



## Legislative Fiscal Bureau

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Joint Committee on Finance

Paper #387

### **Expand the Native American Cigarette and Tobacco Products Tax Refunds (General Fund Taxes -- Excise Taxes and Regulation of Tobacco)**

[LFB 2009-11 Budget Summary: Page 285, #3]

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#### **CURRENT LAW**

For sales of cigarettes that occur on reservations or trust lands, the tribes receive a refund of 100% of the excise tax on cigarettes sold to tribal members and 70% of the tax on sales to non-tribal members. For tobacco products (excluding cigarettes) sold on reservations or trust lands, the tribes receive a refund of 100% of the tax on products sold to tribal members and 50% of the tax on products sold to non-tribal members. The Department of Revenue (DOR) may enter into agreements with, and pay refunds to, tribes whose land was designated a reservation or trust prior to January 1, 1983.

#### **GOVERNOR**

Authorize DOR to provide refunds of state excise taxes on cigarettes and other tobacco products sold by tribal retailers if the land on which the sale occurred was designated a reservation or trust land on or before January 1, 1983, or on a later date as determined by an agreement between DOR and the tribal council. This provision is estimated to increase cigarette and tobacco products refunds by a minimal amount.

#### **DISCUSSION POINTS**

1. Federal law prohibits states from imposing a cigarette tax or a tobacco products tax on sales by tribal members to tribal members on the buyer's reservation or trust land. If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made on reservation or trust land, the tax cannot be enforced absent a clear authorization by Congress.

2. The current law provision to refund Native Americans for cigarette sales on tribal lands was enacted as part of the 1983-85 biennial budget act, 1983 Act 27. The provision was enacted to encourage Native American retailers to sell only stamped (taxed) cigarettes. Previously, unstamped cigarettes were sold on reservations, which raised concern regarding competition and the administration and collection of taxes for sales to non-Native Americans.

3. DOR notes that the current law provision limiting the authority of DOR to enter into agreements with federally recognized tribal lands recognized on or prior to January 1, 1983, was included in Act 27. The date was used to provide certainty as to what land would be included in the original refund agreements, and the date has not been changed since.

4. The Department of Revenue has entered into refund agreements relating to the excise tax on sales of cigarettes with all of the 11 federally recognized tribes in Wisconsin. All 11 tribes have entered into agreements to sell only stamped cigarettes to non-tribal members; however, only 10 of the 11 tribes have agreed to sell stamped cigarettes to tribal members. The one tribe which sells unstamped cigarettes to tribal members has agreed to keep specific records regarding the sale of unstamped cigarettes, and checks for tribal membership when selling unstamped cigarettes.

5. The current law provision to refund Native Americans for tobacco product sales on tribal lands was enacted as part of the 1999-01 budget bill, 1999 Act 9. Similar to the refund provisions for cigarette sales, the provisions in Act 9 were enacted to encourage Native American retailers to sell only taxed tobacco products. The tobacco products tax agreements' temporal limitation for the date of federal recognition of reservation or trust land was set to match existing statutory language at the time limiting DOR's authority to enter into refund agreements with regards to the cigarette tax.

6. DOR has entered into refund agreements with seven of the 11 Wisconsin tribes with regards to the sale of tobacco products to non-tribal members. DOR refunds Native American sales to non-Native Americans at a rate of 70% for cigarettes sales and 50% for tobacco products sales.

7. Wisconsin is one of eight states which has entered into cigarette and tobacco products tax agreements with tribes; however, the specific terms of the tribal agreements vary from state-to-state. Of the surrounding states, Michigan (tax agreements with nine of 12 tribes) and Minnesota (agreements with 10 of 11 tribes) do not impose any temporal limitation for when Native American reservation or trust land was federally recognized with regards to whether the state may enter into agreement with a specific tribe or band.

8. According to DOR, for cigarette and tobacco product sales on reservation or trust land federally recognized after January 1, 1983, all tribes with which the Department has agreements impose and collect state excise taxes on sales to non-tribal members. An argument could be made that the state should not extend refund agreements to tribal lands federally recognized subsequent to 1982 because the tribes are already collecting the tax revenue and the Governor's provision would only result in reduced state revenue. However, a counter-argument could be made that if a tribe currently in agreement determines that the temporal limitation for

federal recognition of reservation or trust land excludes a substantial amount of tribal land and becomes economically unfair, the tribe may decide to terminate its agreement with the state and sell untaxed cigarette and tobacco products.

9. The U.S. Bureau of Indian Affairs (BIA) provided detailed information on tribal land for ten of the 11 federally-recognized Wisconsin tribes (except for the Menominee tribe) which was held in trust by the federal government, and has been granted to the tribes since 1983. According to the BIA, the following 18 counties include parcels of such land: Ashland, Barron, Bayfield, Brown, Burnett, Dane, Eau Claire, Forest, Jackson, Milwaukee, Outagamie, Polk, Sauk, Sawyer, Shawano, Vernon, Vilas, and Wood.

## **ALTERNATIVES**

1. Approve the Governor's proposal. Authorize the Department of Revenue to enter into agreements to provide refunds of state excise taxes on cigarettes and other tobacco products sold by tribal retailers if the sale occurred on land that was designated a reservation or trust land on, before, or on a later date than January 1, 1983.

2. Delete provision.

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