

CHAPTER 142

TAXATION

HOUSE BILL 23-1015

BY REPRESENTATIVE(S) Bird, Duran, Lindstedt, Snyder;
also SENATOR(S) Liston and Hansen, Ginal, Kolker, Rodriguez.

AN ACT**CONCERNING THE TAXATION OF TOBACCO PRODUCTS.**

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, **amend** 39-28.5-101 as follows:

39-28.5-101. Definitions. As used in this article 28.5, unless the context otherwise requires:

(1) "CONSUMER" MEANS ANY PERSON WHO HAS TITLE TO OR POSSESSION OF TOBACCO PRODUCTS FOR THE PERSON'S OWN USE OR CONSUMPTION IN THIS STATE AND NOT FOR RESALE.

~~(2)~~ (2) (a) "Delivery sale" means, EXCEPT AS PROVIDED IN SUBSECTION (2)(b) OF THIS SECTION, the sale of tobacco products to a consumer in this state when:

~~(a)~~ (I) The consumer submits an order for the tobacco products to a delivery seller for sale by means other than an over-the-counter sale on the delivery seller's premises, including, but not limited to, telephone or other voice transmission, the mail or other delivery service, or the internet or other online service; and

~~(b)~~ (II) The tobacco products are delivered when the seller is not in the physical presence of the consumer when the consumer obtains possession of the tobacco products by use of a common carrier, private delivery service, mail, or any other means.

(b) "DELIVERY SALE" DOES NOT INCLUDE THE SALE OF CIGARS OR PIPE TOBACCO.

Capital letters or bold & italic numbers indicate new material added to existing law; dashes through words or numbers indicate deletions from existing law and such material is not part of the act.

~~(1.2)~~ (3) "Delivery seller" means a person located outside of this state who makes delivery sales.

~~(1.4)~~ (4) "Department" means the department of revenue.

~~(1.5)~~ (5) "Distributing subcontractor" means every person, firm, limited liability company, partnership, or corporation who purchases tobacco products from a distributor for resale to a retailer in this state.

~~(2)~~ (6) "Distributor" means every person who:

(a) First receives tobacco products in this state;

(b) Sells tobacco products in this state and is primarily liable for the tobacco products tax on such products;

(c) First sells or offers for sale in this state tobacco products imported into this state from any other state or country; or

(d) Is a delivery seller.

~~(3)~~ (7) (a) "Manufacturer's list price" means, EXCEPT AS PROVIDED IN SUBSECTIONS (7)(b) AND (7)(c) OF THIS SECTION, the invoice price for which a manufacturer or supplier sells a tobacco product to a distributor OR REMOTE RETAIL SELLER exclusive of any discount or other reduction. IN THE CASE OF CIGARS AND PIPE TOBACCO, "MANUFACTURER'S LIST PRICE" IS ALSO KNOWN AS THE ACQUISITION COST AND IS ALSO EXCLUSIVE OF ANY DISCOUNT OR OTHER REDUCTION.

(b) FOR A DELIVERY OR REMOTE RETAIL SELLER, IF DETERMINING THE INVOICE PRICE DESCRIBED IN SUBSECTION (7)(a) OF THIS SECTION IS IMPRACTICABLE, THEN "MANUFACTURER'S LIST PRICE" MEANS THE AVERAGE OF THE ACTUAL PRICE PAID, EXCLUSIVE OF ANY REBATES OR DISCOUNTS APPLIED, FOR THE TOBACCO PRODUCT'S STOCK KEEPING UNIT DURING THE PRECEDING CALENDAR YEAR. THE DEPARTMENT MAY, BY WRITTEN NOTICE TO THE DELIVERY OR REMOTE RETAIL SELLER, PROSPECTIVELY REQUIRE A DELIVERY OR REMOTE RETAIL SELLER TO CALCULATE THE TAX ON THE INVOICE PRICE IF THE DEPARTMENT FINDS THAT THE DELIVERY OR REMOTE RETAIL SELLER'S USE OF THE AVERAGE PRICE PAID WAS FOR THE PURPOSE OF AVOIDING TAX.

(c) FOR A MANUFACTURER WHO IS ALSO A DELIVERY SELLER, A REMOTE RETAIL SELLER, OR A RETAILER, AND WHO SELLS TOBACCO PRODUCTS EXCLUSIVELY TO CONSUMERS AND NOT TO SUPPLIERS OR DISTRIBUTORS, "MANUFACTURER'S LIST PRICE" MEANS THE MANUFACTURER'S COST TO MANUFACTURE THE TOBACCO PRODUCT, WHICH INCLUDES THE MANUFACTURING OVERHEAD AND THE COST OF ALL DIRECT MATERIALS AND DIRECT LABOR USED.

~~(3.3)~~ (8) "Modified risk tobacco product" means any tobacco product for which the secretary of the United States department of health and human services has issued an order authorizing the product to be commercially marketed as a modified risk tobacco product in accordance with 21 U.S.C. sec. 387k, or any successor section.

~~(3-7)~~ (9) "Moist snuff" means any finely cut, ground, or powdered tobacco that is not intended to be smoked but does not include any finely cut, ground, or powdered tobacco that is intended to be placed in the nasal cavity.

(10) (a) "REMOTE RETAIL SALE" MEANS THE SALE OF CIGARS OR PIPE TOBACCO TO A CONSUMER IN THIS STATE WHEN:

(I) THE CONSUMER SUBMITS AN ORDER FOR THE CIGARS OR PIPE TOBACCO TO A REMOTE RETAIL SELLER FOR SALE BY MEANS OTHER THAN AN OVER-THE-COUNTER SALE ON THE REMOTE RETAIL SELLER'S PREMISES, INCLUDING, BUT NOT LIMITED TO, TELEPHONE OR OTHER VOICE TRANSMISSION, THE MAIL OR OTHER DELIVERY SERVICE, OR THE INTERNET OR OTHER ONLINE SERVICE; AND

(II) THE CIGARS OR PIPE TOBACCO ARE DELIVERED TO THE CONSUMER BY USE OF A COMMON CARRIER, PRIVATE DELIVERY SERVICE, MAIL, OR ANY OTHER MEANS OF REMOTE DELIVERY, OR WHEN THE REMOTE RETAIL SELLER IS NOT IN THE PHYSICAL PRESENCE OF THE CONSUMER WHEN THE CONSUMER OBTAINS POSSESSION OF THE CIGARS OR PIPE TOBACCO.

(b) "REMOTE RETAIL SALE" DOES NOT INCLUDE THE SALE OF TOBACCO PRODUCTS OTHER THAN CIGARS OR PIPE TOBACCO.

(11) "REMOTE RETAIL SELLER" MEANS A PERSON LOCATED OUTSIDE OF THIS STATE WHO MAKES REMOTE RETAIL SALES.

~~(4)~~ (12) "Sale" means any transfer, exchange, or barter, in any manner or by any means whatsoever, for a consideration, including all sales made by any person. The term includes:

(a) A gift by a person engaged in the business of selling tobacco products, for advertising, as a means of evading the provisions of this ~~article~~ ARTICLE 28.5 or for any other purposes whatsoever; ~~and~~

(b) A delivery sale; AND

(c) A REMOTE RETAIL SALE.

(13) "STOCK KEEPING UNIT" MEANS THE UNIQUE IDENTIFIER ASSIGNED BY THE DISTRIBUTOR OR REMOTE RETAIL SELLER TO VARIOUS ITEMS IN ORDER TO TRACK INVENTORY.

~~(5)~~ (14) "Tobacco products" means cigars, cheroots, stogies, periques, granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco, snuff, snuff flour, cavendish, plug and twist tobacco, fine-cut and other chewing tobaccos, shorts, refuse scraps, clippings, cuttings and sweepings of tobacco, and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or for smoking in a pipe or otherwise, or both for chewing and smoking, but does not include cigarettes ~~which~~ THAT are taxed separately pursuant to article 28 of this ~~title~~ TITLE 39.

SECTION 2. In Colorado Revised Statutes, 39-28.5-102, **amend** (4) as follows:

39-28.5-102. Tax levied. (4) (a) The tax set forth in this section is collected by the department. ~~and is imposed at the time the distributor:~~

(b) IN THE CASE OF A DISTRIBUTOR, THE TAX SET FORTH IN THIS SECTION IS IMPOSED AT THE TIME THE DISTRIBUTOR:

~~(a)~~ (I) Brings, or causes to be brought, into this state from without the state tobacco products for sale;

~~(b)~~ (II) Makes, manufactures, or fabricates tobacco products in this state for sale in this state;

~~(c)~~ (III) Ships or transports tobacco products to retailers in this state to be sold by those retailers; or

~~(d)~~ (IV) Makes a delivery sale.

(c) IN THE CASE OF A REMOTE RETAIL SELLER, THE TAX SET FORTH IN THIS SECTION IS IMPOSED AT THE TIME THE REMOTE RETAIL SELLER MAKES A REMOTE RETAIL SALE.

SECTION 3. In Colorado Revised Statutes, **amend** 39-28.5-102.5 as follows:

39-28.5-102.5. Tax levied - state constitution. Pursuant to section 21 of article X of the state constitution, there is levied, in addition to the tax levied pursuant to section 39-28.5-102, a tax on the sale, use, consumption, handling, or distribution of tobacco products by distributors AND REMOTE RETAIL SELLERS, at a rate of twenty percent of the manufacturer's list price. The tax shall be paid to and collected by the department. The tax shall be imposed in the same manner as the tax described in section 39-28.5-102.

SECTION 4. In Colorado Revised Statutes, 39-28.5-104, **amend** (1) as follows:

39-28.5-104. Licensing required - rules - fines. (1) It is unlawful for any person to engage in the business of a distributor of tobacco products at any place of business OR TO MAKE DELIVERY OR REMOTE RETAIL SALES without first obtaining a license granted and issued by the department, which license shall be in effect until June 30 following the date of issue, unless sooner revoked. IN THE CASE OF A DISTRIBUTOR LOCATED IN THIS STATE, such license shall be granted only to a person who owns or operates the place from which the person engages in the business of a distributor of tobacco products, and, if such business is operated in two or more separate places IN THIS STATE by any such person, a separate license for each place of business shall be required. Such license shall be renewed only upon timely application and payment of the required fee prior to expiration. Such licenses may be transferred in the discretion of and pursuant to the rules adopted by the department. The fee for a license shall be ten dollars per year, and such fee shall be credited to the general fund. Such fee shall be reduced at the rate of two dollars and fifty cents for each expired quarter of the license year. The department shall, on reasonable notice and after a hearing, suspend or revoke the license of any person violating any provision of this ~~article~~ ARTICLE 28.5, and no license shall be issued to such person within a period of two years thereafter. The department may share information on the names and addresses of persons who purchased tobacco products

for resale with the department of public health and environment and county and district public health agencies. The department shall refuse to issue a new or renewal distributor OR REMOTE RETAIL SELLER license, and shall revoke a distributor's OR REMOTE RETAIL SELLER'S license, if the distributor OR REMOTE RETAIL SELLER owes the state any delinquent taxes administered by the department or interest thereon pursuant to this ~~title~~ TITLE 39 that have been determined by law to be due and unpaid, unless the distributor OR REMOTE RETAIL SELLER has entered into an agreement approved by the department to pay the amount due. The department shall only issue a new or renewal distributor OR REMOTE RETAIL SELLER license to a distributor OR REMOTE RETAIL SELLER that has a current license issued pursuant to section 39-26-103.

SECTION 5. In Colorado Revised Statutes, 39-28.5-105, **add** (5) as follows:

39-28.5-105. Books and records to be preserved. (5) EVERY REMOTE RETAIL SELLER SHALL KEEP COMPLETE AND ACCURATE RECORDS NECESSARY FOR THE DETERMINATION OF THE CORRECT TAX LIABILITY, INCLUDING ITEMIZED INVOICES TO VALIDATE THE ACTUAL COSTS PAID BY THE REMOTE RETAIL SELLER FOR ALL CIGARS AND PIPE TOBACCO OFFERED IN REMOTE RETAIL SALES TO THE CONSUMER WITHIN THIS STATE.

SECTION 6. In Colorado Revised Statutes, 39-28.5-106, **amend** (1), (2), and (4)(a) introductory portion as follows:

39-28.5-106. Returns and remittance of tax - civil penalty. (1) Every distributor AND REMOTE RETAIL SELLER shall file a return with the department each quarter. The return, which shall be upon forms prescribed and furnished by the department, shall contain, among other things, the total amount of tobacco products purchased by the distributor OR REMOTE RETAIL SELLER during the preceding quarter and the tax due thereon.

(2) Every distributor AND REMOTE RETAIL SELLER shall file a return with the department by the twentieth day of the month following the month reported and shall therewith remit the amount of tax due, less three and one-third percent of any sum so remitted that consists of tax collected after July 1, 2005, but before January 1, 2021, and less one and six-tenths percent of any sum so remitted that consists of tax collected on or after January 1, 2021, to cover the distributor's OR REMOTE RETAIL SELLER'S expense in the collection and remittance of said tax; except that no part of the tax imposed pursuant to section 39-28.5-102.5 and section 21 of article X of the state constitution shall be subject to the discount provided for in this subsection (2). If any distributor OR REMOTE RETAIL SELLER is delinquent in remitting said tax, other than in unusual circumstances shown to the satisfaction of the executive director of the department, the distributor OR REMOTE RETAIL SELLER shall not be allowed to retain any amounts to cover his or her expense in collecting and remitting said tax, and in addition the penalty imposed under section 39-28.5-110 (2)(b) shall apply.

(4) (a) Any person, firm, limited liability company, partnership, or corporation, other than a distributor OR REMOTE RETAIL SELLER, in possession of tobacco products for which taxes have not otherwise been remitted pursuant to this section shall be liable and responsible for the uncollected tax that is levied pursuant to

section 39-28.5-102 and section 21 of article X of the state constitution on behalf of the distributor OR REMOTE RETAIL SELLER who failed to pay the tax. The person or entity shall make the payment to the department within thirty days of first taking possession of the tobacco product. The department shall establish a form to be used for remittance of the payment. The department shall remit the proceeds it receives pursuant to this ~~paragraph (a)~~ SUBSECTION (4)(a) to the state treasurer for distribution as follows:

SECTION 7. In Colorado Revised Statutes, 39-28.5-107, **amend** (2)(a), (2)(b)(I), (2)(b)(III), (2)(c), and (2)(d) as follows:

39-28.5-107. When credit may be obtained for tax paid. (2) (a) Credit shall be given by the department to a distributor OR REMOTE RETAIL SELLER for all taxes levied pursuant to this ~~article~~ ARTICLE 28.5 and section 21 of article X of the state constitution and paid pursuant to the provisions of this ~~article~~ ARTICLE 28.5 that are bad debts. Such credit shall offset taxes levied pursuant to this ~~article~~ ARTICLE 28.5 and section 21 of article X of the state constitution and paid pursuant to the provisions of this ~~article~~ ARTICLE 28.5 only. No credit shall be given unless the bad debt has been charged off as uncollectible on the books of the distributor OR REMOTE RETAIL SELLER. Subsequent to receiving the credit, if the distributor OR REMOTE RETAIL SELLER receives a payment for the bad debt, the distributor OR REMOTE RETAIL SELLER shall be liable to the department for the amount received and shall remit this amount in the next payment to the department under section 39-28.5-106.

(b) Any claim for a bad debt credit under this subsection (2) shall be supported by all of the following:

(I) A copy of the original invoice issued by the distributor OR REMOTE RETAIL SELLER;

(III) Evidence that the person who ordered and received the tobacco products did not pay the distributor OR REMOTE RETAIL SELLER for them and that the distributor OR REMOTE RETAIL SELLER used reasonable collection practices in attempting to collect the debt.

(c) If credit is given to a distributor OR REMOTE RETAIL SELLER for a bad debt, the person who ordered and received the tobacco products but did not pay the distributor OR REMOTE RETAIL SELLER for them shall be liable in an amount equal to the credit for the tax imposed in this ~~article~~ ARTICLE 28.5 on the tobacco products. Subsequent to receiving the credit, if the distributor OR REMOTE RETAIL SELLER receives a payment for the bad debt and the distributor OR REMOTE RETAIL SELLER makes a payment to the department, the amount of taxes owed by such person shall be reduced by the amount paid to the department.

(d) As used in this subsection (2), "bad debt" means the taxes attributable to any portion of a debt that is related to a sale of tobacco products subject to tax under this ~~article~~ ARTICLE 28.5, that is not otherwise deductible or excludable, that has become worthless or uncollectible in the time after the tax has been paid pursuant to section 39-28.5-106, and that is eligible to be claimed as a deduction pursuant to section 166 of the federal "Internal Revenue Code of 1986", as amended. A bad debt shall

not include any interest on the wholesale price of tobacco products, uncollectible amounts on property that remain in the possession of the distributor OR REMOTE RETAIL SELLER until the full purchase price is paid, expenses incurred in attempting to collect any account receivable or any portion of the debt recovered, an account receivable that has been sold to a third party for collection, or repossessed property.

SECTION 8. In Colorado Revised Statutes, 39-28.5-110, **amend** (1) as follows:

39-28.5-110. Prohibited acts - penalties. (1) It is unlawful for any ~~distributor~~ PERSON to sell and distribute any tobacco products in this state without a license as required in section 39-28.5-104, or to willfully make any false or fraudulent return or false statement on any return, or to willfully evade the payment of the tax, or any part thereof, as imposed by this ~~article~~ ARTICLE 28.5. Any distributor, REMOTE RETAIL SELLER, or agent thereof who willfully violates any provision of this ~~article~~ ARTICLE 28.5 shall be punished as provided by section 39-21-118.

SECTION 9. In Colorado Revised Statutes, **amend** 39-28.5-112 as follows:

39-28.5-112. List of licensed distributors and remote retail sellers - published on website. ~~On or before December 31, 2009,~~ The department shall publish on its website a list of the names and addresses of all licensed distributors AND REMOTE RETAIL SELLERS. The list shall be updated within seven days of any changes to the list.

SECTION 10. In Colorado Revised Statutes, 39-28.6-102, **amend** (5) and (7)(b) as follows:

39-28.6-102. Definitions. As used in this article 28.6, unless the context otherwise requires:

(5) (a) "Manufacturer's list price" means, EXCEPT AS PROVIDED IN SUBSECTIONS (5)(b) AND (5)(c) OF THIS SECTION, the invoice price for which a manufacturer or supplier sells a nicotine product to a distributor exclusive of any discount or other reduction.

(b) FOR A DELIVERY SELLER, IF DETERMINING THE INVOICE PRICE DESCRIBED IN SUBSECTION (5)(a) OF THIS SECTION IS IMPRACTICABLE, THEN "MANUFACTURER'S LIST PRICE" MEANS THE AVERAGE OF THE ACTUAL PRICE PAID, EXCLUSIVE OF ANY REBATES OR DISCOUNTS APPLIED, FOR THE NICOTINE PRODUCT'S STOCK KEEPING UNIT DURING THE PRECEDING CALENDAR YEAR. THE DEPARTMENT MAY, BY WRITTEN NOTICE TO THE DELIVERY SELLER, PROSPECTIVELY REQUIRE A DELIVERY SELLER TO CALCULATE THE TAX ON THE INVOICE PRICE IF THE DEPARTMENT FINDS THAT THE DELIVERY SELLER'S USE OF THE AVERAGE PRICE PAID WAS FOR THE PURPOSE OF AVOIDING TAX.

(c) FOR A MANUFACTURER WHO IS ALSO A DELIVERY SELLER OR A RETAILER, AND WHO SELLS NICOTINE PRODUCTS EXCLUSIVELY TO CONSUMERS AND NOT TO SUPPLIERS OR DISTRIBUTORS, "MANUFACTURER'S LIST PRICE" MEANS THE MANUFACTURER'S COST TO MANUFACTURE THE NICOTINE PRODUCT, WHICH INCLUDES THE MANUFACTURING OVERHEAD AND THE COST OF ALL DIRECT MATERIALS AND DIRECT LABOR USED.

(7) "Nicotine product" means a product that contains nicotine derived from tobacco or created synthetically that is intended for human consumption, whether by vaporizing, chewing, smoking, absorbing, dissolving, inhaling, snorting, sniffing, aerosolizing, or by any other means, and that is not:

(b) Tobacco products, as defined in section ~~39-28.5-101(5)~~ 39-28.5-101 (14); or

SECTION 11. In Colorado Revised Statutes, 18-8-204, **amend** (2)(m) as follows:

18-8-204. Introducing contraband in the second degree - definition. (2) As used in this section, "contraband" means any of the following, but does not include any article or thing referred to in section 18-8-203:

(m) For purposes of a facility of the department of corrections or any private contract prison, any cigarettes or tobacco products, as defined in section ~~39-28.5-101(5)~~ 39-28.5-101 (14);

SECTION 12. Act subject to petition - effective date. This act takes effect January 1, 2024; except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within the ninety-day period after final adjournment of the general assembly, then the act, item, section, or part will not take effect unless approved by the people at the general election to be held in November 2024 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

Approved: May 1, 2023