



*California State Board of Equalization,
Legislative and Research Division*

LEGISLATIVE BULLETIN



State Capitol Building (from the East) c.1945
Photo courtesy of California State Archives

SPECIAL TAXES LEGISLATION 2005

**SPECIAL TAXES LEGISLATION
TABLE OF CONTENTS**

CHAPTERED LEGISLATION ANALYSES	PAGE
<u>Assembly Bill 178 (Koretz, et. al.) Chapter 633</u> <i>California Cigarette Fire Safety and Firefighter Protection Act</i>	1
<u>Assembly Bill 575 (Wolk) Chapter 59</u> <i>Covered Electronic Waste Recycling Fee: Retailer Election</i>	9
<u>Assembly Bill 892 (Cogdill) Chapter 512</u> <i>Cigarette and Tobacco Products Licensing Act Amendments</i> <i>Excess Tax Reimbursement – Tobacco Products Tax</i>	13
<u>Assembly Bill 1765 (Committee on Revenue and Taxation) Chapter 519</u> <i>Electronic Funds Transfers</i> <i>International Fuel Tax Agreement Reference Corrections</i> <i>Relief of Penalty - Cigarette and Tobacco Products Tax Law</i> <i>Government Entities Reporting Requirements – Diesel Fuel Tax Law</i> <i>Diesel Fuel Inspection Site Designation</i>	21
<u>Senate Bill 118 (Chesbro) Chapter 157</u> <i>Wine Direct Shipper Permit</i>	26
<u>Senate Bill 322 (Migden) Chapter 172</u> <i>ABC Licensee Information</i>	31
TABLE OF SECTIONS AFFECTED	33

Assembly Bill 178 (Koretz) Chapter 633
California Cigarette Fire Safety and Firefighter Protection Act

Effective January 1, 2006, but operative January 1, 2007. Adds Part 8 (commencing with Section 14950) to Division 12 of the Health and Safety Code.

BILL SUMMARY

Among other things, this bill authorizes an employee of the Board, upon presentation of the appropriate identification and credentials, to enter into, and to conduct an inspection of any site where there is evidence of a violation of specified requirements of the Cigarette Fire Safety and Firefighter Protection Act (Act).

Sponsor: Assembly Member Paul Koretz

LAW PRIOR TO AMENDMENT

Under existing law, the Board administers the **Cigarette and Tobacco Products Tax Law**. An excise tax of \$0.87 per package of 20 cigarettes is imposed on the distribution of cigarettes in this state.

Section 30435 of the Cigarette and Tobacco Products Tax Law authorizes an employee of the Board, upon presentation of the appropriate identification and credentials, to enter into, and conduct an inspection of, any of the following:

- Any building, facility, site, or place at which cigarette or tobacco products are sold, produced, or stored; or
- Any building, facility, site, or place for which there is evidence of either the evasion of the cigarette or tobacco products taxes, or the failure to comply with the requirements of the Master Settlement Agreement, as defined.

Any inspection performed must be performed in a reasonable manner and at a reasonable time, taking into consideration the normal business hours of the building, facility, site, or place that is inspected. Any person that refuses to allow an inspection is subject to a fine not to exceed one thousand dollars (\$1,000) for each offense.

Section 30436 authorizes the Board to seize cigarettes and tobacco products under specified conditions, which includes, but is not limited to, cigarettes not contained in packages to which the California cigarette tax stamp is affixed or tobacco products upon which the surtax has not been paid. Upon seizure, those items become the property of the state.

Upon the administrative seizure and forfeiture of cigarettes, the Board is required to give notice to all persons known by the Board to have any right, title or interest in the property. In addition, notice of seizure and forfeiture must be given on the Board's Web site, as specified, if the seizure involves 61 cartons of 200 or more cigarettes.

STATE BOARD OF EQUALIZATION

Any person owning or claiming any interest in the cigarettes may file a verified petition with the Board stating his or her interest in the property and requesting the release or recovery of the property on the grounds that property was erroneously or illegally seized. The petition must be filed within 20 days from the date of the personal service upon him or her or the date of the mailing of the notice. Any person not served personally or by mail, however, must file the petition within 20 days from the date of publication of the notice. The failure of any such person to file a timely verified petition constitutes a bar to his or her right to any interest in the property, unless otherwise provided.

Petitions for release or recovery of seized cigarettes generally appear before the Board by the next scheduled Board Meeting if the 20-day petition period has elapsed. At that point, the Board determines whether the cigarettes were erroneously or illegally seized. If the Board finds that the cigarettes were erroneously or illegally seized, it is required under current law to order the release of the property. However, if the Board denies the petition for the release or recovery of the property, notice of the denial is mailed (within five days) to the petitioner and the Board then destroys the seized cigarettes.

The Board also administers the **Cigarette and Tobacco Products Licensing Act of 2003** (Licensing Act), which requires the licensure of cigarette and tobacco products distributors, wholesalers and retailers, and cigarette manufacturers and importers.

The Licensing Act authorizes any peace officer, or Board employee granted limited peace officer status, upon presenting appropriate credentials, to enter any place, as described, and to conduct inspections. Such inspections must be conducted in a reasonable manner and at times that are reasonable under the circumstances, taking into consideration the normal business hours of the place to be entered, and must be requested or conducted no more than once in a 24-hour period. Any person that refuses to allow an inspection is subject to a misdemeanor, punishable by a fine not to exceed five thousand dollars (\$5,000), or imprisonment not exceeding one year in a county jail, or both the fine and imprisonment.

The Board also has the authority to seize cigarettes and tobacco products under the Licensing Act. With the exception of cigarettes and tobacco products seized and forfeited for continued sales after notification of suspension or revocation, the seizure and forfeiture of such products under the Licensing Act must comply with the seizure and forfeiture procedures set forth in the Cigarette and Tobacco Products Tax Law.

AMENDMENT

This bill adds Part 8 (commencing with Section 14950) to Division 12 of the Health and Safety Code as the California Cigarette Fire Safety and Firefighter Protection Act (Act).

CERTIFICATION, TESTING AND MARKING

This bill requires each cigarette manufacturer to submit a written certification to the State Fire Marshal attesting that each cigarette listed in the certification:

- Has been tested in accordance with the American Society of Testing and Materials standard E2187-04, "Standard Test Method for Measuring the Ignition Strength of Cigarettes," and
- Meets the specified performance standards.

Cigarettes certified by a manufacturer require a marking on the packaging to indicate compliance. The marking is required to be in 8-point type or larger and consist of one of the following:

- Modification of the Universal Product Code to include a visible mark printed at or around the area of that code. The mark may consist of alphanumeric or symbolic characters permanently stamped, engraved, embossed or printed in conjunction with the Universal Product Code.
- Any visible combination of alphanumeric or symbolic characters permanently stamped, engraved, or embossed upon the cigarette packaging or cellophane wrap.
- Printed, stamped, engraved, or embossed text on the cigarette packaging that indicates that the cigarettes meet California standards.

Before a certified cigarette can be sold in the state, a manufacturer is required to submit its proposed marking to the State Fire Marshal. The State Fire Marshal is required to approve the marking upon a finding that it is compliant with the marking criteria. Proposed markings are deemed approved if the State Fire Marshal fails to act within 10 business days of receiving a proposed marking. A marking in use and approved for the sale of cigarettes in New York is deemed approved. A manufacturer is only be allowed to use one marking and apply that marking uniformly for all packaging, including, but not limited to, packages, cartons, and cases, and brands marketed by that manufacturer. A manufacturer who modifies its marking must notify the State Fire Marshal of this change and submit to the State Fire Marshal a copy of the new marking, as specified.

GENERAL REQUIREMENTS

This bill prohibits a person from selling, offering, or possessing for sale in this state cigarettes not in compliance with the following requirements:

- The cigarettes are tested by the manufacturer in accordance with the prescribed test method.
- The cigarettes meet the performance standard, as specified.
- The cigarettes meet the marking requirement.
- The manufacturer files a written certification with the State Fire Marshal.

STATE BOARD OF EQUALIZATION

Distributors, wholesalers, or retailers are not prohibited from selling their inventory of cigarettes existing on January 31, 2007, if they can establish that California tax stamps or meter impressions were affixed to the cigarettes before January 1, 2007, and that the inventory was purchased before January 1, 2007, in comparable quantity to the inventory purchased during the same period of 2005.

In addition, a person or entity is not prohibited from manufacturing or selling cigarettes if the cigarettes are or will be stamped or metered for sale in another state or are packaged for sale outside the United States.

PENALTIES

Any manufacturer or any other person or entity that knowingly sells or offers to sell cigarettes other than through retail sale in violation of the Act is subject to a civil penalty not to exceed ten thousand dollars (\$10,000) for each sale.

Any retailer, distributor, or wholesaler that knowingly sells or offers to sell cigarettes in violation of this part is subject to the following:

- A civil penalty not to exceed five hundred dollars (\$500) for each sale or offer for sale in which the total number of cigarettes sold or offered for sale does not exceed 50 packages of cigarettes.
- A civil penalty not to exceed one thousand dollars (\$1,000) for each sale or offer for sale in which the total number of cigarettes sold or offered for sale exceeds 50 packages of cigarettes.

The civil penalties will be deposited in the Cigarette Fire Safety and Firefighter Protection Fund.

In addition to any other penalty prescribed by law, any corporation, partnership, sole proprietor, limited partnership, or association engaged in the manufacture of cigarettes that knowingly makes a false certification is subject to a civil penalty not to exceed ten thousand dollars (\$10,000) for each false certification.

Any person violating any other provision in this part is subject to a civil penalty not to exceed one thousand dollars (\$1,000) for each violation. Any cigarettes that have been sold or offered for sale that do not comply with the performance standard will be deemed contraband and subject to seizure and disposal by the Board or a law enforcement agency.

It may be a defense in any action for civil penalties that a distributor, wholesaler, retailer, or any person in the stream of commerce relied in good faith on the manufacturer's marking that the cigarettes comply with the requirements of the Act.

ENFORCEMENT

Manufacturers, distributors, wholesalers, and retailers are required to permit an employee of the Board, upon presentation of the appropriate identification and credentials, to enter into, and to conduct an inspection of, any building, facility, site,

STATE BOARD OF EQUALIZATION

or any place where cigarettes are sold, offered for sale, or stored or at any site where there is evidence of a violation of specified requirements of the Act.

Any person that refuses to allow an inspection is subject to a civil penalty not to exceed one thousand dollars (\$1,000) for each failure or refusal.

Upon discovery by the Board or a law enforcement agency that any person offers or possesses for sale, or has made a sale of, cigarettes in violation of specified compliance requirements of the Act, the Board or that law enforcement agency is authorized to seize those cigarettes possessed.

The Act ceases to be applicable if federal fire safety standards for cigarettes that preempt this Act are enacted and take effect subsequent to the effective date of this act and the State Fire Marshal so notifies the Secretary of State.

FINANCIAL PROVISIONS

This bill creates the Cigarette Fire Safety and Firefighter Protection Fund in the State Treasury. Upon appropriation by the Legislature, moneys deposited into that fund will be made available, in part, to the Board to offset minor administrative costs for inspecting, seizing, and disposing of cigarettes.

DEFINITIONS

This bill defines the following terms:

- "Cigarette" - a cigarette as defined in Section 30003 of the Revenue and Taxation Code.
- "Distributor" - a distributor as defined in Section 30011 of the Revenue and Taxation Code.
- "Manufacturer" - any of the following:
 - An entity that manufactures or otherwise produces cigarettes or causes cigarettes to be manufactured or produced anywhere that manufacturer intends to be sold in the state, including cigarettes intended to be sold in the United States through an importer.
 - The first purchaser anywhere that intends to resell in the United States cigarettes manufactured anywhere that the original manufacturer or maker does not intend to be sold in the United States.
 - An entity that becomes a successor of an entity, as described.
- "Offer to sell" - to offer or agree to sell.
- "Package" - package as defined in Section 30015 of the Revenue and Taxation Code.
- "Retailer" - a person who engages in the sale of cigarettes, but not for the purpose of resale.

- "Sale" or "sell" - any transfer, exchange, or barter, in any manner or by any means whatever, or any agreement for these purposes. The giving of cigarettes as samples, prizes, or gifts, and the exchanging of cigarettes for any consideration other than money are considered sales.
- "Stamp and meter impression" - stamp and meter impression as defined in Section 30018 of the Revenue and Taxation Code.
- "Wholesaler" - a wholesaler as defined in Section 30016 of the Revenue and Taxation Code.

COMMENTS

1. **Purpose.** This bill is intended to increase the safety of cigarettes sold in California by prohibiting sales of cigarettes that do not meet established fire safety standards. This bill is modeled on a New York State law that became effective in June 2004. According to the National Fire Protection Association (NFPA), cigarettes are the leading cause of fire-related injuries and death nationwide. Each year 1,000 people die and another 4,000 are injured in cigarette-related fires.
2. **Only cigarettes not meeting the performance standard are subject to disposal by the Board or a law enforcement agency.** This measure would allow the Board or a law enforcement agency to seize cigarettes upon discovery that any person offers or possesses for sale, or has made a sale of, cigarettes in violation of subdivision (a) of Section 14951. Subdivision (a) of Section 14951 provides, in part:

14951. (a) A person shall not sell, offer, or possess for sale in this state cigarettes not in compliance with the following requirements:

(1) The cigarettes are **tested** by the manufacturer in accordance with the test method prescribed in subdivision (a) of Section 14952.

(2) The cigarettes **meet the performance standard** specified in subdivision (b) of Section 14952.

(3) The cigarettes **meet the marking requirement** of Section 14954.

(4) **A written certification is filed by the manufacturer** with the State Fire Marshal in accordance with Section 14953.

However, the bill would only allow the Board or a law enforcement agency to dispose of the seized cigarettes if they do not comply with the **performance standard** (Section 14955(e)). As such, the Board cannot dispose of cigarettes that do not meet the marking requirement, or for which a written certification has not been submitted to the State Fire Marshal. How would the Board know if a seized package of cigarettes meets the performance standard? Does the Board rely on the certification that was filed with the State Fire Marshal that describes, in part, the brand and style of the cigarette? What if a certification was not filed

with the State Fire Marshal, but the cigarettes do meet the performance standard? Does the Board rely on performance standard information provided by the cigarette manufacturer? What if the brand and style is listed in a certification filed with the State Fire Marshal, but the cigarettes seized were meant to be sold in a state that does not have cigarette fire safety standards? Under such a scenario, that particular package of cigarettes would not meet the performance standards. Would that package of cigarettes not be subject to disposal because the brand and style meet the performance standard? Or would they be subject to disposal because that specific package of cigarettes does not meet the performance standard, and how would the Board know? And what would become of the cigarettes seized under this measure where the Board is not authorized to dispose of such cigarettes? Without a forfeiture provision or other statutory direction, it appears the cigarettes would be returned to the person from whom they were seized.

The following language is suggested to address this concern:

14957. Upon discovery by the board or a law enforcement agency that any person offers or possesses for sale, or has made a sale of, cigarettes in violation of subdivision (a) of Section 14951, the board or that law enforcement agency may seize those cigarettes possessed in violation of this part. Any cigarettes seized by the board or by a law enforcement agency shall be deemed forfeited.

3. **What agency is responsible for the collection of penalties?** This measure would impose civil penalties upon persons that knowingly sell or offer to sell cigarettes in violation of the Act, are engaged in the manufacture of cigarettes that knowingly make a false certification, or are in violation of any other provision of the Act. In addition, any person who knowingly fails or refuses to allow an inspection by the Board would be subject to a civil penalty for each failure or refusal. However, this measure does not specify an agency responsible for the collection of the penalties imposed. Based on discussions with the author's office, staff understands that collection would be administered by an agency other than the Board.
4. **Is this measure enforceable?** With ambiguity related to the final disposition of cigarettes seized under the Act, combined with the fact that the bill does not specify an agency to collect the penalties or any administrative provisions for that collection, it is questionable how this measure would be enforced. Without proper enforcement, would the bill accomplish the intent provided in the Legislative findings and declarations "to reduce the likelihood that cigarettes will cause fire, which results in deaths, injuries, and property damage?"
5. **Should the State Fire Marshal maintain an online directory of certified cigarettes by manufacturer?** This bill would require manufacturers certifying cigarettes to provide a copy of the certifications to all distributors and wholesalers to which they sell cigarettes. Manufacturers would also be required to provide sufficient copies of an illustration of the cigarette packaging marking utilized by

the manufacturer for each retailer to which the distributors and wholesalers sell cigarettes.

Consideration should be given to replace the requirement of providing copies with a requirement that the State Fire Marshal post on its Web site cigarettes certified by the manufacturer, as well as an illustration of the marking utilized by the manufacturer. This suggestion would provide manufacturers, distributors, and wholesalers with an efficient manner to verify certified cigarettes and approved markings, as well as provide Board staff the information necessary to conduct inspections of cigarettes to ensure compliance with the Act. Without an online directory, a provision should be added to the bill to require the State Fire Marshal to promptly notify the Board of cigarettes certified by a manufacturer and provide illustrations of approved markings, as well as any updates to such certifications or markings.

6. **Could inspections be conducted concurrently with the Board's current inspection program?** The inspections provided under this bill would be conducted at the same time as inspections under the Cigarette and Tobacco Products Tax Law and Licensing Act since both involve the examination of packages of cigarettes. As such, the provisions of this bill that authorize the Board to conduct inspections to ensure compliance with the Act, and to seize cigarettes in violation of the Act, would not be problematic to administer.

Assembly Bill 575 (Wolk) Chapter 59
Covered Electronic Waste Recycling Fee: Retailer Election

Effective July 18, 2005. Amends Sections 42463, 42464 and 42464.2 of, and adds Section 42464.8 to, the Public Resources Code.

BILL SUMMARY

This bill authorizes a retailer to elect to pay the covered electronic waste recycling fee (fee) on behalf of the consumer by paying the fee to the retailer's vendor if specified conditions are met. A vendor is defined to mean a person that makes a sale of a covered electronic device (CED) to a consumer under a lease that is a continuing sale and purchase.

Sponsor: Equipment Leasing Association

LAW PRIOR TO AMENDMENT

Under existing law, the Electronic Waste Recycling Act of 2003 (Ewaste Act) requires a consumer to pay a fee upon the purchase of a new or refurbished CED in specified amounts. Unless otherwise provided, a retailer is required to collect a fee from the consumer at the time of the retail sale of the CED.

A "retailer" is defined to mean a person who makes a retail sale of a new or refurbished covered electronic device. A "retail sale" is defined to mean a sale for any purpose other than resale in the regular course of business in the form of tangible personal property. A sale means and includes, among other things, any lease of tangible personal property in any manner or by any means whatsoever, for a consideration, except as otherwise provided.

A retailer is authorized to retain 3 percent of the fee as reimbursement for all costs associated with the collection of the fee and is required to transmit the remainder of the fee to the Board. The fees paid to the Board are deposited in the Electronic Waste Recovery and Recycling Account created in the Integrated Waste Management Fund.

AMENDMENT

This bill amends Section 42464 of the Public Resources Code to allow a retailer to elect to pay the fee on behalf of the consumer by paying the fee to the retailer's vendor, but only if all of the following conditions are met:

- The vendor is registered with the Board to collect and remit the fee.
- The vendor holds a valid seller's permit for sales and use tax purposes.
- The retailer paid the fee to the vendor that must be separately stated on the vendor's invoice to the retailer.

STATE BOARD OF EQUALIZATION

- The retailer provides an express statement on the invoice, contract, or other record documenting the sale given to the consumer that the fee has been paid on behalf of the consumer.

If all four conditions are met, the fee is considered a debt owed by the vendor to the state, and the retailer will not be liable for the fee.

A vendor is authorized to retain 3 percent of the fee, in lieu of the retailer, as reimbursement for all costs associated with the collection of the fee if a retailer makes an election to pay the fee to the vendor, and the specified conditions are met. The vendor is required to transmit the remainder of the fee to the Board.

This bill amends Section 42463 to define a "vendor" to mean a person that makes a sale of a CED for the purpose of resale to a retailer who is the lessor of the CED to a consumer under a lease that is a continuing sale and purchase pursuant to Part 1(commencing with Section 6001) of Division 2 of the Revenue and Taxation Code.

This bill also amends Section 42464.2 to provide that a reference in the Fee Collection Procedures Law to "feepayer" includes a vendor in the case of a retailer's election to pay the fee on behalf of the consumer by paying the fee to the vendor.

And lastly, this bill adds Section 42464.8 to allow the Board to disclose the name, address, account number, and account status of a person registered with the Board to collect and remit the fee.

The bill became effective immediately as an urgency statute.

BACKGROUND

In 2003, Senate Bill 20 (Sher, Ch. 526) enacted the Electronic Waste Recycling Act of 2003. Among other things, the Act imposed, on and after July 1, 2004, a fee upon the first sale in the state of a covered electronic device to a consumer by a retailer. The Act authorized the California Integrated Waste Management Board to contract with the Board or another party for collection of the fee.

However, Assembly Bill 901 (Jackson, Ch. 84, Stats. 2004) extended the operative date for the fee from July 1, 2004, to November 1, 2004.

In 2004, Senate Bill 50 (Sher, Ch. 863) made several clarifying changes to the fee and again extended the operative date for the fee by two months to January 1, 2005. The August 18, 2004, version of Senate Bill 50 contained similar provisions to those in proposed in this measure. However, they were subsequently amended out of that bill.

COMMENTS

1. **Purpose.** This bill is intended to resolve fee calculation and collection difficulties unique to commercial equipment leasing.

According to the ELA, commercial equipment lessors that are defined as retailers pursuant to the Ewaste Act do not maintain an inventory and never take physical possession of the equipment they lease. These commercial equipment lessors

are essentially a “financing source” for leased equipment that is usually shipped from a supplier’s (i.e. manufacturer, vendor or distributor) inventory directly to a lessee. Since the commercial equipment lessors never take possession of the leased equipment, they must rely on the descriptions and information contained in vendor invoices for the purpose of imposing the fee. However, these invoices often lack the details necessary for the commercial equipment lessor to determine if and how the fee should apply to its lease agreement. Additionally, most leases provide for “quiet possession by lessee” which does not allow a lessor to access equipment for inspection or gain descriptive details. As such, the current law hinders good faith efforts by equipment lessors to collect the fees.

2. **Why make an exception to the confidentiality statutes?** In part, Section 55381 of the Fee Collection Procedures Law (Rev. & Tax Code, §55001 et seq.), the administrative provisions under which the Board collects the fee, provides it is unlawful for the Board to make known the business affairs, operations, or any other information pertaining to a fee payer which was submitted to the Board in a report or return, or to permit any report or copy thereof to be seen or examined by any person not expressly authorized.

This bill would provide an exception to Section 55381 to allow the Board to disclose the name, address, account number, and account status of a person registered to collect and remit the fee. This exception would allow a retailer/lessor to verify that a vendor is registered with the Board for purposes of the fee, which is a condition to an election. The information disclosed would be similar to what is disclosed under the sales and use tax law, which includes business name, address, account number and account status.

3. **This bill limits the election to lessors.** A retailer would only be authorized to make an election to pay the fee on behalf of the consumer by paying the fee to its vendor. A vendor would be defined to mean a person who makes a sale of a CED for the purpose of resale to a retailer who is the lessor of the CED. The sponsor of this measure intended to limit application of the election to purchases of leased equipment so as not to create unintentional consequences to other industries. Limiting the election to lessors also makes the provisions of this measure manageable for Board audit staff.

If this election was open to all fee payers, it could hinder the Board’s ability to audit and verify payment and liability of the fee. For example, a manufacturer pays the fee on behalf the consumer when it sells a CED to a wholesaler. Before the CED is finally sold to a consumer, it is purchased and sold by another wholesaler. Although the sales invoice includes an express statement that the fee has been paid on behalf of the consumer, it would be burdensome to audit up the distribution chain to verify payment of the fee.

Furthermore, it could potentially lead to abuse where an express statement appears on invoices throughout the distribution chain where the fee has not been paid. This would lead to an unexpected liability for a retailer if that retailer relies on the express statement provided on its purchase invoice and does not remit a fee to the Board.

STATE BOARD OF EQUALIZATION

4. **The provisions of the bill would not be problematic to administer.** This measure would not be problematic for the Board to administer.

Assembly Bill 892 (Cogdill) Chapter 512

***Cigarette and Tobacco Products Licensing Act Amendments
Excess Tax Reimbursement – Tobacco Products Tax***

Effective January 1, 2006. Amends Section 22978.4, 22978.7, 22979.2, 22979.7, and 22980.2 of the Business and Professions Code, and adds Section 30361.5 to the Revenue and Taxation Code.

BILL SUMMARY

This bill contains **Board-sponsored provisions** that accomplish the following:

- Amends Section 22978.4 of the Business and Professions Code to require each distributor and each wholesaler to include on each invoice the date the cigarettes or tobacco products are sold.
- Amends Sections 22978.7 and 22979.7 of the Business and Professions Code to clarify the penalty for second or subsequent violations of the Cigarette and Tobacco Products Licensing Act (Act).
- Amends Section 22979.2 of the Business and Professions Code to include imported cigarettes when computing the administration fee for manufacturers and importers that begin operations after January 1, 2004.
- Amends Section 22980.2 of the Business and Professions Code to clarify that continued sales of cigarettes and tobacco products without a license constitutes a violation of the Act and result in the seizure of such products in the possession of the person by the Board or a law enforcement agency.
- Adds Section 30361.5 to the Revenue and Taxation Code to apply excess tax reimbursement to persons that represent amounts as reimbursement for taxes imposed upon the distribution of tobacco products when such amounts are computed upon an amount that is not taxable or is in excess of the tax amount.

In addition to the Board-sponsored provisions, this bill **also contains provisions sponsored by the California Distributors Association** that requires each distributor and each wholesaler to include the amount of excise taxes due to the Board by the distributor on the sale of cigarettes and tobacco products on each sales invoice. The bill allows an exception to that requirement for a distributor that is also a retailer or a manufacturer and instead requires such person to include either one of the following on each invoice for the sale of cigarettes or tobacco products:

- A statement that reads: "All California cigarette and tobacco product taxes are included in the total amount of this invoice."
- The amount of excise taxes due to the Board by the distributor on the distribution of cigarettes and tobacco products.

Revises the Distributor and Wholesaler Invoicing Requirements for the Sale of Cigarettes or Tobacco Products
Business and Professions Code Section 22978.4

LAW PRIOR TO AMENDMENT

Under current law, Section 22978.4 of the Business and Professions Code requires each distributor and each wholesaler to include specified information on each invoice for the sale of cigarettes or tobacco products. This information includes, in part, the name, address, and telephone number of the distributor or wholesaler and the statement "All California cigarette and tobacco product taxes are included in the total amount of this invoice." Failure to comply with the invoicing requirements is a misdemeanor and punishable by a fine not to exceed five thousand dollars (\$5,000), or imprisonment not exceeding one year in a county jail, or both the fine and imprisonment.

The invoicing provisions currently do not require distributors and wholesalers to include the date the cigarettes or tobacco products were sold on invoices for the sale of such products.

AMENDMENT

This bill amends Section 22978.4 to require distributor and wholesaler invoices for the sale of cigarettes or tobacco products to include the date such products were sold, which assists Board investigators in verifying a retailer's tax paid product.

The bill also revises the requirement that each distributor and wholesaler include the statement "All California cigarette and tobacco product taxes are included in the total amount of this invoice" on each invoice for the sale of cigarettes or tobacco products. Instead, such invoices must include the amount of excise taxes due to the Board by the distributor on the sale of cigarettes and tobacco products. However, a distributor that is also a retailer or manufacturer has the option to include either one of the following on each invoice for the sale of cigarettes or tobacco products:

- A statement that reads: "All California cigarette and tobacco product taxes are included in the total amount of this invoice."
- The amount of excise taxes due to the Board by the distributor on the distribution of cigarettes and tobacco products.

BACKGROUND

In 2003, AB 71 (Ch. 892, J. Horton) enacted the Cigarette and Tobacco Products Licensing Act of 2003. Among other things, the Act required every distributor and every wholesaler to annually obtain and maintain a license to engage in the sale of cigarettes and tobacco products. The Act imposed various record-keeping requirements upon distributors and wholesalers, including invoicing for the sale of cigarettes and tobacco products under Section 22978.4. As enacted, each distributor and wholesaler invoice for the sale of cigarettes or tobacco products was required to include the amount of the excise taxes due to the Board by the distributor on the sale of cigarettes and tobacco products. The purpose of the requirement was

to prove intent to evade the excise tax if shown on a distributor or wholesaler invoice when such tax has not been paid to the state to allow for criminal prosecution.

In 2004, AB 3092 (Ch. 822, J. Horton) amended Section 22978.4 to replace the invoice requirement to include the amount of excise taxes due to the Board by the distributor on the sale of cigarettes and tobacco products with the statement "All California cigarette and tobacco products taxes due to the board by the distributor on the sale of cigarettes and tobacco products." This amendment was intended to address a problem that some distributors and wholesalers had complying with the requirement that sales receipts/invoices must state the exact amount of excise taxes paid in each transaction of cigarettes and tobacco products. The problem for these distributors and wholesalers was that they did not have the software that would allow them to break out the exact amount of excise taxes paid, particularly when their inventory of the same name brand products is purchased at different prices. Changing the reporting requirement on the invoice relieved the distributors and wholesalers of this problem while maintaining the distributors and wholesalers knowledge and intent that all California cigarette and tobacco product taxes have been paid.

COMMENTS

1. **The date the cigarette or tobacco products are sold.** Including the date on each distributor and wholesaler invoice for the sale of cigarettes and tobacco products would be an important tool to allow Board investigators to match cigarettes and tobacco products on a retailer's shelf to distributor or wholesaler invoices for the purpose of verifying tax paid product.
2. **The excise taxes due to the Board by the distributor.** This amendment would require each distributor and each wholesaler to include the amount of excise taxes due to the Board by the distributor, unless otherwise specified, on each distributor and wholesaler sales invoice. A distributor that is also a retailer or manufacturer would be authorized to include the amount of tax due to the Board by the distributor or the statement specified in existing law. This amendment would continue to prove knowledge and intent to evade the excise tax when such tax has not been paid to the state.

However, Board staff is concerned that this amendment could be problematic for wholesalers. The tobacco products tax is based on the wholesale cost of such products, which could fluctuate based on variables such as the distributor purchased from and the time of purchase. As such, the tobacco products tax due to the Board by a distributor on the same name brand of tobacco products in a wholesaler's inventory could vary. For example, a wholesaler purchases several identical cans of chewing tobacco¹ from two distributors in a number of transactions. The excise tax paid by the distributor on the chewing tobacco in each transaction is separately stated on its sales invoice to the wholesaler, but is different depending on which distributor the product was purchased from and the timing of the purchase. When the wholesaler resells the cans of chewing

¹ Tobacco products

tobacco to another wholesaler or retailer, it would seem difficult for that wholesaler to include the amount of excise tax due to the Board by the distributor for each can of chewing tobacco.

For the purpose of proving knowledge and intent to evade the excise tax for criminal prosecution, either of the following is workable for the Board:

- A statement that reads: "All California cigarette and tobacco product taxes are included in the total amount of this invoice."
- The amount of excise taxes due to the Board by the distributor on the distribution of cigarettes and tobacco products.

Clarify the penalty for second or subsequent violations of the Act
Business and Professions Code Sections 22978.7 and 22979.7

LAW PRIOR TO AMENDMENT

Under current law, Section 22974.7 of the Business and Professions Code provides that in addition to any other civil or criminal penalty provided by law, upon a finding that a retailer has a second or any subsequent offense of any provision of the Cigarette and Tobacco Products Licensing Act of 2003, the Board may, in addition to revoking or suspending the license or licenses of the retailer, impose a civil penalty in the amount not to exceed the greater of five times the retail value **of the seized** cigarettes or tobacco products, or five thousand dollars (\$5,000).

Sections 22978.7 and 22979.7 are identical to Section 22974.7 with the exception of the amount of civil penalty relating to the civil penalty amount of five times the retail value of the cigarettes or tobacco products **seized**.

AMENDMENT

This bill amends Section 22978.7 and 22979.7 to clarify that in the case of a second or any subsequent offense, the civil penalty applies to the retail value of the **seized** cigarettes or tobacco products, consistent with Section 22974.7.

COMMENT

Current Sections 22978.7 and 22979.7 are ambiguous as to what the basis for retail value of cigarettes or tobacco products is to be used to compute the civil penalty. For example, would the civil penalty be computed based on the retail value of cigarettes or tobacco products seized or the retail value of all cigarette or tobacco products inventory?

**Include imported cigarettes when computing the administration fee for
manufacturers and importers that begin operations after January 1, 2004**
Business and Professions Code Section 22979.2

LAW PRIOR TO AMENDMENT

Under current law, Section 22979.2 of the Business and Professions Code requires that, **on or before January 1, 2004**, every manufacturer and every importer pay to the Board an administration fee. The amount of the administration fee is one cent (\$0.01) per package of cigarettes (1) manufactured or imported by the manufacturer or the importer and (2) shipped into this state during the 2001 calendar year as reported to the Board.

All manufacturers and all importers that begin operations in the state **after January 1, 2004** are charged a fee commensurate with their respective market share of (1) *cigarettes manufactured or imported by the manufacturer* and (2) sold in this state during the next calendar year as estimated by the Board. The amount of the fee may not be less than that paid by the smallest manufacturer that began operations prior to January 1, 2004, but may not be more than that paid by the eighth largest manufacturer.

AMENDMENT

This bill amends Section 22979.2 to correct an inadvertent drafting error to clarify that cigarettes manufactured or imported by the importer are used to compute the administration fee for importers that begin operations after January 1, 2004. This is consistent with the computation of the fee for importers that commence business on or before January 1, 2004.

COMMENT

The calculation of the administration fee for importers that begin operations after January 1, 2004 is not consistent with the calculation for importers that began operations on or before January 1, 2004. The fee calculation for manufacturers and importers that begin operations after January 1, 2004 does not consider cigarettes manufactured or imported by the importer.

Clarify that continued sales without a license constitutes a violation of the Act and result in the seizure of all cigarette and tobacco products in the possession of the person by the Board or a law enforcement agency
Business and Professions Code Section 22980.2

LAW PRIOR TO AMENDMENT

Under current law, Section 22980.2 of the Business and Professions Code provides that a person or entity that engages in the business of selling cigarettes or tobacco products in this state **without a license** or after a license has been suspended or revoked is guilty of a misdemeanor. Such a violation is punishable by a fine not to exceed five thousand dollars (\$5,000), or imprisonment not exceeding one year in a county jail, or both the fine and imprisonment.

Continued sales after a notification of suspension or revocation is a misdemeanor punishable by a fine not to exceed five thousand dollars (\$5,000), or imprisonment not exceeding one year in a county jail, or both the fine and imprisonment, and results in the seizure of all cigarettes and tobacco products in the possession of the person by the Board or a law enforcement agency.

AMENDMENT

This bill amends Section 22980.2 to make continue sales **without a license** a misdemeanor punishable by a fine not to exceed five thousand dollars (\$5,000), or imprisonment not exceeding one year in a county jail, or both the fine and imprisonment, and results in the seizure of all cigarettes and tobacco products in the possession of the person by the Board or a law enforcement agency.

COMMENT

Although existing law prohibits a person from engaging in the business of selling cigarettes or tobacco products in this state without a license, it does not authorize the seizure of all cigarette and tobacco products in possession of the person for continued sales without a license. Persons selling without a license would include persons that never applied or were issued a license.

With respect to Section 22980.2, the Board or a law enforcement agency is only authorized to seize cigarettes or tobacco products from persons that continue to sell such products after notification of a revocation or suspension. However, cigarettes or tobacco products in a person's possession that never had a license and continued to sell could not be seized.

This provision would make the Board's and law enforcement agency's ability to seize cigarettes and tobacco products from persons that continue to sell without a license or after a notification of suspension or revocation consistent.

Apply excess tax reimbursement to persons that represent amounts as reimbursement for taxes imposed upon the distribution of tobacco products when such amounts are computed upon an amount that is not taxable or is excess of the tax amount

Revenue and Taxation Code Section 30361.5

LAW PRIOR TO AMENDMENT

Under existing Sales and Use Tax Law, when an amount represented by a person to a customer as constituting reimbursement for taxes due is computed upon an amount that is not taxable or is in excess of the taxable amount and is actually paid by the customer to the person, the amount so paid is required to be returned by the person to the customer upon notification by the Board or by the customer that such excess tax has been collected. In the event of his or her failure or refusal to do so, the amount so paid is required to be remitted to the state. Those amounts remitted to the state will be credited by the Board on any amounts due and payable on the same transaction from the person by whom it was paid to this state and the balance, if any, shall constitute an obligation due from the person to this state.

The Cigarette and Tobacco Products Tax Law requires every distributor to pay a tax upon his or her distribution of tobacco products, based on the wholesale cost of these products, at a tax rate determined annually by the Board. Distribution is defined to mean, in part, the sale of untaxed cigarettes or tobacco products in this state. However, tobacco products distributors who import tobacco products manufactured outside of the United States (original importer) are exempt from the excise tax imposed on the distribution of tobacco if such sales are to a licensed distributor. As such, an original importer's distribution of tobacco products to a licensed California distributor is not subject to tax and the purchasing licensed distributor owes the excise tax upon their distribution of the tobacco products based upon the wholesale cost of the product.

AMENDMENT

This bill adds Section 30361.5 to conform the tobacco products tax law to other tax and fee programs administered by the Board to allow the state to issue a determination for excess tobacco products tax when any person fails to return that excess tax to the customer or to remit those amounts to the state. Amounts remitted to the state will be credited to amounts due and payable from the purchasing licensed distributor, as specified.

COMMENT

Notwithstanding the exemption provided, the Board has found a few original importers collecting an amount represented as tobacco products tax from licensed distributors. Although these original importers may believe they are doing a favor by collecting and paying the excise tax, *it does not offset or relieve the purchasing licensed distributor's excise tax liability*. Since the tobacco products taxes are not owed by the original importer, they are eligible to claim and receive a refund of all tobacco products taxes incorrectly paid. However, existing law does not require the

STATE BOARD OF EQUALIZATION

original importer to return amounts that were represented as tax to the purchasing licensed distributor. This imposes a hardship on licensed distributors that thought they had paid the excise tax on tobacco products only to discover that they still owe the tax, including interest, and the original importer is not willing to return the excess amounts collected that were represented as excise tax.

Currently the Board has twelve appeals cases as a result of audits where tobacco product taxes have been assessed against licensed distributors for their purchases from original importers where the original importer has indicated that taxes are included in the price to the distributor.

In addition, a similar issue exists for manufacturers of tobacco products as existing law provides an exemption for manufacturers where their sales are to licensed distributors.

The amendment to replace the word "person" with "customer" is intended to clarify that those excess taxes remitted to the Board by a person that collected the excess tax reimbursement would be credited by the Board on any amounts due and payable from the customer.

Assembly Bill 1765 (Committee on Revenue and Taxation) Chapter 519

Board-Sponsored Measure

Effective January 1, 2006. Amends Sections 8760, 9405, 9407, 9411, 9420, 9432, 30180, 30190, 30283, 32260, 40067, 41060, 43170, 45160, 46160, 50112.7, 55050, 60043, 60250, and 60603 of, the Revenue and Taxation Code.

BILL SUMMARY

Among other things, this bill contains **Board-sponsored provisions** for the special taxes and fees programs, which do the following:

- Amend Sections 9405, 9407, 9411, 9420 and 9432 of the Revenue and Taxation Code to properly reference the International Fuel Tax Agreement.
- Amend Section 30180 of the Cigarette and Tobacco Products Tax Law to allow for relief of penalty, consistent with other relief of penalty statutes.
- Amend Section 60043 of the Diesel Fuel Tax Law to eliminate the licensing and reporting requirements for government entities that use only tax-paid diesel fuel on the highway and have no tax liability, in order to ease their reporting requirements.
- Amend Section 60603 of the Diesel Fuel Tax Law to allow the state to designate an inspection site for diesel fuel, consistent with current practice.

Eliminate the requirement that persons voluntarily electing to remit amounts due by electronic funds transfers must do so for a minimum of one year

Revenue and Taxation Code Sections 6479.3, 7659.9, 8760, 30190, 32260, 40067, 41060, 43170, 45160, 46160, 50112.7, 55050, and 60250

LAW PRIOR TO AMENDMENT

Under existing law, Section 6479.3 of the Revenue and Taxation Code provides the statutory authority to require taxpayers with monthly tax liabilities averaging \$20,000 or more to remit their tax payments via an electronic funds transfer (EFT). Under the law, other taxpayers may voluntarily elect to remit their tax liabilities via the EFT method, but the law requires that these taxpayers continue this method of payment for a minimum of one year.

AMENDMENT

This bill amends the various business taxes statutes to delete the provision that requires those taxpayers who voluntarily remit their funds by the EFT method to continue that method for a minimum of one year.

COMMENT

In 1991, when the EFT provisions were added into the law, the process to transmit and accept payments via EFT was a relatively new concept. The one-year minimum requirement was incorporated into the provisions, because it was believed at the time that acceptance of payments in different forms from the same taxpayer could complicate matters. However, now with the frequency and familiarity with the EFT payment methodology, the one-year minimum requirement is no longer necessary. And, most taxpayers that voluntarily choose to remit their payments via EFT likely prefer that method, so there is no apparent reason to require volunteers to commit to the EFT program for a year or more at the outset. In fact, such a requirement could actually discourage taxpayers from volunteering for the EFT program.

<p>Properly reference the International Fuel Tax Agreement <i>Revenue and Taxation Code Sections 9405, 9407, 9411, 9420, and 9432</i></p>
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LAW PRIOR TO AMENDMENT

Under current law, Section 9405 of the Revenue and Taxation Code states that Chapter 2, Part 3.5, Division 2 of the Revenue and Taxation Code shall be administered in conjunction with the IFTA Articles of Agreement, the Use Fuel Tax Law, and the Diesel Fuel Tax Law. "IFTA" is defined in Section 9411 to mean the International Fuel Tax Agreement, which is a document that is comprised of three separate parts—the Articles of Agreement, the Procedures Manual and the Audit Manual.

AMENDMENT

This bill amends Sections 9405, 9407, 9411, and 9432 to clarify the definition and reference to the International Fuel Tax Agreement. The bill also amends Section 9420 to clarify that the license for the IFTA is a license and not a permit.

COMMENT

By referencing only the IFTA Articles of Agreement in Section 9405, existing law too narrowly defines the governing document. To correct this, Section 9411 would be amended to properly define the International Fuel Tax Agreement. Also, Sections 9405, 9407, 9420 and 9432 would be amended to properly reference the International Fuel Tax Agreement. The reference to IFTA Articles of Agreement in current law does not completely identify the International Fuel Tax Agreement, which by its terms includes all of the governing documents (e.g. the Articles of Agreement, the Procedures Manual and the Audit Manual). These suggested changes are consistent with changes recommended in the Final Report (April 1999) prepared by the National Conference of State Legislatures titled "IFTA Legislation and State Constitutional Provisions Project".

Under the current law, Section 9420 states that all interstate users who choose to obtain an IFTA permit from the Board shall apply for a license and secure decals for their vehicles. The rest of the section uses the term license instead of permit. A

license is what is issued to an IFTA licensee. Therefore, the term IFTA “permit” should be changed to IFTA “license” to conform with the rest of the law and the IFTA Agreement.

Relief of Penalty

Revenue and Taxation Code Sections 30180 and 30283

LAW PRIOR TO AMENDMENT

Under existing law, distributors of cigarettes can purchase cigarette stamps on either a cash or deferred basis. Those distributors who purchase stamps on a deferred basis are not required to pay the state until the 25th day of the following month.

Section 30171 requires any distributor who fails to pay any amount owing for the purchase of stamps or meter register settings within the time required, to pay a penalty of 10 percent of the amount due in addition to the amount plus interest at the modified adjusted rate per month, or fraction thereof, established pursuant to Section 6591.5, from the date on which the amount became due and payable until the date of payment.

Article 6 of Chapter 4 (commencing with Section 30281) contains provisions that relieve a person of the tax, interest or penalty under specified conditions. These provisions include:

- Section 30282 provides that if the Board finds that a person's failure to make a timely report or payment is due to reasonable cause and circumstances beyond the person's control, and occurred notwithstanding the exercise of ordinary care and in the absence of willful neglect, the person may be relieved of the **penalty** provided by specified sections, including Sections 30171.
- Section 30283 provides that if the Board finds that a person's failure to make a timely return or payment was due to a disaster, and occurred notwithstanding the exercise of ordinary care and the absence of willful neglect, the person may be relieved of the **interest** provided by specified sections, not including Section 30171.
- Section 30283.5 provides that the Board, in its discretion, may relieve all or any part of the **interest** imposed on a person under the Cigarette and Tobacco Products Tax Law where the failure to pay tax is due in whole or in part to an unreasonable error or delay by an employee of the Board acting in his or her official capacity.
- Section 30284 provides that if the Board finds that a person's failure to make a timely report, return, or payment is due to the person's reasonable reliance on written advice from the board, the person may be relieved of the **taxes** imposed under the Cigarette and Tobacco Products Tax Law and **any penalty or interest** thereto.

STATE BOARD OF EQUALIZATION

Unfortunately current law contains conflicting statutes. Section 30180 specifically states that Article 6 of Chapter 4 (which contains Section 30282, 30283.5 and 30284) does not apply to amounts due or paid with respect to purchases of stamps, thereby creating conflict between Section 30180 and Sections 30282, 30283.5 and 30284.

AMENDMENT

This bill amends Section 30180 to delete the reference to Article 6 (commencing with Section 30281) of Chapter 4 and allow the Board to continue to relieve a cigarette stamp purchaser of the tax, interest and/or penalty under Section 30282, 30283.5, and 30284.

In addition, this bill amends Section 30283 to grant the Board the authority to relieve a person from the payment of interest imposed under Section 30171 if the person's failure to make a timely return or payment was due to a disaster, as provided.

COMMENT

This relief of penalty provisions is consistent with other relief of penalty provisions in the cigarette tax program and all other tax and fee programs administered by the Board.

Tax Paid Diesel Fuel Used by Governmental Entities
Revenue and Taxation Code Section 60043

LAW PRIOR TO AMENDMENT

Under the existing Diesel Fuel Tax Law, all government entities that operate a diesel-powered highway vehicle upon the state's highways are required to have a diesel fuel tax license and to file monthly tax returns. However, only government entities that use dyed (untaxed) diesel fuel in a diesel-powered highway vehicle on state highways pay tax on the tax return and the tax is based upon each gallon of dyed diesel fuel used on the highway.

AMENDMENT

This bill amends Section 60043 to eliminate the need for a government entity to obtain a license and file tax returns when that entity only uses tax-paid diesel fuel on the highway.

COMMENT

A number of government entities purchase only tax-paid diesel fuel for use on the highway and owe no additional tax on the tax return. The licensing and reporting requirements place an additional burden on these governmental entities that have no tax liability. Some government entities are questioning the need for a license, including the obligation to file monthly tax returns, when they only purchase tax-paid diesel fuel and therefore owe no additional tax.

State designated diesel fuel inspection site
Revenue and Taxation Code Section 60603

LAW PRIOR TO AMENDMENT

Under the existing Diesel Fuel Tax Law, officers or employees of the state are authorized to conduct inspections at any designated inspection site where evidence of activities of diesel fuel tax evasion may be discovered. A designated inspection site includes any state highway inspection station, weigh station, agricultural inspection station, mobile station, or other location designated by the Internal Revenue Service (IRS) to be used as a diesel fuel inspection site.

AMENDMENT

This bill amends Section 60603 to clarify the state's authority to specify that either the IRS or the state may designate an inspection site at an "other location". In addition, this updates existing law to be consistent with the current practice of state, rather than IRS, conducted inspections.

COMMENT

When the diesel fuel tax law was enacted in 1995, only the IRS was conducting diesel fuel inspections. Thus, the inspection site language was drafted to authorize the IRS to designate an inspection site at a location other than the specified fixed sites controlled by the state. However, both the Board and the IRS now contract with the California Air Resources Board (CARB) to do inspections to check for diesel fuel tax evasion. Since the IRS designates the inspection sites where the CARB is to conduct inspections, such inspection sites qualify as IRS-designated.

However, a question has arisen as to the state's authority to designate an inspection site other than at one of the listed sites when such an inspection does not involve the IRS. A narrow interpretation of the statute could conclude that inspections could not be conducted at a site other than those specified in statute if the Board contracts with a state agency independent of the IRS. Since the law currently authorizes officers or employees of the state to conduct inspections at listed sites, and since state agencies currently conduct inspections at other locations designated by the IRS, it follows that the law should include a provision for the state, as well as the IRS, to designate an "other location" inspection site.

Senate Bill 118 (Senator Chesbro, et al) Chapter 157***Wine Direct Shipper Permit***

Effective January 1, 2006. Amends Section 23661.2 of, and adds Section 23661.3 to, the Business and Professions Code, and amends Section 32101 of the Revenue and Taxation Code.

BILL SUMMARY

This bill creates a wine direct shipper permit that authorizes the permit holder to sell and ship wine directly to any person in California that is twenty-one years of age or older for his or her personal use. The issuance of a wine direct shipper permit by the Department of Alcoholic Beverage Control (ABC) constitutes the registration of the person to whom the permit is issued as a taxpayer with the Board under the Alcoholic Beverage Tax Law.

Sponsor: Senator Wesley Chesbro

LAW PRIOR TO AMENDMENT**ALCOHOLIC BEVERAGE TAX LAW**

Under existing law, Section 32101 of the Revenue and Taxation Code provides that licenses issued to any manufacturer, winegrower, wine blender, distilled spirits manufacturer agent, rectifier, wholesaler, importer, or customs broker under the Alcoholic Beverage Control Act² constitutes the registration of the person to whom the license is issued as a taxpayer under the Alcoholic Beverage Tax Law. Upon the issuance of any such license, ABC is required to furnish a copy of the license to the Board.

Among other things, Sections 32151 and 32220 of the Revenue and Taxation Code impose a per-gallon excise tax upon all beer and wine sold in this state by a manufacturer, wine grower, or importer, and others selling such beverages with respect to which no tax has been paid.

The current taxes and surcharges on wine are as follows:

	<u>Tax Per Gallon</u>	<u>Surcharge Per Gallon</u>	<u>Total Per Gallon</u>
Wine (not more than 14 percent alcohol)	\$0.01	\$0.19	\$0.20
Wine (more than 14 percent alcohol)	\$0.02	\$0.18	\$0.20
Sparkling wine	\$0.30	None	\$0.30

² Division 9 (commencing with Section 23000) of the Business and Professions Code

The alcoholic beverage tax is paid to the Board and deposited into the Alcohol Beverage Control Fund.

SALES AND USE TAX LAW

Current law imposes a sales or use tax on the sale or purchase of tangible personal property in this state (including alcoholic beverages). When a person sells wine at retail in this state, the sales tax applies. The seller is responsible for this tax and must pay it to the state. When the sales tax does not apply, the use tax does. For example, when a person buys wine from a point outside this state for use or consumption in this state, the use tax is the applicable tax. If the out-of-state seller has nexus within the state, the seller is required to collect the use tax from the purchaser at the time of sale. If the seller does not collect the use tax, or if the seller does not have nexus in this state, the purchaser is required to pay the use tax directly to the Board.

Under existing law, every person desiring to engage in or conduct business as a seller within this state is required to apply for a seller's permit for each place of business. Also, every out-of-state retailer selling tangible personal property for use in this state is required to register with the Board and, among other things, give the name and address of all agents operating in this state.

The Board's Regulation 1684, *Collection of Use Tax by Retailers*, provides, in part, that a retailer not engaged in business in this state may apply for a Certificate of Registration – Use Tax. Holders of such certificates are required to collect tax from purchasers and pay the tax to the Board in the same manner as retailers engaged in business in this state.

ALCOHOLIC BEVERAGE CONTROL ACT

Under existing law, Section 23661.2 of the Business and Professions Code allows any unlicensed adult resident of California to apply to ABC and be issued a permit to receive a shipment of wine, including vermouth and champagne, from a state other than California. The shipment of wine may be from any state of the United States that allows adult residents of that state to receive by permit of nominal cost shipments of no less than nine liters of wine, including vermouth and champagne, per month from California. The shipment into this state must be made in accordance with rules adopted by ABC, and the total shipments permitted in any calendar month to a person can not exceed nine liters. A common carrier to which the permit is presented is authorized to make delivery of the shipment to the person named in the permit. Delivery of a shipment pursuant to the permit is not deemed to constitute a sale in this state.

An individual or licensee in a state that affords California licensees or individuals an equal reciprocal shipping privilege may ship, for personal use and not for resale, no more than two cases of wine (no more than nine liters each case) per month to any adult resident in this state. Such a delivery of a wine shipment does not constitute a sale in this state. The shipping container of any wine sent into or out of this state must be clearly labeled to indicate that the package cannot be delivered to a minor or to an intoxicated person.

AMENDMENT

This bill amends Section 23661.2 of the Business and Professions Code to remove the provision that allows any adult resident of California to apply to ABC and be issued a permit to receive a shipment of wine, including vermouth and champagne.

This bill also adds Section 23661.3 to the Business and Professions Code to allow any person, who is currently licensed in this state or any other state as a winegrower and who obtains a wine direct shipper permit, to sell and ship wine directly to a resident of California. Such person is allowed to ship wine directly to a resident of California, who is at least 21 years of age, for the resident's personal use and not for resale. Before sending any shipment to a resident of California, the wine direct shipper permit holder is required to:

- File an application with ABC.
- Pay a ten dollar (\$10) annual registration fee if the winegrower is not currently licensed by ABC.
- Provide ABC its California alcoholic beverage license number or a true copy of its current alcoholic beverage license issued by another state.
- Obtain from ABC a wine direct shipper permit.
- Obtain a seller's permit or register with the Board pursuant to Part 1 (commencing with Section 6001) of Division 2 of the Revenue and Taxation Code.

A wine direct shipper permit authorizes the permit holder to do all of the following:

- Sell and ship wine to any person 21 years of age or older for his or her personal use and not for resale.
- Ship wine directly to a resident in this state only in containers that are conspicuously labeled with the words: "CONTAINS ALCOHOL: SIGNATURE OF PERSON AGE 21 YEARS OR OLDER REQUIRED FOR DELIVERY."
- Ship wine only if the permit holder requires the carrier to obtain the signature of any individual 21 years of age or older before delivering any wine shipped to an individual in this state.
- If the permit holder is located outside of this state, report to ABC no later than January 31 of each year, the total amount of wine shipped into the state during the preceding calendar year under the wine direct shipper permit.
- If the permit holder is located outside of this state, pay to the Board all sales and use taxes and excise taxes on sales to residents of California under the wine direct shipper permit. For excise tax purposes, all wine sold pursuant to a direct shipper permit is deemed to be wine sold in this state for excise tax purposes.
- If located within this state, provide ABC any necessary additional information not currently provided to ensure compliance.

STATE BOARD OF EQUALIZATION

- Permit ABC or the Board to perform an audit of the wine direct shipper permit holder's records upon request.
- Be deemed to have consented to the jurisdiction of ABC or any other state agency and the California courts concerning enforcement of this section and related laws, rules, or regulations.

This bill prohibits sales and shipments of wine directly to consumers in California from winegrowers who do not possess a current wine direct shipper permit from ABC. Any person who knowingly makes, participates in, transports, imports, or receives such a shipment would be guilty of a misdemeanor, as specified.

A wine direct shipper permit holder located outside of the state could annually renew its permit with ABC by paying a ten dollar (\$10) renewal registration fee and providing ABC with a true copy of its current alcoholic beverage license issued by another state. A wine direct shipper permit holder located within California is required to renew its wine direct shipper permit in conjunction with its master license. A "master license" means a winegrower's license issued by the department.

This bill also allows ABC and the Board to promulgate rules and regulations to effectuate the purpose of Section 23661.3.

And lastly, this bill amends Section 32101 of the Revenue and Taxation Code to make issuance of any wine direct shipper permit under the Alcoholic Beverage Control Act a registration of that person to whom the permit is issued as a taxpayer under the Alcoholic Beverage Tax Law.

IN GENERAL

Upon the repeal of prohibition in 1933 and the return of the legal sale of alcoholic beverages to California, taxation and regulation of the manufacture, distribution, and sale of alcoholic beverages were given to the Board. In 1955, an amendment to the State Constitution became effective which removed the duty of regulating the manufacture and sale of alcoholic beverages from the Board and placed it in the new ABC. The Board is responsible for assessing and collecting the excise taxes that are or may be imposed by the Legislature on the manufacture, importation, and sale of alcoholic beverages in this state.

BACKGROUND

On May 16, 2005, the U. S. Supreme Court ruled on a challenge to state regulatory schemes in Michigan and New York brought by small wineries (*Granholm v. Heald*, 125 S.Ct. 1885 (2005)). The Court heard oral arguments on the question: *Does a state law that allows in-state wineries to directly ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant commerce clause in light of the 21st Amendment?* In general, the Commerce Clause prohibits states from adopting laws that benefit in-state economic interests to the detriment of out-of-state interests. In similar broad terms, § 2 of the 21st Amendment forbids transporting or importing liquor into a state in violation of its laws.

STATE BOARD OF EQUALIZATION

Both Michigan and New York have regulatory schemes that ban the direct shipment of out-of-state wine to in-state consumers. In Michigan, out-of-state wineries are only allowed to ship directly to wholesalers, while their in-state counterparts are allowed to ship directly to consumers. In addition, all parties wishing to access wholesalers must obtain a license from the state. The wholesale license costs \$300 for out-of-state wineries and \$50 for in-state wineries.

The New York regulatory scheme differs slightly. In New York, all wineries must be licensed to sell directly to consumers. To receive a license, a winery must pay certain regulatory fees, maintain an office within the state, and receive wine in a government-bonded winery, warehouse, or storeroom located within the state.

The Supreme Court held, in a 5 to 4 decision, that laws banning or severely restricting the ability of out-of-state shippers to ship wine directly to consumers while allowing in-state wineries to do so violate the Commerce Clause. The Court's opinion stressed that, if states choose to allow the direct shipment of wine to consumers, they must do so on even-handed terms.

The Court determined that the laws of both states discriminated against out-of-state wineries in violation of the Commerce Clause. Having made the determination, it considered whether the laws were justified because there is no other way to achieve the states' goals of preventing deliveries to minors and ensuring that state taxes are collected. It found that the states could meet their goals by requiring an adult's signature as a condition of delivery and requiring the out-of-state winery to obtain a liquor permit.

COMMENTS

1. **Purpose.** This bill is intended to implement statutory changes required with respect to the issue of "direct-to-consumer" shipments of wine based on the U.S. Supreme Court decision in *Granholm v. Heald*.
2. **The provisions of the bill would not be problematic to administer.** Creating a new direct wine shipper permit under the Alcoholic Beverage Tax Law would not be problematic for the Board.

Senate Bill 322 (Migden) Chapter 172

ABC Licensee Information

Effective January 1, 2006. Adds Section 23058 to the Business and Professions Code.

BILL SUMMARY

This bill requires the Alcoholic Beverage Control Board (ABC) each quarter to electronically transmit to the Board a report on the alcoholic beverage licenses issued or transferred, as specified, at no cost.

Sponsor: Senator Carole Migden

LAW PRIOR TO AMENDMENT

Under the State Constitution, the ABC is granted the exclusive authority to administer the provisions of the Alcoholic Beverage Control Act in accordance with laws enacted by the Legislature. This involves licensing individuals and businesses associated with the manufacture, importation, and sale of alcoholic beverages in this state and the collection of license fees or occupation taxes for this purpose. Under this Act, a license is required for the privilege of selling all types of alcoholic beverages, namely, beer, wine, and distilled spirits. However, this Act does not require that a seller's permit be obtained as a prerequisite to obtaining a license.

Under California's Sales and Use Tax Law, every person desiring to engage in or conduct business as a seller of tangible personal property within this state is required to apply to the Board for a seller's permit for each place of business. In general, a seller's permit must be obtained if a person intends to sell or lease tangible personal property, including alcohol, that would ordinarily be subject to sales tax if sold at retail. The requirement to obtain a seller's permit applies to individuals, partnerships, corporations, organizations, limited liability partnerships and limited liability companies. Both wholesalers and retailers are required to apply for a seller's permit.

AMENDMENT

This bill adds Section 23058 to the Business and Professions Code to require the ABC to electronically transmit to the Board each quarter, at no cost, a report on the licenses issued or transferred pursuant the Alcoholic Beverage Control Act. The bill requires that the report include the names and addresses of all persons to whom the license is issued or transferred, the type of license issued or transferred, and the effective date of the license or transfer. With respect to transfers, the bill requires that the report additionally include the names and addresses of the transferors.

The bill also requires that the information be transmitted to the Board in a format agreed upon by the Board and the ABC.

The bill becomes operative January 1, 2006.

IN GENERAL

Current law does not specifically require an applicant to possess a seller's permit prior to applying for an alcoholic beverage license; however, both the Board and the ABC alert applicants of the requirements under the law. The Board's seller's permit application has a space to designate the applicant's alcoholic beverage license number. If an alcoholic beverage license is applied for, but not yet issued, the BOE will nevertheless issue a seller's permit and make a notation that the alcoholic beverage license is pending. Board staff instructs the applicant to provide the alcoholic beverage license information when it is obtained. Applicants generally do respond back with the number.

The ABC, as part of its application requirements, currently provides information on its web site alerting potential applicants of the seller's permit requirements and provides a link to the Board's web site for further information.

COMMENTS

- 1. Purpose.** The purpose of this bill is to ensure that every person that obtains a liquor license is properly registered as a seller with the Board.
- 2. Key amendments.** The **April 21, 2005 amendments** deleted the provisions contained in the introduced version which would have required that the application to obtain a license to sell alcoholic beverages include a copy of the applicant's valid seller's permit issued by the Board. Instead the bill now requires ABC to electronically transmit to the Board specified information regarding licenses and transfers issued.
- 3. The bill will enable the Board to verify whether an alcoholic beverage licensee is properly registered under the Sales and Use Tax Law.** Having access to the information that ABC has in an electronic format will provide a valuable tool for the Board to identify any persons to whom an ABC license is issued or transferred that may be operating without a seller's permit. Also, the information regarding transferors that ABC will be required to transmit to the Board will also enable the Board to update current permitholders' registration information.

TABLE OF SECTIONS AFFECTED

SECTION	BILL AND CHAPTER NUMBER		SUBJECT	
Revenue and Taxation Code				
<i>Motor Vehicle Fuel Tax Law</i>				
§7659.9	Amend	AB 1765	Ch. 519	Electronic Funds Transfers
<i>Use Fuel Tax Law</i>				
§8760	Amend	AB 1765	Ch. 519	Electronic Funds Transfers
<i>Fuel Tax Agreements</i>				
§9405	Amend	AB 1765	Ch. 519	Construction of the International Fuel Tax Agreement
§9407	Amend	AB 1765	Ch. 519	Authority
§9411	Amend	AB 1765	Ch. 519	IFTA defined
§9420	Amend	AB 1765	Ch. 519	License and fees
§9432	Amend	AB 1765	Ch. 519	Distribution of funds
<i>Cigarette and Tobacco Products Tax Law</i>				
§30180	Amend	AB 1765	Ch. 519	Other applicable provisions
§30190	Amend	AB 1765	Ch. 519	Electronic Funds Transfers
§30283	Amend	AB 1765	Ch. 519	Disaster: relief from interest
§30361.5	Add	AB 892	Ch. 512	Excess tax reimbursement: tobacco products tax
<i>Alcoholic Beverage Tax Law</i>				
§32101	Amend	SB 118	Ch. 157	Direct shipper permit: registration
§32260	Amend	AB 1765	Ch. 519	Electronic Funds Transfers

TABLE OF SECTIONS AFFECTED (CONTINUED)

SECTION	BILL AND CHAPTER NUMBER		SUBJECT
Revenue and Taxation Code			
<i>Energy Resources Surcharge Law</i>			
§40067	Amend	AB 1765 Ch. 519	Electronic Funds Transfers
<i>Emergency Telephone Users Surcharge Law</i>			
§41060	Amend	AB 1765 Ch. 519	Electronic Funds Transfers
<i>Hazardous Substances Tax Law</i>			
§43170	Amend	AB 1765 Ch. 519	Electronic Funds Transfers
<i>Integrated Waste Management Fee Law</i>			
§45160	Amend	AB 1765 Ch. 519	Electronic Funds Transfers
<i>Oil Spill Response, Prevention, and Administration Fees Law</i>			
§46160	Amend	AB 1765 Ch. 519	Electronic Funds Transfers
<i>Underground Storage Tank Maintenance Fee Law</i>			
§50112.7	Amend	AB 1765 Ch. 519	Electronic Funds Transfers
<i>Fee Collection Procedures Law</i>			
§55050	Amend	AB 1765 Ch. 519	Electronic Funds Transfers
<i>Diesel Fuel Tax Law</i>			
§60043	Amend	AB 1765 Ch. 519	Government entity defined
§60250	Amend	AB 1765 Ch. 519	Electronic Funds Transfers
§60603	Amend	AB 1765 Ch. 519	Inspections by the Board

TABLE OF SECTIONS AFFECTED (CONTINUED)

SECTION		BILL AND CHAPTER NUMBER		SUBJECT
Business and Professions Code				
<i>Cigarette and Tobacco Products Licensing Act of 2003</i>				
§22978.4	Amend	AB 892	Ch. 512	Invoice requirements
§22978.7	Amend	AB 892	Ch. 512	Penalty for violation: distributors and wholesalers
§22979.2	Amend	AB 892	Ch. 512	Administration fee
§22979.7	Amend	AB 892	Ch. 512	Penalty for violation: manufacturers and importers
§22980.2	Amend	AB 892	Ch. 512	Penalty for unlicensed persons
<i>Alcoholic Beverage Tax Law</i>				
§23058	Add	SB 322	Ch. 172	ABC licensee information
§23661.2	Amend	SB 118	Ch. 157	Direct shipper permit
§23661.3	Add	SB 118	Ch. 157	Direct shipper permit
Health and Safety Code				
<i>California Cigarette Fire Safety and Firefighter Act</i>				
Part 8 (commencing with Section 14950) to Division 12	Add	AB 178	Ch. 633	California Cigarette Fire Safety and Firefighter Protection Act
Public Resources Code				
<i>Covered Electronic Waste Recycling Fee</i>				
§42463	Amend	AB 575	Ch. 59	Definitions
§42464	Amend	AB 575	Ch. 59	Imposition of fee
§42464.2	Amend	AB 575	Ch. 59	Administration
§42464.8	Add	AB 575	Ch. 59	Disclosure of information