

Add Sections 22974.6 and 22978.9 to the Business and Professions Code to authorize the Board of Equalization (BOE) to impose a civil penalty rather than seizing tobacco products with a retail value of less than one thousand dollars (\$1,000) in cases where the licensee is unable to document the payment of tax with a purchase invoice.

Source: Honorable Michelle Steel

Current Law

Under existing Cigarette and Tobacco Products Tax Law (Tax Law), the cigarette tax is paid through the use of stamps or meter impressions. An appropriate stamp is affixed to, or an appropriate meter impression is made on, each package of cigarettes prior to the distribution of the cigarettes. On the other hand, the tobacco products tax is paid through the use of a return on which the distributor reports the wholesale cost of the tobacco products distributed and calculates the tax due.

The Cigarette and Tobacco Products Licensing Act of 2003¹ (Licensing Act) authorizes the BOE to seize cigarette and tobacco products possessed, stored, owned or sold by any retailer, distributor, wholesaler, or any other person upon which the tax is due but has not been paid. While evidence of the payment of tax on cigarettes is more easily identified by BOE staff through the use of an appropriate tax stamp on the cigarette package, tobacco products are not stamped because the tax is paid through the use of a distributor's return. For purposes of the Licensing Act, it is presumed that the tobacco products tax has not been paid until the contrary is established by proof of payment to the BOE or by a purchase invoice that shows that the tax has been paid or is included in the purchase price, as provided. The burden of proof that tax has been paid on tobacco products for which tax is due is upon the person in possession of the tobacco products.

The Members of the BOE hear several cases each year for the release or recovery of seized tobacco products involving persons who, among other things, are unable to locate a purchase invoice showing evidence of the payment of the tobacco products tax or received tobacco products erroneously delivered instead of other products that had been ordered and which do appear on invoices. In many cases, the petitioner has offered to pay the tax or a penalty in exchange for the tobacco products. However, current law does not allow for the release of seized tobacco products unless the seizure itself was erroneous or illegal.

The process of seizing tobacco products, including any appeal, requires a substantial amount of BOE resources. Upon the administrative seizure and forfeiture of cigarettes or tobacco products, the BOE is required to give notice by personal service or by certified mail to all persons known by the BOE to have any right, title or interest in the property. Any person owning or claiming any interest in the cigarettes or tobacco products may file a petition with the BOE 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. Petitions for release or recovery of seized cigarettes or tobacco products generally appear before the BOE by the next scheduled Board Meeting.

¹ Division 8.6 (commencing with Section 22970) of the Business and Professions Code

Staff time related to preparing an appeal and mailing costs associated with small seizures and petitions, as well as the time to hear the case, generally exceed the amount of tax due on the tobacco products.

Furthermore, if a licensee is able to later document payment of the tax, the tobacco products will be returned. However, by the time the licensee is able to document the payment of tax, the freshness date of the product has passed, resulting in a financial loss to the business owner.

During fiscal year 2009-10, there were a total of 382 tobacco products seizures worth a total approximate retail value of \$1,327,438, with an average seizure amount of \$3,475. Of these seizures, 201 (53%) were less than \$500, and 181 (47%) were \$500 or more. There were a total of 79 seizures with amounts of \$500 to \$1,000 (21%).

This Proposal

This proposal would authorize the BOE to impose a civil penalty in the amount of one hundred dollars (\$100) upon a licensee for failing to maintain purchase invoices to document the payment of tax upon tobacco products instead of seizing such products. The option to impose a civil penalty would only be available in the case of a first offense involving tobacco products that have a retail value of one thousand dollars (\$1,000) or less. Tobacco products with a retail value over one thousand dollars (\$1,000) upon which the licensee is not able to document payment of the tax, would continued to be seized. The BOE staff would also continue to have the authority to seize tobacco products that have a value of one thousand dollars (\$1,000) or less, which may be exercised by BOE staff in cases, for example, where the licensee has had a previous violation of the Licensing Act.

Based on the data for fiscal year 2009-10, 280 (74%) of the tobacco products seizures may have qualified under this proposal. The staff time saved by eliminating these small seizures could have been redirected to other revenue generating or enforcement activities, such as additional Licensing Act inspections, or other appeal case workload. Furthermore, the proceeds from the penalty would be deposited into the Cigarette and Tobacco Products Compliance Fund thereby decreasing reliance on the Cigarette and Tobacco Products Surtax Fund and California Children and Families Trust Fund to help fund the BOE's administration of the Licensing Act program.

Section 22974.6 is added to the Business and Professions Code to read:

22974.6. (a) In addition to any other applicable penalty, any retailer who fails to establish by a proof of payment to the board or by a purchase invoice as described in Section 22978.4 that tax has been paid to the board on tobacco products possessed, stored, owned, or sold at retail on which tax is due, the board may impose a civil penalty in an amount of one hundred dollars (\$100).

(b) This section shall apply only in the case of a first offense involving tobacco products whose retail value is less than one thousand dollars (\$1,000) that are not seized pursuant to Chapter 7.5 (commencing with Section 30435).

Section 22978.9 is added to the Business and Professions Code to read:

22978.9. (a) In addition to any other applicable penalty, any distributor or wholesaler who fails to establish by the distributor's proof of payment to the board or by a purchase invoice as described in Section 22978.4 that tax has been paid to the board on tobacco products possessed, stored, owned, or sold on which tax is due, the board may impose a civil penalty in an amount of one hundred dollars (\$100).

(b) This section shall apply only in the case of a first offense involving tobacco products whose retail value is less than one thousand dollars (\$1,000) that are not seized pursuant to Chapter 7.5 (commencing with Section 30435).