

10-35776

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CONFEDERATED TRIBES AND BANDS OF THE
YAKAMA INDIAN NATION
Plaintiff-Appellant

v.

CHRISTINE O. GREGOIRE, Governor of the State of Washington;
CINDI HOLMSTROM, Director of the Washington State Department of Revenue;
LESLIE CUSHMAN, Deputy Director of the Washington State Department of
Revenue; STUART THRONSON, Assistant Director of Special Programs of the
Washington State Department of Revenue; and PAT PARMER, Chief of
Enforcement and Education Division of the Washington State Liquor Control
Board,
Defendants-Appellees.

ON APPEAL FROM ORDERS AND JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
Case No. 2:08-cv-03056-RHW
The Honorable Robert H. Whaley, Senior District Judge

**OPENING BRIEF OF PLAINTIFF – APPELLANT
CONFEDERATED TRIBES AND BANDS
OF THE YAKAMA INDIAN NATION**

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FED. R. APP. P. 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the undersigned counsel for Plaintiff – Appellant the Confederated Tribes and Bands of the Yakama Indian Nation certifies that, on information supplied by the Confederated Tribes and Bands of the Yakama Indian Nation, the Confederated Tribes and Bands of the Yakama Indian Nation has no parent corporation(s) and no publicly-held corporation owns stock in the Confederated Tribes and Bands of the Yakama Indian Nation.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiff-Appellant the Confederated Tribes and Bands of the Yakama Indian Nation requests oral argument in light of the importance of the issues presented herein.

GLOSSARY

In discussing factual and historical matters, litigation positions, and arguments in this brief, the terms “Nation” and “Yakama Nation” refer to Plaintiff-Appellant the Confederated Tribes and Bands of the Yakama Indian Nation. In discussing litigation positions and arguments, the term “State” refers to Defendants-Appellees Christine Gregoire, Cindi Holmstrom, Leslie Cushman, Stuart Thronson, and Pat Parmer. In discussing factual and historical matters, the term “State” refers to the Washington State Legislature (“Legislature”) and to the Washington State Department of Revenue (“Department”), unless otherwise indicated. The term “the State’s cigarette tax scheme” or “the State’s scheme” refers to the Revised Code of Washington §§ 82.24.010-900 (West, Westlaw through 2011 legislation) and to the Department’s rule implementing those statutes, Washington Administrative Code § 458-20-186 (West, Westlaw through amendments adopted on Dec. 15, 2010). Unless otherwise indicated, all citations to the State’s cigarette tax scheme in this brief are to the current versions of these codes, copies of which are included in the Addendum for the Court’s convenience.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over the Yakama Nation's claims under 28 U.S.C. §§ 1331 and 1362 because this case arises under the Constitution and laws of the United States, including the federal common law right of reservation Indians to be free from state taxation.

This Court has jurisdiction under 28 U.S.C. § 1291 because the Nation appeals from the district court's order denying the Nation's motion for summary judgment and granting the State's motion for summary judgment on January 4, 2010, *Confederated Tribes & Bands of the Yakama Nation v. Gregoire*, 680 F. Supp. 2d 1258 (E.D. Wash. 2010), ER13-30; the district court's order granting the State's motion to dissolve the temporary restraining order and to enter judgment on August 4, 2010, ER5-12; and the district court's order granting the State's motion to disburse bond funds on November 9, 2010, ER1-4. The Nation timely filed notices of appeal from these orders and judgment, which dispose of the parties' claims, on September 2, 2010, ER34, and on December 8, 2010, ER31.

STATEMENT OF THE ISSUES

The United States Supreme Court has categorically held that states may not tax Indian nations or their members in Indian country. Accordingly, if the legal incidence of a state tax falls on Indians in Indian

country, the tax is invalid and unenforceable absent express congressional authorization. This case raises a single issue with respect to the State of Washington's cigarette tax scheme:

Whether the legal incidence of the State's cigarette tax falls on Yakama retailers in violation of federal law where (1) wholesalers are required to pass down the tax to retailers but retailers are not required to pass down the tax to individual consumers; (2) retailers and wholesalers are required to keep records showing that retailers have paid the tax but retailers are not required to document that consumers have paid the tax; and in contrast to wholesalers, (3) retailers cannot defer payment of the tax pending their collection of the tax from their customers; (4) retailers receive no compensation or other benefits for acting as a transmittal agent for the State; and (5) retailers remain liable for the tax even when they are unable to sell to consumers the cigarettes upon which they have already paid the tax?

STATEMENT OF THE CASE

The Yakama Nation commenced this action for declaratory and injunctive relief on September 2, 2008, challenging the validity under federal law of the State's cigarette tax scheme as applied to Yakama cigarette wholesalers and retailers on the Yakama Indian Reservation. ER206. The district court granted the Nation's motion for a temporary

restraining order on September 12, 2008, and enjoined the State from threatening or taking any enforcement action against Yakama wholesalers or retailers or their suppliers with respect to the possession, delivery, and sale of cigarettes not bearing a Washington State tax stamp. ER188-193. The district court required the Nation to post a \$500,000 bond as security for this preliminary injunctive relief. ER187.

The parties filed cross motions for summary judgment on June 3, 2009. ER254-255. On January 4, 2010, the district court (Whaley, J.) denied the Nation's motion and granted the State's motion in part, and in doing so, held that the legal incidence of the State's cigarette tax does not fall on Yakama retailers in violation of federal law. ER13-30. On the basis of that order, the district court granted the State's motion to dissolve the restraining order and to enter judgment on August 4, 2010. ER5-12. The Nation appealed the district court's order and judgment on September 2, 2010. ER34. On November 9, 2010, the district court granted the State's motion to disburse the proceeds of the bond posted by the Nation in connection with the restraining order, ER1-4, and the Nation filed an amended notice of appeal to include that order on December 8, 2010, ER31.

STATEMENT OF THE FACTS

I. The Yakama Nation and Its Economy

The Yakama Nation is a federally-recognized Indian nation with approximately 10,000 enrolled members that is party to the Yakama Treaty of 1855, 12 Stat. 951, and that exercises the sovereign right of self-government over the 1.4 million-acre Yakama Indian Reservation in Central Washington. ER54-55 (Plaintiffs' LR 56.1 Statement of Undisputed Facts in Support of Plaintiffs' Motion for Summary Judgment and Motion to Strike ("Plaintiffs' Statement")) ¶ 22; ER38 (Defendants' Statement of Facts Opposing Plaintiffs' LR 56.1 Statement of Facts ("Defendants' Statement")) ¶ 22; ER198 (Declaration of Athena Sanchey in Support of Temporary Restraining Order ("Sanchey Decl.)) ¶ 8. The Yakama Nation's diverse economy includes farming, tobacco manufacturing, gaming, Yakama cultural centers, restaurants, retail shops, and other entertainment and tourist activities. ER198 (Sanchey Decl.) ¶ 9.

There are nine Yakama member-owned businesses on the reservation engaged in the retail sale of cigarettes and other tobacco products. ER73-74 (Defendants' Corrected Interrogatories and Requests for Production to Plaintiff Yakama Nation Commerce Association with Responses) Int. 6. These businesses also sell motor vehicle fuel and other convenience store

items. *E.g.*, ER195 (Declaration of Richard “Kip” Ramsey) ¶ 2. Each of these businesses is organized, licensed, and operates pursuant to the laws of the Yakama Nation, including the Nation’s Law and Order Code for Tribal Business Incorporation and Regulation. ER56, 75-88 (Plaintiffs’ Statement) ¶ 64, Ex. J; ER39 (Defendants’ Statement) ¶ 64. Through the affixation of the Yakama Nation tax stamp, the Nation imposes a tax on tobacco products sold by Yakama retailers. ER198-199 (Sanchey Decl.) ¶ 10. The revenues generated by this tax support essential government services, including police, water and sewer, electricity and gas, tribal court, and burial services, as well as fisheries, forestry, and other natural and cultural resources programs. ER198-201 (*Id.*) ¶¶ 10-11, 13.

II. The State’s Cigarette Tax Scheme

The State of Washington also imposes an excise tax on “the sale, use, consumption, handling, possession, or distribution of all cigarettes.” Wash. Rev. Code § 82.24.020(1). It is the Legislature’s intent “to collect the tax from the person who first sells, uses, consumes, handles, possesses . . . or distributes [cigarettes] in the state,” *id.* § 82.24.080(1), and to “impose[] [the tax] at the time and place of the first taxable event and upon the first taxable person within this state,” *id.* § 82.24.080(2). To facilitate the collection of the tax with respect to cigarettes sold by Washington retailers, the State

employs what is commonly referred to as a “collect and remit” scheme, *Coeur d’Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 688 (9th Cir. 2004), *cert. denied*, 543 U.S. 1187 (2005), as described below.¹

A. The Rights and Obligations of Wholesalers under the State’s Tax Scheme

“Wholesalers,” who distribute cigarettes “to retailers for the purpose of resale,” Wash. Rev. Code § 82.24.010(8), are required to purchase and affix tax stamps to each package of unstamped cigarettes that they acquire from manufacturers or distributors. *Id.* § 82.24.030; *see also* Wash. Admin. Code § 458-20-186(101)(b) (“Payment of the cigarette tax is made through the purchase of stamps from banks authorized by the department . . . to sell

¹ With respect to cigarettes that are *not* sold by Washington retailers, the Department collects the tax by other means. For example, when a manufacturer gives away cigarettes for advertising, promotional, or other purposes, the manufacturer must pay the tax directly to the Department. Wash. Admin. Code § 458-20-186(101)(d), (602)(f); ER104 (Deposition of Lee Smith (“Smith Dep.”)) 67:3-6. And when a Washington resident purchases cigarettes from an *out-of-state* retailer, the resident must pay the tax directly to the Department. Wash. Admin. Code § 458-20-186(602)(g). Out-of-state retailers are required by the Federal Jenkins Act, 15 U.S.C. §§ 375-378, to report these interstate sales to the Department, *id.* § 376(a)(2); *see also* Wash. Admin. Code § 458-20-186(602)(d), and the Department has used this information to inform Washington consumers of their tax obligation and to issue tax assessments where appropriate, ER133-135 (Smith Dep.) 131:1—133:12. As a result of recent amendments to the Jenkins Act by the Prevent All Cigarette Trafficking Act of 2009, Pub. L. No. 111-154, 124 Stat. 1087 (2010), out-of-state retailers must now sell to Washington residents cigarettes affixed with a Washington tax stamp and must comply with all of the same legal obligations as Washington retailers. 15 U.S.C. § 376a(a)(3), (d).

the stamps.”). Only wholesalers may possess and affix tax stamps to unstamped cigarettes. Wash. Rev. Code §§ 82.24.030(3), .040(1)-(2); Wash. Admin. Code § 458-20-186(101)(b). Wholesalers may defer payment for tax stamps for up to 30 days to enable them to first collect the tax from the retailers to which they sell the stamped cigarettes. ER57-58 (Plaintiffs’ Statement) ¶¶ 71, 73; ER40-41 (Defendants’ Statement) ¶¶ 71, 73.

Wholesalers are also “compensated [by the State] for affixing the stamps at the rate of \$6.00 per thousand stamps affixed.” Wash. Admin. Code § 458-20-186(201)(b).

Wholesalers must “pass [the tax] on” to cigarette retailers, Wash. Rev. Code § 82.24.020(2), and must maintain for the Department’s inspection records documenting that retailers have in fact paid the tax on all cigarettes that they purchase, ER58 (Plaintiffs’ Statement) ¶ 72 (“All invoices for sales by wholesalers to retailers must show that the cigarette tax was charged to the retailer.”); ER40 (Defendants’ Statement) ¶ 72; *see also* Wash. Rev. Code § 82.24.090(1); ER59-60 (Plaintiffs’ Statement) ¶ 80; ER42-43 (Defendants’ Statement) ¶ 80.² The Department requires wholesalers, moreover, to submit monthly reports of their sales “to make sure the tax was paid by the retailer.” ER60 (Plaintiffs’ Statement) ¶ 84; ER43 (Defendants’

² Wholesalers may absorb, in their discretion, one cent of tax per package of cigarettes. Wash. Rev. Code. § 82.24.020(2).

Statement) ¶ 84; *see also* Wash. Rev. Code § 82.24.090(2). In the event a wholesaler is unable to sell to a downstream retailer cigarettes to which it has affixed tax stamps—for example, because those cigarettes are damaged or become unfit for sale or because the Washington State Attorney General removes those cigarettes from the list of brands approved for sale in Washington—the wholesaler is entitled to a full refund of the tax. Wash. Rev. Code § 82.24.210; *see also* ER62-63 (Plaintiffs’ Statement) ¶¶ 91, 95; ER45-46 (Defendants’ Statement) ¶¶ 91, 95.

B. The Rights and Obligations of Retailers under the State’s Tax Scheme

Retailers may not possess or affix tax stamps to unstamped cigarettes, but must instead purchase and pay the tax on cigarettes previously stamped by wholesalers. Wash. Rev. Code §§ 82.24.050, .110(1)(e). Unlike wholesalers, retailers may not defer payment of the tax pending their recoupment of the tax from individual consumers. ER58 (Plaintiffs’ Statement) ¶ 73; ER40-41 (Defendants’ Statement) ¶ 73. When the cigarette tax rate increases, retailers must also promptly pay to the Department an additional tax (equivalent to the amount of the increase) on all cigarettes in their inventories. Wash. Rev. Code §§ 82.24.080(3), .280(1); ER64 (Plaintiffs’ Statement) ¶¶ 111-112; ER47-48 (Defendants’ Statement) ¶¶ 111-112.

In contrast to wholesalers, retailers are not required to “pass [the tax] on,” Wash. Rev. Code § 82.24.020(2), to their customers or to maintain or submit to the Department records documenting that consumers have in fact paid the tax. ER58-60 (Plaintiffs’ Statement) ¶¶ 74, 78, 80, 83; ER41-43 (Defendants’ Statement) ¶¶ 74, 78, 80, 83. Retailers are, however, required to maintain for five years for the Department’s inspection detailed records of their transactions with wholesalers. Wash. Rev. Code §§ 82.24.090(1), .110(1)(l). Nor are retailers required to provide consumers with a receipt or other documentation showing that the consumer has in fact paid the tax, and consumers are not required to maintain any such records. ER58-59, 61 (Plaintiffs’ Statement) ¶¶ 75-76, 85; ER41-43 (Defendants’ Statement) ¶¶ 75-76, 85. Also in contrast to wholesalers, retailers may not obtain a refund of the tax that they have paid on cigarettes that they are subsequently unable to sell to consumers. ER163-164 (Plaintiffs’ First Set of Requests for Admissions to Defendants and Defendants’ Responses Thereto (“Defendants’ Responses”)) RFA 1 (Defendants “[a]dmit that retailers are not allowed a refund for the cost of the Washington state cigarette tax stamp paid when purchasing cigarettes but which cost could not later be collected from a consumer.”).

III. The Nation's Challenge to the State's 1976 Cigarette Tax Scheme

These stark distinctions between the rights and obligations of wholesalers and retailers have not always existed under the State's cigarette tax scheme. Under the version of the scheme in force in 1976, for example, both wholesalers and retailers could lawfully possess and affix tax stamps to unstamped cigarettes, Wash. Rev. Code §§ 82.24.040-.050 (1976); Wash. Admin. Code § 458-20-186 (1976) (Collection ¶ 2); both wholesalers and retailers could defer payment of the tax until they collected the tax from their customers, Wash. Admin. Code § 458-20-186 (1976) (Collection ¶ 7); both wholesalers and retailers received compensation for their services as tax transmittal agents for the State, Wash. Rev. Code § 82.24.070 (1976); Wash. Admin. Code § 458-20-186 (1976) (Collection ¶ 7); both wholesalers and retailers received a refund from the Department for the tax paid on cigarettes damaged or unfit for sale, Wash. Admin. Code § 458-20-186 (1976) (Refunds); and neither wholesalers nor retailers were affirmatively required to pass the tax on to their customers.

The Yakama Nation and other Indian nations and tribes challenged the 1976 scheme on numerous grounds in *Confederated Tribes of the Colville Indian Reservation v. Washington*, 446 F. Supp. 1339 (E.D. Wash. 1978), *aff'd in part and rev'd in part*, 447 U.S. 134 (1980). With respect to the

question of legal incidence, the State conceded that if “the legal incidence of the tax is imposed directly upon the Tribe or Indian retailer . . . the tax must fail,” *Colville*, 446 F. Supp. at 1352, and also “candidly admit[ted]” that the Washington Supreme Court had previously held that the legal incidence of the tax fell on retailers, *id.* at 1353-54. Nevertheless, the district court agreed with the State that “the legislature[] inten[ded] to impose the legal incidence of the tax at the earliest *constitutional* opportunity,” *id.* at 1355 (emphasis added), and that the Legislature could shift the legal incidence of the tax based solely on the Indian or non-Indian status (that is, the taxability) of the particular retailer. The district court thus held that “[w]here on-reservation tribal sales to non-Indians are involved, . . . the legal incidence falls upon the non-Indian purchaser rather than the tribal seller.” *Id.* The Supreme Court “accept[ed]” the district court’s conclusion, *Colville*, 447 U.S. at 142 n.9, but as the court below correctly recognized, “[t]he Supreme Court did not itself analyze the question of legal incidence,” ER18.

SUMMARY OF THE ARGUMENT

It is a bedrock principle of federal law that Indian nations and their members are immune from state taxation in Indian country. To determine whether a party in the chain of distribution bears the legal incidence of a state excise tax, a court must review the tax scheme in its entirety, as written

and applied, and ascertain whether that party is a mere transmittal agent for the tax or is ultimately responsible for its payment. The application of these principles to the State of Washington's cigarette tax scheme demonstrates that the legal incidence of the tax falls on cigarette retailers. The tax is accordingly invalid and unenforceable as applied to Yakama retailers.

Under the State's scheme, wholesalers are required by law to pass through the tax to retailers and both parties must maintain records showing that retailers have in fact paid the tax. Retailers, however, are not required to pass through the tax to individual consumers or to maintain records of doing so. Also, in contrast to wholesalers, retailers cannot defer payment of the tax pending their recoupment of that tax from their customers and receive no other benefits or compensation for their role in the scheme. Retailers, moreover, are not entitled to a refund of the tax that they have paid on cigarettes that they are subsequently unable to sell to consumers. The tax buck therefore plainly stops with retailers. And while the State's scheme purports to shift *by fiat* the legal incidence of the tax based upon the Indian or non-Indian status of the retailer, this Court has squarely held that a State legislature possesses no authority to subvert federal law in this manner. The Yakama Nation is therefore entitled to summary judgment.

In a cursory one-page analysis, the district court concluded that the legal incidence of the tax does not fall on Yakama retailers. ER20. The district court, however, failed to faithfully apply the controlling legal standards to the State's scheme, and instead erroneously viewed the analysis of the 1976 cigarette tax scheme in *Colville*, which differs in significant respects from the current scheme, as *stare decisis*. As a result, the district court failed to consider several key provisions of the current scheme, and a substantial body of evidence submitted by the Nation regarding the application of those provisions, that are critical to the question of legal incidence. The court compounded its error by viewing the evidence in the light most favorable to the State for purposes of the State's own motion for summary judgment. The district court's order on summary judgment and its subsequent orders flowing therefrom should accordingly be reversed.³

³ The Yakama Nation firmly believes that the district court also erred in rejecting the Nation's other claims, including the Nation's unique "treaty right to transport goods to market without restriction." *United States v. Smiskin*, 487 F.3d 1260, 1266 (9th Cir. 2007). The threshold question of legal incidence, however, is dispositive. *See infra* at 15. It is therefore unnecessary to reach those claims here, *Squaxin Island Tribe v. Stephens*, 400 F. Supp. 2d 1250, 1261 n.8 (W.D. Wash. 2005) ("Because the State is categorically barred from imposing its fuel tax on the sale of fuel on Tribal lands, the Court does not reach either the preemption or infringement on tribal sovereignty claims."), and the district court's order should be vacated with respect to those claims, *see Wal-Mart Stores, Inc. v. Rodriguez*, 322 F.3d 747, 750 (1st Cir. 2003) (noting that governments have an "institutional interest in vacating adverse rulings of potential precedential value").

STANDARD OF REVIEW

The district court's order on cross motions for summary judgment and its conclusion of law that the legal incidence of the State's cigarette tax does not fall on Yakama retailers are subject to de novo review. *Trunk v. City of San Diego*, 629 F.3d 1099, 1105 (9th Cir. 2011) ("We review de novo the district court's decision on cross motions for summary judgment."); *United States v. Liquidators of European Fed. Credit Bank*, ___ F.3d ___, 2011 WL 9730, *4 (9th Cir. Jan. 4, 2011) ("We review de novo questions of law"); *Hammond*, 384 F.3d at 681 n.2 (reviewing de novo the district court's grant of summary judgment on the issue of legal incidence). Further, "[i]t is well-settled in this circuit and others that the filing of cross-motions for summary judgment, both parties asserting that there are no uncontested issues of material fact, does not vitiate the court's responsibility to determine whether disputed issues of material fact are present. A summary judgment cannot be granted if a genuine issue as to any material fact exists." *Fair Hous. Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001) (citation omitted).

ARGUMENT

I. As a Matter of Federal Law, the State May Not Impose the Legal Incidence of Its Cigarette Tax on Yakama Retailers

“The initial and frequently dispositive question in Indian tax cases . . . is who bears the legal incidence of a tax.” *Oklahoma Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995); *see also Hammond*, 384 F.3d at 681 (same). “As a corollary of [exclusive federal] authority [over relations with Indian tribes], and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory.” *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985). Accordingly, “[i]f the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization.” *Chickasaw Nation*, 515 U.S. at 459. “The question of where the legal incidence of a tax lies is decided by federal law.” *Hammond*, 384 F.3d at 681.

In this Court’s seminal decision in *Hammond*, it explained that to determine where the legal incidence of a state tax falls, a court must conduct “a fair interpretation of the taxing statute as written and applied,” 384 F.3d at 181 (quoting *California State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 11 (1985)), and must “ascertain the legal obligations

imposed upon the concerned parties,” *Hammond*, 384 F.3d at 181 (quotation marks and citation omitted). A court must conduct this review “in light of the state statutory scheme, an assessment of its effects, and the total circumstances germane to incidence.” *Id.* at 685; *see also id.* at 682 n.4 (“[T]he *entire state taxation scheme* and the context in which it operates *as well as the express words of the taxing statute must be considered.*”) (quoting *United States v. California State Bd. of Equalization*, 650 F.2d 1127, 1131 (9th Cir. 1981)) (emphasis added by *Hammond* Court). Ultimately, the legal incidence of a tax falls where the “tax buck stops” with respect to its payment. *Hammond*, 384 F.3d at 687.

This Court and the Supreme Court have articulated several specific factors that are critical to discerning what party in the chain of distribution bears the legal incidence of a state excise tax. Where the upstream party is required to pass through the tax to the downstream party and is required to maintain records of doing so, where the upstream party is compensated for its services as a transmittal agent, and where the upstream party is protected financially (via a tax refund or credit) in the event it is unable to collect the tax from the downstream party, then the downstream party bears the legal incidence of the tax. *Chickasaw Nation*, 515 U.S. at 461-62; *Hammond*, 384 F.3d at 685-88. In contrast, where the upstream party is not required to pass

through the tax to the downstream party or to maintain records of doing so, where the upstream party is entitled to no compensation for its role in the collection scheme, and where the upstream party is not protected financially in the event it is unable to sell the taxed good to the downstream party, then the upstream party bears the legal incidence of the tax. *Chickasaw Nation*, 515 U.S. at 461-62; *Hammond*, 384 F.3d at 685-88.

This Court and the Supreme Court have also identified two factors that do *not* control the question of legal incidence. First, a legislature's bare statement of intent with respect to legal incidence is not dispositive:

The incidence of a state tax on a sovereign Indian nation inescapably is a question of federal law that cannot be conclusively resolved in and of itself by the state legislature's mere statement.

. . . .

If the legislature could indirectly tax Indian nations merely by reciting *ipso facto* that the incidence of the tax was on another party, it would wholly undermine the Supreme Court's precedent that taxing Indians is impermissible absent clear *congressional* authorization.

Hammond, 384 F.3d at 682-83 (citing *Montana*, 471 U.S. at 765). A state legislature thus may not shift the legal incidence of its tax by "mere say-so." *Hammond*, 384 F.3d at 685.

Second, "[t]he person or entity bearing the legal incidence of the tax is not necessarily the one bearing the economic burden." *Hammond*, 384 F.3d at 681; *see also Chickasaw Nation*, 515 U.S. at 459-60 (rejecting the State of

Oklahoma's invitation "to make 'economic reality' our guide," and explaining that "[j]udicial focus on legal incidence in lieu of a more venturesome approach accords due deference to the lead role of Congress in evaluating state taxation as it bears on Indian tribes and tribal members"). In almost all cases, the economic burden of an excise tax eventually rests on the individual consumer. *Chickasaw Nation*, 515 U.S. at 459-61; *Gurley v. Rhoden*, 421 U.S. 200, 204 (1975) ("The economic burden of taxes incident to the sale of merchandise is traditionally passed on to the purchasers of the merchandise. Therefore, the decision as to where the legal incidence of either tax falls is not determined by the fact that petitioner, by increasing his pump prices in the amounts of the taxes, shifted the economic burden of the taxes from himself to the purchaser-consumer.").

As discussed below, the application of these principles to the entirety of the State's cigarette tax scheme as written *and* applied demonstrates that the legal incidence of the tax falls on Washington cigarette retailers, whether Indian or non-Indian. The tax is accordingly invalid and unenforceable with respect to Yakama retailers.

II. The Analysis of the State's 1976 Cigarette Tax Scheme in *Colville* Does Not Control Here and the District Court Erred in Proceeding Otherwise

Although the district court paid lip service to these controlling legal standards, ER18, it did not faithfully apply them. Instead, it erroneously proceeded as if the district court's analysis of the State's 1976 cigarette tax scheme in *Colville* somehow controls this case. In *Colville*, the district court concluded that with respect to sales by Indian retailers, the legal incidence of the tax fell on consumers, 446 F. Supp. at 1355, and the Supreme Court accepted this conclusion, 447 U.S. at 142 n.9. The Nation was a party to *Colville*, and if the 1976 scheme were at issue here, the Nation's claim would be subject to scrutiny under the doctrine of *res judicata*. See *Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985, 987 (9th Cir. 2005) (setting forth the test for *res judicata* or claim preclusion). The Nation, however, challenges the State's *current cigarette tax scheme*, which differs from the 1976 scheme in numerous respects, each of which, as discussed in detail below, is critical to ascertaining where the legal incidence of the tax falls.

In stark contrast to the current scheme, the 1976 scheme treated wholesalers and retailers equally—both could purchase and affix tax stamps, both could defer payment for those stamps until they collected the tax from their customers, both received compensation for their services as tax

transmittal agents, both received a refund for unsold cigarettes or unused stamps, and neither were expressly required to pass through the tax to their customers. *See supra* at 10. The Nation's claim here thus does not arise out of the same "nucleus of facts" as its challenge to the 1976 tax scheme, *Mpoyo*, 430 F.3d at 987, and *res judicata* poses no barrier to its claim. *See Comm'r of Internal Revenue v. Sec.-First Nat. Bank of Los Angeles*, 148 F.2d 937, 940 (9th Cir. 1945) (amendments to federal tax regulations create a "new situation" such that the Board of Tax Appeals' decision based on a previous version of the regulations is not *res judicata* against the same taxpayer); *see also Potts v. Zettel*, 220 F. App'x 559, 561 (9th Cir. 2007) ("Because the California legislature significantly amended section 651(h)(5)(A) in 2002, subsequent to the judgment in [*Bingham v. Hamilton*, 100 F. Supp. 2d 1233 (E.D. Cal. 2000)], neither the claim nor the issues in the instant litigation are substantially identical to those before the court in the prior case."). The State did not dispute this issue in the court below. ER20 n.1 ("[W]hile Defendants argue the doctrine of *res judicata* defeats other arguments Plaintiffs advance, they do not argue that it applies to the issue of legal incidence.").

Nevertheless, the district court mistakenly believed that the *Colville* court's conclusion that the legal incidence of the 1976 scheme fell on

consumers controls under the doctrine of *stare decisis*, ER19 (“An applicable decision of the U.S. Supreme Court controls under the principles of *stare decisis* . . .”), and that it would be overruling *Colville* if it concluded that the legal incidence of the current scheme falls on Yakama retailers, ER19 (“[I]f a precedent of [the Supreme] Court has direct application in a case, . . . [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”) (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997)). *Stare decisis*, meaning “to stand by things decided,” is “[t]he doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.” *Black’s Law Dictionary* 1443 (8th ed. 2004). Neither the Supreme Court, nor this Court, nor any other court, however, has decided where the legal incidence of the State’s current cigarette tax scheme falls. The doctrine of *stare decisis* thus has no application here, and the district court erred in proceeding as if it did.

As a result of this error, the district court failed to actually apply the legal standards that control the outcome of this case—those articulated by this Court in *Hammond* and the Supreme Court in *Chickasaw Nation*. That is, the district court did not “conduct a fair interpretation of the taxing statute as written and applied,” in light of “the state statutory scheme, an assessment

of its effects, and the total circumstances germane to incidence,” to determine where the legal incidence of the State’s current cigarette tax scheme falls, ER18 (quoting *Hammond*, 384 F.3d at 681, 685), but instead considered *in isolation* only certain “differences between the scheme examined in *Colville* and the current scheme” and deemed “none [of those differences] . . . sufficient to change the conclusion” reached in *Colville*, ER20. In the course of doing so, the court ignored several features of the current scheme that are critical to the question of legal incidence, and in granting the State’s motion for summary judgment, further erred by failing to consider a substantial body of evidence submitted by the Nation that demonstrates that the tax buck stops with cigarette retailers.

III. As Written and Applied, the Legal Incidence of the State’s Cigarette Tax Impermissibly Falls on Yakama Retailers

A. While Retailers Must Pay the Tax to Wholesalers, Retailers Are Not Required to Pass Through the Tax to Consumers or to Keep Records of Doing So and Cannot Defer Payment of the Tax

Paramount in determining where the legal incidence of a tax falls is the presence or absence of provisions mandating that the upstream party “pass through” the tax to the downstream party. *Chickasaw Nation*, 515 U.S. at 461 (“The Oklahoma legislation does not . . . contain a ‘pass through’ provision, requiring distributors and retailers to pass on the tax’s cost to consumers.”); *Hammond*, 384 F.3d at 688 (“[T]he statute retains the

pass through quality of the prior statute, and . . . is still a collect and remit scheme which places the incidence of the tax on the Indian retailers.”) (quotation marks and citation omitted). Although the State’s cigarette tax scheme affirmatively requires wholesalers to pass through the tax to retailers, no similar provision requires that retailers pass through the tax to consumers. This is compelling evidence that retailers bear the legal incidence of the tax. *United States v. Mississippi Tax Comm’n*, 421 U.S. 599, 608 (1975) (“[W]here a State requires that its sales tax be passed on to the purchaser and be collected by the vendor from him, this establishes as a matter of law that the legal incidence of the tax falls upon the purchaser.”).

Washington wholesalers are required by law to “pass [the tax] on” to the retailers to which they sell cigarettes. Wash. Rev. Code § 82.24.020(2). The State’s tax scheme thus “requires the non-tribal distributor who receives the [good] and sells it to the Indian tribes to pass on and to collect the tax from the retailer, and then to remit the taxes to the State.” *Hammond*, 384 F.3d at 685. Indeed, wholesalers may defer payment for the tax stamps they affix to those cigarettes for 30 days so that they may first collect the \$30.25 per carton tax from retailers. ER57-58 (Plaintiffs’ Statement) ¶¶ 71, 73; ER40-41 (Defendants’ Statement) ¶¶ 71, 73; Wash. Rev. Code. §§ 82.24.020(1), .026(1) (setting the cigarette tax rate at \$3.025 per pack of 20

cigarettes, or \$30.25 per carton). “[W]holesalers prefer this deferred process because they will be paid the tax by the retailer before the amount is due to the State and therefore do not have to front any money for the stamps.”

ER57-58 (Plaintiffs’ Statement) ¶ 71; ER40 (Defendants’ Statement) ¶ 71.

Confirming the mandatory nature of this pass through requirement, “all invoices for sales by distributors to retailers must show that the state . . . tax was charged to the retailer,” *Hammond*, 384 F.3d at 686. *See* ER58-60 (Plaintiffs’ Statement) ¶¶ 72, 80; ER40, 42-43 (Defendants’ Statement) ¶¶ 72, 80. Wholesalers must also submit monthly reports to the Department regarding their sales “to make sure the tax was paid by the retailer,” ER60 (Plaintiffs’ Statement) ¶ 84; ER42-43 (Defendants’ Statement) ¶ 84.

According to Lee Smith, an Excise Tax Examiner employed by the Department since 1984 who is responsible for the day-to-day administration of the cigarette tax program, ER92, 94-95 (Deposition of Lee Smith (“Smith Dep.”)) 12:11-19, 35:10-20, 37:3-4, the Department imposes these record-keeping and reporting requirements because “[w]e want to follow the cigarettes to make sure the tax is appropriately taken care of . . . [s]o we definitely need to know about who the purchaser is,” ER101 (Smith Dep.) 56:9-12. The Department also inspects and audits wholesalers and retailers

to ensure compliance with these requirements. ER99, 140 (*Id.*) 54:16-19, 140:15-21; ER70 (Deposition of Timothy Thompson) 36:6-24.

There is, however, no comparable statutory or regulatory provision that requires retailers to pass through the cigarette tax to individual consumers. Although retailers must “keep an accurate set of records,” including invoices, regarding their transactions with wholesalers for a period of five years for the Department’s inspection, ER138-139 (Smith Dep.) 138:20—139:2; *supra* at 9, retailers are not required to maintain or to provide to individual consumers any receipt or other documentation showing that the consumer has in fact paid the cigarette tax to the retailer. ER58-61 (Plaintiffs’ Statement) ¶¶ 74-76, 78, 80, 83, 85; ER41-43 (Defendants’ Statement) ¶¶ 74-76, 78, 80, 83, 85. Mr. Smith explained that retailers “don’t need to keep anything special or unique specifically related to cigarette sales to consumers,” that retailers are not required to report those sales to the Department, and that he is not “aware of any statutory or regulatory provision that would require the retailer to provide any documentation to a consumer that indicates the consumer has paid the

cigarette tax at the point of sale.” ER139-142 (Smith Dep.) 139:13-16, 140:3-6, 141:19—142:5.⁴

The State’s retail sales tax scheme—which unequivocally requires consumers to pay the tax to retailers and requires retailers to collect the tax from consumers and to document that they have done so—provides a striking contrast in these respects:

- (1) The tax imposed in this chapter *must be paid by the buyer to the seller. Each seller must collect from the buyer the full amount of the tax payable in respect to each taxable sale*
.....
- (8) The amount of tax, until paid by the buyer to the seller or to the department, constitutes *a debt from the buyer to the seller. .*
..
- (9) . . . [T]he tax required by this chapter to be collected by the seller *must be stated separately from the selling price* in any sales invoice or other instrument of sale.

Wash. Rev. Code § 82.08.050 (emphases added). The cigarette tax scheme, however, only “requires that [the] taxes be passed from distributor to retailer but not from retailer to consumer. Just as in *Hammond*, this factor indicates that the ‘tax buck’ stops at the retail level.” *Squaxin Island Tribe v. Stephens*, 400 F. Supp. 2d 1250, 1258 (W.D. Wash. 2005); *see also American Oil Co. v. Neill*, 380 U.S. 451, 456-57 (1965) (finding that the

⁴ Contrary to the State’s position below, a tax stamp does not constitute such documentation. The presence of a tax stamp informs the consumer only that *someone* in the chain of distribution has paid the tax, but does not reflect *who* has paid that tax.

legal incidence of the tax is not on the consumer where the retailer is not required to pass the tax on to the consumer).⁵ And while the consumer ultimately bears the economic burden of the cigarette tax, that “economic reality” is immaterial in identifying the party in the chain of distribution that bears the legal incidence. *See supra* at 17-18.

Notwithstanding the substantial arguments and evidence presented by the Nation with respect to the pass through and record-keeping requirements of the State’s tax scheme, *the district court did not even mention (let alone analyze) these crucial factors* in its cursory analysis. This failure was in error, and the district court should not have awarded summary judgment to the State. *See Riverside Two*, 249 F.3d at 1134 (“when simultaneous cross-motions for summary judgment on the same claim are before the court, the court must consider the appropriate evidentiary material identified and submitted in support of both motions, and in opposition to both motions”). Had the district court performed the proper legal analysis, the undisputed facts show that these factors weigh heavily in favor of the conclusion that the legal incidence of the cigarette tax rests on Yakama retailers.

⁵ The district court in *Colville* recognized this same contrast between the 1976 cigarette and retail sales tax schemes and found “the absence of any provision requiring that the [cigarette] tax be passed on to the buyer” to be of “particular importance” in concluding that “the decisions of the Supreme Court do not necessarily require a conclusion that the legal incidence of [the] cigarette tax is on the buyer.” 446 F. Supp. at 1352-53.

Nor did the district court properly analyze other factors relevant to whether the legal incidence of the tax falls on retailers under the State's current scheme. Retailers must pay an additional tax on all cigarettes in their inventory when there is an increase in the tax rate. ER64 (Plaintiffs' Statement) ¶¶ 111-112; ER47-48 (Defendants' Statement) ¶¶ 111-112; *see also* Wash. Rev. Code § 82.24.280(1); Wash. Admin. Code § 458-20-186(202)(b).⁶ For example, at the time of summary judgment briefing in this case, the tax rate was \$20.25 per carton, \$10 less than it is today. *See* ER158 (Smith Dep.) Ex. 30. Mr. Smith testified that retailers are "liable" for this inventory tax and make payment using the Department's Cigarette Floor Stock Tax Return form, which sets forth substantial monetary penalties for untimely filing. ER130-132, 156 (*Id.*) 128:4—130:16, Ex. 29. The Department, however, does not similarly require individual consumers to remit this additional tax on cigarettes in their possession when the tax rate increases, and the record reflects no administrative procedure by which they could do so.

⁶ The district court misunderstood the manner in which this tax operates, erroneously stating that "Indian retailers . . . prepay for tax stamps" when they "pay a so-called 'inventory tax' to the state on inventory in stock when the tax rate is increased." ER20 & n.2. Retailers, however, pay this tax directly to the Department and no tax stamp is affixed in connection with the additional tax payment.

Retailers, moreover, may not defer payment of the \$30.25 per carton tax (or of any additional inventory tax) until they can recoup those costs from consumers. ER58 (Plaintiffs' Statement) ¶ 73; ER40-41 (Defendants' Statement) ¶ 73. The district court summarily dismissed this undisputed fact as "insufficient to shift the legal incidence of the tax," ER20, but did so without any legal analysis and in isolation from other factors relevant to the question of legal incidence. The court, for example, failed to consider that this is a substantial threshold burden to engage in the sale of cigarettes that is shouldered solely by retailers—wholesalers, by contrast, can and do defer payment of the tax pending their collection of the tax from downstream retailers, *see supra* at 23-24. As in *Chickasaw Nation*, this is but one of several factors indicating that "[t]he distributor . . . is no more than a transmittal agent for the taxes imposed on the retailer." 515 U.S. at 461-62 (quotation marks and citation omitted).

B. Retailers May Not Obtain a Refund when They Are Unable to Sell to Consumers Cigarettes upon which They Have Paid the Tax and Receive No Compensation for Collecting the Tax

The financial protections afforded by a state tax scheme to each party in the chain of distribution in the form of tax refunds, credits, and compensation are also critical to identifying the party that bears the legal incidence of the tax. *Chickasaw Nation*, 515 U.S. at 462 (finding that in

contrast to distributors, “[n]o provision sets off the retailer’s liability when consumers fail to make payments due; neither are retailers compensated for their tax collection efforts. And the tax imposed when a distributor sells [the good] to a retailer applies whether or not the [good] is ever purchased by a consumer.”); *Hammond*, 384 F.3d at 687-88 (same). Although the State’s cigarette tax scheme provides absolute financial protection to wholesalers such that they are never stuck footing the tax bill, those same protections are not available to retailers that have paid the tax. This factor further demonstrates that the legal incidence of the tax falls on Washington retailers.

The record reflects that the two tax refunds available to *wholesalers* when they are unable to sell to retailers the cigarettes upon which they have already paid the tax are not available to *retailers* that are unable to sell such cigarettes to consumers. First, if a “distributor or wholesaler” has affixed tax stamps to cigarettes that the Washington State Attorney General subsequently removes from the list of brands approved for sale in the State (and the wholesaler thus cannot “sell those cigarettes lawfully”), the wholesaler “may apply to the department for a refund of the cost of the stamps.” Wash. Rev. Code § 82.24.210; *see also* ER63 (Plaintiffs’ Statement) ¶ 95; ER46 (Defendants’ Statement) ¶ 95. This refund, however, is not available to retailers that cannot lawfully sell cigarettes upon which

they have paid the tax when those cigarettes are disapproved for sale. Mr. Smith confirmed unequivocally that *there is no “statutory or regulatory authority that would give the retailer the right to apply for a refund if he or she is left holding on to stamped products that had been removed from the [Attorney General’s] certification list.”* ER129-130 (Smith Dep.) 127:10—128:2. The tax buck plainly stops with retailers under these circumstances, and the district court erred by wholly failing to address this refund provision in its analysis.

Second, the State’s scheme provides a tax refund to wholesalers when they are unable to sell cigarettes that “by reason of damage become unfit for sale.” Wash. Rev. Code § 82.24.210; *see also* ER62 (Plaintiffs’ Statement) ¶ 91; ER45 (Defendants’ Statement) ¶ 91. While Wash. Rev. Code § 82.24.210 makes this refund available to all “dealers”—a term undefined by statute or regulation—the scheme reflects that dealers are those persons that affix tax stamps to unstamped cigarettes, *i.e.*, wholesalers. *See* Wash. Rev. Code § 82.24.110(1)(m) (“It is presumed that persons other than dealers who purchase or receive shipments of unstamped cigarettes do so to avoid payment of the tax imposed herein.”); Wash. Admin. Code § 458-20-186(203)(b) (“[r]efunds for stamped cigarettes will not include the stamping allowance,” which allowance is available only to wholesalers); Wash. Rev.

Code § 82.24.210 (same). Because retailers may not affix tax stamps, *see supra* at 8, they are not eligible for this refund.

The Department's *application* of this refund provision confirms that retailers cannot obtain a tax refund for cigarettes that by reason of damage become unfit for sale to consumers. Refunds are available only through forms authorized by the Department, Wash. Admin. Code § 458-20-186(203)(c) ("The claim for refund must be filed on a form provided by the department."), and only one such form exists, ER117-118 (Smith Dep.) 102:8—103:4. This "Cigarette Tax Claim for Refund Form" and the Department's accompanying web application require the person requesting a refund to possess a "distributor number," which is "an internal three-digit number that [the Department] issue[s] to all cigarette wholesalers." ER116, 149-155 (*Id.*) 99:6-18, Ex. 26-27. Retailers do not possess a distributor number (or any other analogous identifier) and therefore may not request a refund using this form. ER116 (*Id.*) 99:15-21.⁷ Further, although the

⁷ Mr. Smith did not dispute that a retailer may not use the Department's form or web application to request a refund, but suggested that "if a retailer wants a refund, usually we'll ask them to go back to the wholesaler" because "they'll not only get a refund of the cigarettes, they'll get a refund of the stamp." ER117 (Smith Dep.) 102:2-11; *see also* ER121 (*Id.*) 111:12-16 (agreeing that "[i]f a retailer fills out [the refund form] and seeks a refund for cigarettes that are unfit for sale, [the Department] won't process the refund" but will "direct them to work with the wholesaler"). Nothing in the record, however, reflects that a retailer is *entitled under any statute or*

Department's official Cigarette Tax Manual dedicates an entire chapter to refunds, it fails to mention retailers at all. Instead, the manual speaks exclusively to procedures for processing refunds to wholesalers, including when cigarettes become unfit for sale, when tax stamps are damaged during the affixation process, and when a wholesaler is going out of business and possesses unused tax stamps. ER124, 143, 151-155 (*Id.*) 115:2-24, 149:11-23, Ex. 27.

Accordingly, as written and applied, the State's tax scheme does not relieve retailers of liability for the cigarette tax even when consumers never actually purchase or use the cigarettes taxed. Indeed, *the State forthrightly admitted in discovery "that retailers are not allowed a refund for the cost of the Washington state cigarette tax stamp paid when purchasing cigarettes but which cost could not later be collected from a consumer."* ER163 (Defendants' Responses) RFA 1. This is powerful evidence that the legal incidence of the tax falls on retailers. *Hammond*, 384 F.3d at 687 ("[T]he Idaho statute imposes the tax whether or not the [good] is ever sold to the Indian retailers' customers. So it is plain that the tax buck stops with the Indian tribal retailers.").

Department regulation to receive such a refund from a wholesaler. Rather, the availability of such a refund appears to be contingent upon the wholly discretionary business practice of the particular wholesaler.

The district court, however, utterly failed to analyze any of the arguments or substantial evidence submitted by the Nation on this point, including the State's own admission. Instead, the court summarily stated that it was "not persuaded by Plaintiffs' argument that retailers are ineligible for refunds for unsold or destroyed cigarettes." ER20. The district court relied exclusively upon the two words "any person" found in Wash. Admin. Code § 458-20-186(303) (2009), recodified as subsection (203), which provides that "[a]ny person may request a refund of the face value of the stamps when the tax is not applicable and the stamps are returned to the department," and reasoned by negative implication that "nothing in state law or regulations prohibits retailers from obtaining a refund," ER20. In doing so, the district court erred by completely disregarding the manner in which the law is applied, contrary to *Hammond* and *Chickasaw Nation*, *see supra* at 15-16, and by viewing the evidence in the light most favorable *to the State* and by drawing all inferences *in the State's favor* for purposes of the State's own motion for summary judgment. *See Riverside Two*, 249 F.3d at 1136 ("[W]e agree with the commentators that, when parties submit cross-motions for summary judgment, each motion must be considered on its own merits.") (quotation marks and citations omitted); *Dominguez-Curry v. Nevada Transp. Dep't*, 424 F.3d 1027, 1038-39 (9th Cir. 2005) ("[It] is not the

province of a court to spin . . . evidence in [movant's] favor when evaluating its motion for summary judgment. To the contrary, all inferences must be drawn in favor of the non-moving party.”) (quotation marks and citation omitted).

Further, only wholesalers are compensated by the State for their role in collecting and remitting the cigarette tax. *See* Wash. Admin. Code § 458-20-186(201)(b). Although the district court correctly noted that retailers are not eligible for this stamping allowance because they do not affix tax stamps, ER20, it failed to recognize that retailers receive no other form of compensation or credit for collecting and remitting tax on the State's behalf, ER61 (Plaintiffs' Statement) ¶¶ 89-90; ER44-45 (Defendants' Statement) ¶¶ 89-90. This omission is inconsistent with *Hammond*, where this Court noted that the fuel tax statute “provides tax credits to the distributor for ‘collecting and remitting’ the tax on behalf of the State,” 384 F.3d at 686, and with *Chickasaw Nation*, where the Supreme Court similarly observed that “for their services as agent of the state for collection, distributors retain a small portion of the [fuel] taxes they collect,” 515 U.S. at 462. The courts found this compensation significant notwithstanding that the fuel distributors did not affix a tax stamp to or otherwise physically alter the motor vehicle fuel subject to the tax. As in those cases, the State's cigarette tax scheme

“contains no comparable indication that retailers are simply collection agents for taxes ultimately imposed on consumers,” *Chickasaw Nation*, 515 U.S. at 462, and this is “a factor supporting that the tax incidence lay impermissibly on tribal retailers,” *Hammond*, 384 F.3d at 687.

In sum, under the State’s tax scheme as written and applied, the tax buck stops at the retail level. While wholesalers must collect the cigarette tax from retailers on the State’s behalf, “retailers are [not] simply collection agents for taxes ultimately imposed on consumers.” *Chickasaw Nation*, 515 U.S. at 462. Retailers are not required to pass through the tax to consumers, are not required to document that consumers have paid the tax, receive no compensation or other benefits for serving as a transmittal agent, and receive no refund for the tax even when they are unable to sell to consumers the cigarettes upon which they have paid the tax. Accordingly, “[t]he import of the language and the structure of the [cigarette] tax statutes is that . . . the [cigarette] taxes are legally imposed on the retailer rather than on the distributor or the consumer.” *Id.* (quotation marks and citation omitted).⁸

⁸ The Nation does not dispute that Washington retailers do not bear the legal incidence of the tax with respect to cigarettes *that they do not in fact sell*. For example, manufacturers that give away unstamped cigarettes for promotional purposes and Washington residents that purchase unstamped cigarettes from out-of-state retailers must remit the tax directly to the Department and bear the legal incidence under those circumstances. *See supra* at 6 n.1. Those circumstances are irrelevant here.

As a matter of federal law, the State's cigarette tax scheme is invalid and unenforceable as applied to Yakama retailers. The district court therefore erred in denying the Yakama Nation's motion for summary judgment and in granting the State's motion for summary judgment.

IV. The Legislature's Superficial Statement of Intent Is Not Probative Evidence that the Legal Incidence of the Tax Does Not Fall on Yakama Retailers

The State will argue as it did below that the legal incidence of the cigarette tax does not fall on tax-exempt Yakama retailers because Wash. Rev. Code § 82.24.080(2) says that it cannot. That section purports to set forth the Legislature's intent to "impose[] [the tax] at the time and place of the first *taxable event* and upon the first *taxable person* within this state." (emphases added). The argument goes like this: Because a Yakama retailer is not, as a matter of federal law, a "taxable person," and because a Yakama retailer's "sale, use, consumption, handling, possession, or distribution" of cigarettes, Wash. Rev. Code § 82.24.020(1), is thus not a "taxable event," then by definition the legal incidence of the tax cannot fall on Yakama retailers. The State's argument has been rejected by this Court and is wholly without merit.

In *Hammond*, the Court considered statutory language setting forth the Idaho Legislature's "explicit intention to have the legal incidence [of the

motor vehicle fuel tax] fall on the non-tribal distributors,” rather than on tribal retailers. 384 F.3d at 682. This Court emphatically rejected the contention that this statement of intent was dispositive:

We agree with the Tribes that if we determined legal incidence solely by looking at the legislature’s stated intent, we would be permitting the state to name one party the taxpayer while requiring another to pay the tax, in the process avoiding tax immunities held by the second party. Thus we conclude that, while the legislative declaration is “dispositive” as to what the legislature intended, removing the need to predict the legislative aim from reports and legislative statements, it cannot be viewed as entirely “dispositive” of the legal issue that the federal courts are charged with determining as to the incidence of the tax.

Id. at 684. The Court explained why “this is not merely a technical tax issue:”

If state legislatures could tax Indian tribes merely on the assertion that the incidence of the tax lies elsewhere, it would permit states indirectly to threaten the very existence of the Tribes. It has long been understood in our nation that, in the adage coined by the great Chief Justice John Marshall, the unchecked power to tax is the power to destroy.

Id. (citing *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819)). Accordingly, a state legislature may not shift the legal incidence of a tax by “mere say-so.” *Hammond*, 384 F.3d at 685.

Like the language at issue in *Hammond*, Wash. Rev. Code § 82.24.080(2) purports to shift the identity of the person upon whom the State imposes its cigarette tax by legislative fiat. The statute does not “shift[] the

substance of the legal burdens of the tax” based upon the retailer’s status as a taxable or non-taxable person, but instead “simply cosmetically re-assign[s] the incidence of the tax to suit the legislature’s interests.”

Hammond, 384 F.3d at 684 n.7. The statute thus does “not materially alter the operation of the statute or its probable impact on the Tribes.” *Id.* at 685.

That the Legislature has purported to redefine retailers’ role in the scheme under these circumstances as a “precollection obligation,” Wash. Rev. Code

§ 82.24.080(2), is of no moment.⁹ Each of the factors critical to the

determination of legal incidence canvassed above applies equally to Indian

and non-Indian retailers. Indeed, the *only* circumstances under which the

cigarette tax “do[es] not apply to the sale, use, consumption, handling,

possession, or distribution of cigarettes by an Indian retailer” is where an

Indian nation has entered a contract with the State providing otherwise.

Wash. Rev. Code § 82.24.295(1); *see also* Wash. Rev. Code § 82.24.302

(same with respect to Yakama retailers). The Yakama Nation is not a party

to any such contract or agreement with the State.

⁹ The State conceded below that the Legislature made this superficial change only “so that a non-Indian purchaser would bear the legal incidence of the tax in a transaction with a tribal retailer.” ER51 (Defendants’ Opposition to Plaintiffs’ Motion for Summary Judgment). States, however, are not free “to set policy in a way that risks undermining the preserved sovereignty of Indian nations.” *Hammond*, 384 F.3d at 683.

The force of the Court's reasoning in *Hammond* is underscored by considering more closely the plain language of Wash. Rev. Code § 82.24.080(2). If the State imposes an excise tax on "the sale, use, consumption, handling, possession, or distribution of all cigarettes," Wash. Rev. Code § 82.24.020(1), and if the tax is "imposed at the time and place of the first taxable event and upon the first taxable person within this state," Wash. Rev. Code § 82.24.080(2), then the first taxable event would presumably be a non-Indian wholesaler's handling and possession of the cigarettes prior to their sale and distribution to retailers. *See also* Wash. Admin. Code § 458-20-186(101)(c) ("Ordinarily, the tax obligation is imposed on and collected from the first possessor of unstamped cigarettes."). The State, however, did not contend below that the legal incidence of the tax falls on wholesalers, and the analysis above demonstrates that, as the scheme is written and applied, it clearly does not.

Instead, the State *conceded that the legal incidence of the tax falls on retailers*, so long as those retailers are non-Indian. ER50 (Defendants' Opposition to Plaintiffs' Motion for Summary Judgment) ("[T]he legal incidence of the State's cigarette tax is . . . on the ultimate consumer, with respect to purchasers in transactions in which the vendor, such as a tribal

retailer on a reservation, is untaxable”).¹⁰ That concession is critical here because the rights and obligations of Indian and non-Indian retailers under the State’s scheme are identical in all material respects. In short, Wash. Rev. Code § 82.24.080(2) does not alter the conclusion that inexorably follows from the proper application of *Hammond* and *Chickasaw Nation* here—that the legal incidence of the State’s cigarette tax falls on Yakama retailers.

V. The District Court Erred in Dissolving the Restraining Order and in Disbursing to the State the Bond Posted by the Nation

The district court dissolved its temporary restraining order because it found “that Defendants are entitled to summary judgment on all of Plaintiffs’ causes of action,” ER11, and disbursed to the State the proceeds of the bond posted by the Nation as security for that order because “Defendants were wrongfully enjoined in light of the Court’s rulings in this case,” ER1-2. For the reasons set forth above, however, the district court erred in concluding that the legal incidence of the State’s cigarette tax does not fall on Yakama retailers in violation of federal law, and in granting

¹⁰ The State made the same concession in *Colville*, admitting that the legal incidence of the 1976 tax fell upon retailers “where the transaction . . . involves only non-Indians,” but arguing that the legal incidence fell “upon the buyer where the transaction involves an on-reservation sale by an Indian to a non-Indian.” 446 F. Supp. at 1353-54. Although the district court accepted the State’s argument, *id.* at 1355, it did so only because at that time it viewed the Legislature’s intent with respect to legal incidence as dispositive, *id.* at 1353 (“In the final analysis, the key to making the determination is the divination of legislative intent.”).

summary judgment in the State's favor. Accordingly, the district court erred in dissolving the restraining order and in disbursing to the State the bond posted by the Nation on the basis of that order and judgment.

CONCLUSION

For the foregoing reasons, the Yakama Nation respectfully requests the following relief:

- (1) Reverse the district court's order denying the Nation's motion for summary judgment with respect to the issue of legal incidence;
- (2) Reverse the district court's order granting the State's motion for summary judgment with respect to the issue of legal incidence;
- (3) Vacate the remainder of the district court's order on summary judgment because the question of legal incidence is dispositive as to the validity of the State's cigarette tax scheme as applied to Yakama retailers;
- (4) Reverse the district court's order dissolving the temporary restraining order;
- (5) Reverse the district court's order disbursing to the State the bond posted by the Nation;
- (6) Remand this case to the district court with directions to enter summary judgment and appropriate injunctive relief in the Nation's favor and for further proceedings consistent with this Court's order.

Dated this 2nd day of March, 2011.

Respectfully submitted,

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ADDENDUM

**THE STATE'S CURRENT
CIGARETTE TAX
SCHEME**

T. 82, Ch. 82.24, Refs & Annos, West's RCWA T. 82, Ch. 82.24, Refs & Annos

West's Revised Code of Washington Annotated

Title 82. Excise Taxes

Chapter 82.24. Tax on Cigarettes

West's RCWA T. 82, Ch. 82.24, Refs & Annos
Currentness

Current with 2011 Legislation effective through February 23, 2011

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82.24.010. Definitions, West's RCWA 82.24.010

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.010

82.24.010. Definitions

Currentness

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter:

(1) "Board" means the liquor control board.

(2) "Cigarette" means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any material, except where such wrapper is wholly or in the greater part made of natural leaf tobacco in its natural state.

(3) "Indian tribal organization" means a federally recognized Indian tribe, or tribal entity, and includes an Indian wholesaler or retailer that is owned by an Indian who is an enrolled tribal member conducting business under tribal license or similar tribal approval within Indian country. For purposes of this chapter "Indian country" is defined in the manner set forth in 18 U.S.C. Sec. 1151.

(4) "Precollection obligation" means the obligation of a seller otherwise exempt from the tax imposed by this chapter to collect the tax from that seller's buyer.

(5) "Retailer" means every person, other than a wholesaler, who purchases, sells, offers for sale or distributes any one or more of the articles taxed herein, irrespective of quantity or amount, or the number of sales, and all persons operating under a retailer's registration certificate.

(6) "Retail selling price" means the ordinary, customary or usual price paid by the consumer for each package of cigarettes, less the tax levied by this chapter and less any similar tax levied by this state.

(7) "Stamp" means the stamp or stamps by use of which the tax levy under this chapter is paid or identification is made of those cigarettes with respect to which no tax is imposed.

(8) "Wholesaler" means every person who purchases, sells, or distributes any one or more of the articles taxed herein to retailers for the purpose of resale only.

(9) The meaning attributed, in chapter 82.04 RCW, to the words "person," "sale," "business" and "successor" applies equally in this chapter.

Credits

[1997 c 420 § 3; 1995 c 278 § 1; 1961 c 15 § 82.24.010. Prior: 1959 c 270 § 9; 1949 c 228 § 14; 1935 c 180 § 83; Rem. Supp. 1949 § 8370-83.]

Notes of Decisions (6)

Current with 2011 Legislation effective through February 23, 2011

82.24.020. Tax imposed--Absorption of tax--Possession defined--Exempt tribal..., West's RCWA 82.24.020

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.020

82.24.020. Tax imposed--Absorption of tax--Possession defined--Exempt tribal members

Currentness

(1) There is levied and collected as provided in this chapter, a tax upon the sale, use, consumption, handling, possession, or distribution of all cigarettes, in an amount equal to 12.125 cents per cigarette.

(2) Wholesalers subject to the payment of this tax may, if they wish, absorb five one-hundredths cents per cigarette of the 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.

(3) For purposes of this chapter, "possession" means both (a) physical possession by the purchaser and, (b) when cigarettes are being transported to or held for the purchaser or his or her designee by a person other than the purchaser, constructive possession by the purchaser or his or her designee, which constructive possession is deemed to occur at the location of the cigarettes being so transported or held.

(4) In accordance with federal law and rules prescribed by the department, an enrolled member of a federally recognized Indian tribe may purchase cigarettes from an Indian tribal organization under the jurisdiction of the member's tribe for the member's own use exempt from the applicable taxes imposed by this chapter. Except as provided in subsection (5) of this section, any person, who purchases cigarettes from an Indian tribal organization and who is not an enrolled member of the federally recognized Indian tribe within whose jurisdiction the sale takes place, is not exempt from the applicable taxes imposed by this chapter.

(5) If the state enters into a cigarette tax contract or agreement with a federally recognized Indian tribe under chapter 43.06 RCW, the terms of the contract or agreement take precedence over any conflicting provisions of this chapter while the contract or agreement is in effect.

Credits

[2010 1st sp.s. c 22 § 2, eff. May 1, 2010; 2009 c 479 § 66, eff. July 1, 2009. Prior: 2008 c 226 § 3, eff. June 12, 2008; 2008 c 86 § 301, eff. June 12, 2008; 2003 c 114 § 1, eff. July 27, 2003; 1994 sp.s. c 7 § 904 (Referendum Bill No. 43, approved November 8, 1994); 1993 c 492 § 307; 1989 c 271 § 504; 1987 c 80 § 1; 1983 2nd ex.s. c 3 § 15; 1982 1st ex.s. c 35 § 8; 1981 c 172 § 6; 1972 ex.s. c 157 § 3; 1971 ex.s. c 299 § 13; 1965 ex.s. c 173 § 23; 1961 ex.s. c 24 § 3; 1961 c 15 § 82.24.020; prior: 1959 c 270 § 2; prior: 1949 c 228 § 13, part; 1943 c 156 § 11, part; 1941 c 178 § 13, part; 1939 c 225 § 23, part; 1935 c 180 § 82, part; Rem. Supp. 1949 § 8370-82, part.]

Notes of Decisions (29)

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82.24.026. Additional tax imposed--Where deposited, West's RCWA 82.24.026

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.026

82.24.026. Additional tax imposed--Where deposited

Currentness

(1) In addition to the tax imposed upon the sale, use, consumption, handling, possession, or distribution of cigarettes set forth in RCW 82.24.020, there is imposed a tax in an amount equal to three cents per cigarette.

(2) The revenue collected under this section must be deposited as follows:

(a) 14 percent must be deposited into the general fund.

(b) The remainder must be deposited into the education legacy trust account.

Credits

[2010 1st sp.s. c 22 § 3, eff. May 1, 2010; 2009 c 479 § 67, eff. July 1, 2009; 2008 c 86 § 302, eff. June 12, 2008; 2005 c 514 § 1102, eff. July 1, 2005.]

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82.24.030. Stamps, West's RCWA 82.24.030

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.030

82.24.030. Stamps

Currentness

(1) In order to enforce collection of the tax hereby levied, the department of revenue shall design and have printed stamps of such size and denominations as may be determined by the department. The stamps must be affixed on the smallest container or package that will be handled, sold, used, consumed, or distributed, to permit the department to readily ascertain by inspection, whether or not such tax has been paid or whether an exemption from the tax applies.

(2) Except as otherwise provided in this chapter, only a wholesaler shall cause to be affixed on every package of cigarettes, stamps of an amount equaling the tax due thereon or stamps identifying the cigarettes as exempt before he or she sells, offers for sale, uses, consumes, handles, removes, or otherwise disturbs and distributes the same: PROVIDED, That where it is established to the satisfaction of the department that it is impractical to affix such stamps to the smallest container or package, the department may authorize the affixing of stamps of appropriate denomination to a large container or package.

(3) Only wholesalers may purchase or obtain cigarette stamps. Wholesalers shall not sell or provide stamps to any other wholesaler or person.

(4) Each roll of stamps, or group of sheets, shall have a separate serial number, which shall be legible at the point of sale. The department of revenue shall keep records of which wholesaler purchases each roll or group of sheets. If the department of revenue permits wholesalers to purchase partial rolls or sheets, in no case may stamps bearing the same serial number be sold to more than one wholesaler. The remainder of the roll or sheet, if any, shall either be retained for later purchases by the same wholesaler or destroyed.

(5) Nothing in this section shall be construed as limiting any otherwise lawful activity under a cigarette tax compact pursuant to chapter 43.06 RCW.

Credits

[2003 c 114 § 2, eff. July 27, 2003; 1995 c 278 § 2; 1990 c 216 § 1; 1975 1st ex.s. c 278 § 61; 1961 c 15 § 82.24.030. Prior: 1959 c 270 § 3; prior: 1949 c 228 § 13, part; 1943 c 156 § 11, part; 1941 c 178 § 13, part; 1939 c 225 § 23, part; 1935 c 180 § 82, part; Rem. Supp. 1949 § 8370-82, part.]

Notes of Decisions (3)

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82.24.035. Circumstances when no stamp may be affixed--Violation of..., West's RCWA 82.24.035

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.035

82.24.035. Circumstances when no stamp may be affixed--Violation of consumer protection act

Currentness

(1) No stamp may be affixed to, or made upon, any container or package of cigarettes if:

(a) The container or package differs in any respect with the requirements of the federal cigarette labeling and advertising act (15 U.S.C. Sec. 1331 et seq.) for the placement of labels, warnings, or any other information upon a package of cigarettes that is to be sold within the United States;

(b) The container or package has been imported into the United States after January 1, 2000, in violation of 26 U.S.C. Sec. 5754;

(c) The container or package, including a container of individually stamped containers or packages, is labeled "For Export Only," "U.S. Tax Exempt," "For Use Outside U.S.," or similar wording indicating that the manufacturer did not intend that the product be sold in the United States; or

(d) The container or package has been altered by adding or deleting the wording, labels, or warnings described in (a) or (c) of this subsection.

(2) In addition to the penalty and forfeiture provisions otherwise provided for in this chapter, a violation of this section is a deceptive act or practice under the consumer protection act, chapter 19.86 RCW.

Credits

[1999 c 193 § 5.]

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82.24.040. Duty of wholesaler, West's RCWA 82.24.040

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.040

82.24.040. Duty of wholesaler

Currentness

(1) Except as authorized by this chapter, no person other than a licensed wholesaler shall possess in this state unstamped cigarettes.

(2) No wholesaler in this state may possess within this state unstamped cigarettes except that:

(a) Every wholesaler in the state who is licensed under Washington state law may possess within this state unstamped cigarettes for such period of time after receipt as is reasonably necessary to affix the stamps as required; and

(b) Any wholesaler in the state who is licensed under Washington state law and who furnishes a surety bond in a sum satisfactory to the department, shall be permitted to set aside, without affixing the stamps required by this chapter, such part of the wholesaler's stock as may be necessary for the conduct of the wholesaler's business in making sales to persons in another state or foreign country or to instrumentalities of the federal government. Such unstamped stock shall be kept separate and apart from stamped stock.

(3) Every wholesaler licensed under Washington state law shall, at the time of shipping or delivering any of the articles taxed herein to a point outside of this state or to a federal instrumentality, make a true duplicate invoice of the same which shall show full and complete details of the sale or delivery, whether or not stamps were affixed thereto, and shall transmit such true duplicate invoice to the department, at Olympia, not later than the fifteenth day of the following calendar month. For failure to comply with the requirements of this section, the department may revoke the permission granted to the taxpayer to maintain a stock of goods to which the stamps required by this chapter have not been affixed.

(4) Unstamped cigarettes possessed by a wholesaler under subsection (2) of this section that are transferred by the wholesaler to another facility of the wholesaler within the borders of Washington shall be transferred in compliance with RCW 82.24.250.

(5) Every wholesaler who is licensed by Washington state law shall sell cigarettes to retailers located in Washington only if the retailer has a current cigarette retailer's license or is an Indian tribal organization authorized to possess untaxed cigarettes under this chapter and the rules adopted by the department.

(6) Nothing in this section shall be construed as limiting any otherwise lawful activity under a cigarette tax compact pursuant to chapter 43.06 RCW.

Credits

[2003 c 114 § 3, eff. July 27, 2003; 1995 c 278 § 3; 1990 c 216 § 2; 1969 ex.s. c 214 § 1; 1961 c 15 § 82.24.040. Prior: 1959 c 270 § 4; prior: 1949 c 228 § 13, part; 1943 c 156 § 11, part; 1941 c 178 § 13, part; 1939 c 225 § 23, part; 1935 c 180 § 82, part; Rem. Supp. 1949 § 8370-82, part.]

Notes of Decisions (4)

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82.24.050. Retailer--Possession of unstamped cigarettes, West's RCWA 82.24.050

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.050

82.24.050. Retailer--Possession of unstamped cigarettes

Currentness

(1) No retailer in this state may possess unstamped cigarettes within this state unless the person is also a wholesaler in possession of the cigarettes in accordance with RCW 82.24.040.

(2) A retailer may obtain cigarettes only from a wholesaler subject to the provisions of this chapter.

Credits

[2003 c 114 § 4, eff. July 27, 2003; 1995 c 278 § 4; 1990 c 216 § 3; 1969 ex.s. c 214 § 2; 1961 c 15 § 82.24.050. Prior: 1959 c 270 § 5; prior: 1949 c 228 § 13, part; 1943 c 156 § 11, part; 1941 c 178 § 13, part; 1939 c 225 § 23, part; 1935 c 180 § 82, part; Rem. Supp. 1949 § 8370-82, part.]

Notes of Decisions (3)

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82.24.060. Stamps--How affixed, West's RCWA 82.24.060

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.060

82.24.060. Stamps--How affixed

Currentness

Stamps shall be affixed in such manner that they cannot be removed from the package or container without being mutilated or destroyed, which stamps so affixed shall be evidence of the tax imposed.

In the case of cigarettes contained in individual packages, as distinguished from cartons or larger units, the stamps shall be affixed securely on each individual package.

Credits

[1961 c 15 § 82.24.060. Prior: 1959 c 270 § 6; prior: 1949 c 228 § 13, part; 1943 c 156 § 11, part; 1941 c 178 § 13, part; 1939 c 225 § 23, part; 1935 c 180 § 82, part; Rem. Supp. 1949 § 8370-82, part.]

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82.24.080. Legislative intent--Taxable event--Tax liability, West's RCWA 82.24.080

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.080

82.24.080. Legislative intent--Taxable event--Tax liability

Currentness

(1) It is the intent and purpose of this chapter to levy a tax on all of the articles taxed under this chapter, 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 taxed under this chapter 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.

(2) 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 and upon the first taxable person within this state. Any person whose activities would otherwise require payment of the tax imposed by subsection (1) of this section but who is exempt from the tax nevertheless has a precollection obligation for the tax that must be imposed on the first taxable event within this state. A precollection obligation may not be imposed upon a person exempt from the tax who sells, distributes, or transfers possession of cigarettes to another person who, by law, is exempt from the tax imposed by this chapter or upon whom the obligation for collection of the tax may not be imposed. 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.

(3) In the event of an increase in the rate of the tax imposed under this chapter, it is the intent of the legislature that the first person who sells, uses, consumes, handles, possesses, or distributes previously taxed articles after the effective date of the rate increase shall be liable for the additional tax, or its precollection obligation as required by this chapter, represented by the rate increase. The failure to pay the additional tax with respect to the first taxable event after the effective date of a rate increase shall not prevent tax liability for the additional tax from arising from a subsequent taxable event.

(4) It is the intent of the legislature that, in the absence of a cigarette tax contract or agreement under chapter 43.06 RCW, applicable taxes imposed by this chapter be collected on cigarettes sold by an Indian tribal organization to any person who is not an enrolled member of the federally recognized Indian tribe within whose jurisdiction the sale takes place consistent with collection of these taxes generally within the state. The legislature finds that applicable collection and enforcement measures under this chapter are reasonably necessary to prevent fraudulent transactions and place a minimal burden on the Indian tribal organization, pursuant to the United States supreme court's decision in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

Credits

[2008 c 226 § 2, eff. June 12, 2008; 1995 c 278 § 5; 1993 c 492 § 308; 1972 ex.s. c 157 § 4; 1961 c 15 § 82.24.080. Prior: 1959 c 270 § 8; prior: 1949 c 228 § 13, part; 1943 c 156 § 11, part; 1941 c 178 § 13, part; 1939 c 225 § 23, part; 1935 c 180 § 82, part; Rem. Supp. 1949 § 8370-82, part.]

Notes of Decisions (2)

Current with 2011 Legislation effective through February 23, 2011

82.24.090. Records--Preservation--Reports, West's RCWA 82.24.090

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.090

82.24.090. Records--Preservation--Reports

Currentness

(1) Every wholesaler or retailer subject to the provisions of this chapter shall keep and preserve for a period of five years an accurate set of records. These records must show all transactions relating to the purchase and sale of any of the articles taxed under this chapter and show all physical inventories performed on those articles, all invoices, and a record of all stamps purchased. All such records and all stock of taxable articles on hand shall be open to inspection at all reasonable times by the department of revenue or its duly authorized agent.

(2) All wholesalers shall within fifteen days after the first day of each month file with the department of revenue a report of all drop shipment sales made by them to retailers within this state during the preceding month. The report shall show the name and address of the retailer to whom the cigarettes were sold, the kind and quantity, and the date of delivery thereof.

Credits

[1995 c 278 § 6; 1975 1st ex.s. c 278 § 62; 1961 c 15 § 82.24.090. Prior: 1941 c 178 § 14; 1939 c 225 § 24; 1935 c 180 § 84; Rem. Supp. 1941 § 8370-84.]

Notes of Decisions (1)

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82.24.100. Forgery or counterfeiting of stamps--Penalty, West's RCWA 82.24.100

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.100

82.24.100. Forgery or counterfeiting of stamps--Penalty

Currentness

To forge or counterfeit any stamp of the kind herein provided is a felony.

Credits

[1961 c 15 § 82.24.100. Prior: 1935 c 180 § 85; RRS § 8370-85.]

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82.24.110. Other offenses--Penalties, West's RCWA 82.24.110

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.110

82.24.110. Other offenses--Penalties

Currentness

(1) Each of the following acts is a gross misdemeanor and punishable as such:

(a) To sell, except as a licensed wholesaler engaged in interstate commerce as to the article being taxed herein, without the stamp first being affixed;

(b) To sell in Washington as a wholesaler to a retailer who does not possess and is required to possess a current cigarette retailer's license;

(c) To use or have in possession knowingly or intentionally any forged or counterfeit stamps;

(d) For any person other than the department of revenue or its duly authorized agent to sell any stamps not affixed to any of the articles taxed herein whether such stamps are genuine or counterfeit;

(e) For any person other than the department of revenue, its duly authorized agent, or a licensed wholesaler who has lawfully purchased or obtained them to possess any stamps not affixed to any of the articles taxed herein whether such stamps are genuine or counterfeit;

(f) To violate any of the provisions of this chapter;

(g) To violate any lawful rule made and published by the department of revenue or the board;

(h) To use any stamps more than once;

(i) To refuse to allow the department of revenue or its duly authorized agent, on demand, to make full inspection of any place of business where any of the articles herein taxed are sold or otherwise hinder or prevent such inspection;

(j) For any retailer to have in possession in any place of business any of the articles herein taxed, unless the same have the proper stamps attached;

(k) For any person to make, use, or present or exhibit to the department of revenue or its duly authorized agent, any invoice for any of the articles herein taxed which bears an untrue date or falsely states the nature or quantity of the goods therein invoiced;

(l) For any wholesaler or retailer or his or her agents or employees to fail to produce on demand of the department of revenue all invoices of all the articles herein taxed or stamps bought by him or her or received in his or her place of business within five years prior to such demand unless he or she can show by satisfactory proof that the nonproduction of the invoices was due to causes beyond his or her control;

(m) For any person to receive in this state any shipment of any of the articles taxed herein, when the same are not stamped, for the purpose of avoiding payment of tax. It is presumed that persons other than dealers who purchase or receive shipments of unstamped cigarettes do so to avoid payment of the tax imposed herein;

82.24.110. Other offenses--Penalties, West's RCWA 82.24.110

(n) For any person to possess or transport in this state a quantity of ten thousand cigarettes or less unless the proper stamps required by this chapter have been affixed or unless: (i) Notice of the possession or transportation has been given as required by RCW 82.24.250; (ii) the person transporting the cigarettes has in actual possession invoices or delivery tickets which show the true name and address of the consignor or seller, the true name and address of the consignee or purchaser, and the quantity and brands of the cigarettes so transported; and (iii) the cigarettes are consigned to or purchased by any person in this state who is authorized by this chapter to possess unstamped cigarettes in this state;

(o) For any person to possess or receive in this state a quantity of ten thousand cigarettes or less unless the proper stamps required by this chapter have been affixed or unless the person is authorized by this chapter to possess unstamped cigarettes in this state and is in compliance with the requirements of this chapter; and

(p) To possess, sell, distribute, purchase, receive, ship, or transport within this state any container or package of cigarettes that does not comply with this chapter.

(2) It is unlawful for any person knowingly or intentionally to possess or to:

(a) Transport in this state a quantity in excess of ten thousand cigarettes unless the proper stamps required by this chapter are affixed thereto or unless: (i) Proper notice as required by RCW 82.24.250 has been given; (ii) the person transporting the cigarettes actually possesses invoices or delivery tickets showing the true name and address of the consignor or seller, the true name and address of the consignee or purchaser, and the quantity and brands of the cigarettes so transported; and (iii) the cigarettes are consigned to or purchased by a person in this state who is authorized by this chapter to possess unstamped cigarettes in this state; or

(b) Receive in this state a quantity in excess of ten thousand cigarettes unless the proper stamps required by this chapter are affixed thereto or unless the person is authorized by this chapter to possess unstamped cigarettes in this state and is in compliance with this chapter.

Violation of this subsection (2) shall be punished as a class C felony under Title 9A RCW.

(3) All agents, employees, and others who aid, abet, or otherwise participate in any way in the violation of the provisions of this chapter or in any of the offenses described in this chapter shall be guilty and punishable as principals, to the same extent as any wholesaler or retailer or any other person violating this chapter.

(4) For purposes of this section, "person authorized by this chapter to possess unstamped cigarettes in this state" has the same meaning as in RCW 82.24.250.

Credits

[2008 c 226 § 4, eff. June 12, 2008; 2003 c 114 § 5, eff. July 27, 2003; 1999 c 193 § 2; 1997 c 420 § 4; 1995 c 278 § 7; 1990 c 216 § 4; 1987 c 496 § 1; 1975 1st ex.s. c 278 § 63; 1961 c 15 § 82.24.110. Prior: 1941 c 178 § 15; 1935 c 180 § 86; Rem. Supp. 1941 § 8370-86.]

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82.24.120. Violations--Penalties and interest, West's RCWA 82.24.120

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.120

82.24.120. Violations--Penalties and interest

Currentness

(1) If any person, subject to the provisions of this chapter or any rules adopted by the department of revenue under authority hereof, is found to have failed to affix the stamps required, or to have them affixed as herein provided, or to pay any tax due hereunder, or to have violated any of the provisions of this chapter or rules adopted by the department of revenue in the administration hereof, there shall be assessed and collected from such person, in addition to any tax that may be found due, a remedial penalty equal to the greater of ten dollars per package of unstamped cigarettes or two hundred fifty dollars, plus interest on the amount of the tax at the rate as computed under RCW 82.32.050(2) from the date the tax became due until the date of payment, and upon notice mailed to the last known address of the person or provided electronically as provided in RCW 82.32.135. The amount shall become due and payable in thirty days from the date of the notice. If the amount remains unpaid, the department or its duly authorized agent may make immediate demand upon such person for the payment of all such taxes, penalties, and interest.

(2) The department, for good reason shown, may waive or cancel all or any part of penalties imposed, but the taxpayer must pay all taxes due and interest thereon, at the rate as computed under RCW 82.32.050(2) from the date the tax became due until the date of payment.

(3) The keeping of any unstamped articles coming within the provisions of this chapter shall be prima facie evidence of intent to violate the provisions of this chapter.

(4) This section does not apply to taxes or tax increases due under RCW 82.24.280.

Credits

[2007 c 111 § 102, eff. July 22, 2007; 2006 c 14 § 6, eff. June 7, 2006; 1996 c 149 § 7; 1995 c 278 § 8; 1990 c 267 § 1; 1975 1st ex.s. c 278 § 64; 1961 c 15 § 82.24.120. Prior: 1949 c 228 § 15; 1939 c 225 § 25; 1935 c 180 § 87; Rem. Supp. 1949 § 8370-87.]

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82.24.130. Seizure and forfeiture, West's RCWA 82.24.130

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.130

82.24.130. Seizure and forfeiture

Currentness

(1) The following are subject to seizure and forfeiture:

(a) Subject to RCW 82.24.250, any articles taxed in this chapter that are found at any point within this state, which articles are held, owned, or possessed by any person, and that do not have the stamps affixed to the packages or containers; any container or package of cigarettes possessed or held for sale that does not comply with this chapter; and any container or package of cigarettes that is manufactured, sold, or possessed in violation of RCW 82.24.570.

(b) All conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation, for the purpose of sale or receipt of property described in (a) of this subsection, except:

(i) A conveyance used by any person as a common or contract carrier having in actual possession invoices or delivery tickets showing 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 transported, unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of this chapter;

(ii) A conveyance subject to forfeiture under this section by reason of any act or omission of which the owner thereof establishes to have been committed or omitted without his or her knowledge or consent;

(iii) A conveyance encumbered by a bona fide security interest if the secured party neither had knowledge of nor consented to the act or omission.

(c) Any vending machine used for the purpose of violating the provisions of this chapter.

(d) Any cigarettes that are stamped, sold, imported, or offered or possessed for sale in this state in violation of RCW 70.158.030(3). For the purposes of this subsection (1)(d), "cigarettes" has the meaning as provided in RCW 70.158.020(3).

(e) All cigarettes sold, delivered, or attempted to be delivered in violation of *RCW 70.155.105.

(2) Property subject to forfeiture under this chapter may be seized by any agent of the department authorized to collect taxes, any enforcement officer of the board, or law enforcement officer of this state upon process issued by any superior court or district court having jurisdiction over the property. Seizure without process may be made if:

(a) The seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant; or

(b) The department, the board, or the law enforcement officer has probable cause to believe that the property was used or is intended to be used in violation of this chapter and exigent circumstances exist making procurement of a search warrant impracticable.

82.24.130. Seizure and forfeiture, West's RCWA 82.24.130

(3) Notwithstanding the foregoing provisions of this section, articles taxed in this chapter which are in the possession of a wholesaler, licensed under Washington state law, for a period of time necessary to affix the stamps after receipt of the articles, shall not be considered contraband unless they are manufactured, sold, or possessed in violation of RCW 82.24.570.

Credits

[2003 c 114 § 7, eff. July 27, 2003; 2003 c 113 § 4, eff. July 27, 2003; 2003 c 25 § 9, eff. July 1, 2003; 1999 c 193 § 3; 1997 c 420 § 5; 1990 c 216 § 5; 1987 c 496 § 2; 1972 ex.s. c 157 § 5; 1961 c 15 § 82.24.130. Prior: 1941 c 178 § 16; 1935 c 180 § 88; Rem. Supp. 1941 § 8370-88.]

Notes of Decisions (8)

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82.24.135. Forfeiture procedure, West's RCWA 82.24.135

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.135

82.24.135. Forfeiture procedure

Currentness

In all cases of seizure of any property made subject to forfeiture under this chapter the department or the board shall proceed as follows:

(1) Forfeiture shall be deemed to have commenced by the seizure. Notice of seizure shall be given to the department or the board immediately if the seizure is made by someone other than an agent of the department or the board authorized to collect taxes.

(2) Upon notification or seizure by the department or the board or upon receipt of property subject to forfeiture under this chapter from any other person, the department or the board shall list and particularly describe the property seized in duplicate and have the property appraised by a qualified person not employed by the department or the board or acting as its agent. Listing and appraisal of the property shall be properly attested by the department or the board and the appraiser, who shall be allowed a reasonable appraisal fee. No appraisal is required if the property seized is judged by the department or the board to be less than one hundred dollars in value.

(3) The department or the board shall cause notice to be served within five days following the seizure or notification to the department or the board of the seizure on the owner of the property seized, if known, on the person in charge thereof, and on any other person having any known right or interest therein, of the seizure and intended forfeiture of the seized property. The notice may be served by any method authorized by law or court rule including but not limited to service by mail. The department may also furnish notice electronically as provided in RCW 82.32.135. If service is by mail or notice is provided electronically as provided in RCW 82.32.135, the notice shall also be served by certified mail with return receipt requested. Electronic notification or service by mail shall be deemed complete upon mailing the notice, electronically sending the notice, or electronically notifying the person or persons entitled to the notice that the notice is available to be accessed by the person or persons, within the five-day period following the seizure or notification of the seizure to the department or the board.

(4) If no person notifies the department or the board in writing of the person's claim of ownership or right to possession of the items seized within fifteen days of the date of the notice of seizure, the item seized shall be considered forfeited.

(5) If any person notifies the department or the board, in writing, of the person's claim of ownership or right to possession of the items seized within fifteen days of the date of the notice of seizure, the person or persons shall be afforded a reasonable opportunity to be heard as to the claim or right. The hearing shall be before the director or the director's designee or the board or the board's designee, except that any person asserting a claim or right may bring an action for return of the seized items in the superior court of the county in which such property was seized, if the aggregate value of the article or articles involved is more than five hundred dollars. A hearing and any appeal therefrom shall be in accordance with chapter 34.05 RCW. The burden of proof by a preponderance of the evidence shall be upon the person claiming to be the lawful owner or the person claiming to have the lawful right to possession of the items seized. The department or the board shall promptly return the article or articles to the claimant upon a determination that the claimant is the present lawful owner or is lawfully entitled to possession thereof of the items seized.

Credits

[2007 c 111 § 103, eff. July 22, 2007; 1998 c 53 § 1; 1987 c 496 § 3.]

82.24.145. Forfeited property--Retention, sale, or destruction--Use of sale proceeds, West's RCWA 82.24.145

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.145

82.24.145. Forfeited property--Retention, sale, or destruction--Use of sale proceeds

Currentness

When property is forfeited under this chapter the department may:

(1) Retain the property or any part thereof for official use or upon application by any law enforcement agency of this state, another state, or the District of Columbia, or of the United States for the exclusive use of enforcing the provisions of this chapter or the laws of any other state or the District of Columbia or of the United States.

(2) Sell the property at public auction to the highest bidder after due advertisement, but the department before delivering any of the goods so seized shall require the person to whom the property is sold to affix the proper amount of stamps. The proceeds of the sale and all moneys forfeited under this chapter shall be first applied to the payment of all proper expenses of any investigation leading to the seizure and of the proceedings for forfeiture and sale, including expenses of seizure, maintenance of custody, advertising, and court costs. The balance of the proceeds and all moneys shall be deposited in the general fund of the state. Proper expenses of investigation includes costs incurred by any law enforcement agency or any federal, state, or local agency.

(3) Notwithstanding the provisions of subsections (1) and (2) of this section, cigarettes seized for a violation of RCW 82.24.035 or 70.158.030(3) shall be destroyed. For the purposes of this subsection (3) "cigarettes" has the same meaning as provided in RCW 70.158.020(3).

Credits

[2003 c 25 § 10, eff. July 1, 2003; 1999 c 193 § 4; 1987 c 496 § 4.]

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82.24.180. Seized property may be returned--Penalty, interest, West's RCWA 82.24.180

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.180

82.24.180. Seized property may be returned--Penalty, interest

Currentness

(1) The department of revenue may return any property seized under the provisions of this chapter when it is shown that there was no intention to violate the provisions thereof.

(2) When any property is returned under this section, the department may return such goods to the parties from whom they were seized if and when such parties affix the proper amount of stamps thereto, and pay to the department as penalty an amount equal to the greater of ten dollars per package of unstamped cigarettes or two hundred fifty dollars, and interest on the amount of the tax at the rate as computed under RCW 82.32.050(2) from the date the tax became due until the date of payment, and in such cases, no advertisement shall be made or notices posted in connection with said seizure.

Credits

[1996 c 149 § 8; 1990 c 267 § 2; 1975 1st ex.s. c 278 § 66; 1961 c 15 § 82.24.180. Prior: 1935 c 180 § 90; RRS § 8370-90.]

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82.24.190. Search and seizure, West's RCWA 82.24.190

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.190

82.24.190. Search and seizure

Currentness

When the department of revenue or the board has good reason to believe that any of the articles taxed herein are being kept, sold, offered for sale, or given away in violation of the provisions of this chapter or regulations issued under authority hereof, it may make affidavit of such fact, describing the place or thing to be searched, before any judge of any court in this state, and such judge shall issue a search warrant directed to the sheriff, any deputy, police officer, or duly authorized agent of the department of revenue commanding him or her diligently to search any building, room in a building, place or vehicle as may be designated in the affidavit and search warrant, and to seize such tobacco so possessed and to hold the same until disposed of by law, and to arrest the person in possession or control thereof. If upon the return of such warrant, it shall appear that any of the articles taxed herein, unlawfully possessed, were seized, the same shall be sold as provided in this chapter.

Credits

[1997 c 420 § 6; 1987 c 202 § 244; 1975 1st ex.s. c 278 § 67; 1961 c 15 § 82.24.190. Prior: 1949 c 228 § 16; 1935 c 180 § 91; Rem. Supp. 1949 § 8370-91.]

Notes of Decisions (2)

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82.24.210. Redemption of stamps, West's RCWA 82.24.210

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.210

82.24.210. Redemption of stamps

Currentness

The department of revenue may promulgate rules and regulations providing for the refund to dealers for the cost of stamps affixed to articles taxed herein, which by reason of damage become unfit for sale and are destroyed by the dealer or returned to the manufacturer or jobber. In the case of any articles to which stamps have been affixed, and which articles have been sold and shipped to a regular dealer in such articles in another state, the seller in this state shall be entitled to a refund of the actual amount of the stamps so affixed, less the affixing discount, upon condition that the seller in this state makes affidavit that the articles were sold and shipped outside of the state and that he has received from the purchaser outside the state a written acknowledgment that he has received such articles with the amount of stamps affixed thereto, together with the name and address of such purchaser. The department of revenue may redeem any unused stamps purchased from it at the face value thereof less the affixing discount. A distributor or wholesaler that has lawfully affixed stamps to cigarettes, and subsequently is unable to sell those cigarettes lawfully because the cigarettes are removed from the directory created pursuant to RCW 70.158.030(2), may apply to the department for a refund of the cost of the stamps.

Credits

[2003 c 25 § 11, eff. July 1, 2003; 1975 1st ex.s. c 278 § 68; 1961 c 15 § 82.24.210. Prior: 1949 c 228 § 17; 1941 c 178 § 17; 1935 c 180 § 92; Rem. Supp. 1949 § 8370-92.]

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82.24.230. Administration, West's RCWA 82.24.230

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.230

82.24.230. Administration

Currentness

All of the provisions contained in chapter 82.32 RCW shall have full force and application with respect to taxes imposed under the provisions of this chapter, except the following sections: RCW 82.32.050, 82.32.060, 82.32.070, 82.32.100, and 82.32.270, except as noted otherwise in RCW 82.24.280.

Credits

[2006 c 14 § 7, eff. June 7, 2006; 1995 c 278 § 9; 1961 c 15 § 82.24.230. Prior: 1935 c 180 § 95; RRS § 8370-95.]

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82.24.235. Rules, West's RCWA 82.24.235

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.235

82.24.235. Rules

Currentness

The department may adopt such rules as are necessary to enforce and administer this chapter.

Credits

[1995 c 278 § 15.]

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82.24.250. Transportation of unstamped cigarettes--Invoices and delivery..., West's RCWA 82.24.250

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.250

82.24.250. Transportation of unstamped cigarettes--Invoices and delivery tickets required--Stop and inspect

Currentness

(1) No person other than: (a) A licensed wholesaler in the wholesaler's own vehicle; or (b) a person who has given notice to the board in advance of the commencement of transportation shall transport or cause to be transported in this state cigarettes not having the stamps affixed to the packages or containers.

(2) When transporting unstamped cigarettes, such persons shall have in their actual possession or cause to have in the actual possession of those persons transporting such cigarettes on their behalf invoices or delivery tickets for such cigarettes, which shall show the true name and address of the consignor or seller, the true name and address of the consignee or purchaser, and the quantity and brands of the cigarettes so transported.

(3) If unstamped cigarettes are consigned to or purchased by any person in this state such purchaser or consignee must be a person who is authorized by this chapter to possess unstamped cigarettes in this state.

(4) In the absence of the notice of transportation required by this section or 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 a person authorized by this chapter 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.

(5) 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.

(6) 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.

(7) For purposes of this section, the term "person authorized by this chapter to possess unstamped cigarettes in this state" means:

(a) A wholesaler, licensed under Washington state law;

(b) The United States or an agency thereof;

(c) Any person, including an Indian tribal organization, who, after notice has been given to the board as provided in this section, brings or causes to be brought into the state unstamped cigarettes, if within a period of time after receipt of the cigarettes as the department determines by rule to be reasonably necessary for the purpose the person has caused stamps to be affixed in accordance with RCW 82.24.030 or otherwise made payment of the tax required by this chapter in the manner set forth in rules adopted by the department; and

(d) Any purchaser or consignee of unstamped cigarettes, including an Indian tribal organization, who has given notice to the board in advance of receiving unstamped cigarettes and who within a period of time after receipt of the cigarettes as

82.24.250. Transportation of unstamped cigarettes--Invoices and delivery..., West's RCWA 82.24.250

the department determines by rule to be reasonably necessary for the purpose the person has caused stamps to be affixed in accordance with RCW 82.24.030 or otherwise made payment of the tax required by this chapter in the manner set forth in rules adopted by the department.

Nothing in this subsection (7) shall be construed as modifying RCW 82.24.050 or 82.24.110.

(8) Nothing in this section shall be construed as limiting any otherwise lawful activity under a cigarette tax compact pursuant to chapter 43.06 RCW.

(9) Nothing in this section shall be construed as limiting the right to travel upon all public highways under Article III of the treaty with the Yakamas of 1855.

Credits

[2008 c 226 § 5, eff. June 12, 2008; 2003 c 114 § 8, eff. July 27, 2003; 1997 c 420 § 7; 1995 c 278 § 10; 1990 c 216 § 6; 1972 ex.s. c 157 § 6.]

Notes of Decisions (18)

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82.24.260. Selling or disposal of unstamped cigarettes--Person to pay and..., West's RCWA 82.24.260

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.260

82.24.260. Selling or disposal of unstamped cigarettes--Person to pay and remit tax or affix stamps--Liability

Currentness

(1) Other than:

- (a) A wholesaler required to be licensed under this chapter;
- (b) A federal instrumentality with respect to sales to authorized military personnel; or
- (c) An Indian tribal organization with respect to sales to enrolled members of the tribe,

a person who is in lawful possession of unstamped cigarettes and who intends to sell or otherwise dispose of the cigarettes shall pay, or satisfy its precollection obligation that is imposed by this chapter, the tax required by this chapter by remitting the tax or causing stamps to be affixed in the manner provided in rules adopted by the department.

(2) When stamps are required to be affixed, the person may deduct from the tax collected the compensation allowable under this chapter. The remittance or the affixing of stamps shall, in the case of cigarettes obtained in the manner set forth in RCW 82.24.250(7)(c), be made at the same time and manner as required in RCW 82.24.250(7)(c).

(3) This section shall not relieve the buyer or possessor of unstamped cigarettes from personal liability for the tax imposed by this chapter.

(4) Nothing in this section shall relieve a wholesaler from the requirements of affixing stamps pursuant to RCW 82.24.040 and 82.24.050.

Credits

[2003 c 114 § 9, eff. July 27, 2003; 1995 c 278 § 11; 1987 c 80 § 3; 1986 c 3 § 13. Prior: 1983 c 189 § 3; 1983 c 3 § 217; 1975 1st ex.s. c 22 § 1; 1972 ex.s. c 157 § 7.]

Notes of Decisions (2)

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82.24.280. Liability from tax increase--Interest and penalties on unpaid..., West's RCWA 82.24.280

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.280

82.24.280. Liability from tax increase--Interest and penalties on unpaid tax--Administration

Currentness

(1) Any additional tax liability arising from a tax rate increase under this chapter shall be paid, along with reports and returns prescribed by the department, on or before the last day of the month in which the increase becomes effective.

(2) If not paid by the due date, interest shall apply to any unpaid tax. Interest shall be calculated at the rate as computed under RCW 82.32.050(2) from the date the tax became due until the date of payment.

(3) If upon examination of any returns or from other information obtained by the department it appears that a tax or penalty has been paid less than that properly due, the department shall assess against the taxpayer such additional amount found to be due. The department shall notify the taxpayer by mail, or electronically as provided in RCW 82.32.135, of the additional amount due, including any applicable penalties and interest. The taxpayer shall pay the additional amount within thirty days from the date of the notice, or within such further time as the department may provide.

(4) All of chapter 82.32 RCW applies to tax rate increases except: RCW 82.32.050(1) and 82.32.270.

Credits

[2007 c 111 § 104, eff. July 22, 2007; 1996 c 149 § 10; 1995 c 278 § 13.]

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82.24.290. Exceptions--Federal instrumentalities and purchasers from federal..., West's RCWA 82.24.290

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.290

82.24.290. Exceptions--Federal instrumentalities and purchasers from federal instrumentalities

Currentness

The taxes imposed by this chapter do not apply to the sale of cigarettes to:

- (1) United States army, navy, air force, marine corps, or coast guard exchanges and commissaries and navy or coast guard ships' stores;
- (2) The United States veterans' administration; or
- (3) Any authorized purchaser from the federal instrumentalities named in subsection (1) or (2) of this section.

Credits

[1995 c 278 § 14.]

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82.24.295. Exceptions--Sales by Indian retailer under cigarette tax contract, West's RCWA 82.24.295

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.295

82.24.295. Exceptions--Sales by Indian retailer under cigarette tax contract

Currentness

(1) The taxes imposed by this chapter do not apply to the sale, use, consumption, handling, possession, or distribution of cigarettes by an Indian retailer during the effective period of a cigarette tax contract subject to RCW 43.06.455.

(2) Effective July 1, 2002, wholesalers and retailers subject to the provisions of this chapter shall be allowed compensation for their services in affixing the stamps required under this chapter a sum computed at the rate of six dollars per one thousand stamps purchased or affixed by them.

Credits

[2001 c 235 § 6.]

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82.24.300. Exceptions--Puyallup Tribe of Indians, West's RCWA 82.24.300

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.300

82.24.300. Exceptions--Puyallup Tribe of Indians

Currentness

The taxes imposed by this chapter do not apply to the sale, use, consumption, handling, possession, or distribution of cigarettes by an Indian retailer during the effective period of a cigarette tax agreement under RCW 43.06.465.

Credits

[2005 c 11 § 5, eff. April 5, 2005.]

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82.24.302. Exceptions--Sales by tribal retailers--Yakama Nation, West's RCWA 82.24.302

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.302

82.24.302. Exceptions--Sales by tribal retailers--Yakama Nation

Currentness

The taxes imposed by this chapter do not apply to the sale, use, consumption, handling, possession, or distribution of cigarettes by a tribal retailer during the effective period of a cigarette tax agreement under RCW 43.06.466.

Credits

[2008 c 228 § 2, eff. March 28, 2008.]

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82.24.500. Business of cigarette purchase, sale, consignment, or..., West's RCWA 82.24.500

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.500

82.24.500. Business of cigarette purchase, sale, consignment, or distribution--License required--Penalty

Currentness

No person may engage in or conduct the business of purchasing, selling, consigning, or distributing cigarettes in this state without a license under this chapter. A violation of this section is a class C felony.

Credits

[2003 c 114 § 10, eff. July 27, 2003; 1986 c 321 § 4.]

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82.24.510. Wholesaler's and retailer's licenses--Application and..., West's RCWA 82.24.510

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.510

82.24.510. Wholesaler's and retailer's licenses--Application and issuance--Criminal background check

Currentness

(1) The licenses issuable under this chapter are as follows:

(a) A wholesaler's license.

(b) A retailer's license.

(2) Application for the licenses shall be made through the master license system under chapter 19.02 RCW. The board shall adopt rules regarding the regulation of the licenses. The board may refrain from the issuance of any license under this chapter if the board has reasonable cause to believe that the applicant has wilfully withheld information requested for the purpose of determining the eligibility of the applicant to receive a license, or if the board has reasonable cause to believe that information submitted in the application is false or misleading or is not made in good faith. In addition, for the purpose of reviewing an application for a wholesaler's license or retailer's license and for considering the denial, suspension, or revocation of any such license, the board may consider any prior criminal conduct of the applicant, including an administrative violation history record with the board and a criminal history record information check within the previous five years, in any state, tribal, or federal jurisdiction in the United States, its territories, or possessions, and the provisions of RCW 9.95.240 and chapter 9.96A RCW shall not apply to such cases. The board may, in its discretion, grant or refuse the wholesaler's license or retailer's license, subject to the provisions of RCW 82.24.550.

(3) No person may qualify for a wholesaler's license or a retailer's license under this section without first undergoing a criminal background check. The background check shall be performed by the board and must disclose any criminal conduct within the previous five years in any state, tribal, or federal jurisdiction in the United States, its territories, or possessions. A person who possesses a valid license on July 22, 2001, is subject to this subsection and subsection (2) of this section beginning on the date of the person's master license expiration, and thereafter. If the applicant or licensee also has a license issued under chapter 66.24 or 82.26 RCW, the background check done under the authority of chapter 66.24 or 82.26 RCW satisfies the requirements of this section.

(4) Each such license shall expire on the master license expiration date, and each such license shall be continued annually if the licensee has paid the required fee and complied with all the provisions of this chapter and the rules of the board made pursuant thereto.

(5) Each license and any other evidence of the license that the board requires must be exhibited in each place of business for which it is issued and in the manner required for the display of a master license.

Credits

[2009 c 154 § 1, eff. July 26, 2009; 2001 c 235 § 8; 1986 c 321 § 5.]

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82.24.520. Wholesaler's license--Fee--Display of license--Bond, West's RCWA 82.24.520

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.520

82.24.520. Wholesaler's license--Fee--Display of license--Bond

Currentness

A fee of six hundred fifty dollars shall accompany each wholesaler's license application or license renewal application. If a wholesaler sells or intends to sell cigarettes at two or more places of business, whether established or temporary, a separate license with a license fee of one hundred fifteen dollars shall be required for each additional place of business. Each license, or certificate thereof, and such other evidence of license as the department of revenue requires, shall be exhibited in the place of business for which it is issued and in such manner as is prescribed for the display of a master license. The department of revenue shall require each licensed wholesaler to file with the department a bond in an amount not less than one thousand dollars to guarantee the proper performance of the duties and the discharge of the liabilities under this chapter. The bond shall be executed by such licensed wholesaler as principal, and by a corporation approved by the department of revenue and authorized to engage in business as a surety company in this state, as surety. The bond shall run concurrently with the wholesaler's license.

Credits

[1986 c 321 § 6.]

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82.24.530. Retailer's license--Vending machines, West's RCWA 82.24.530

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.530

82.24.530. Retailer's license--Vending machines

Currentness

A fee of ninety-three dollars shall accompany each retailer's license application or license renewal application. A separate license is required for each separate location at which the retailer operates. A fee of thirty additional dollars for each vending machine shall accompany each application or renewal for a license issued to a retail dealer operating a cigarette vending machine.

Credits

[1993 c 507 § 15; 1986 c 321 § 7.]

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82.24.540. Licensee to operate within scope of license--Penalty, West's RCWA 82.24.540

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.540

82.24.540. Licensee to operate within scope of license--Penalty

Currentness

Any person licensed only as a wholesaler, or as a retail dealer, shall not operate in any other capacity unless the additional appropriate license or licenses are first secured. A violation of this section is a misdemeanor.

Credits

[1986 c 321 § 8.]

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82.24.550. Enforcement--Rules--Notice--Hearing--Reinstatement of license--Appeal, West's RCWA 82.24.550

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.550

82.24.550. Enforcement--Rules--Notice--Hearing--Reinstatement of license--Appeal

Currentness

- (1) The board shall enforce the provisions of this chapter. The board may adopt, amend, and repeal rules necessary to enforce and administer the provisions of this chapter.
- (2) The department may adopt, amend, and repeal rules necessary to administer the provisions of this chapter. The board may revoke or suspend the license or permit of any wholesale or retail cigarette dealer in the state upon sufficient cause appearing of the violation of this chapter or upon the failure of such licensee to comply with any of the provisions of this chapter.
- (3) A license shall not be suspended or revoked except upon notice to the licensee and after a hearing as prescribed by the board. The board, upon finding that the licensee has failed to comply with any provision of this chapter or any rule adopted under this chapter, shall, in the case of the first offense, suspend the license or licenses of the licensee for a period of not less than thirty consecutive business days, and, in the case of a second or further offense, shall suspend the license or licenses for a period of not less than ninety consecutive business days nor more than twelve months, and, in the event the board finds the licensee has been guilty of willful and persistent violations, it may revoke the license or licenses.
- (4) Any licenses issued under chapter 82.26 RCW to a person whose license or licenses have been suspended or revoked under this section shall also be suspended or revoked during the period of suspension or revocation under this section.
- (5) Any person whose license or licenses have been revoked under this section may reapply to the board at the expiration of one year from the date of revocation of the license or licenses. The license or licenses may be approved by the board if it appears to the satisfaction of the board that the licensee will comply with the provisions of this chapter and the rules adopted under this chapter.
- (6) A person whose license has been suspended or revoked shall not sell cigarettes or tobacco products or permit cigarettes or tobacco products to be sold during the period of such suspension or revocation on the premises occupied by the person or upon other premises controlled by the person or others or in any other manner or form whatever.
- (7) Any determination and order by the board, and any order of suspension or revocation by the board of the license or licenses issued under this chapter, or refusal to reinstate a license or licenses after revocation shall be reviewable by an appeal to the superior court of Thurston county. The superior court shall review the order or ruling of the board and may hear the matter de novo, having due regard to the provisions of this chapter and the duties imposed upon the board.
- (8) If the board makes an initial decision to deny a license or renewal, or suspend or revoke a license, the applicant may request a hearing subject to the applicable provisions under Title 34 RCW.
- (9) For purposes of this section, "tobacco products" has the same meaning as in RCW 82.26.010.

Credits

[2009 c 154 § 2, eff. July 26, 2009; 2005 c 180 § 19, eff. July 1, 2005; 1997 c 420 § 8; 1993 c 507 § 17; 1986 c 321 § 9.]

82.24.551. Enforcement--Appointment of officers of liquor control board, West's RCWA 82.24.551

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.551

82.24.551. Enforcement--Appointment of officers of liquor control board

Currentness

The department shall appoint, as duly authorized agents, enforcement officers of the liquor control board to enforce provisions of this chapter. These officers shall not be considered employees of the department.

Credits

[1997 c 420 § 10.]

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82.24.552. Enforcement--Administration--Inspection of books and records, West's RCWA 82.24.552

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.552

82.24.552. Enforcement--Administration--Inspection of books and records

Currentness

(1) For the purposes of obtaining information concerning any matter relating to the administration or enforcement of this chapter, the department, the board, or any of its agents may inspect the books, documents, or records of any person transporting cigarettes for sale to any person or entity in the state, and books, documents, or records containing any information relating to the transportation or possession of cigarettes for sale in the possession of a specific common carrier as defined in RCW 81.80.010 doing business in this state, or books, documents, and records of vehicle rental agencies whose vehicles are being rented for the purpose of transporting contraband cigarettes.

(2) If a person neglects or refuses to produce and submit for inspection any book, record, or document as required by this section when requested to do so by the department, the board, or its agent, then the department or the board may seek an order in superior court compelling production of the books, records, or documents.

Credits

[2007 c 221 § 2, eff. July 22, 2007.]

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82.24.560. Fees and penalties credited to general fund, West's RCWA 82.24.560

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.560

82.24.560. Fees and penalties credited to general fund

Currentness

Except as specified in RCW 70.155.120, all fees and penalties received or collected by the department of revenue pursuant to this chapter shall be paid to the state treasurer, to be credited to the general fund.

Credits

[1993 c 507 § 18; 1986 c 321 § 10.]

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82.24.570. Counterfeit cigarette offenses--Penalties, West's RCWA 82.24.570

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.570

82.24.570. Counterfeit cigarette offenses--Penalties

Currentness

(1) It is unlawful for any person to knowingly manufacture, sell, or possess counterfeit cigarettes. A cigarette is "counterfeit" if:

(a) The cigarette or its packaging bears any reproduction or copy of a trademark, service mark, trade name, label, term, design, or work adopted or used by a manufacturer to identify its own cigarettes; and

(b) The cigarette is not manufactured by the owner or holder of that trademark, service mark, trade name, label, term, design, or work, or by any authorized licensee of that person.

(2) Any person who violates the provisions of this section is guilty of a class C felony which is punishable by up to five years in prison and a fine of up to ten thousand dollars.

(3) Any person who is convicted of a second or subsequent violation of the provisions of this section is guilty of a class B felony which is punishable by up to ten years in prison and a fine of up to twenty thousand dollars.

Credits

[2003 c 114 § 6, eff. July 27, 2003.]

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82.24.900. Construction--1961 c 15, West's RCWA 82.24.900

West's Revised Code of Washington Annotated

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

West's RCWA 82.24.900

82.24.900. Construction--1961 c 15

Currentness

The provisions of this chapter shall not apply in any case in which the state of Washington is prohibited from taxing under the Constitution of this state or the Constitution or the laws of the United States.

Credits

[1961 c 15 § 82.24.900. Prior: 1935 c 180 § 94; RRS § 8370-94.]

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Washington Administrative Code Currentness

Title 458. Revenue, Department of

Chapter 458-20. Excise Tax Rules (Refs & Annos)

WAC 458-20-186

458-20-186. Tax on cigarettes.

(1) **Introduction.** This rule addresses those taxes activities that apply exclusively to cigarettes as defined by RCW 82.24.010. See WAC 458-20-185 for tax liabilities associated with tobacco products other than cigarettes. The tax on cigarettes is in addition to all other taxes owed. For example, retailers and wholesalers are liable for business and occupation tax on their retailing or wholesaling activities, and must collect and remit sales tax on retail sales of cigarettes. Consumers pay the cigarette tax in addition to sales or use tax on purchases of cigarettes for consumption within this state. (Wholesalers not licensed in the state of Washington who are making sales of cigarettes to Indians in accordance with a cigarette tax contract authorized by RCW 43.06.455 must comply with the specific terms of their individual contracts. See also WAC 458-20-192 regarding sales in Indian country.)

(2) **Licensing requirements and responsibilities.** The Washington state liquor control board assumed the licensing responsibilities for cigarettes on July 1, 2009. Please see chapters 314-33 and 314-34 WAC.

(3) **Organization of rule.** The information provided in this rule is divided into six parts:

- (a) Part I explains the tax liabilities of persons who sell, use, consume, handle, possess, or distribute cigarettes in this state.
- (b) Part II explains the stamping requirements and how the cigarette tax rates are calculated.
- (c) Part III describes the exemptions from the tax and the procedures that must be followed to qualify for exemption.
- (d) Part IV explains the requirements and responsibilities for persons transporting cigarettes in Washington.
- (e) Part V explains the requirements and responsibilities for persons engaged in making delivery sales of cigarettes into this state.
- (f) Part VI explains the enforcement and administration of the cigarette tax.

Part I - Tax on Cigarettes

(101) **In general.** The Washington state cigarette tax is due and payable by the first person who sells, uses, consumes, handles, possesses, or distributes the cigarettes in this state.

(a) **Possession.** For the purpose of this rule, a 'possessor' of cigarettes is anyone who personally or through an agent, employee, or designee, has possession of cigarettes in this state.

(b) **Payment.** Payment of the cigarette tax is made through the purchase of stamps from banks authorized by the department of revenue (department) to sell the stamps. Only licensed wholesalers may purchase or obtain cigarette stamps. Except as specifically provided in Part III of this rule, it is unlawful for any person other than a licensed wholesaler to possess unstamped cigarettes in this state. However, as explained in subsection (102)(b) of this rule, certain consumers may possess unstamped cigarettes for personal consumption if they pay the tax as provided in this rule.

(c) **Imposition of tax.** Ordinarily, the tax obligation is imposed on and collected from the first possessor of unstamped cigarettes. However, failure of an exempt entity with an obligation to collect and remit the tax does not relieve a subsequent nonexempt possessor of unstamped cigarettes from liability for the tax.

(d) **Promotions.** Cigarettes given away for advertising or any other purpose are taxed in the same manner as if they were sold, used, consumed, handled, possessed, or distributed in this state, but are not required to have the stamp affixed. Instead, the manufacturer of the cigarettes must pay the tax on a monthly return filed with the department. See subsection (602) of this rule.

(102) Possession of cigarettes in Washington state.

(a) Every person who is (i) in possession of unstamped cigarettes in this state, and (ii) is not specifically exempt by law, is liable for payment of the cigarette tax as provided in chapter 82.24 RCW and this rule.

(b) Consumers who buy unstamped cigarettes or who purchase cigarettes from sources other than licensed retailers in this state must pay the cigarette tax as provided in subsection (602) of this rule when they first bring the cigarettes into this state or first possess them in this state. This requirement includes, but is not limited to, delivery sales as described in Part VI of this rule.

(c) **Cigarettes purchased from Indian retailers.** Special rules apply to cigarettes purchased from Indian retailers.

(i) Indians purchasing cigarettes in Indian country are exempt from the state cigarette tax; however, these sales must comply with WAC 458-20-192. Other consumers may purchase cigarettes for their personal consumption from 'qualified Indian retailers' without incurring liability for state cigarette tax. A 'qualified Indian retailer' is one who is subject to the terms of a valid cigarette tax contract with the state pursuant to RCW 43.06.455.

(ii) Consumers who purchase cigarettes from Indian retailers who are not subject to a cigarette tax contract with the state must comply with the reporting requirements and remit the cigarette tax as explained in subsection (602) of this rule. These consumers are also liable for the use tax on their purchases. See WAC 458-20-178.

(iii) It is the duty of the consumer in each instance to ascertain his or her responsibilities with respect to such purchases.

(d) **Cigarettes purchased on military reservations.** Active duty or retired military personnel, and their dependants, may purchase cigarettes for their own consumption on military reservations without paying the state tax (see Part III). However, such persons are not permitted to give or resell those cigarettes to others.

(e) **Counterfeit cigarettes.** It is unlawful for any person to manufacture, sell, or possess counterfeit cigarettes. A cigarette is counterfeit if (i) it or its packaging bears any logo or marking used by a manufacturer to identify its own cigarettes, and (ii) the cigarette was not manufactured by the owner of that logo or trademark or by any authorized licensee of the manufacturer. RCW 82.24.570.

(f) Possession of unstamped and untaxed cigarettes, and possession of counterfeit cigarettes, are criminal offenses in this state. See Part VI.

Part II - Stamping and Rates

(201) Cigarette stamps.

(a) Stamps indicating payment of the cigarette tax must be affixed prior to any sale, use, consumption, handling, possession, or distribution of all cigarettes other than those specifically exempted as explained in Part III of this rule. The stamp must be applied to the smallest container or package, unless the department, in its sole discretion, determines that it is impractical to do so. Stamps must be of the type authorized by the department and affixed in such a manner that they cannot be removed from the package or container without being mutilated or destroyed.

(b) Licensed wholesalers may purchase state-approved cigarette stamps from authorized banks. Payment for stamps must be made at the time of purchase unless the wholesaler has prior approval of the department to defer payment and furnishes a surety bond equal to the proposed monthly credit limit. Payments under a deferred plan are due within thirty days following purchase. Licensed wholesalers are compensated for affixing the stamps at the rate of \$6.00 per thousand stamps affixed ('stamping allowance').

(202) Rates.

(a) The Washington state cigarette tax is imposed on a per cigarette basis. The rate of the tax is a combination of statutory rates found in RCW 82.24.020, 82.24.027, and 82.24.028.

(b) When the rate of tax increases, the first person who sells, uses, consumes, handles, possesses, or distributes previously taxed cigarettes after the rate increase is liable for the additional tax.

(203) Refunds. Any person may request a refund of the face value of the stamps when the tax is not applicable and the stamps are returned to the department. Documentation supporting the claim must be provided at the time the claim for refund is made.

(a) Refunds for stamped untaxed cigarettes sold to Indian tribal members or tribal entities in the full value of the stamps affixed will be approved by an agent of the department.

(b) Refunds for stamped cigarettes will not include the stamping allowance if the stamps are:

(i) Damaged, or unfit for sale, and as a result are destroyed or returned to the manufacturer or distributor; or

(ii) Improperly or partially affixed through burns, jams, double stamps, stamped on carton flaps, or improperly removed from the stamp roll.

(c) The claim for refund must be filed on a form provided by the department. An affidavit or a certificate from the manufacturer for stamped cigarettes returned to the manufacturer for destruction or by an agent of the department verifying the voiding of stamps and authorizing the refund must accompany the claim for refund.

Part III - Exemptions

(301) In general. There are limited exemptions from the cigarette tax provided by law. This part discusses exemptions and the procedures that must be followed to qualify for an exemption.

(302) Government sales. The cigarette tax does not apply to the sale of cigarettes to:

(a) The United States Army, Navy, Air Force, Marine Corps, or Coast Guard exchanges and commissaries and Navy or Coast Guard ships' stores;

(b) The United States Veteran's Administration; or

(c) Any person authorized to purchase from the federal instrumentalities named in (a) or (b) above, if the cigarettes are purchased from the instrumentality for personal consumption.

(303) Sales in Indian country.

(a) The definitions of 'Indian,' 'Indian country,' and 'Indian tribe,' in WAC 458-20-192 apply to this rule. 'Cigarette contract' means an agreement under RCW 43.06.450 through 43.06.460.

(b) The cigarette tax does not apply to cigarettes taxed by an Indian tribe in accordance with a cigarette contract under RCW 43.06.450 through 43.06.460.

(c) The cigarette tax does not apply to cigarettes sold to an Indian in Indian country for personal consumption; however, those sales must comply with the allocation provisions of WAC 458-20-192. Sales made by an Indian cigarette outlet to nontribal members are subject to the tax, except as provided in (b) above.

(d) See WAC 458-20-192 for information on making wholesale sales of cigarettes to Indians and Indian tribes.

(304) **Interstate commerce.** The cigarette tax does not apply to cigarettes sold to persons licensed as cigarette distributors in other states when, as a condition of the sale, the seller either delivers the cigarettes to the buyer at a point outside this state, or delivers the same to a common carrier with the shipment consigned by the seller to the buyer at a location outside this state. Any person engaged in making sales to licensed distributors in other states or making export sales or in making sales to the federal government must furnish a surety bond in a sum equal to twice the amount of tax that would be affixed to the cigarettes that are set aside for the conduct of such business without affixing cigarette stamps. The unstamped stock must be kept separate and apart from any stamped stock.

Part IV - Transporting Cigarettes in Washington

(401) **Transportation of cigarettes restricted.** No person other than a licensed wholesaler may transport unstamped cigarettes in this state except as specifically set forth in RCW 82.24.250 and this rule, or as may be allowed under a cigarette tax contract subject to the provisions of RCW 43.06.455. Licensed wholesalers transporting unstamped cigarettes in this state must do so only in their own vehicles unless they have given prior notice to the liquor control board of their intent to transport unstamped cigarettes in a vehicle belonging to another person.

(402) **Notice required.** Persons other than licensed wholesalers intending to transport unstamped cigarettes in this state must first give notice to the liquor control board of their intent to do so.

(403) **Transportation of unstamped cigarettes.** All persons transporting unstamped cigarettes must have in their actual possession invoices or delivery tickets for such cigarettes. The invoices or delivery tickets must show the true name and address of the consignor or seller, the true name and address of the consignee or purchaser, and the quantity and brands of the cigarettes transported. It is the duty of the person responsible for the delivery or transport of the cigarettes to ensure that all drivers, agents, or employees have the delivery tickets or invoices in their actual possession for all such shipments.

(404) **Consignment.** If the cigarettes transported pursuant to subsection (401), (402), or (403) of this rule are consigned to or purchased by any person in this state, that purchaser or consignee must be a person who is authorized by chapter 82.24 RCW to possess unstamped cigarettes in this state.

(405) **Out-of-state shipments.** Licensed wholesalers shipping cigarettes to a point outside Washington or to a federal instrumentality must, at the time of shipping or delivery, report the transaction to the department. The report must show both (a) complete details of the sale or delivery, and (b) whether stamps have been affixed to the cigarettes.

The report may be made either by submitting a duplicate invoice or by completing a form provided by the department, and must be filed with the department as set forth in subsection (602) of this rule.

(406) **Compliance required.** No person may possess or transport cigarettes in this state unless the cigarettes have been properly stamped or that person has fully complied with the requirements of RCW 82.24.250 and this rule. Failure to comply with the requirements of RCW 82.24.250 is a criminal act. Cigarettes in the possession of persons who have failed to comply are deemed contraband and are subject to seizure and forfeiture under RCW 82.24.130.

Part V - Delivery Sales of Cigarettes

(501) **Definitions.** The definitions in this subsection apply throughout this rule.

(a) **'Delivery sale'** means any sale of cigarettes to a consumer in the state where either: (i) The purchaser submits an order for a sale by means of a telephonic or other method of voice transmission, mail delivery, any other delivery service, or the internet or other online service; or (ii) the cigarettes are delivered by use of mail delivery or any other delivery service. A sale of cigarettes made in this manner is a delivery sale regardless of whether the seller is located within or outside the state. (For example, 'Royal Tax-free Smokes,' located in the state of Vermont, offers sales via the internet and a toll-free telephone number, and ships its products to consumers in this state. These transactions are delivery sales.) A sale of cigarettes not for personal consumption to a person who is a wholesaler licensed under chapter 82.24 RCW or a retailer licensed under chapter 82.24 RCW is not a delivery sale.

(b) **'Delivery service'** means any private carrier engaged in the commercial delivery of letters, packages, or other containers, that requires the recipient of that letter, package, or container to sign to accept delivery.

(502) **Tax liability.** Cigarettes delivered in this state pursuant to a delivery sale are subject to tax as provided in Part I of this rule. Persons making delivery sales in this state are required to provide prospective consumers with notice that the sales are subject to tax pursuant to chapters 82.24 and 82.12 RCW, with an explanation of how the tax has been or is to be paid with respect to such sales.

(503) **Additional requirements.** Persons making delivery sales of cigarettes in this state must comply with all the provisions of chapter 70.155 RCW. All cigarettes sold, delivered, or attempted to be delivered, in violation of RCW 70.155.105 are subject to seizure and forfeiture. RCW 82.24.130.

Part VI - Enforcement and Administration

(601) **Books and records.** An accurate set of records showing all transactions related to the purchase, sale, or distribution of cigarettes must be retained. RCW 82.24.090. These records may be combined with those required in connection with the tobacco products tax (see WAC 458-20-185), if there is a segregation therein of the amounts involved. All records must be preserved for five years from the date of the transaction.

(602) **Reports and returns.** The department may require any person dealing with cigarettes in this state to complete and return forms, as furnished by the department, setting forth sales, inventory, and other data required by the department to maintain control over trade in cigarettes.

(a) Manufacturers and wholesalers selling stamped, unstamped, or untaxed cigarettes must submit a complete record of sales of cigarettes in this state monthly. This report is due no later than the fifteenth day of the calendar month and must include all transactions occurring in the previous month.

(b) Persons making sales of tax-exempt cigarettes to Indian tribes or Indian retailers pursuant to WAC 458-20-192 (9)(a) must transmit a copy of the invoice for each such sale to the special programs division of the department prior to shipment.

(c) Wholesalers selling stamped cigarettes manufactured by nonparticipating manufacturers as defined in WAC 458-20-264 must report all such sales to the special programs division no later than the twenty-fifth day of the calendar month and must include all transactions occurring in the previous month.

(d) Persons making sales of cigarettes into this state to other than a licensed wholesaler or retailer must file a report as required under Title 15, Chapter 10A, section 376 of the U.S. Code (commonly referred to as the 'Jenkins Act' report). This report is due no later than the 10th day of each calendar month and must include all transactions occurring in the previous month.

(e) Persons shipping or delivering any cigarettes to a point outside of this state must submit a report showing full and complete details of the interstate sale or delivery as set forth in Part V of this rule. This report is due no later than the fifteenth day of the calendar month immediately following the shipment or delivery.

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(f) Persons giving away unstamped cigarettes for advertising, promotional, or any other purpose, must report and pay the tax on the number of cigarettes distributed in this state.

(g) Consumers who buy unstamped cigarettes or who purchase cigarettes from sources other than licensed retailers in this state must pay the tax when they first bring the cigarettes into this state or first possess them in this state. The tax is paid with a 'Tax Declaration for Cigarettes,' which may be obtained from the department.

(603) **Criminal provisions.** Chapter 82.24 RCW prohibits certain activities with respect to cigarettes. Persons handling cigarettes within this state must refer to these statutes. The prohibited activities include, but are not limited to, the following:

(a) **Transportation, possession, or receiving 10,000 or fewer cigarettes.** Transportation, possession or receiving 10,000 or fewer unstamped cigarettes is prohibited unless the notice requirements set forth in RCW 82.24.250 have been met; failure to meet those notice requirements is a gross misdemeanor. RCW 82.24.110 (1)(n).

(b) **Transportation, possession, or receiving more than 10,000 cigarettes.** Transportation, possession, or receiving more than 10,000 unstamped cigarettes is prohibited unless the notice requirements set forth in RCW 82.24.250 have been met; failure to meet those notice requirements is a felony. RCW 82.24.110(2).

(c) **Forgery or counterfeiting of stamps.** Alteration, fabrication, forgery, and counterfeiting of stamps are felonies. RCW 82.24.100.

(d) **Counterfeit cigarettes.** The manufacture, sale, or possession of counterfeit cigarettes in this state is a felony. RCW 82.24.570.

(604) **Search, seizure, and forfeiture.** The department or the liquor control board may search for, seize, and subsequently dispose of unstamped cigarette packages and containers, counterfeit cigarettes, conveyances of all kinds (including aircraft, vehicles, and vessels) used for the transportation of unstamped and/or counterfeit cigarettes, and vending machines used for the sale of unstamped and/or counterfeit cigarettes. See RCW 82.24.130, et seq., for provisions relating to search, seizure, and forfeiture of property, possible redemption of property, and for treatment of such property in the absence of redemption.

(605) **Penalties.** RCW 82.24.120 provides a penalty for failure to affix the cigarette stamps or to cause the stamps to be affixed as required, or to pay any tax due under chapter 82.24 RCW. In addition to the tax deemed due, a penalty equal to the greater of \$10.00 per package of unstamped cigarettes or \$250.00 will be assessed. Interest is also assessed on the amount of the tax at the rate as computed under RCW 82.32.050(2) from the date the tax became due until the date of payment. The department may, in its sole discretion, cancel all or part of the penalty for good cause.

Credits

Statutory Authority: RCW 82.32.300 and 82.01.060(2). 10-10-033, S 458-20-186, filed 4/26/10, effective 5/27/10; 07-04-119, S 458-20-186, filed 2/7/07, effective 3/10/07. Statutory Authority: RCW 82.24.235, 82.32.300, and 82.01.060(1). 05-02-035, S 458-20-186, filed 12/30/04, effective 1/30/05. Statutory Authority: RCW 82.32.300. 94-10-062, S 458-20-186, filed 5/3/94, effective 6/3/94; 90-24-036, S 458-20-186, filed 11/30/90, effective 1/1/91; 90-04-039, S 458-20-186, filed 1/31/90, effective 3/3/90; 87-19-007 (Order ET 87-5), S 458-20-186, filed 9/8/87; 83-07-032 (Order ET 83-15), S 458-20-186, filed 3/15/83; Order ET 75-1, S 458-20-186, filed 5/2/75; Order ET 73-2, S 458-20-186, filed 11/9/73; Order ET 71-1, S 458-20-186, filed 7/22/71; Order ET 70-3, S 458-20-186 (Rule 186), filed 5/29/70, effective 7/1/70.

Current with amendments adopted through the 10-24 Washington State Register dated December 15, 2010.

WAC 458-20-186, WA ADC 458-20-186

End of Document

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**THE STATE'S 1976
CIGARETTE TAX
SCHEME**

82.20.070

Title 82: Excise Taxes

FORMER PART OF SECTION: 1935 c 180 § 54 now codified as RCW 82.20.005.]

228 § 14; 1935 c 180 § 83; Rem. Supp. 1949 § 8370-83.]

Chapter 82.24
TAX ON CIGARETTES

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Cigarette vending machine license fee: RCW 19.91.150.

Schools, additional cigarette tax: Chapter 28A.47 RCW.

Veterans' bonus, additional cigarette tax: Chapters 73.32, 73.33 RCW.

82.24.010 Definitions. For the purposes of this chapter, unless otherwise required by the context:

(1) "Wholesaler" means every person who purchases, sells, or distributes any one or more of the articles taxed herein to retailers for the purpose of resale only;

(2) "Retailer" means every person, other than a wholesaler, who purchases, sells, offers for sale or distributes any one or more of the articles taxed herein, irrespective of quantity or amount, or the number of sales, and all persons operating under a retailer's registration certificate;

(3) "Retail selling price" means the ordinary, customary or usual price paid by the consumer for each package of cigarettes, less the tax levied by this chapter and less any similar tax levied by this state;

(4) "Cigarette" means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any material, except where such wrapper is wholly or in the greater part made of natural leaf tobacco in its natural state;

(5) "Stamp" means the stamp or stamps or meter impressions by use of which the tax levy under this chapter is paid;

(6) The meaning attributed, in chapter 82.04 RCW, to the words "person," "sale," "business" and "successor" shall apply equally in the provisions of this chapter. [1961 c 15 § 82.24.010. Prior: 1959 c 270 § 9; 1949 c

82.24.020 Tax imposed—Rate—Possession, defined. 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. [1972 ex.s. c 157 § 3; 1971 ex.s. c 299 § 13; 1965 ex.s. c 173 § 23; 1961 ex.s. c 24 § 3; 1961 c 15 § 82.24.020. Prior: 1959 c 270 § 2; prior: 1949 c 228 § 13, part; 1943 c 156 § 11, part; 1941 c 178 § 13, part; 1939 c 225 § 23, part; 1935 c 180 § 82, part; Rem. Supp. 1949 § 8370-82, part.]

Severability—1972 ex.s. c 157: "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." [1972 ex.s. c 157 § 8.] This applies to the 1972 ex.s. amendments to RCW 28A.47.440, 73.32.130, 82.24.020, 82.24.080, 82.24.130 and to 82.24.250 and 82.24.260.

82.24.030 Stamps to be affixed—Meter machines authorized. In order to enforce collection of the tax hereby levied, the department of revenue shall design and have printed stamps of such size and denominations as may be determined by the department, such stamps to be affixed on the smallest container or package that will be handled, sold, used, consumed, or distributed, to permit the department to readily ascertain by inspection, whether or not such tax has been paid. Every person shall cause to be affixed on every package of cigarettes on which a tax is due, stamps of an amount equaling the tax due thereon before he sells, offers for sale, uses, consumes, handles, removes, or otherwise disturbs and distributes the same: *Provided*, That where it is established to the satisfaction of the department that it is impractical to affix such stamps to the smallest container or package, the department may authorize the affixing of stamps of appropriate denomination to a large container or package.

The department may authorize the use of meter stamping machines for imprinting stamps, which imprinted stamps shall be in lieu of those otherwise provided for under this chapter, and if such use is authorized, shall provide reasonable rules and regulations with respect thereto. [1975 1st ex.s. c 278 § 61; 1961 c 15 § 82.24.030. Prior: 1959 c 270 § 3; prior: 1949 c 228 § 13, part; 1943 c 156 § 11, part; 1941 c 178 § 13, part; 1939 c 225 § 23, part; 1935 c 180 § 82, part; Rem. Supp. 1949 § 8370-82, part.]

Construction—Severability—1975 1st ex.s. c 278: See notes following RCW 11.08.160.

82.24.040 Duty of wholesaler. Every wholesaler in this state shall, within a reasonable time after receipt of any of the articles taxed herein, cause the same to have the requisite denomination and amount of stamps affixed to represent the tax imposed herein: *Provided*, That any wholesaler who furnishes surety bond in a sum satisfactory to the department, shall be permitted to set aside, without affixing the stamps required by this chapter, such part of his stock as may be necessary for the conduct of his business in making sales to persons in another state or foreign country, to instrumentalities of the federal government, or to the established governing bodies of any Indian tribe, recognized as such by the United States Department of the Interior. Such unstamped stock shall be kept separate and apart from stamped stock: *Provided further*, That every wholesaler shall, at the time of shipping or delivering any of the articles taxed herein to a point outside of this state, or to a federal instrumentality, or to an Indian tribal organization, make a true duplicate invoice of the same which shall show full and complete details of the sale or delivery, whether or not stamps were affixed thereto, and shall transmit such true duplicate invoice to the main office of the department, at Olympia, not later than the fifteenth day of the following calendar month, and for failure to comply with the requirements of this section the department may revoke the permission granted to the taxpayer to maintain a stock of goods to which the stamps required by this chapter have not been affixed. The department may also revoke this permission to maintain a stock of unstamped goods for sale to a specific Indian tribal organization when it appears that sales of unstamped cigarettes to persons who are not enrolled members of a recognized Indian tribe are taking place, or have taken place, within the exterior boundaries of the reservation occupied by that tribe. [1969 ex.s. c 214 § 1; 1961 c 15 § 82.24.040. Prior: 1959 c 270 § 4; prior: 1949 c 228 § 13, part; 1943 c 156 § 11, part; 1941 c 178 § 13, part; 1939 c 225 § 23, part; 1935 c 180 § 82, part; Rem. Supp. 1949 § 8370-82, part.]

82.24.050 Duty of retailer. Every retailer shall, within a reasonable time after receipt of any of the articles taxed herein, cause the same to have the requisite denomination and amount of stamps affixed to represent the tax imposed herein: *Provided*, That those articles to which stamps have been properly affixed by a wholesaler or another retailer may be retained by any retailer, and that those articles intended for sale to qualified purchasers may be retained by federal instrumentalities and Indian tribal organizations, without affixing the stamps required by this chapter. [1969 ex.s. c 214 § 2; 1961 c 15 § 82.24.050. Prior: 1959 c 270 § 5; prior: 1949 c 228 § 13, part; 1943 c 156 § 11, part; 1941 c 178 § 13, part; 1939 c 225 § 23, part; 1935 c 180 § 82, part; Rem. Supp. 1949 § 8370-82, part.]

82.24.060 Stamps—How affixed. Stamps shall be affixed in such manner that they cannot be removed from the package or container without being mutilated or destroyed, which stamps so affixed shall be evidence of the tax imposed.

In the case of cigarettes contained in individual packages, as distinguished from cartons or larger units, the stamps shall be affixed securely on each individual package. [1961 c 15 § 82.24.060. Prior: 1959 c 270 § 6; prior: 1949 c 228 § 13, part; 1943 c 156 § 11, part; 1941 c 178 § 13, part; 1939 c 225 § 23, part; 1935 c 180 § 82, part; Rem. Supp. 1949 § 8370-82, part.]

82.24.070 Compensation of dealers. Wholesalers and retailers subject to the provisions of this chapter shall be allowed compensation for their services in affixing the stamps herein required a sum equal to two percent of the first four mills of the value of the stamps purchased or affixed by them. [1971 ex.s. c 299 § 14; 1965 ex.s. c 173 § 24; 1961 ex.s. c 24 § 4; 1961 c 15 § 82.24.070. Prior: 1959 c 270 § 7; prior: 1953 c 240 § 2; 1949 c 228 § 13, part; 1943 c 156 § 11, part; 1941 c 178 § 13, part; 1939 c 225 § 23, part; 1935 c 180 § 82, part; Rem. Supp. 1949 § 8370-82, part.]

Effective dates—Severability—1971 ex.s. c 299: See notes following RCW 82.04.050.

82.24.080 Legislative intent. 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. [1972 ex.s. c 157 § 4; 1961 c 15 § 82.24.080. Prior: 1959 c 270 § 8; prior: 1949 c 228 § 13, part; 1943 c 156 § 11, part; 1941 c 178 § 13, part; 1939 c 225 § 23, part; 1935 c 180 § 82, part; Rem. Supp. 1949 § 8370-82, part.]

Severability—1972 ex.s. c 157: See note following RCW 82.24.020.

82.24.090 Records to be preserved—Reports. Every wholesaler or retailer subject to the provisions of this chapter shall keep and preserve for a period of five years an accurate set of records, showing all transactions had with reference to the purchase and sale of any of the articles taxed herein and such persons shall also keep separately all invoices, and shall keep a record of all stamps purchased, and all such records and all stock of taxable articles on hand shall be open to inspection at all reasonable times by the department of revenue or its duly authorized agent.

All wholesalers shall within fifteen days after the first day of each month file with the department of revenue a report of all drop shipment sales made by them to retailers within this state during the preceding month,

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which report shall show the name and address of the retailer to whom the cigarettes were sold, the kind and quantity, and the date of delivery thereof. [1975 1st ex.s. c 278 § 62; 1961 c 15 § 82.24.090. Prior: 1941 c 178 § 14; 1939 c 225 § 24; 1935 c 180 § 84; Rem. Supp. 1941 § 8370-84.]

Construction—Severability—1975 1st ex.s. c 278: See notes following RCW 11.08.160.

82.24.100 Forgery or counterfeiting of stamps—
Penalty. To forge or counterfeit any stamp of the kind herein provided is a felony. [1961 c 15 § 82.24.100. Prior: 1935 c 180 § 85; RRS § 8370-85.]

82.24.110 Other offenses—Penalty. Each of the following acts is a gross misdemeanor and punishable as such:

(1) To sell, except as a registered wholesaler or retailer engaged in interstate commerce as to the article being taxed herein, without the stamp first being affixed;

(2) To use or have in possession knowingly or intentionally any forged or counterfeit stamps;

(3) For any person other than the department of revenue or its duly authorized agent to sell any stamps not affixed to any of the articles taxed herein whether such stamps are genuine or counterfeit;

(4) To violate any of the provisions of this chapter;

(5) To violate any lawful rule or regulation made and published by the department of revenue;

(6) To use any stamps more than once;

(7) To refuse to allow the department of revenue or any duly authorized agent thereof, on demand, to make full inspection of any place of business where any of the articles herein taxed are sold or otherwise hinder or prevent such inspection;

(8) For any retailer, except one permitted to maintain an unstamped stock to engage in interstate business as provided herein, to have in possession in any place of business any of the articles herein taxed, unless the same have the proper stamps attached;

(9) For any person to make, use, or present or exhibit to the department of revenue or any duly authorized agent thereof, any invoice for any of the articles herein taxed which bears an untrue date or falsely states the nature or quantity of the goods therein invoiced;

(10) For any wholesaler or retailer or his agents or employees to fail to produce on demand of the department of revenue all invoices of all the articles herein taxed or stamps bought by him or received in his place of business within five years prior to such demand unless he can show by satisfactory proof that the nonproduction of the invoices was due to causes beyond his control;

(11) For any person to receive in this state any shipment of any of the articles taxed herein, when the same are not stamped, for the purpose of avoiding payment of tax. It is presumed that persons other than dealers who purchase or receive shipments of unstamped cigarettes do so to avoid payment of the tax imposed herein.

All agents, employees, and others who aid, abet, or otherwise participate in any way in the violation of the provisions of this chapter or in any of the offenses herein described shall be guilty and punishable as principals, to

the same extent as any wholesaler or retailer violating the provisions thereof. [1975 1st ex.s. c 278 § 63; 1961 c 15 § 82.24.110. Prior: 1941 c 178 § 15; 1935 c 180 § 86; Rem. Supp. 1941 § 8370-86.]

Construction—Severability—1975 1st ex.s. c 278: See notes following RCW 11.08.160.

82.24.120 Violations—Penalties and interest. If any person, subject to the provisions of this chapter or any rules and regulations promulgated by the department of revenue under authority hereof, is found to have failed to affix the stamps required, or to have them affixed as herein provided, or to pay any tax due hereunder, or to have violated any of the provisions of this chapter or rules and regulations promulgated by the department of revenue in the administration hereof, there shall be assessed and collected from such person, in addition to any tax that may be found due, a penalty equal to the amount of any tax found to be due plus interest thereon at the rate of one percent for each thirty days or portions thereof from the date the tax became due, and upon notice mailed to the last known address of the taxpayer said amount shall become due and payable in ten days, at which time the department or its duly authorized agent may make immediate demand upon such person for the payment of all such taxes and penalties. The department, for good reason shown, may remit all or any part of penalties imposed, but the taxpayer must pay all taxes due and interest thereon, at the rate of one percent for each thirty days or portion thereof. The keeping of any unstamped articles coming within the provisions of this chapter shall be prima facie evidence of intent to violate the provisions of this chapter. [1975 1st ex.s. c 278 § 64; 1961 c 15 § 82.24.120. Prior: 1949 c 228 § 15; 1939 c 225 § 25; 1935 c 180 § 87; Rem. Supp. 1949 § 8370-87.]

Construction—Severability—1975 1st ex.s. c 278: See notes following RCW 11.08.160.

82.24.130 Contraband—Seizure and sale. Subject to the provisions of RCW 82.24.250, any articles taxed herein found at any point within this state, which articles shall be held, owned or possessed 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 department of revenue, or its duly authorized agent, or by any peace officer of the state, when directed by the department of revenue so to do, without a warrant, and said goods shall be offered by the department of revenue for sale at public auction to the highest bidder after due advertisement, but the 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 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. [1972 ex.s. c 157 § 5; 1961 c 15 § 82.24.130. Prior: 1941 c 178 § 16; 1935 c 180 § 88; Rem. Supp. 1941 § 8370-88.]

Severability—1972 ex.s. c 157: See note following RCW 82.24.020.

82.24.140 Forfeiture procedure—Seizures—Notice—Claimant's bond—Court proceedings. In all cases of seizure of any property made subject to forfeiture under the provisions of this chapter, which, in the opinion of the person making the seizure, is of the appraised value of one hundred dollars, or more, the said person shall proceed as follows:

(1) He shall cause a list containing a particular description of the property seized to be prepared in duplicate, and an appraisal thereof to be made by three sworn appraisers to be selected by him, who shall be respectable and disinterested citizens of this state, residing within the county where the seizure was made. Said list and appraisal shall be properly attested by the said person and the said appraisers, for which service each of the said appraisers shall be allowed the sum of one dollar per day for not exceeding two days, to be paid as other costs;

(2) If the property seized is believed, by the person making the seizure, to be of less value than one hundred dollars, no appraisal shall be made;

(3) The person making the seizure shall proceed to give notice thereof for five days, in writing, at three places in the county where the seizure is made. One of the notices shall be posted at the county court house; another at the place where the goods were seized; and the other at some public place. The notice shall describe the property seized, and the time and place and cause of seizure and give the name and place of residence, if known, of the person from whom the property was seized, and shall require any person claiming it to appear and make such claim in writing, within five days from the date of the first posting of such notice. Such person making the seizure shall also deliver to the person from whom the property was seized, and also to the owner, if known, a copy of the said notice;

(4) Any person claiming the said property seized as contraband, within the time specified in the notice, may file with the department of revenue a claim, in writing, stating his interest in the property seized, and may execute a bond to the department of revenue in a penal sum equal to double the value of the property so seized, but in no case shall said bond be less than one hundred dollars, with sureties to be approved by the clerk of the superior court in the county in which the property is seized, conditioned that in case of condemnation of the property seized, the obligor shall pay to the department of revenue the full value of the property so seized, and all costs and expenses of the proceedings to obtain such

condemnation, including a reasonable attorney's fee. And, upon delivery of such bond to the department of revenue, it shall transmit the same with the duplicate list or description of the property seized to the prosecuting attorney of the county in which such seizure was made, and said prosecuting attorney shall prosecute the case to secure the forfeiture of said property in the court having jurisdiction. Upon filing the bond aforesaid, the said property shall be delivered to the claimant pending the outcome of the case: *Provided*, That he shall at once affix the required stamps thereto;

(5) If no claim is interposed and no bond is filed within the time above specified, such property shall be forfeited, without further proceedings, and the same shall be sold as herein provided, and the proceeds of sale when received by the department of revenue shall be paid into the state treasury as are other funds collected: *Provided*, That in seizures of property of less value than one hundred dollars, the same may be advertised by the department of revenue with other quantities at Olympia or at any other city or town in which a branch office of the department of revenue is located and disposed of as hereinbefore provided;

(6) In proceedings to secure a confiscation of the property hereinbefore mentioned, where the value of the goods seized at one time is one hundred dollars, or less, the justice court of the place where the property is situated, shall have jurisdiction to try the cause. Where the value of the property seized at one time is more than one hundred dollars, then the superior court of the county where the property is seized shall have jurisdiction to try the cause.

The proceedings against property seized, according to the provisions of this chapter, shall be considered a proceeding in rem unless otherwise herein provided.

Within ten days after filing the bond provided for in subdivision (4) hereof, the claimant shall file a petition in the court having jurisdiction of the cause, and the department of revenue or other party authorized to prosecute the confiscation of said property, shall plead to it as if it were an ordinary action at law, and the same rules of pleading and procedure applicable to actions in the justice court or superior court shall be observed in this action, and the costs shall be adjudged as in other actions: *Provided, however*, That neither the state, nor the department of revenue, nor any other person representing the state shall be liable for the costs in event the court shall not confiscate the property in controversy. [1975 1st ex.s. c 278 § 65; 1961 c 15 § 82.24.140. Prior: 1939 c 225 § 26; 1935 c 180 § 89; RRS § 8370-89. Formerly RCW 82.24.140, 82.24.150, 82.24.160, 82.24.170 and 82.24.200.]

Construction—Severability—1975 1st ex.s. c 278: See notes following RCW 11.08.160.

82.24.180 Seized property may be returned. The department of revenue may return any property seized under the provisions of this chapter when it is shown that there was no intention to violate the provisions thereof.

When any property is seized, under the provisions of this chapter, the department may return such goods to

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the parties from whom they were seized if and when such parties affix the proper amount of stamps thereto, and pay to the department as penalty an amount equal to twenty-five percent of the amount of tax due and interest thereon at the rate of one percent for each thirty days or portion thereof from the date the tax became due, and in such cases, no advertisement shall be made or notices posted in connection with said seizure. [1975 1st ex.s. c 278 § 66; 1961 c 15 § 82.24.180. Prior: 1935 c 180 § 90; RRS § 8370-90.]

Construction—Severability—1975 1st ex.s. c 278: See notes following RCW 11.08.160.

82.24.190 Search and seizure. When the department of revenue has good reason to believe that any of the articles taxed herein are being kept, sold, offered for sale, or given away in violation of the provisions of this chapter or regulations issued under authority hereof, it may make affidavit of such fact, describing the place or thing to be searched, before any justice of the peace, mayor of any city, town or village, or judge of any court in this state, and such justice, mayor or judge shall issue a search warrant directed to the sheriff, any constable, police officer, or duly authorized agent of the department of revenue commanding him diligently to search any building, room in a building, place or vehicle as may be designated in the affidavit and search warrant, and to seize such tobacco so possessed and to hold the same until disposed of by law, and to arrest the person in possession or control thereof. If upon the return of such warrant, it shall appear that any of the articles taxed herein, unlawfully possessed, were seized, the same shall be sold as provided in this chapter. [1975 1st ex.s. c 278 § 67; 1961 c 15 § 82.24.190. Prior: 1949 c 228 § 16; 1935 c 180 § 91; Rem. Supp. 1949 § 8370-91.]

Construction—Severability—1975 1st ex.s. c 278: See notes following RCW 11.08.160.

82.24.210 Redemption of stamps. The department of revenue may promulgate rules and regulations providing for the refund to dealers for the cost of stamps affixed to articles taxed herein, which by reason of damage become unfit for sale and are destroyed by the dealer or returned to the manufacturer or jobber. In the case of any articles to which stamps have been affixed, and which articles have been sold and shipped to a regular dealer in such articles in another state, the seller in this state shall be entitled to a refund of the actual amount of the stamps so affixed, less the affixing discount, upon condition that the seller in this state makes affidavit that the articles were sold and shipped outside of the state and that he has received from the purchaser outside the state a written acknowledgment that he has received such articles with the amount of stamps affixed thereto, together with the name and address of such purchaser. The department of revenue may redeem any unused stamps purchased from it at the face value thereof less the affixing discount. [1975 1st ex.s. c 278 § 68; 1961 c 15 § 82.24.210. Prior: 1949 c 228 § 17; 1941 c 178 § 17; 1935 c 180 § 92; Rem. Supp. 1949 § 8370-92.]

Construction—Severability—1975 1st ex.s. c 278: See notes following RCW 11.08.160.

[Title 82—p 44]

82.24.220 Vending machines—Certificates. Every person in this state who by means of a vending machine sells any of the articles taxed herein shall be required before engaging in such business to apply to and obtain from the department of revenue a certificate to engage in business as a retailer, and shall obtain a separate certificate for each machine used in vending or selling any of the articles taxed herein and each machine so used shall be considered a separate place of business. Any articles taxed herein vended by means of any such machine shall bear stamps as evidence that the tax herein imposed has been paid and the articles taxed herein contained in such machines shall be available for inspection by the department or its duly authorized agents at all times. [1975 1st ex.s. c 278 § 69; 1961 c 15 § 82.24.220. Prior: 1941 c 178 § 18; 1935 c 180 § 93; Rem. Supp. 1941 § 8370-93.]

Construction—Severability—1975 1st ex.s. c 278: See notes following RCW 11.08.160.

82.24.230 Administration. All of the provisions contained in chapter 82.32 RCW shall have full force and application with respect to taxes imposed under the provisions of this chapter, except the following sections thereof: RCW 82.32.050, 82.32.060, 82.32.070, 82.32.100 and 82.32.270. [1961 c 15 § 82.24.230. Prior: 1935 c 180 § 95; RRS § 8370-95.]

82.24.240 Additional cigarette tax for veterans' bonus, school plant facilities. See chapters 28A.47, 73.32, 73.33 RCW.

82.24.250 Transportation of unstamped cigarettes—Invoices and delivery tickets required—Stop and inspect. 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 to possess unstamped cigarettes. [1972 ex.s. c 157 § 6.]

Severability—1972 ex.s. c 157: See note following RCW 82.24.020.

82.24.260 Selling or disposing of unstamped cigarettes—Retailer to collect and remit tax—Liability. Any retailer who sells or otherwise disposes of any unstamped cigarettes other than (1) a federal instrumentality with respect to sales to authorized military personnel and (2) a federally recognized Indian tribal organization with respect to sales to enrolled members of the tribe shall collect from the buyer or transferee thereof the tax imposed on such buyer or transferee by RCW 82.24.020, 28A.47.440, and 73.32.130, and remit the same to the department after deducting from the tax collected the compensation he would have been entitled to under the provisions of this chapter, RCW 28A.47.440 and 73.32.130 if he had affixed stamps to the unstamped cigarettes. Such remittance shall be made at the same time and manner as remittances of the retail sales tax as required under chapters 82.08 and 82.32 RCW. In the event the retailer fails to collect the tax from the buyer or transferee, or fails to remit the same, the retailer shall be personally liable therefor, and shall be subject to the administrative provisions of RCW 82.24.230 with respect to the collection thereof by the department. The provisions of this section shall not relieve the buyer or possessor of unstamped cigarettes from personal liability for the tax imposed by RCW 82.24.020, 28A.47.440 and 73.32.130.

Nothing in this section shall relieve a wholesaler or a retailer from the requirements of affixing stamps pursuant to RCW 82.24.040 and 82.24.050. [1975 1st ex.s. c 22 § 1; 1972 ex.s. c 157 § 7.]

Severability—1972 ex.s. c 157: See note following RCW 82.24.020.

82.24.900 Construction—1961 c 15. The provisions of this chapter shall not apply in any case in which the state of Washington is prohibited from taxing under the Constitution of this state or the Constitution or the laws of the United States. [1961 c 15 § 82.24.900. Prior: 1935 c 180 § 94; RRS § 8370-94.]

Chapter 82.26 TAX ON TOBACCO PRODUCTS

Sections	
82.26.010	Definitions.
82.26.020	Tax imposed—Rate.
82.26.030	Legislative intent.
82.26.040	When tax not applicable under laws of United States.
82.26.050	Certificate of registration required.

82.26.060	Books and records to be preserved—Entry and inspection by department.
82.26.070	Preservation of invoices of sales to other than ultimate consumer.
82.26.080	Invoices of purchases to be procured by retailer, subjobber—Preservation—Inspection.
82.26.090	Records of shipments, deliveries from public warehouse of first destination—Preservation—Inspection.
82.26.100	Reports and returns.
82.26.110	When credit may be obtained for tax paid.
82.26.120	Administration.

82.26.010 Definitions. As used in this chapter:

(1) "Tobacco products" means cigars, cheroots, stogies, periques, granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco, snuff, snuff flour, cavendish, plug and twist tobacco, fine-cut and other chewing tobaccos, shorts, refuse scraps, clippings, cuttings and sweepings of tobacco, and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking, but shall not include cigarettes as defined in RCW 82.24.010(4);

(2) "Manufacturer" means a person who manufactures and sells tobacco products;

(3) "Distributor" means (a) any person engaged in the business of selling tobacco products in this state who brings, or causes to be brought, into this state from without the state any tobacco products for sale, (b) any person who makes, manufactures, or fabricates tobacco products in this state for sale in this state, (c) any person engaged in the business of selling tobacco products without this state who ships or transports tobacco products to retailers in this state, to be sold by those retailers;

(4) "Subjobber" means any person, other than a manufacturer or distributor, who buys tobacco products from a distributor and sells them to persons other than the ultimate consumers;

(5) "Retailer" means any person engaged in the business of selling tobacco products to ultimate consumers;

(6) "Sale" means any transfer, exchange, or barter, in any manner or by any means whatsoever, for a consideration, and includes and means all sales made by any person. It includes a gift by a person engaged in the business of selling tobacco products, for advertising, as a means of evading the provisions of this chapter, or for any other purposes whatsoever.

(7) "Wholesale sales price" means the established price for which a manufacturer sells a tobacco product to a distributor, exclusive of any discount or other reduction;

(8) "Business" means any trade, occupation, activity, or enterprise engaged in for the purpose of selling or distributing tobacco products in this state;

(9) "Place of business" means any place where tobacco products are sold or where tobacco products are manufactured, stored, or kept for the purpose of sale or consumption, including any vessel, vehicle, airplane, train, or vending machine;

(10) "Retail outlet" means each place of business from which tobacco products are sold to consumers;

[Title 82—p 45]

Attested to: _____

 Authorized Agent Name of Affiant
 DEPARTMENT OF REVENUE
 OF THE
 STATE OF WASHINGTON
 Date: _____

 Position with Dealer

 Dealer

 Address of Dealer

AFFIDAVIT OF MANUFACTURER

Claim for Credit on Tobacco Products Tax
Merchandise Returned

State of _____ }
County of _____ } ss.

The undersigned being first duly sworn, upon oath deposes and says:

That he is (Position) of the (Name of Manufacturer) a manufacturer of tobacco products; that the said manufacturer has received from (Dealer), (Address) a dealer in tobacco products within the State of Washington, certain tobacco products which were unfit for sale, said tobacco products having a wholesale sales price of \$____; that said tobacco products were destroyed in the following manner:

(State date and manner of destruction)

Credit issued on Memo No. _____
Name of Affiant _____
Name of Manufacturer _____
Address _____

Subscribed and sworn to before me this _____ day of _____, 19____

Date _____
Notary Public in and for the state of _____, residing at _____

(Order ET 71-1, § 458-20-185, filed 7/22/71; Order ET 70-3, § 458-20-185, filed 5/29/70, effective 1/1/70.)

WAC 458-20-186 (Rule 186) Tax on cigarettes. The Washington state cigarette tax is imposed in the total amount of 16 cents upon each package of 20 cigarettes by the following statutes:

1. RCW 82.24.020, which imposes a tax of six and one-half mills per cigarette;

2. RCW 73.32.130, which imposes a tax of 1 mill per cigarette to provide for the retirement of the Veterans Bonus Bonds;

3. RCW 28.47.440 [28A.47.440], which imposes a tax of 1/2 mill per cigarette to provide for financing the state school construction bond program.

This tax is payable by the first person who sells, uses, consumes, handles or distributes the cigarettes in this state. Payment is made through the purchase of stamps from the Department of Revenue or its authorized agent.

EXEMPTIONS. The cigarette tax does not apply upon cigarettes sold to persons licensed as cigarette distributors in other states when, as a condition of the sale, the seller either delivers the cigarettes to such a buyer at a point outside this state, or delivers the same to a common carrier with the shipment consigned by the seller to such a buyer at a location outside this state. Any person engaged in making sales to licensed distributors in other states or making export sales (see Rule 193A [WAC 458-20-193A] and Rule 193C [WAC 458-20-193C]) or in making sales to the federal government or to the established governing bodies of an Indian tribe recognized as such by the U.S. Department of the Interior and who are authorized by Rule 192 [WAC 458-20-192] to receive unstamped cigarettes who furnishes surety bond in a sum satisfactory to the Department of Revenue, may set aside such part of his stock as may be necessary for the conduct of such business without affixing cigarette tax stamps. Such unstamped stock must be kept separate and apart from any stamped stock.

Cigarettes, other than those above mentioned, are not exempt from the tax by reason of their sale either to an Indian or for resale on an Indian reservation. Permission to maintain an unstamped stock of cigarettes for sale to a specified Indian tribe may be revoked when it appears that sales to unauthorized purchasers are being, or have been, made.

COLLECTION. Stamps indicating the payment of the cigarette tax must be affixed prior to any sale of the cigarettes. The stamp must be applied to the smallest container or package, unless the department determines that it is impractical to do so.

Every wholesaler or retailer in the state shall stamp within 72 hours after receipt, any of the articles taxed herein. Stamps must be of the heat applied "fuson" type. The use of meter stamping machines for use in imprinting packages, in lieu of attaching stamps, is not authorized by the department. The use of water "decalcomania" type stamps by such vendors is not authorized.

Persons other than wholesalers or retailers, upon holding, owning, possessing or controlling cigarettes in this state, must affix stamps on or before the close of the first business day following receipt of the cigarettes.

Prior to the receipt or transportation of cigarettes in this state such persons must file with a district office of the Department of Revenue a Notice of Intent to Possess Unstamped Cigarettes in the State of Washington. A

copy of this notice, validated by an agent of the Department of Revenue, must be in the possession of any such person who is in possession of unstamped cigarettes in this state.

Persons who have filed the aforementioned notice must bring the cigarettes to a district office of the Department of Revenue and there affix the required stamps within the time limitation provided above.

Any unstamped cigarettes in the possession of persons (other than wholesalers or retailers) who have either failed to file a Notice of Intent to Possess Unstamped Cigarettes in the State of Washington or who have failed to affix stamps within the time limitation provided above will be deemed contraband and subject to seizure and sale under the provisions of RCW 82.24.130.

The "fuson" type stamps are available, in rolls of 30,000 stamps, from an authorized bank. Payment for stamps may be made either at the time of sale, or deferred until later, although the latter form of payment is available only to vendors who meet the requirements of the department and who have furnished a surety bond equal to the proposed total monthly credit limit, or in the amount of \$2,500, whichever is greater. In addition, purchases on a deferred payment plan may be made only by the cigarette seller himself or by an agent authorized by him to do so. This authorization may be in the form of a signature card, filed with the bank, from which stamps are usually obtained, and kept current by the vendor. Payments under a deferred plan are due 30 days following the purchase, and are to be paid at the outlet from which the stamps were obtained, and may be paid by check payable to the Department of Revenue. Cigarette dealers, either retail or wholesale, who purchase stamps under either plan are allowed, as compensation for their services in affixing stamps, an amount equal to \$1.85 per thousand stamps, which may be offset against the purchase price.

BOOKS AND RECORDS. An accurate set of records, showing all transactions had with reference to the purchase, sale or distribution of articles subject to the cigarette tax must be retained. These records may be combined with those required in connection with the Tobacco Products Tax, by Rule 185 [WAC 458-20-185], provided there is a segregation therein of the amount involved. All such records must be preserved for 5 years from the date of the transaction.

In particular, persons shipping or delivering any of the articles taxed herein to a point outside of this state shall transmit to the Miscellaneous Tax Section, not later than the 15th of the following calendar month, a true duplicate invoice showing full and complete details of the interstate sale or delivery.

REPORTS AND RETURNS. The Department of Revenue may require any person dealing with cigarettes, in this state, to complete and return forms, as furnished, setting forth sales, inventory and other data required by the department to maintain control over trade in the articles taxed herein.

Manufacturers selling these articles shall, before the 15th day of each month, transmit to the Miscellaneous Tax Section a complete record of sales of cigarettes in this state during the preceding month.

[Title 458 WAC—p 114]

REFUNDS. Any person may request a refund of the face value of the stamps, less the affixing discount when cigarettes to which they are affixed are:

1. Damaged, or unfit for sale, and as a result are destroyed or returned to the manufacturer or distributor.

2. Sold and shipped to a registered dealer regularly making sales of cigarettes in another state.

In either case, the claim for refund, (a form which is provided by the department) must be accompanied by an affidavit, in the first instance, of the receipt by the manufacturer and, in the second instance, of the receipt by the buyer of cigarettes bearing stamps from this state.

Revised [Order ET 75-1, § 458-20-186, filed 5/2/75; Order ET 73-2, § 458-20-186, filed 11/9/73; Order ET 71-1, § 458-20-186, filed 7/22/71; Order ET 70-3, § 458-20-186, filed 5/29/70, effective 7/1/70.]

WAC 458-20-187 (Rule 187) Coin operated vending machines, amusement devices and service machines.

COIN OPERATED VENDING MACHINES, AMUSEMENT DEVICES AND SERVICE MACHINES

As used herein;

The term "vending machines" means machines which, through the insertion of a coin will return to the patron a predetermined specific article of merchandise or provide facilities for installing, repairing, cleaning, altering, imprinting, or improving of tangible personal property of or for consumers. It includes machines which vend photographs, toilet articles, cigarettes and confections as well as machines which provide laundry and cleaning services.

The term "amusement devices" means those devices and machines which, through the insertion of a coin, will permit the patron to play a game. It includes slot and pinball machines and those machines or devices which permit the patron to see, hear or read something of interest.

The term "service machines" means any coin operated machines other than those defined as "vending machines" or "amusement devices". It includes, for example, scales and luggage lockers, but does not include coin operated machines used in the conduct of a public utility business, such as telephones and gas meters; also excluded are shuffleboards and pool games.

VENDING MACHINES. Persons operating vending machines are engaged in a retailing business and must report and pay tax under the Retailing classification with respect to the gross proceeds of sales.

AMUSEMENT DEVICES. Persons operating amusement devices, except shuffleboard, pool, and billiard games, are taxable under the Service and Other Business Activities classification on the gross receipts therefrom.

Persons engaged in operating shuffleboards or games of pool or billiards are taxable under the Retailing classification on the gross receipts therefrom and are responsible for collecting and reporting to the department the retail sales tax measured by the gross receipts therefrom.

**STATEMENT OF RELATED CASES
PURSUANT TO NINTH CIRCUIT RULE 28-2.6**

To the best of undersigned counsel's knowledge, there are no related cases currently pending before the Court.

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**CERTIFICATE OF COMPLIANCE WITH
TYPE-VOLUME LIMITATION,
TYPEFACE REQUIREMENTS, AND
TYPE STYLE REQUIREMENTS**

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,019 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, 14 point Times New Roman.

Dated this 2nd day of March, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Opening Brief of Plaintiff – Appellant the Confederated Tribes and Bands of the Yakama Indian Nation with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 2, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated the 2nd day of March, 2011.

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