

CHAPTER 157

[Engrossed House Bill No. 44]

TAX ON CIGARETTES

AN ACT Relating to revenue and taxation; amending section 28A.47.440; chapter 223, Laws of 1969 ex. sess. as amended by section 1, chapter 70, Laws of 1971 ex. sess. and RCW 28A.47.440; amending section 2, chapter 272, Laws of 1959 as amended by section 2, chapter 299, Laws of 1971 ex. sess. and RCW 73.32.130; amending section 82.24.020, chapter 15, Laws of 1961, as last amended by section 13, chapter 299, Laws of 1971 ex. sess. and RCW 82.24.020; amending section 82.24.080, chapter 15, Laws of 1961 and RCW 82.24.080; amending section 82.24.130, chapter 15, Laws of 1961 and RCW 82.24.130; adding new sections to chapter 15, Laws of 1961 and to chapter 82.24 RCW; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Section 1. Section 28A.47.440, chapter 223, Laws of 1969 ex. sess. as amended by section 1, chapter 70, Laws of 1971 ex. sess. and RCW 28A.47.440 are each amended to read as follows:

In addition to the taxes levied by RCW 73.32.130 and 82.24.020, there is levied and shall be collected by the department of revenue from the persons mentioned in and in the manner provided by chapter 82.24 RCW, as now or hereafter amended, an excise tax upon the sale, use, consumption, handling, possession or distribution of cigarettes in an amount equal to the rate of one-half mill per cigarette, but the provisions of RCW 82.24.070 allowing dealers' compensation for affixing stamps shall not apply to this additional tax. Instead, wholesalers and retailers subject to the provisions of chapter 82.24 RCW shall be allowed as compensation for their services in affixing the stamps for the additional tax required by this section a sum equal to one-half of one percent of the value of the stamps for such additional tax purchased or affixed by them. Wholesalers and retailers subject to the payment of this tax may, if they wish, absorb such additional tax and not pass it on to purchasers without being in violation of this section or any other act relating to the sale or taxation of cigarettes.

Revenues derived from the tax imposed by this section shall be transmitted by the department of revenue to the state treasurer in accordance with the provisions of RCW 82.32.320, to the credit of the public schools building bond redemption fund. The amount so deposited in the aforesaid fund shall be devoted exclusively to payment of interest on and to retirement of the bonds authorized by

RCW 28A.47.420.

As additional security for the payment of the bonds herein authorized, all revenues derived from the tax imposed by RCW 82.24.020 over and above the amount required by RCW 73.32.130 to be paid into and retained in the war veterans' compensation bond retirement fund shall be paid into the public schools building bond redemption fund and shall be devoted exclusively to the payment of interest on and to retirement of the bonds authorized by RCW 28A.47.420: PROVIDED, That whenever the receipts into the public schools building bond redemption fund from all sources during any one year exceed the annual amounts required for debt service, the balance shall be transferred by the state treasurer to the state general fund.

Sec. 2. Section 2, chapter 272, Laws of 1959 as amended by section 2, chapter 299, Laws of 1971 ex. sess. and RCW 73.32.130 are each amended to read as follows:

For the purpose of creating the fund for the retirement of such bonds upon maturity and the payment of interest thereon as it falls due, all proceeds hereafter received from the excise tax on cigarettes imposed by chapter 82.24 as now or hereafter amended, shall, so long as any part of principal or interest of the bonds herein provided for remains outstanding, be paid into the war veterans' compensation bond retirement fund hereinafter provided for.

In addition thereto, there is hereby levied and there shall be collected by the department of revenue from the persons mentioned in and in the manner provided by chapter 82.24, as now or hereafter amended, an excise tax upon the sale, use, consumption, handling, possession or distribution of cigarettes in an amount equal to the rate of one mill per cigarette, but the provisions of RCW 82.24.070 allowing dealers' compensation for affixing stamps shall not apply to this additional tax. Instead, wholesalers and retailers subject to the provisions of chapter 82.24 shall be allowed as compensation for their services in affixing the stamps for the additional tax required by this section a sum equal to one percent of the value of the stamps for such additional tax purchased or affixed by them.

All money derived from such tax shall be paid to the state treasurer and credited to a special trust fund to be known as the war veterans' compensation bond retirement fund, which shall be kept segregated from all money in the state treasury and shall, while any of the bonds herein authorized or any interest thereon remain unpaid, be available solely for the payment thereof.

Whenever the receipts into the war veterans' compensation bond retirement fund during any year exceed the annual amounts required for debt service, the balance shall be transferred by the state treasurer to the state general fund, and whenever there has

accumulated in the war veterans' compensation bond retirement fund a sum in excess of the amount required in any year, as determined by the state finance committee, to meet obligations during that year for bond retirement and interest, the state treasurer shall transfer from such fund to the state general fund all money in excess of such amount.

Sec. 3. Section 82.24.020, chapter 15, Laws of 1961, as last amended by section 13, chapter 299, Laws of 1971 ex. sess. and RCW 82.24.020 are each amended to read as follows:

There is levied and there shall be collected as hereinafter provided, a tax upon the sale, use, consumption, handling, possession or distribution of all cigarettes, in an amount equal to the rate of six and one-half mills per cigarette. For purposes of this section, and for purposes of RCW 28A.47.440 and 73.32.130, "possession" shall mean both (1) physical possession by the purchaser and, (2) when cigarettes are being transported to or held for the purchaser or his designee by a person other than the purchaser, constructive possession by the purchaser or his designee, which constructive possession shall be deemed to occur at the location of the cigarettes being so transported or held.

Sec. 4. Section 82.24.080, chapter 15, Laws of 1961 and RCW 82.24.080 are each amended to read as follows:

It is the intent and purpose of this chapter to levy a tax on all of the articles taxed herein, sold, used, consumed, handled, possessed, or distributed within this state and to collect the tax from the person who first sells, uses, consumes, handles, possesses (either physically or constructively, in accordance with RCW 82.24.020) or distributes them in the state. It is further the intent and purpose of this chapter that whenever any of the articles herein taxed is given away for advertising or any other purpose, it shall be taxed in the same manner as if it were sold, used, consumed, handled, possessed, or distributed in this state.

It is also the intent and purpose of this chapter that the tax shall be imposed at the time and place of the first taxable event occurring within this state; PROVIDED, HOWEVER, That failure to pay the tax with respect to a taxable event shall not prevent tax liability from arising by reason of a subsequent taxable event.

Sec. 5. Section 82.24.130, chapter 15, Laws of 1961 and RCW 82.24.130 are each amended to read as follows:

Subject to the provisions of section 6 of this 1972 amendatory act, any articles taxed herein found at any point within this state, which articles shall be held, owned((?)) or possessed((? or in the control of any person for a period of time longer than the time necessary to affix the stamps)) by any person, and not having the stamps affixed to the packages or containers are hereby declared to

be contraband goods, and may be seized by the ((~~commission~~)) department of revenue, or its duly authorized agent, or by any peace officer of the state, when directed by the ((~~commission~~)) department of revenue so to do, without a warrant, and said goods shall be offered by the ((~~commission~~)) department of revenue for sale at public auction to the highest bidder after due advertisement, but the ((~~commission~~)) department of revenue before delivering any of the goods so seized shall require the person, to whom such articles are sold, to affix the proper amount of stamps. The proceeds of sale of any goods sold hereunder shall be paid to the ((~~commission~~)) department of revenue.

The cost of seizure and sale shall be paid out of the proceeds derived from the sale before making remittance.

Any vending machine and any vehicle, not a common carrier, which may be used for the purpose of violating the provisions of this chapter shall likewise be subject to seizure and sale in the same manner.

Notwithstanding the foregoing provisions of this section, articles taxed herein which are in the possession of a wholesaler or retailer, licensed by the department, pursuant to the provisions of chapter 19.91 RCW for a period of time necessary to affix the stamps after receipt of the articles, shall not be considered contraband.

NEW SECTION. Sec. 6. There is added to chapter 15, Laws of 1961 and to chapter 82.24 RCW a new section to read as follows:

Every person who shall transport cigarettes not having the stamps affixed to the packages or containers, upon the public highways, roads or streets of this state shall have in his actual possession invoices or delivery tickets for such cigarettes, which shall show the true name and address of the consignor or seller, the true name of the consignee or purchaser, and the quantity and brands of the cigarettes so transported. If the cigarettes are consigned to or purchased by any person in this state such purchaser or consignee must be a person who is authorized by chapter 82.24 RCW to possess unstamped cigarettes in this state. In the absence of such invoices or delivery tickets, or, if the name or address of the consignee or purchaser is falsified or if the purchaser or consignee is not authorized by chapter 82.24 RCW to possess unstamped cigarettes, the cigarettes so transported shall be deemed contraband subject to seizure and sale under the provisions of RCW 82.24.130.

Transportation of cigarettes from a point outside this state to a point in some other state will not be considered a violation of this section provided that the person so transporting such cigarettes has in his possession adequate invoices or delivery tickets which give the true name and address of such out-of-state seller or consignor and such out-of-state purchaser or consignee.

In any case where the department or its duly authorized agent, or any peace officer of the state, has knowledge or reasonable grounds to believe that any vehicle is transporting cigarettes in violation of this section, the department, such agent, or such police officer, is authorized to stop such vehicle and to inspect the same for contraband cigarettes.

For purposes of this section, the term "person authorized by chapter 82.24 RCW to possess unstamped cigarettes" shall mean a wholesaler or retailer licensed pursuant to the provisions of chapter 19.91 RCW, the United States or an agency thereof, and any Indian tribal organization authorized by the department to possess unstamped cigarettes.

NEW SECTION. Sec. 7. There is added to chapter 15, Laws of 1961 and to chapter 82.24 RCW a new section to read as follows:

Notwithstanding any other provisions of this chapter, a person may acquire and physically possess, if acquired and possessed for purposes other than resale, four hundred or less cigarettes at any single time without incurring tax liability under this chapter, RCW 28A.47.440 and RCW 73.32.130.

NEW SECTION. Sec. 8. If any provision of this 1972 amendatory act, or its application to any person or circumstance is held invalid, the remainder of this 1972 amendatory act, or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 9. This 1972 amendatory act is necessary for the immediate preservation of the public peace, health and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

Passed the House January 29, 1972.

Passed the Senate February 19, 1972.

Approved by the Governor February 27, 1972 with the exception of one item in section 6 which is vetoed.

Filed in Office of Secretary of State February 28, 1972.

Note: Governor's explanation of partial veto is as follows:

"...There has recently developed between the taxing authority of this state and certain Indian people a conflict, undesired by all parties, over the permissible scope of the state taxing authority as it relates to the sale of cigarettes in this state. More particularly, certain Indian people selling cigarettes on reservations have alleged that federal law relieves them of the state imposed duty to collect the cigarette excise tax upon sales to non-Indians.

Veto
Message

These allegations have been acted upon and the matter is presently in litigation.

Veto
Message

This bill is an attempt to eliminate this controversy by interposing the authority of the state at points removed from the reservations. To achieve this result the bill provides that the tax is imposed upon the first taxable event occurring in this state (section 4) and denominates as contraband any untaxed cigarettes which are not consigned to, or in the possession of, a person authorized to possess untaxed cigarettes (sections 5 and 6). Included among persons authorized to possess untaxed cigarettes are ' . . . any Indian tribal organization authorized by the department to possess unstamped cigarettes.' (Section 6.) In addition, Section 7 legitimatizes individual possession of two cartons or less of unstamped cigarettes if held for personal use, thus legitimatizing to that extent non-Indian purchases from Indian sellers who have not collected the tax otherwise due from such buyers.

Serious questions have been raised about the propriety of the above-quoted portion of section 6. On its face, it purports to render dependent upon department approval even those sales of cigarettes by Indians to Indians when they are occupying their own trust land over which the state has not assumed full jurisdiction. It is highly doubtful that the state possesses authority thus to regulate inter-Indian on-reservation trade taking place on trust land where the state has not assumed full jurisdiction pursuant to chapter 37.12 RCW. It is equally doubtful that the legislature wished to make the attempt and particularly so if this condition to sale is viewed as an attempt to require an additional license of federal Indian traders.

If reference is had to Laws 1969, 1st ex. sess., ch. 214, sec. 1, it will be noted that the state has already assumed authority to determine which tribes, if any, may obtain untaxed cigarettes. A reading of this 1969 act makes clear that the phrase 'authorized by the department' in House Bill 44 is not intended to constitute a new grant of authority. It is instead, merely an internal reference to the powers already assumed under Laws 1969, 1st ex. sess., ch. 214, sec. 1. As such it is at best surplusage. But at worst it may be mistaken for a grant of authority to the department to regulate inter-Indian reservation sales. For

this reason, I have vetoed the item 'by the department' in the last paragraph of section 6.

Veto
Message

By taking this action the bill authorizes possession of unstamped cigarettes by '. . . any Indian tribal organization authorized to possess unstamped cigarettes.' As such, the bill in no way can be said to interfere with pending litigation in this area in which Indian sellers are claiming such authorization under federal law. The question of which tribes are so authorized, and the source of any such authority, is thus not answered by this bill. Whether Laws 1969, 1st ex. sess., ch. 214, sec. 1, effectively grant the department this authority, and if so, to what extent, is not answered. Through this veto, however, that issue is not raised in House Bill 44; House Bill 44 ceases to be construable as granting any such authority to the department, and those claiming the invalidity of such grant are referred directly to its source, i.e., Laws 1969, 1st ex. sess., ch. 214, sec. 1.

I think it especially important to make two observations about this legislation a part of this communication. First, this legislation does not attempt, as has been reported, to impose any state taxes on the reservation and it actually legitimatizes untaxed sales in limited quantities to non-Indian buyers by Indian sellers. Second, it is my opinion that the question of the proper source of any tribal authorization to possess unstamped cigarettes, as raised in this act, should be judicially determined.

With the exception of the one item referred to above, the remainder of House Bill 44 is approved."