

ACT 157

S.B. NO. 2840

A Bill for an Act Relating to Tobacco.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The purpose of this Act is to address some of the issues relating to tobacco products. Specifically, Part I of this Act prohibits the distribution of untaxed cigarettes via telephone, mail order, the Internet, or other on-line sources and revises the seizure and confiscation authority of the department of the attorney general to address the availability of low-priced cigarettes to underage smokers. Part

II of this Act limits supersedeas bond amounts for tobacco master settlement signatories to ensure their ability to continue to make settlement payments.

PART I

SECTION 2. Chapter 245, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

“§245- Unlawful shipment of cigarettes; penalty; reports; liability for unpaid taxes. (a) A person or entity commits the offense of unlawful shipment of cigarettes if the person or entity is engaged in the business of selling cigarettes and:

- (1) Ships or causes to be shipped any cigarettes to a person or entity in this State that is not:
 - (A) A licensee under this chapter; or
 - (B) An export warehouse proprietor pursuant to chapter 52 of the Internal Revenue Code, or an operator of a customs bonded warehouse pursuant to section 1311 or 1555 of title 19 of the United States Code; or
- (2) Ships or causes to be shipped any cigarettes to a person or entity in this State in any container or wrapping, other than the cigarette manufacturer’s original container or wrapping, and the container or wrapping is not plainly and visibly marked with the word “cigarette”.

(b) This section shall not apply to the shipment of cigarettes if any of the following conditions are met:

- (1) The cigarettes are exempt from taxes as provided by section 245-3(b) or are otherwise exempt from the applicability of this chapter as provided by section 245-62;
- (2) All applicable Hawaii taxes on the cigarettes are paid in accordance with the requirements of this chapter; or
- (3) The person or entity engaged in the business of selling, advertising, or offering cigarettes for sale and transfer or shipment:
 - (A) Has fully complied with all of the requirements of chapter 10A (commencing with section 375) of title 15 of the United States Code, otherwise known as the Jenkins Act; and
 - (B) Includes on the outside of the shipping container an externally visible and easily legible notice located on the same side of the shipping container as the address to which the shipping container is delivered stating as follows:

“CIGARETTES: HAWAII LAW PROHIBITS THE SALE OF CIGARETTES TO INDIVIDUALS UNDER EIGHTEEN YEARS OF AGE AND REQUIRES THE PAYMENT OF ALL APPLICABLE TAXES. YOU ARE LEGALLY RESPONSIBLE FOR ALL APPLICABLE UNPAID TAXES ON THESE CIGARETTES.”

(c) Unlawful shipment of cigarettes is a class C felony if the person or entity knowingly ships or causes to be shipped one thousand or more cigarettes in violation of subsection (a).

(d) Unlawful shipment of cigarettes is a misdemeanor if the person or entity knowingly ships or causes to be shipped less than one thousand cigarettes in violation of subsection (a).

(e) For purposes of this section, a person or entity is a licensee if the person or entity’s name appears on a list of authorized licensees published by the department.

(f) Any person or entity that is required to comply with the requirements of chapter 10A (commencing with section 375) of title 15 of the United States Code, otherwise known as the Jenkins Act, shall file such a report with the department on or before the tenth day of each calendar month.

(g) Notwithstanding the existence of other remedies at law, any person or entity that purchases, uses, controls, or possesses any cigarettes for which the applicable taxes imposed under title 14, Hawaii Revised Statutes, have not been paid, shall be liable for the applicable taxes, plus any penalty and interest as provided for by law.”

SECTION 3. Section 245-1, Hawaii Revised Statutes, is amended by adding a new definition to be appropriately inserted and to read as follows:

““Ship” or “causes to be shipped” means to send by any means of transportation, including by vessel, vehicle, or aircraft.”

SECTION 4. Section 245-1, Hawaii Revised Statutes, is amended as follows:

1. By amending the definition of “dealer” to read:

““Dealer” means any person coming into the possession of cigarettes or tobacco products, at the person’s place of business, a stock of cigarettes or tobacco products] which have not been acquired from [a wholesaler or dealer licensed] an authorized permit holder or licensee under this chapter, [and who distributes or uses such cigarettes or tobacco products.] or any person rendering a distribution service who buys and maintains, at the person’s place of business, a stock of cigarettes or tobacco products that have not been acquired from a licensee and who distributes or uses such cigarettes or tobacco products.”

2. By amending the definition of “distribute” to read:

““Distribute”, “distributes”, or “distribution” means to sell, ship, transfer, give, or deliver to another, or to leave, barter, or exchange with another, or to offer or agree to do the same.”

3. By amending the definition of “sale” to read:

““Sale” includes every act of selling[-] and includes any sale or act of selling that originates from any order that is placed or submitted by means of a telephonic or other method of voice transmission, the mail, or any other delivery service, or the Internet or other online service.”

SECTION 5. Section 245-40, Hawaii Revised Statutes, is amended to read as follows:

“[E]§245-40[] Forfeitures; disposition. Any cigarette, package of cigarettes, [œ] carton of cigarettes, or container of cigarettes unlawfully possessed, kept, stored, acquired, transported, [œ] sold, imported, offered, received, or distributed in violation of this [part] chapter may be seized and confiscated by the attorney general and ordered forfeited pursuant to chapter 712A.”

SECTION 6. Section 245-62, Hawaii Revised Statutes, is amended to read as follows:

“[E]§245-62[] Applicability. (a) This [part] chapter shall not apply to:

- (1) Cigarettes allowed to be imported or brought into the United States for personal use free of federal tax or duty or voluntarily abandoned to the United States Secretary of Treasury at the time of entry; [œ]
- (2) Cigarettes sold or intended to be sold as duty-free merchandise by a duty-free sales enterprise in accordance with the provisions of [Title 19

U.S.C.] section 1555(b) of Title 19, United States Code, and any implementing regulations; provided that this [part] chapter shall apply to any [such] cigarettes that are brought back into the customs territory for resale within the customs territory[-]; or

- (3) A delivery service when engaged in the business of transporting or delivering packages or other containers of cigarettes, if the delivery service is not a knowing accomplice in any act that circumvents the requirements of this chapter. The department and the attorney general shall retain inspection and investigation authority under this chapter. The delivery service shall provide the department or the attorney general with access to inspect any shipments of any cigarettes and shall provide any information, including shipping and delivery documents, deemed necessary to verify compliance with the requirements of this chapter.

(b) As used in this section:

“Delivery service” means an entity, including the United States Postal Service (as defined in section 102 of title 39, United States Code), that is engaged in the commercial transport or delivery by water, land, or air of letters, packages, merchandise, or other containers whether or not the entity actually operates the vessel, vehicle, or aircraft by which the transportation is provided.

“Shipping documents” or “delivery documents” include but are not limited to bills of lading, air bills, or any other documents, records, or documentation in whatever format, including electronic format used to evidence the undertaking by a delivery service to ship, transport, or deliver letters, packages, merchandise, or other containers.”

PART II

SECTION 7. The legislature finds that the payments that the State receives from tobacco companies under the tobacco master settlement agreement fund vitally important public programs, and it is in the State’s interest to protect the continued receipt of these funds.

The legislature further finds that the tobacco companies that make payments to the State pursuant to the tobacco master settlement agreement are involved in extensive litigation that on occasion produces verdicts in the hundreds of millions or billions of dollars. As in other states, were such a verdict entered against the tobacco companies in Hawaii, the only way they could protect their assets, and hence their ability to make their tobacco master settlement agreements payments to the State while they appeal, would be to post a supersedeas bond that could equal or exceed the amount of the judgment. The companies may not be able to post such a bond, and this could adversely impact their ability to continue to meet their obligations under the tobacco master settlement agreement.

The legislature further finds that twenty-four states have recognized this, and these states have passed legislation limiting the size of supersedeas bonds, sometimes in legislation that applies to all litigants and other times in legislation that applies only to tobacco master settlement agreement signatories, successors, and affiliates. By limiting the amount of the bond that defendants must post to stay the execution of the judgment during appeal, such legislation guarantees that tobacco master settlement agreement signatories, affiliates, and successors will be able to appeal a judgment while continuing to make their payments to Hawaii and other states. A supersedeas bond limit would not in any way affect the outcome of the appeal or the ultimate ability of the plaintiff to prevail in the appeal. It would only ensure that the tobacco companies are able fully to use their constitutional right to

appeal, while protecting the interest of the State in the receipt of its tobacco master settlement agreement funds during the course of appeal.

Accordingly, the purpose of this part is to safeguard the flow of funds under the tobacco master settlement agreement to the State, by limiting the supersedeas bond that tobacco master settlement agreement signatories and their successors and affiliates must post to stay the execution of a judgment during appeal to \$150,000,000 regardless of the amount of the judgment. This part also provides for a higher bond amount, up to the full amount of the judgment, if the court determines that the appellant is dissipating assets to avoid the payment of a judgment.

SECTION 8. Chapter 328L, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

“§328L- Limitation on bond requirements in litigation involving master settlement agreement signatories, successors, and affiliates. (a) In civil litigation under any legal theory involving a signatory, a successor of a signatory, or an affiliate of a signatory to the tobacco master settlement agreement, the supersedeas bond to be furnished to stay the execution of the judgment during the entire course of appellate review shall be set in accordance with applicable laws or court rules, except that the total bond that is required of all appellants collectively shall not exceed \$150,000,000, regardless of the amount of the judgment.

(b) Notwithstanding subsection (a), if an appellee proves by a preponderance of the evidence that an appellant is dissipating assets outside the ordinary course of business to avoid the payment of a judgment, a court may require the appellant to post a bond in an amount up to the full amount of the judgment.”

PART III

SECTION 9. Part I of this Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 10. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.¹

SECTION 11. This Act shall take effect on July 1, 2004. Part II of this Act shall apply to all cases pending on or filed on or after its effective date.

(Approved June 30, 2004.)

Note

1. Edited pursuant to HRS §23G-16.5.