

CHAPTER 241

TAXATION

HOUSE BILL 99-1208

BY REPRESENTATIVES Gordon, Bacon, Chavez, Clarke, Coleman, Decker, Gagliardi, Hagedorn, Mace, Morrison, Ragsdale, Saliman, Tupa, Vigil, S. Williams, Windels, and Zimmerman;
also SENATORS Reeves, Anderson, Hernandez, Linkhart, Rupert, Weddig, and Wham.

AN ACT

CONCERNING MEASURES TO SUPPORT THE MULTISTATE TOBACCO SETTLEMENT, AND MAKING AN APPROPRIATION IN CONNECTION THEREWITH.

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

SECTION 1. Article 28 of title 39, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW PART to read:

**PART 2
TOBACCO ESCROW FUNDS**

39-28-201. Legislative declaration. (1) THE GENERAL ASSEMBLY HEREBY FINDS, DETERMINES, AND DECLARES:

(a) THAT CIGARETTE SMOKING PRESENTS SERIOUS PUBLIC HEALTH CONCERNS TO THE STATE AND TO THE CITIZENS OF THE STATE. THE SURGEON GENERAL HAS DETERMINED THAT SMOKING CAUSES LUNG CANCER, HEART DISEASE AND OTHER SERIOUS DISEASES, AND THAT THERE ARE HUNDREDS OF THOUSANDS OF TOBACCO-RELATED DEATHS IN THE UNITED STATES EACH YEAR. THESE DISEASES MOST OFTEN DO NOT APPEAR UNTIL MANY YEARS AFTER THE PERSON IN QUESTION BEGINS SMOKING.

(b) THAT CIGARETTE SMOKING ALSO PRESENTS SERIOUS FINANCIAL CONCERNS FOR THE STATE. UNDER CERTAIN HEALTH-CARE PROGRAMS, THE STATE MAY HAVE A LEGAL OBLIGATION TO PROVIDE MEDICAL ASSISTANCE TO ELIGIBLE PERSONS FOR HEALTH CONDITIONS ASSOCIATED WITH CIGARETTE SMOKING, AND THOSE PERSONS MAY HAVE A LEGAL ENTITLEMENT TO RECEIVE SUCH MEDICAL ASSISTANCE.

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

(c) THAT UNDER THESE PROGRAMS, THE STATE PAYS MILLIONS OF DOLLARS EACH YEAR TO PROVIDE MEDICAL ASSISTANCE FOR THESE PERSONS FOR HEALTH CONDITIONS ASSOCIATED WITH CIGARETTE SMOKING.

(d) THAT IT IS THE POLICY OF THE STATE THAT FINANCIAL BURDENS IMPOSED ON THE STATE BY CIGARETTE SMOKING BE BORNE BY TOBACCO PRODUCT MANUFACTURERS RATHER THAN BY THE STATE TO THE EXTENT THAT SUCH MANUFACTURERS EITHER DETERMINE TO ENTER INTO A SETTLEMENT WITH THE STATE OR ARE FOUND CULPABLE BY THE COURTS.

(e) THAT ON NOVEMBER 23, 1998, LEADING UNITED STATES TOBACCO PRODUCT MANUFACTURERS ENTERED INTO A SETTLEMENT AGREEMENT, ENTITLED THE "MASTER SETTLEMENT AGREEMENT," WITH THE STATE. THE MASTER SETTLEMENT AGREEMENT OBLIGATES THESE MANUFACTURERS, IN RETURN FOR A RELEASE OF PAST, PRESENT AND CERTAIN FUTURE CLAIMS AGAINST THEM AS DESCRIBED THEREIN, TO PAY SUBSTANTIAL SUMS TO THE STATE, TIED IN PART TO THEIR VOLUME OF SALES; TO FUND A NATIONAL FOUNDATION DEVOTED TO THE INTERESTS OF PUBLIC HEALTH; AND TO MAKE SUBSTANTIAL CHANGES IN THEIR ADVERTISING AND MARKETING PRACTICES AND CORPORATE CULTURE, WITH THE INTENTION OF REDUCING UNDERAGE SMOKING.

(f) THAT IT WOULD BE CONTRARY TO THE POLICY OF THE STATE IF TOBACCO PRODUCT MANUFACTURERS WHO DETERMINE NOT TO ENTER INTO SUCH A SETTLEMENT COULD USE A RESULTING COST ADVANTAGE TO DERIVE LARGE, SHORT-TERM PROFITS IN THE YEARS BEFORE LIABILITY MAY ARISE WITHOUT ENSURING THAT THE STATE WILL HAVE AN EVENTUAL SOURCE OF RECOVERY FROM THEM IF THEY ARE PROVEN TO HAVE ACTED CULPABLY. IT IS THUS IN THE INTEREST OF THE STATE TO REQUIRE THAT SUCH MANUFACTURERS ESTABLISH A RESERVE FUND TO GUARANTEE A SOURCE OF COMPENSATION AND TO PREVENT SUCH MANUFACTURERS FROM DERIVING LARGE, SHORT-TERM PROFITS AND THEN BECOMING JUDGMENT-PROOF BEFORE LIABILITY MAY ARISE.

39-28-202. Definitions. AS USED IN THIS PART 2:

(1) "ADJUSTED FOR INFLATION" MEANS INCREASED IN ACCORDANCE WITH THE FORMULA FOR INFLATION ADJUSTMENT SET FORTH IN EXHIBIT C TO THE MASTER SETTLEMENT AGREEMENT.

(2) "AFFILIATE" MEANS A PERSON WHO DIRECTLY OR INDIRECTLY OWNS OR CONTROLS, IS OWNED OR CONTROLLED BY, OR IS UNDER COMMON OWNERSHIP OR CONTROL WITH, ANOTHER PERSON. SOLELY FOR PURPOSES OF THIS DEFINITION, THE TERMS "OWNS," "IS OWNED," AND "OWNERSHIP" MEAN OWNERSHIP OF AN EQUITY INTEREST, OR THE EQUIVALENT THEREOF, OF TEN PERCENT OR MORE, AND THE TERM "PERSON" MEANS AN INDIVIDUAL, PARTNERSHIP, COMMITTEE, ASSOCIATION, CORPORATION, OR ANY OTHER ORGANIZATION OR GROUP OF PERSONS.

(3) "ALLOCABLE SHARE" MEANS ALLOCABLE SHARE AS THAT TERM IS DEFINED IN THE MASTER SETTLEMENT AGREEMENT.

(4)(a) "CIGARETTE" MEANS ANY PRODUCT THAT CONTAINS NICOTINE, IS INTENDED TO BE BURNED OR HEATED UNDER ORDINARY CONDITIONS OF USE, AND CONSISTS OF OR CONTAINS:

(I) ANY ROLL OF TOBACCO WRAPPED IN PAPER OR IN ANY SUBSTANCE NOT CONTAINING TOBACCO; OR

(II) TOBACCO, IN ANY FORM, THAT IS FUNCTIONAL IN THE PRODUCT, WHICH, BECAUSE OF ITS APPEARANCE, THE TYPE OF TOBACCO USED IN THE FILLER, OR ITS PACKAGING AND LABELING, IS LIKELY TO BE OFFERED TO, OR PURCHASED BY, CONSUMERS AS A CIGARETTE; OR

(III) ANY ROLL OF TOBACCO WRAPPED IN ANY SUBSTANCE CONTAINING TOBACCO THAT, BECAUSE OF ITS APPEARANCE, THE TYPE OF TOBACCO USED IN THE FILLER, OR ITS PACKAGING AND LABELING, IS LIKELY TO BE OFFERED TO, OR PURCHASED BY, CONSUMERS AS A CIGARETTE DESCRIBED IN SUBPARAGRAPH (I) OF THIS PARAGRAPH (a).

(b) THE TERM "CIGARETTE" INCLUDES ROLL-YOUR-OWN, I.E., ANY TOBACCO THAT, BECAUSE OF ITS APPEARANCE, TYPE, PACKAGING, OR LABELING, IS SUITABLE FOR USE AND LIKELY TO BE OFFERED TO, OR PURCHASED BY, CONSUMERS AS TOBACCO FOR MAKING CIGARETTES.

(c) FOR PURPOSES OF THIS DEFINITION OF "CIGARETTES", 0.09 OUNCES OF ROLL-YOUR-OWN TOBACCO SHALL CONSTITUTE ONE INDIVIDUAL "CIGARETTE".

(5) "MASTER SETTLEMENT AGREEMENT" MEANS THE SETTLEMENT AGREEMENT AND RELATED DOCUMENTS DATED NOVEMBER 23, 1998, ENTERED INTO BY THE STATE AND LEADING UNITED STATES TOBACCO PRODUCT MANUFACTURERS AND ATTACHED AS EXHIBIT A TO THE CONSENT DECREE APPROVED BY THE DISTRICT COURT FOR THE CITY AND COUNTY OF DENVER ON NOVEMBER 25, 1998, IN CIVIL ACTION NO. 97CV3432.

(6) "QUALIFIED ESCROW FUND" MEANS AN ESCROW ARRANGEMENT WITH A FEDERALLY OR STATE CHARTERED FINANCIAL INSTITUTION HAVING NO AFFILIATION WITH ANY TOBACCO PRODUCT MANUFACTURER AND HAVING ASSETS OF AT LEAST ONE BILLION DOLLARS, WHERE SUCH ARRANGEMENT REQUIRES THAT SUCH FINANCIAL INSTITUTION HOLD THE ESCROWED FUNDS' PRINCIPAL FOR THE BENEFIT OF RELEASING PARTIES AND PROHIBITS THE TOBACCO PRODUCT MANUFACTURER PLACING THE FUNDS INTO ESCROW FROM USING, ACCESSING, OR DIRECTING THE USE OF THE FUNDS' PRINCIPAL EXCEPT AS CONSISTENT WITH SECTION 39-28-203 (2).

(7) "RELEASED CLAIMS" MEANS RELEASED CLAIMS AS THAT TERM IS DEFINED IN THE MASTER SETTLEMENT AGREEMENT.

(8) "RELEASING PARTIES" MEANS RELEASING PARTIES AS THAT TERM IS DEFINED IN THE MASTER SETTLEMENT AGREEMENT.

(9) (a) "TOBACCO PRODUCT MANUFACTURER" MEANS AN ENTITY THAT, AFTER THE EFFECTIVE DATE OF THIS SECTION, DIRECTLY AND NOT EXCLUSIVELY THROUGH ANY AFFILIATE:

(I) MANUFACTURES ANYWHERE CIGARETTES WHICH THE MANUFACTURER INTENDS TO BE SOLD IN THE UNITED STATES, INCLUDING CIGARETTES INTENDED TO BE SOLD IN THE UNITED STATES THROUGH AN IMPORTER; PROVIDED, HOWEVER, THAT AN ENTITY

THAT MANUFACTURES CIGARETTES THAT IT INTENDS TO BE SOLD IN THE UNITED STATES SHALL NOT BE CONSIDERED A TOBACCO PRODUCT MANUFACTURER UNDER THIS SUBSECTION (9) (a) IF:

(A) SUCH CIGARETTES ARE SOLD IN THE UNITED STATES EXCLUSIVELY THROUGH AN IMPORTER THAT IS AN ORIGINAL PARTICIPATING MANUFACTURER, AS THAT TERM IS DEFINED IN THE MASTER SETTLEMENT AGREEMENT, THAT WILL BE RESPONSIBLE FOR THE PAYMENTS UNDER THE MASTER SETTLEMENT AGREEMENT WITH RESPECT TO SUCH CIGARETTES AS A RESULT OF THE PROVISIONS OF SUBSECTION II(mm) OF THE MASTER SETTLEMENT AGREEMENT AND THAT PAYS THE TAXES SPECIFIED IN SECTION II(z) OF THE MASTER SETTLEMENT AGREEMENT; AND

(B) THE MANUFACTURER OF SUCH CIGARETTES DOES NOT MARKET OR ADVERTISE SUCH CIGARETTES IN THE UNITED STATES;

(II) IS THE FIRST PURCHASER ANYWHERE FOR RESALE IN THE UNITED STATES OF CIGARETTES MANUFACTURED ANYWHERE THAT THE MANUFACTURER DOES NOT INTEND TO BE SOLD IN THE UNITED STATES; OR

(III) BECOMES A SUCCESSOR OF AN ENTITY DESCRIBED IN SUBPARAGRAPH (I) OR (II) OF THIS PARAGRAPH (a).

(b) "TOBACCO PRODUCT MANUFACTURER" DOES NOT INCLUDE AN AFFILIATE OF A TOBACCO PRODUCT MANUFACTURER UNLESS SUCH AFFILIATE ITSELF FALLS WITHIN SUBPARAGRAPHS (I) THROUGH (III) OF PARAGRAPH (a) OF THIS SUBSECTION (9).

(10) "UNITS SOLD" MEANS THE NUMBER OF INDIVIDUAL CIGARETTES SOLD IN THE STATE BY THE APPLICABLE TOBACCO PRODUCT MANUFACTURER, WHETHER DIRECTLY OR THROUGH A DISTRIBUTOR, RETAILER, OR SIMILAR INTERMEDIARY OR INTERMEDIARIES, DURING THE YEAR IN QUESTION, AS MEASURED BY EXCISE TAXES COLLECTED BY THE STATE ON CONTAINERS OF ROLL-YOUR-OWN TOBACCO, AND ON PACKS OF CIGARETTES BEARING THE EXCISE TAX STAMP OF THE STATE. THE DEPARTMENT SHALL PROMULGATE SUCH RULES AS ARE NECESSARY TO ASCERTAIN THE AMOUNT OF STATE EXCISE TAX PAID ON THE CIGARETTES OF SUCH TOBACCO PRODUCT MANUFACTURER FOR EACH YEAR.

39-28-203. Requirements. ANY TOBACCO PRODUCT MANUFACTURER SELLING CIGARETTES TO CONSUMERS WITHIN THE STATE, WHETHER DIRECTLY OR THROUGH A DISTRIBUTOR, RETAILER, OR SIMILAR INTERMEDIARY OR INTERMEDIARIES, AFTER THE EFFECTIVE DATE OF THIS SECTION SHALL EITHER:

(1) BECOME A PARTICIPATING MANUFACTURER AS THAT TERM IS DEFINED IN SECTION II(jj) OF THE MASTER SETTLEMENT AGREEMENT AND GENERALLY PERFORM ITS FINANCIAL OBLIGATIONS UNDER THE MASTER SETTLEMENT AGREEMENT; OR

(2) (a) PLACE INTO A QUALIFIED ESCROW FUND BY APRIL 15 OF THE YEAR FOLLOWING THE YEAR IN QUESTION THE FOLLOWING AMOUNTS AS SUCH AMOUNTS ARE ADJUSTED FOR INFLATION:

(I) 1999: \$.0094241 PER UNIT SOLD AFTER THE EFFECTIVE DATE OF THIS PART 2;

(II) 2000: \$.0104712 PER UNIT SOLD;

(III) FOR EACH OF 2001 AND 2002: \$.0136125 PER UNIT SOLD;

(IV) FOR EACH OF 2003 THROUGH 2006: \$.0167539 PER UNIT SOLD;

(V) FOR EACH OF 2007 AND EACH YEAR THEREAFTER: \$.0188482 PER UNIT SOLD.

(b) A TOBACCO PRODUCT MANUFACTURER THAT PLACES FUNDS INTO ESCROW PURSUANT TO SUBSECTION (2) (a) OF THIS SECTION SHALL RECEIVE THE INTEREST OR OTHER APPRECIATION ON SUCH FUNDS AS EARNED. SUCH FUNDS THEMSELVES SHALL BE RELEASED FROM ESCROW ONLY UNDER THE FOLLOWING CIRCUMSTANCES:

(I) TO PAY A JUDGMENT OR SETTLEMENT ON ANY RELEASED CLAIM BROUGHT AGAINST SUCH TOBACCO PRODUCT MANUFACTURER BY THE STATE OR ANY RELEASING PARTY LOCATED OR RESIDING IN THE STATE. FUNDS SHALL BE RELEASED FROM ESCROW UNDER THIS SUBPARAGRAPH (I):

(A) IN THE ORDER IN WHICH THEY WERE PLACED INTO ESCROW; AND

(B) ONLY TO THE EXTENT AND AT THE TIME NECESSARY TO MAKE PAYMENTS REQUIRED UNDER SUCH JUDGMENT OR SETTLEMENT;

(II) TO THE EXTENT THAT A TOBACCO PRODUCT MANUFACTURER ESTABLISHES THAT THE AMOUNT IT WAS REQUIRED TO PLACE INTO ESCROW IN A PARTICULAR YEAR WAS GREATER THAN THE STATE'S ALLOCABLE SHARE OF THE TOTAL PAYMENTS THAT SUCH MANUFACTURER WOULD HAVE BEEN REQUIRED TO MAKE IN THAT YEAR UNDER THE MASTER SETTLEMENT AGREEMENT HAD IT BEEN A PARTICIPATING MANUFACTURER, AS SUCH PAYMENTS ARE DETERMINED PURSUANT TO SECTION IX(i)(2) OF THE MASTER SETTLEMENT AGREEMENT AND BEFORE ANY OF THE ADJUSTMENTS OR OFFSETS DESCRIBED IN SECTION IX(i)(3) OF THAT AGREEMENT OTHER THAN THE INFLATION ADJUSTMENT, THE EXCESS SHALL BE RELEASED FROM ESCROW AND REVERT BACK TO SUCH TOBACCO PRODUCT MANUFACTURER; OR

(III) TO THE EXTENT NOT RELEASED FROM ESCROW UNDER SUBPARAGRAPH (I) OR (II) OF THIS PARAGRAPH (b), FUNDS SHALL BE RELEASED FROM ESCROW AND REVERT BACK TO SUCH TOBACCO PRODUCT MANUFACTURER TWENTY-FIVE YEARS AFTER THE DATE ON WHICH THE FUNDS WERE PLACED INTO ESCROW.

(c) (I) EACH TOBACCO PRODUCT MANUFACTURER THAT ELECTS TO PLACE FUNDS INTO ESCROW PURSUANT TO THIS SUBSECTION (2) SHALL ANNUALLY CERTIFY TO THE ATTORNEY GENERAL THAT IT IS IN COMPLIANCE WITH THIS SUBSECTION (2). THE ATTORNEY GENERAL MAY BRING A CIVIL ACTION ON BEHALF OF THE STATE AGAINST ANY TOBACCO PRODUCT MANUFACTURER THAT FAILS TO PLACE INTO ESCROW THE FUNDS REQUIRED UNDER THIS SECTION. ANY TOBACCO PRODUCT MANUFACTURER THAT FAILS IN ANY YEAR TO PLACE INTO ESCROW THE FUNDS REQUIRED UNDER THIS SECTION SHALL:

(A) BE REQUIRED WITHIN FIFTEEN DAYS TO PLACE SUCH FUNDS INTO ESCROW AS SHALL BRING IT INTO COMPLIANCE WITH THIS SECTION. THE COURT, UPON A FINDING OF A VIOLATION OF THIS SUBSECTION (2), MAY IMPOSE A CIVIL PENALTY, TO BE PAID

TO THE GENERAL FUND OF THE STATE, IN AN AMOUNT NOT TO EXCEED FIVE PERCENT OF THE AMOUNT IMPROPERLY WITHHELD FROM ESCROW PER DAY OF THE VIOLATION AND IN A TOTAL AMOUNT NOT TO EXCEED ONE HUNDRED PERCENT OF THE ORIGINAL AMOUNT IMPROPERLY WITHHELD FROM ESCROW;

(B) IN THE CASE OF A KNOWING VIOLATION, BE REQUIRED WITHIN FIFTEEN DAYS TO PLACE SUCH FUNDS INTO ESCROW AS SHALL BRING IT INTO COMPLIANCE WITH THIS SECTION. THE COURT, UPON A FINDING OF A KNOWING VIOLATION OF THIS SUBSECTION (2), MAY IMPOSE A CIVIL PENALTY, TO BE PAID TO THE GENERAL FUND OF THE STATE, IN AN AMOUNT NOT TO EXCEED FIFTEEN PERCENT OF THE AMOUNT IMPROPERLY WITHHELD FROM ESCROW PER DAY OF THE VIOLATION AND IN A TOTAL AMOUNT NOT TO EXCEED THREE HUNDRED PERCENT OF THE ORIGINAL AMOUNT IMPROPERLY WITHHELD FROM ESCROW; AND

(C) IN THE CASE OF A SECOND OR SUBSEQUENT KNOWING VIOLATION, BE PROHIBITED FROM SELLING CIGARETTES TO CONSUMERS WITHIN THE STATE, WHETHER DIRECTLY OR THROUGH A DISTRIBUTOR, RETAILER, OR SIMILAR INTERMEDIARY OR INTERMEDIARIES, FOR A PERIOD NOT TO EXCEED TWO YEARS.

(II) EACH FAILURE TO MAKE AN ANNUAL DEPOSIT REQUIRED UNDER THIS SECTION SHALL CONSTITUTE A SEPARATE VIOLATION.

SECTION 2. Appropriation - adjustments in the 1999 long bill. (1) In addition to any other appropriation, there is hereby appropriated, out of any moneys in the general fund not otherwise appropriated, to the department of law, for the fiscal year beginning July 1, 1999, the sum of twenty-seven thousand six hundred forty-eight dollars (\$27,648) and 0.5 FTE, or so much thereof as may be necessary, for the implementation of this act.

(2) In addition to any other appropriation, there is hereby appropriated, out of any moneys in the general fund not otherwise appropriated, to the department of revenue, for the fiscal year beginning July 1, 1999, the sum of one hundred forty thousand eight hundred forty dollars (\$140,840), or so much thereof as may be necessary, for the implementation of this act.

(3) For the implementation of this act, appropriations made in the annual general appropriations act for the fiscal year beginning July 1, 1999, shall be adjusted as follows:

(a) The general fund appropriation to the capital construction fund outlined in section 3 (1) (f) is reduced by one hundred sixty-eight thousand four hundred eighty-eight dollars (\$168,488).

(b) The capital construction fund exempt appropriation to the department of transportation, construction projects, is reduced by one hundred sixty-eight thousand four hundred eighty-eight dollars (\$168,488).

SECTION 3. Effective date - applicability. This act shall take effect July 1, 1999, and shall apply to the sale of all cigarettes on or after said date.

SECTION 4. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: May 28, 1999