question, as measured by excise taxes [~~collected~~] owed,
8 ounces of "roll-your-own" tobacco sold and sales of products
9 bearing tax-exempt or tax-credit stamps on packs or "roll-your-
10 own" tobacco containers. The secretary of taxation and revenue
11 shall promulgate such rules as are necessary to ascertain the
12 amount of state excise tax paid on the cigarettes of such
13 tobacco product manufacturer for each year."

14 SECTION 2. Section 6-4-22 NMSA 1978 (being Laws 2003,
15 Chapter 114, Section 9, as amended) is amended to read:

16 "6-4-22. PENALTIES AND OTHER REMEDIES.--

17 A. It is unlawful for a person to:

18 (1) affix a tax stamp, a tax-exempt stamp or a
19 tax-credit stamp or otherwise pay the tax due on a package or
20 other container of cigarettes of a tobacco product manufacturer
21 or a brand family that is not included in the directory; or

22 (2) sell, offer for sale or possess for any
23 purpose other than personal use cigarettes of a tobacco product
24 manufacturer or a brand family that is not included in the
25 directory.

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1 B. The secretary may revoke or suspend the
2 registration or license of a person licensed or registered
3 pursuant to Section 7-12-9.1 or 7-12A-7 NMSA 1978 that violates
4 Subsection A of this section.

5 C. Each stamp affixed, payment of tobacco tax,
6 offer to sell, possession for any purpose other than personal
7 use or sale of cigarettes in violation of Subsection A of this
8 section constitutes a separate violation. For each violation,
9 the secretary may impose a civil penalty in an amount not to
10 exceed the greater of [~~five thousand dollars (\$5,000)~~] ten
11 thousand dollars (\$10,000) or [~~five hundred~~] one thousand
12 percent of the retail value of the cigarettes sold, offered for
13 sale or possessed for any purpose other than personal use.

14 D. Cigarettes that have been sold, offered for sale
15 or possessed for any purpose other than personal use in this
16 state in violation of Subsection A of this section are
17 contraband, are subject to seizure and forfeiture and shall be
18 destroyed.

19 E. It is unlawful for a person to sell, distribute,
20 acquire, hold, own, possess, transport, import or cause to be
21 imported cigarettes that the person knows or should know are
22 intended for distribution or sale in violation of Subsection A
23 of this section. A person who violates this subsection is
24 guilty of a [~~misdemeanor~~] fourth degree felony and shall be
25 sentenced in accordance with Section [~~31-19-1~~] 31-18-15 NMSA

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1 1978.

2 F. A tobacco product manufacturer, stamping agent
3 or importer of cigarettes, or any officer, employee or agent of
4 any such entity, who knowingly makes any materially false
5 statement in any record required by the Tobacco Escrow Fund Act
6 or Section 6-4-13 NMSA 1978 to be filed with the attorney
7 general is guilty of a [~~fourth~~] third degree felony and upon
8 conviction shall be sentenced pursuant to the provisions of
9 Section 31-18-15 NMSA 1978.

10 G. The attorney general or the department may seek
11 an injunction to compel compliance with or to restrain a
12 threatened or actual violation of Subsection A of this section.
13 In any action brought pursuant to this subsection, the state
14 shall be entitled to recover the costs of investigation, costs
15 of the action and reasonable attorney fees, if the state
16 prevails.

17 H. The attorney general may issue a civil
18 investigative demand based on reasonable belief that any person
19 may be in possession, custody or control of an original or copy
20 of any book, record, report, memorandum, paper, communication,
21 tabulation, map, chart, photograph, mechanical transcription or
22 other document or recording relevant to the subject matter of
23 an investigation of a probable violation of the Tobacco Escrow
24 Fund Act. The attorney general may, prior to the institution
25 of a civil proceeding, execute in writing and cause to be

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1 served upon the person a civil investigative demand requiring
2 the person to produce documentary material and permit the
3 inspection and copying of the material.

4 I. For the purposes of this section, fewer than one
5 thousand cigarettes shall be presumed to be for personal use."

6 SECTION 3. Section 7-12-5 NMSA 1978 (being Laws 1971,
7 Chapter 77, Section 5, as amended) is amended to read:

8 "7-12-5. AFFIXING STAMPS.--

9 A. Except as provided in Section 7-12-6 NMSA 1978,
10 all cigarettes shall be placed in packages or containers to
11 which a stamp shall be affixed. Only a distributor with a
12 valid license issued pursuant to the Cigarette Tax Act may
13 purchase or obtain unaffixed tax-exempt stamps, tax-credit
14 stamps or tax stamps. A distributor shall not sell or provide
15 unaffixed stamps to another distributor, manufacturer, export
16 warehouse proprietor or importer with a valid permit pursuant
17 to 26 U.S.C. 5713 or any other person.

18 B. Stamps shall be affixed by the distributor to
19 each package of cigarettes to be sold or distributed in New
20 Mexico within thirty days of receipt of those packages.

21 C. A distributor shall apply stamps only to
22 packages of cigarettes that the distributor has received
23 directly from another distributor or from a manufacturer or
24 importer of cigarettes that possesses a valid and current
25 permit pursuant to 26 U.S.C. 5713.

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1 D. A distributor shall not affix a tax stamp, a
2 tax-exempt stamp or a tax-credit stamp to a package of
3 cigarettes of a manufacturer or a brand family that is not
4 included in the directory or sell, offer or possess for sale
5 cigarettes of a manufacturer or brand family that is not
6 included in the directory.

7 E. Packages shall contain cigarettes in lots of
8 five, ten, twenty or twenty-five.

9 F. Unless the requirements of this section are
10 waived pursuant to Section 7-12-6 NMSA 1978, a tax stamp shall
11 be affixed to each package of cigarettes subject to the
12 cigarette tax, a tax-credit stamp shall be affixed to each
13 package of cigarettes subject to a qualifying tribal cigarette
14 tax and a tax-exempt stamp shall be affixed to each package of
15 cigarettes not subject to the cigarette tax pursuant to Section
16 7-12-4 NMSA 1978.

17 ~~[G. A tax-exempt stamp or tax-credit stamp is not~~
18 ~~an excise tax stamp for purposes of determining units sold~~
19 ~~pursuant to Section 6-4-12 NMSA 1978.~~

20 H.] G. Stamps shall be affixed inside the
21 boundaries of New Mexico, unless the department has granted a
22 license allowing a person to affix stamps outside New Mexico."

23 SECTION 4. Section 7-12-12 NMSA 1978 (being Laws 1971,
24 Chapter 77, Section 12, as amended) is amended to read:

25 "7-12-12. SHIPMENT OF UNSTAMPED CIGARETTES IN NEW

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1 MEXICO.--

2 A. A person that ships unstamped packages of
3 cigarettes into New Mexico other than to a distributor shall
4 first file a notice of the shipment with the department. The
5 requirements of this subsection apply to a person that uses the
6 services of a common or contract carrier to deliver unstamped
7 packages of cigarettes to other than a licensed distributor in
8 New Mexico.

9 B. A person that transports unstamped packages of
10 cigarettes into or within New Mexico shall carry, in the
11 transporting vehicle, invoices or equivalent documents
12 applicable to all cigarettes in the shipment. The invoices or
13 documents shall show:

14 (1) the name and address of the consignor or
15 seller;

16 (2) the name and address of the consignee or
17 purchaser; and

18 (3) the quantity [~~of each~~], manufacturer and
19 brand of all cigarettes transported.

20 C. The provisions of Subsections A and B of this
21 section shall not apply to shipments using a common or contract
22 carrier transporting cigarettes through New Mexico for delivery
23 to [~~another~~] a location outside of New Mexico pursuant to a
24 proper bill of lading or freight bill that states the quantity,
25 source and destination of the cigarettes.

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1 D. A common or contract carrier transporting
2 cigarettes to a distributor pursuant to a proper bill of lading
3 or freight bill that states the quantity of cigarettes, the
4 name and address of the consignor or seller of the cigarettes
5 and the name and address of the consignee or purchaser of the
6 cigarettes shall not be in violation of the provisions of
7 Subsection A of this section.

8 [~~D.~~] E. The department may, by regulation, require
9 and prescribe the contents of reports to be filed with the
10 department by persons transporting unstamped packages of
11 cigarettes in New Mexico."

12 SECTION 5. Section 7-12-13.1 NMSA 1978 (being Laws 2006,
13 Chapter 91, Section 16) is amended to read:

14 "7-12-13.1. CIVIL PENALTIES.--

15 A. Whoever [~~knowingly~~] fails, neglects or refuses
16 to comply with the provisions of the Cigarette Tax Act shall be
17 liable for, in addition to any other penalty provided in that
18 act:

19 (1) for a first offense, a penalty of up to
20 [~~one thousand dollars (\$1,000)~~] two thousand dollars (\$2,000);

21 (2) for a second offense, a penalty of not
22 less than [~~one thousand five hundred dollars (\$1,500)~~] three
23 thousand dollars (\$3,000) and no more than [~~two thousand five~~
24 ~~hundred dollars (\$2,500)~~] five thousand dollars (\$5,000); and

25 (3) for a third or subsequent offense, a

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1 penalty of not less than [~~five thousand dollars (\$5,000)~~] ten
2 thousand dollars (\$10,000).

3 B. Whoever fails to pay a tax imposed pursuant to
4 the Cigarette Tax Act at the time the tax is due shall, in
5 addition to any other penalty provided in that act, be liable
6 for a penalty of five hundred percent of the tax due but
7 unpaid.

8 C. Contraband cigarettes in New Mexico and the
9 equipment used to manufacture, package or stamp them are
10 subject to seizure, forfeiture and destruction by the
11 department, its revenue officers or its agents or by other
12 state or local peace officers.

13 D. Counterfeit stamps for use in New Mexico in the
14 possession of any person and the equipment used to produce them
15 are subject to seizure by the department, its revenue officers
16 or its agents or by other state or local peace officers."

17 SECTION 6. Section 7-12-13.2 NMSA 1978 (being Laws 2006,
18 Chapter 91, Section 17, as amended) is amended to read:

19 "7-12-13.2. CRIMINAL OFFENSES--CRIMINAL PENALTIES--
20 SEIZURE AND DESTRUCTION OF EVIDENCE.--

21 A. Whoever violates a provision of the Cigarette
22 Tax Act or a rule adopted pursuant to that act is guilty of a
23 [~~misdemeanor~~] fourth degree felony and shall be sentenced in
24 accordance with the provisions of Section [~~31-19-1~~] 31-18-15
25 NMSA 1978.

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1 B. Whoever, with intent to defraud, fails to comply
2 with a licensing, reporting or stamping requirement of the
3 Cigarette Tax Act or with a licensing, reporting or stamping
4 rule adopted pursuant to that act is guilty of a [~~fourth~~] third
5 degree felony and upon conviction shall be sentenced pursuant
6 to the provisions of Section 31-18-15 NMSA 1978.

7 C. Whoever packages cigarettes for sale in New
8 Mexico or whoever sells cigarettes in New Mexico, in packages
9 of other than five, ten, twenty or twenty-five cigarettes is:

10 (1) for the first offense, guilty of a
11 [~~misdemeanor~~] fourth degree felony and when convicted shall be
12 sentenced pursuant to Section [~~31-19-1~~] 31-18-15 NMSA 1978; and

13 (2) for the second or subsequent offense,
14 guilty of a [~~fourth~~] third degree felony and when convicted
15 shall be sentenced pursuant to Section 31-18-15 NMSA 1978.

16 D. Whoever purchases or otherwise knowingly obtains
17 counterfeit stamps or whoever produces, uses or causes
18 counterfeit stamps to be used is guilty of a [~~fourth~~] third
19 degree felony and upon conviction shall be sentenced pursuant
20 to the provisions of Section 31-18-15 NMSA 1978.

21 E. Whoever sells or possesses for the purpose of
22 sale contraband cigarettes is in violation of the Cigarette Tax
23 Act and shall have the product and related equipment seized.
24 If convicted of selling or possessing for sale contraband
25 cigarettes, the person shall be sentenced as follows:

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1 (1) a violation with a quantity of fewer than
2 two cartons of contraband cigarettes, or the equivalent, is a
3 [~~petty~~] misdemeanor and is punishable in accordance with the
4 provisions of Section 31-19-1 NMSA 1978;

5 (2) a first violation with a quantity of two
6 cartons or more of contraband cigarettes, or the equivalent, is
7 a [~~misdemeanor~~] fourth degree felony and is punishable in
8 accordance with the provisions of Section [~~31-19-1~~] 31-18-15
9 NMSA 1978; and

10 (3) a second or subsequent violation with a
11 quantity of two cartons or more of contraband cigarettes, or
12 the equivalent, is a [~~fourth~~] third degree felony and is
13 punishable by a fine not to exceed [~~fifty thousand dollars~~
14 ~~(\$50,000)~~] one hundred thousand dollars (\$100,000) or
15 imprisonment for a definite term not to exceed eighteen months,
16 or both, and shall also result in the revocation by the
17 department of the manufacturer's or distributor's license, if
18 any.

19 F. Contraband cigarettes or counterfeit stamps
20 seized by the department or by a law enforcement agency shall
21 be retained as evidence to the extent necessary. Contraband
22 cigarettes or counterfeit stamps no longer needed as evidence
23 shall be destroyed.

24 G. Prosecution for a violation of a provision of
25 this section does not preclude prosecution under other

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1 applicable laws."

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