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SENATE BILL 264

**50TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2011**

INTRODUCED BY

Clinton D. Harden

AN ACT

RELATING TO TAXATION; PROVIDING FOR CIGARETTE EXCISE TAX TO BE PAID BY A CIGARETTE VENDOR ON TRIBAL LAND ON SALES OF CIGARETTES TO PERSONS WHO ARE NOT TRIBAL MEMBERS; LIMITING TAX-CREDIT STAMPS TO SALES TO TRIBAL MEMBERS; ELIMINATING THE REQUIREMENT FOR A TRIBE TO IMPOSE A TRIBAL CIGARETTE TAX; COUNTING TRIBAL MEMBER SALES AS "UNITS SOLD" FOR TOBACCO ESCROW PAYMENTS.

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 6-4-13.2 NMSA 1978:

A. "adjusted for inflation" means increased in accordance with the formula for inflation adjustment set forth

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1 in Exhibit C to the Master Settlement Agreement;

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

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

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

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

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

23 (3) any roll of tobacco wrapped in any  
24 substance containing tobacco [~~which~~] that, because of its  
25 appearance, the type of tobacco used in the filler or its

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

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

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

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

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1           H. "releasing parties" means "Releasing Parties" as  
2 that term is defined in the Master Settlement Agreement;

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

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

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

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

25           The term "tobacco product manufacturer" shall not include

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1 an affiliate of a tobacco product manufacturer unless such  
2 affiliate itself falls within Paragraph (1), (2) or (3) of this  
3 subsection; and

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

15 (1) the excise tax due from cigarettes sold  
16 bearing tax stamps pursuant to the Cigarette Tax Act;

17 (2) ounces of "roll-your-own" tobacco sold on  
18 which the tobacco products tax is due pursuant to the Tobacco  
19 Products Tax Act; or

20 (3) cigarettes sold bearing tax-exempt or tax-  
21 credit stamps pursuant to the Cigarette Tax Act."

22 SECTION 2. A new Section 6-4-13.2 NMSA 1978 is enacted to  
23 read:

24 "6-4-13.2. [NEW MATERIAL] RULES--AMOUNT OF STATE EXCISE  
25 TAX PAID ON CIGARETTES OF TOBACCO PRODUCT MANUFACTURER.--The

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1 secretary of taxation and revenue shall adopt rules regarding  
2 how to determine:

3 A. the amount of state excise tax paid each year on  
4 the cigarettes of a tobacco product manufacturer and on the  
5 number of ounces of "roll-your-own" tobacco sold; and

6 B. the number of cigarettes bearing tax-exempt or  
7 tax-credit stamps that are sold."

8 SECTION 3. Section 7-12-2 NMSA 1978 (being Laws 1971,  
9 Chapter 77, Section 2, as amended) is amended to read:

10 "7-12-2. DEFINITIONS.--As used in the Cigarette Tax Act:

11 A. "cigarette" means:

12 (1) any roll of tobacco or any substitute for  
13 tobacco wrapped in paper or in any substance not containing  
14 tobacco;

15 (2) any roll of tobacco that is wrapped in any  
16 substance containing tobacco, other than one hundred percent  
17 natural leaf tobacco, which, because of its appearance, the  
18 type of tobacco used in the filler, its packaging and labeling,  
19 or its marketing and advertising, is likely to be offered to,  
20 or purchased by, consumers as a cigarette, as described in  
21 Paragraph (1) of this subsection;

22 (3) bidis and kreteks; or

23 (4) any other roll of tobacco that is defined  
24 as a "cigarette" in Subsection D of Section 6-4-12 NMSA 1978;

25 B. "close of business" means that time when a

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1 business ceases to operate for the remainder of the day or  
2 12:00 a.m., if the business is open and conducting business at  
3 12:00 a.m.;

4 C. "contraband cigarettes" means cigarette packages  
5 with counterfeit stamps, counterfeit cigarettes, cigarettes  
6 that have false or fraudulent manufacturing labels, cigarettes  
7 not sold in packages of five, ten, twenty or twenty-five,  
8 cigarette packages without the tax, tax-credit or tax-exempt  
9 stamps required by the Cigarette Tax Act and cigarettes  
10 produced by a manufacturer or in a brand family not included in  
11 the directory;

12 D. "department" means the taxation and revenue  
13 department, the secretary of taxation and revenue or any  
14 employee of the department exercising authority lawfully  
15 delegated to that employee;

16 E. "directory" means a listing of tobacco product  
17 manufacturers and brand families that is developed, maintained  
18 and published by the attorney general under the Tobacco Escrow  
19 Fund Act;

20 F. "distributor" means a person licensed pursuant  
21 to the Cigarette Tax Act to sell or distribute cigarettes in  
22 New Mexico. "Distributor" does not include:

23 (1) a retailer;

24 (2) a cigarette manufacturer, export warehouse  
25 proprietor or importer with a valid permit pursuant to 26

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1 U.S.C. 5713, if that person sells cigarettes in New Mexico only  
2 to distributors that hold valid licenses under the laws of a  
3 state or sells to an export warehouse proprietor or to another  
4 manufacturer; or

5 (3) a common or contract carrier transporting  
6 cigarettes pursuant to a bill of lading or freight bill, or a  
7 person who ships cigarettes through the state by a common or  
8 contract carrier pursuant to a bill of lading or freight bill;

9 G. "license" means a license granted pursuant to  
10 the Cigarette Tax Act that authorizes the holder to conduct  
11 business as a manufacturer or distributor of cigarettes;

12 H. "manufacturer" means a person that manufactures,  
13 fabricates, assembles, processes or labels a cigarette or that  
14 imports from outside the United States, directly or indirectly,  
15 a finished cigarette for sale or distribution in the United  
16 States;

17 I. "master settlement agreement" means the  
18 settlement agreement and related documents entered into on  
19 November 23, 1998 by the state and leading United States  
20 tobacco product manufacturers;

21 J. "package" means an individual pack, box or other  
22 container; "package" does not include a container that itself  
23 contains other containers, such as a carton of cigarettes;

24 [~~K. "qualifying tribal cigarette tax" means an~~  
25 ~~excise, privilege or similar tax at a minimum rate of:~~

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1                   ~~(1) three and seventy-five hundredths cents~~  
2  ~~(\$.0375) per cigarette if the cigarettes are packaged in lots~~  
3  ~~of twenty or twenty-five;~~

4                   ~~(2) seven and one-half cents (\$.075) per~~  
5  ~~cigarette if the cigarettes are packaged in lots of ten; or~~

6                   ~~(3) fifteen cents (\$.15) per cigarette if the~~  
7  ~~cigarettes are packaged in lots of five;~~

8                   ~~L.]~~ K. "retailer" means a person, whether located  
9 within or outside of New Mexico, that sells cigarettes at  
10 retail to a consumer in New Mexico and the sale is not for  
11 resale;

12                   ~~[M.]~~ L. "stamp" means an adhesive label issued and  
13 authorized by the department to be affixed to cigarette  
14 packages for excise tax purposes and upon which is printed a  
15 serial number and the words "State of New Mexico" and "tobacco  
16 tax";

17                   ~~[N.]~~ M. "tax stamp" means a stamp that has a  
18 specific cigarette tax value pursuant to the Cigarette Tax Act;

19                   ~~[O.]~~ N. "tax-credit stamp" means a stamp that  
20 indicates the cigarette package bearing the stamp is to be or  
21 has been sold to a tribal member by a retailer located on a  
22 tribe's land; ~~[of a tribe that has imposed a qualifying tribal~~  
23  ~~cigarette tax;~~

24                   ~~P.]~~ O. "tax-exempt stamp" means a stamp that  
25 indicates a tax-exempt status pursuant to the Cigarette Tax

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1 Act;

2 [Q-] P. "tribal member" means a person who is  
3 recognized by the governing body of an Indian tribe to be an  
4 enrolled member of that Indian tribe;

5 [R-] Q. "tribe" means a federally recognized Indian  
6 nation, tribe or pueblo located wholly or partially in New  
7 Mexico, including:

8 (1) a political subdivision, agency or  
9 department of a tribe;

10 (2) an incorporated or unincorporated  
11 enterprise of a tribe, one or more tribes or a political  
12 subdivision of a tribe; or

13 (3) a corporation considered to be an Indian  
14 or a tribe by the federal government or the state; and

15 [S-] R. "tribe's land" means the reservation,  
16 pueblo grant or trust land of a tribe and property held by the  
17 United States in trust jointly for the nineteen New Mexico  
18 Indian pueblos pursuant to Public Law 95-232."

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

21 "7-12-4. EXEMPTION.--

22 A. Exempted from the cigarette tax are sales of  
23 cigarettes:

24 (1) to the United States or any agency or  
25 instrumentality thereof or the state of New Mexico or any

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1 political subdivision thereof;

2 (2) to a tribe, or to a tribal member licensed  
3 by the governing body of a tribe for ~~[use or]~~ sale to a tribal  
4 member on that tribe's land ~~[if the tribe has in place a~~  
5 ~~qualifying tribal cigarette tax]~~; and

6 (3) sales that the state is prohibited from  
7 taxing by a provision of the United States constitution or the  
8 constitution of ~~[the state of]~~ New Mexico.

9 B. As used in this section, the term "agency or  
10 instrumentality" does not include persons who are agents or  
11 instrumentalities of the United States for a particular purpose  
12 or only when acting in a particular capacity or corporate  
13 agencies or instrumentalities."

14 SECTION 5. Section 7-12-4.1 NMSA 1978 (being Laws 2010  
15 (2nd S.S.), Chapter 5, Section 7) is amended to read:

16 "7-12-4.1. CIGARETTE TAX--TRIBAL SALES--TAX-CREDIT  
17 STAMPS.--

18 A. A distributor shall obtain from the department  
19 tax-credit stamps to affix to packages of cigarettes sold to a  
20 tribe or a tribal member licensed or otherwise approved by a  
21 tribe to sell cigarettes under the authority of the tribe on  
22 that tribe's land ~~[provided that the tribe has certified to the~~  
23 ~~department that the tribe has in effect a qualifying tribal~~  
24 ~~cigarette tax]~~ for resale to a tribal member.

25 B. Cigarettes bearing a tax-credit stamp sold to a

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1 tribal member by a retailer of cigarettes licensed or otherwise  
2 approved to sell cigarettes by a tribe [~~or tribal member~~  
3 ~~bearing a tax-credit stamp~~] shall be sold for use or sale on  
4 that tribe's land or on the land of another tribe or for use  
5 but not for resale in the state or at a location off any  
6 tribe's land."

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

9 "7-12-5. AFFIXING STAMPS.--

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

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

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

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1 permit pursuant to 26 U.S.C. 5713.

2 D. A distributor shall not affix a stamp to a  
3 package of cigarettes of a manufacturer or a brand family that  
4 is not included in the directory or sell, offer or possess for  
5 sale 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~~] intended for sale to tribal members by a person licensed  
15 or otherwise authorized by a tribe to sell cigarettes on that  
16 tribe's land and a tax-exempt stamp shall be affixed to each  
17 package of cigarettes not subject to the cigarette tax pursuant  
18 to Section 7-12-4 NMSA 1978 and not intended for sale to a  
19 tribal member on the tribal member's tribe's land.

20 G. A tax-exempt stamp [~~or tax-credit stamp~~] is not  
21 an excise tax stamp for purposes of determining units sold  
22 pursuant to Section 6-4-12 NMSA 1978. Cigarettes bearing a  
23 tax-credit stamp shall be included in the determination of  
24 units sold pursuant to Section 6-4-12 NMSA 1978.

25 H. Stamps shall be affixed inside the boundaries of

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1 New Mexico, unless the department has granted a license  
2 allowing a person to affix stamps outside New Mexico."

3 SECTION 7. EFFECTIVE DATE.--The effective date of the  
4 provisions of this act is July 1, 2011.