

STATE OF OKLAHOMA

2nd Session of the 50th Legislature (2006)

SENATE BILL 1096

By: Adelson

AS INTRODUCED

An Act relating to revenue and taxation; amending 68 O.S. 2001, Section 301, as amended by Section 1, Chapter 475, O.S.L. 2003, Section 346, as amended by Section 8, Chapter 322, O.S.L. 2004, 348, 349, 350 and 351(68 O.S. Supp. 2005, Sections 301 and 346), which relate to taxation of cigarettes and tobacco products sold by Indian tribes; modifying definitions; deleting certain legislative findings; making legislative findings regarding collection of taxes on certain sales; modifying legislative intent; removing certain authority of the Governor; making certain sales by wholesalers subject to certain terms and conditions; imposing certain requirements on Indian tribes or nations; modifying definitions; modifying rate of taxation on certain sales; modifying conditions under which certain tribes can claim refunds; modifying statutory references; modifying type of stamp required on cigarettes; repealing 68 O.S. 2001, Section 347, which relates to exemption from certain provisions of law for certain tribes; providing an effective date; and declaring an emergency.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 68 O.S. 2001, Section 301, as amended by Section 1, Chapter 475, O.S.L. 2003 (68 O.S. Supp. 2005, Section 301), is amended to read as follows:

Section 301. For purposes of Section 301 et seq. of this title:

1. The term "cigarette" is defined to mean and include all rolled tobacco or any substitute therefor, wrapped in paper or any substitute therefor and weighing not to exceed three (3) pounds per thousand cigarettes;

2. The term "person" is defined to mean and include any individual, company, partnership, joint venture, joint agreement, association (mutual or otherwise), limited liability company, corporation, estate, trust, business trust receiver, or trustee

appointed by any state or federal court, or otherwise, syndicate, or any political subdivision of the state or combination acting as a unit, in the plural or singular number;

3. The term "wholesaler", "distributor" and/or "jobber" is defined to mean and include a person, firm or corporation organized and existing, or doing business, primarily to sell cigarettes to, and render service to retailers in the territory such person, firm or corporation chooses to serve, and that:

- a. purchases cigarettes directly from the manufacturer,
- b. at least seventy-five percent (75%) of whose gross sales are made at wholesale,
- c. handles goods in wholesale quantities and sells through salespersons, advertising and/or sales promotion devices,
- d. carries at all times at its principal place of business a representative stock of cigarettes for sale, and
- e. comes into the possession of cigarettes for the purpose of selling them to retailers or to persons outside or within the state who might resell or retail such cigarettes to consumers.

In addition to the foregoing, and irrespective of the percentage or type of sales, the term "wholesaler", "distributor" and/or "jobber" shall also include all purchasers of cigarettes making purchases directly from the manufacturer for distribution at wholesale or retail sale and this shall not affect the requirements relating to retail licenses;

4. The term "retailer" is defined to be:

- a. a person who comes into the possession of cigarettes for the purpose of selling, or who sells them at retail, or

- b. a person, not coming within the classification of wholesaler, distributor and/or jobber as herein defined, having possession of more than one thousand cigarettes;

5. The term "consumer" is defined to be a person who receives or who in any way comes into possession of cigarettes for the purpose of consuming them, giving them away, or disposing of them in a way other than by sale, barter or exchange;

6. The term "Tax Commission" is defined to mean the Oklahoma Tax Commission;

7. The term "sale" and/or "sales" is hereby defined to be and declared to include sales, barter, exchanges and every other manner, method and form of transferring the ownership of personal property from one person to another, and is also declared to be the use or consumption in this state in the first instance of cigarettes received from without the state or of any other cigarettes upon which the tax has not been paid. The term "first sale" shall mean and include the first sale or distribution of cigarettes in intrastate commerce or the first use or consumption of cigarettes within this state;

8. The term "stamp" as herein used shall mean the stamp or stamps by use of which:

- a. the tax levied pursuant to the provisions of Section 301 et seq. of this title is paid, or

- b. the tax levied pursuant to the provisions of Section 349 of this title is paid, ~~or~~

- ~~c. the payment in lieu of taxes authorized pursuant to a compact entered into by the State of Oklahoma and a federally recognized Indian tribe or nation pursuant to the provisions of subsection C of Section 346 of this title is paid;~~

9. The term "drop shipment" shall mean and include any delivery of cigarettes received by any person within this state when payment for such cigarettes is made to the shipper or seller by or through a person other than the consignee;

10. The term "distributing agent" shall mean and include every person in this state who acts as an agent of any person outside the state by receiving cigarettes in interstate commerce and storing such cigarettes subject to distribution or delivery upon order from the person outside the state to distributors, wholesale dealers and retail dealers, or to consumers. The term "distributing agent" shall also mean and include any person who solicits or takes orders for cigarettes to be shipped in interstate commerce to a person in this state by a person residing outside of Oklahoma, the tax not having been paid on such cigarettes;

11. The term "vending machine" shall mean and include any coin operating machine, contrivance, or device, by means of which cigarettes are sold or dispensed in their original container;

12. The term "use" means and includes the exercise of any right or power over cigarettes incident to the ownership or possession thereof, except that it shall not include the sale of cigarettes in the regular course of business;

13. a. The term "delivery sale" means any sale of cigarettes to a consumer in Oklahoma where either:
- (1) the purchaser submits the order for such sale by means of a telephonic or other method of voice transmission, the mails or any other delivery service, or the Internet or other online service, or
 - (2) the cigarettes are delivered by use of the mails or other delivery service.

b. A sale of cigarettes which satisfies the criteria in subparagraph a of this paragraph shall be a delivery

sale regardless of whether the seller is located within or outside of Oklahoma.

- c. A sale of cigarettes not for personal consumption to a person who is a wholesale dealer or a retail dealer shall not be a delivery sale.
- d. For purposes of this paragraph, any sale of cigarettes to an individual in Oklahoma shall be treated as a sale to a consumer unless such individual is licensed as a distributor or retailer of cigarettes by the Tax Commission;

14. The term "delivery service" means any person, including but not limited to the United States Postal Service, that is engaged in the commercial delivery of letters, packages, or other containers;

15. The term "manufacturer" means any person who manufactures, fabricates, assembles, processes, or labels a finished cigarette; or imports, either directly or indirectly, a finished cigarette for sale or distribution in this state;

16. The term "mails" or "mailing" means the shipment of cigarettes through the United States Postal Service;

17. The term "shipping container" means a container in which cigarettes are shipped in connection with a delivery sale; and

18. The term "shipping documents" means bills of lading, airbills, or any other documents used to evidence the undertaking by a delivery service to deliver letters, packages, or other containers.

SECTION 2. AMENDATORY 68 O.S. 2001, Section 346, as amended by Section 8, Chapter 322, O.S.L. 2004 (68 O.S. Supp. 2005, Section 346), is amended to read as follows:

Section 346. A. The Legislature finds that:

1. Federal law recognizes the right of Indian tribes or nations to engage in sales of cigarettes and tobacco products to their members free of state taxation; and

2. ~~The doctrine of tribal sovereign immunity prohibits the State of Oklahoma from bringing a lawsuit against an Indian tribe or nation to compel the tribe or nation to collect state taxes on sales made in Indian country to either members or nonmembers of the tribe or nation without a waiver of immunity by the tribe or nation or congressional abrogation of the doctrine; and~~

3. The Supreme Court of the United States, in "Oklahoma Tax Commission v. Citizen Band Pottawatomie Indian Tribe of Oklahoma", suggested that a state may provide other methods of collection of state taxes on sales of cigarettes and tobacco products made by Indian tribes or nations to persons who are not members of the tribe or nation, such as ~~entering into mutually satisfactory agreements with Indian tribes or nations~~ collecting the tax from cigarette wholesalers or by requiring the Indian tribes or nations to collect and remit to the state all state taxes applicable to sales to persons who are not members of the tribe or nation. This suggestion was reaffirmed by the Court's holding in Department of Taxation & Finance v. Milhelm Attea & Bros. in 1994.

B. It is the intent of the Legislature to establish a system of state taxation of sales of cigarettes and tobacco products made by federally recognized Indian tribes or nations or their licensees, ~~other than such tribes or nations which have entered into a compact with the State of Oklahoma pursuant to the provisions of subsection C of this section, under which the rate of payments in lieu of state taxes is less than the rate of state taxes on other sales of cigarettes and tobacco products~~ in order to allow such tribes or nations or their licensees to make sales of cigarettes and tobacco products to enrolled tribal members free of state taxation while collecting all state taxes applicable for purchases of tobacco products from such tribes or nations or their licensees by nontribal member purchasers.

C. ~~The Governor is authorized by this enactment to enter into cigarette and tobacco products tax compacts on behalf of the State of Oklahoma with the federally recognized Indian tribes or nations of this state. The compacts shall set forth the terms of agreement between the sovereign parties regulating sale of cigarettes and tobacco products by the tribes or nations or their licensees in Indian country. All~~ No sales in Indian country by ~~these compacting~~ tribes or nations and their licensees shall be exempt from the taxes levied pursuant to the provisions of Section 301 et seq., Section 401 et seq. and Section 1350 et seq. of Title 68 of the Oklahoma Statutes and Sections 349 and 425 of this title~~7~~. All sales of cigarettes and tobacco products to Indian tribes or nations and their licensees by wholesalers doing business in the State of Oklahoma shall be subject to the following terms and conditions:

1. ~~A payment in lieu of state sales and excise taxes, as provided for in said compact, shall be paid to the State of Oklahoma by the tribes or nations, their licensees or their wholesalers upon purchase of all cigarettes and tobacco products intended for resale in Indian country by the tribes or nations or their licensees~~ All cigarettes and tobacco products sold by wholesalers doing business in the State of Oklahoma to Indian tribes or nations and their licensees shall bear tax stamps evidencing that all state taxes thereon have been paid to the state, except for a percentage of each such sale equal to the percentage of the population of Oklahoma representing American Indians (one race) as set forth in the most recent federal decennial census as certified by the Oklahoma Tax Commission which shall bear restricted sale stamps evidencing that the sale of such cigarettes and tobacco products may be sold only to enrolled tribal members;

2. ~~All cigarettes and tobacco products sold or held for sale to the public, without distinction between member and nonmember sales, shall bear a payment in lieu of tax stamp evidencing that payment in~~

~~lieu of state taxes has been paid to the state. State and tribal officials may provide for use of a single joint stamp evidencing payment of both the payment in lieu of tax as specified in a compact pursuant to the provisions of this section and any tax levied by a tribe or nation.~~ All Indian tribes or nations and their licensees shall maintain for state inspection records of all nontaxable sales of cigarettes and tobacco products to members of Indian tribes or nations, which record as to each sale to an Indian purchaser shall include number of packages or cartons of cigarettes or tobacco products sold, purchaser's name and address, tribal affiliation, form of tribal membership verification presented by the Indian purchaser and his or her tribal identification number, provided that any sale for which any part of this required information is missing shall be deemed a taxable sale to a nonmember and the tribe or nation or its licensee shall be liable for the collection and remittance to the state of all unpaid taxes due on such sale;

~~3. In the event that a compacting tribe or nation fails to comply with all terms and conditions of the compact including, but not limited to, requirements to include all state taxes required by the terms of the compact to be collected by the tribe or nation in the price of its cigarettes or tobacco products, the tribe or nation shall not be eligible to receive any payment due from the state pursuant to the terms of the compact for the tax reporting period during which the noncompliance occurred;~~

~~4. Records of all sales of cigarettes and tobacco products to the tribes or nations and their licensees shall be kept by all wholesalers doing business in the State of Oklahoma and shall be made available for inspection by state officials on a timely basis. Copies of all invoices of wholesale sales of cigarettes or tobacco products to tribally owned or licensed retail stores shall be forwarded by the wholesaler to the Oklahoma Tax Commission; and~~

~~5.~~ 4. For purposes of ~~a compact pursuant to~~ the provisions of this section, the term "tribal licensee" shall only extend to:

- a. members of the tribe or nation, and
- b. business entities in which the tribe or nation or tribal members have a majority ownership interest.

D. In addition to any other authority granted by law, the Tax Commission shall regularly conduct an audit of wholesalers, distributors, jobbers and warehousemen selling cigarettes or tobacco products to a federally recognized Indian tribe or nation or a tribally owned or licensed store to determine if the correct amount of tax payable under this act has been collected and to determine compliance with any and all compacts.

SECTION 3. AMENDATORY 68 O.S. 2001, Section 348, is amended to read as follows:

Section 348. As used in Sections 346 through 352 of this title:

1. "Tribally owned or licensed store" means a store or place of business which is owned and operated by a federally recognized Indian tribe or nation, ~~other than a federally recognized Indian tribe or nation which has entered into a compact with the State of Oklahoma pursuant to the provisions of subsection C of Section 346 of this title during the period that such compact is effective,~~ on Indian country within the territorial jurisdiction of that tribe or nation or which is duly licensed by such tribe or nation pursuant to tribal laws or ordinances to conduct business located on Indian country within the territorial jurisdiction of that tribe or nation;
2. "Federally recognized Indian tribe or nation" means an Indian tribal entity which is recognized by the United States Bureau of Indian Affairs as having a special relationship with the United States;
3. "Indian country" means:

- a. land held in trust by the United States of America for the benefit of a federally recognized Indian tribe or nation,
- b. all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, including rights-of-way running through the reservation,
- c. all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
- d. all Indian allotments, the Indian titles to which have not been extinguished, including individual allotments held in trust by the United States or allotments owned in fee by individual Indians subject to federal law restrictions regarding disposition of said allotments and including rights-of-way running through the same;

4. "Member of the tribe" or "tribal member" means a person who is duly enrolled within the membership of the federally recognized Indian tribe or nation which owns or licenses the store;

5. "Nonmember of the tribe" or "nontribal member" means, with respect to a particular Indian tribe or nation, any person who is not a duly enrolled member of that tribe or nation, and shall include any person who is a member of another Indian tribe or nation but not a member of that tribe or nation;

6. "Unstamped cigarettes" means packages of cigarettes which bear no evidence of a tax stamp or restricted sale stamp required by state law;

7. "Contraband cigarettes" means unstamped cigarettes which are required by the provisions of Sections ~~348~~ 346 through 351 of this title or Section 301 et seq. of this title to bear stamps and which

are in the possession, custody or control of any person, for the purpose of being consumed, sold, offered for sale or consumption or transported to any person in this state other than a wholesaler licensed under Section 304 of this title; provided, contraband cigarettes shall not include unstamped cigarettes sold to veterans' hospitals, to state-operated domiciliary homes for veterans or to the United States for sale or distribution by said entities in accordance with Sections 321 through 324 of this title;

8. "Stamped cigarettes" means packages of cigarettes which bear a tax stamp or restricted sale stamp required by state law;

9. "Commission" means the Oklahoma Tax Commission; and

10. "Person" shall include any individual, company, partnership, joint venture, joint agreement, association (mutual or otherwise), limited liability company, corporation, trust, estate, business trust receiver or trustee appointed by any state or federal court, syndicates or any combination acting as a unit, in the plural or singular number.

SECTION 4. AMENDATORY 68 O.S. 2001, Section 349, is amended to read as follows:

Section 349 A. ~~There is hereby levied upon the sale of cigarettes at a tribally owned or licensed store a tax in the amount of seventy-five percent (75%) of the cigarette excise taxes imposed by Section 301 et seq. of Title 68 of the Oklahoma Statutes, which tax shall be in lieu of all sales and excise taxes on such cigarettes.~~

~~B.~~ A federally recognized Indian tribe or nation may receive a refund for a portion of the tax imposed pursuant to the provisions of this section if it can provide sufficient documentation that sales of cigarettes to its tribal members ~~exceed twenty-five percent (25%) of its total sales of cigarettes~~ exceeded its allotment of nontaxed cigarettes or tobacco products shipped to it. The amount of the refund shall be the amount of tax paid which is attributable

to sales of cigarettes made to tribal members ~~which is in excess of twenty-five percent (25%) of the tribe's or nation's total sales of cigarettes.~~ Refunds shall be paid quarterly. The Tax Commission shall promulgate rules and regulations to administer the provisions of this subsection.

~~C.~~ B. All cigarettes which are sold or held for sale at a tribally owned or licensed store shall have affixed thereto a tax or restricted sale stamp or stamps evidencing ~~payment of the in lieu tax required by subsection A of this section~~ that they are lawfully stamped cigarettes.

~~D.~~ C. It shall be unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute or purchase contraband cigarettes. Any person who engages in shipping, transporting, receiving, possessing, selling, distributing or purchasing contraband cigarettes shall, upon conviction, be guilty of a misdemeanor punishable by a fine of not more than One Thousand Dollars (\$1,000.00). Any person convicted of a second or subsequent violation hereof shall be guilty of a felony and shall be punishable by a fine of not more than Five Thousand Dollars (\$5,000.00), by a term of imprisonment in the State Penitentiary for not more than two (2) years, or by both such fine and imprisonment.

~~E.~~ D. Any person who knowingly engages in shipping, transporting, receiving, possessing, selling, distributing or purchasing contraband cigarettes shall be subject to the forfeiture of property as is provided by Section 305 of ~~Title 68 of the Oklahoma Statutes~~ this title and assessment of penalty as provided thereby and assessment for any delinquent taxes found to be owing.

SECTION 5. AMENDATORY 68 O.S. 2001, Section 350, is amended to read as follows:

Section 350. A. Every wholesaler, jobber or warehouseman doing business within this state and required to secure a license as provided in Section 304 of ~~Title 68 of the Oklahoma Statutes~~ this

title may sell cigarettes to tribally owned or licensed stores in this state. It shall be the duty of the wholesaler, jobber or warehouseman to affix the tax stamp or restricted sale stamp required by ~~Section 4 of this act~~ Section 346 of this title to cigarette inventory sold to a tribally owned or licensed store.

B. Tribally owned or licensed stores may only purchase, receive, stock, possess, sell or distribute stamped cigarettes.

SECTION 6. AMENDATORY 68 O.S. 2001, Section 351, is amended to read as follows:

Section 351. A. All unstamped cigarettes sold or shipped to tribally owned or licensed stores in this state by wholesalers, jobbers or warehousemen not licensed by this state pursuant to the provisions of Section 304 of ~~Title 68 of the Oklahoma Statutes~~ this title for the purpose of selling or consuming unstamped cigarettes in this state in violation of this act shall be subject to seizure of the shipments and forfeiture of the inventory pursuant to the provisions of Section 305 of ~~Title 68 of the Oklahoma Statutes~~ this title.

B. Any peace officer of this state, including but not limited to officers of the Department of Public Safety or the Oklahoma State Bureau of Investigation, any sheriff, any salaried deputy sheriff or any municipal police officer is authorized to stop any vehicle upon any road or highway of this state in order to inspect the bill of lading or to take such action as may be necessary to determine if unstamped cigarettes are being sold or shipped in violation of the provisions of this section. Such officers shall also have the duty to cooperate with the Oklahoma Tax Commission to enforce the provisions of this act.

SECTION 7. REPEALER 68 O.S. 2001, Section 347 is hereby repealed.

SECTION 8. This act shall become effective July 1, 2006.

SECTION 9. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

50-2-2965

RWT

6/13/2015 8:21:28 AM