



## Legislative Fiscal Bureau

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March 11, 2024

TO: Members  
Joint Committee on Finance

FROM: Bob Lang, Director

SUBJECT: Assembly Bill 910/Senate Bill 835: Remote Sales of Cigars and Pipe Tobacco

Assembly Bill 910 (AB 910) and Senate Bill 835 (SB 835) would allow remote retail sellers to sell cigars and pipe tobacco to consumers in this state, and would impose the tobacco excise tax on the actual cost of cigars and pipe tobacco.

AB 910 was introduced on January 4, 2024, and was referred to the Assembly Committee on Jobs, Economy, and Small Business Development. That Committee held a public hearing on January 24, 2024. Assembly Substitute Amendment 1 (ASA 1) was adopted and the bill was recommended for passage, as amended, on February 7, 2024, by separate votes of 11 to 0. The Assembly passed AB 910, as amended by ASA 1, by a voice vote on February 13, 2024, and messaged the bill to the Senate. The bill was referred to the Senate Committee on Universities and Revenue on February 19, 2024.

SB 835 was introduced on December 19, 2023, and was referred to the Senate Committee on Universities and Revenue. That Committee held a public hearing on January 31, 2024. Senate Substitute Amendment 1 (SSA 1) to SB 835 was offered on February 7, 2024, and is identical to ASA 1.

AB 910 and SB 835 are herein referred to as "the bill," and ASA 1 to AB 910 and SSA 1 to SB 835 are herein referred to as "the substitute amendment."

### **CURRENT LAW**

Under current law, the definition of tobacco products applies to most items containing tobacco, including cigars and pipe tobacco. Tobacco products do not include cigarettes. The tobacco products tax is imposed upon the sale, offering or exposing for sale, possession with intent to sell, or removal for consumption or sale or other disposition for any purpose of tobacco products by distributors. The tax is also imposed upon the use or storage by consumers of tobacco products. The

tax is imposed at a rate of 100% of the manufacturer's established list price for moist snuff and at a rate of 71% of the manufacturer's established list price for all other tobacco products (excluding vapor products), but not more than 50¢ per cigar. The tax attaches at the time the tobacco products are received by the distributor in this state.

"Manufacturer's established list price" is not defined in statute. However, the Department of Revenue (DOR) administers the tax such that "manufacturer's list price" means the total price of tobacco products charged by the manufacturer or other seller to an unrelated distributor. The total price includes all charges by the manufacturer or other seller that are necessary to complete the sale, and cannot be reduced by any cost or expense incurred by the manufacturer or other seller, such as fees, delivery, freight, transportation, packaging, handling, marketing, federal excise taxes, and import fees or duties, regardless of whether such cost or expense is separately stated on an invoice. The total price also cannot be reduced by the value or cost of discounts or free promotional or sample products. A manufacturer or other seller is considered to be related to a distributor if the two parties have significant common purposes and have either substantial common membership or, directly or indirectly, have substantial common direction or control.

A distributor of tobacco products is: (a) any person engaged in the business of selling tobacco products or vapor products in this state who brings, or causes to be brought, into this state from outside the state any tobacco products or vapor products for sale; (b) any person who makes, manufactures, or fabricates tobacco products or vapor products in this state for sale in this state; or (c) any person engaged in the business of selling tobacco products or vapor products outside this state who ships or transports tobacco products or vapor products to retailers in this state to be sold by those retailers.

## **SUMMARY OF THE SUBSTITUTE AMENDMENT**

Under the substitute amendment, cigars and pipe tobacco would be defined and taxed separately from other tobacco products. "Cigar" would mean any roll of tobacco wrapped in leaf tobacco or in any substance containing tobacco, but would not include a cigarette. "Pipe tobacco" would mean any tobacco that, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco to be smoked in a pipe.

The substitute amendment would allow remote retail sales of cigars and pipe tobacco, rather than only authorizing retail sales by municipally-licensed retailers as under current law. The substitute amendment would define a "remote retail seller" as a person located inside or outside of this state who makes remote retail sales. A "remote retail sale" would mean any sale of cigars or pipe tobacco to a consumer that satisfies any of the following: (a) the consumer submits the order for the sale by telephone, a method of voice transmission, mail, or the internet or other online service, or the seller is otherwise not in the physical presence of the consumer when the order or request for purchase is made; or (b) the cigars or pipe tobacco are delivered to the consumer by common carrier, private delivery service, or other method of remote delivery, or the seller is not in the physical presence of the consumer when the consumer obtains possession of the cigars or pipe tobacco.

Under the substitute amendment, no person would be permitted to engage in the business of a

remote retail seller at any place of business, including a legal location in any state at which records are kept or accessed by the remote retail seller, unless that person has filed an application for, and obtained, a permit from DOR to engage in that business at such place. In addition to obtaining a permit, the substitute amendment specifies that remote retail sellers would be required to: (a) register with DOR and collect the state sales and use tax; (b) collect and remit the tobacco products excise tax; and (c) use an independent, 3<sup>rd</sup>-party age verification service that compares information available from a commercially available database or aggregate of databases that are regularly used by government agencies and business for age and identity verification to determine whether a prospective consumer has attained the minimum age for purchasing a tobacco product under the federal Food, Drug, and Cosmetic Act based on the personal information provided by the prospective consumer during the ordering process.

Provisions that apply to distributors under current law would also apply to remote retail sellers under the substitute amendment, including permit requirements for any officers, directors, agents, and stockholders holding 5% or more of the stock of any corporation who may apply for a permit from DOR. As with distributor permits, DOR would be prohibited from issuing a permit to any applicant if they: (a) have been convicted of a misdemeanor at least three times; (b) have been convicted of a felony, unless the person was pardoned; (c) are addicted to the use of a controlled substance or controlled substance analog; (d) have income that comes principally from gambling or have been convicted of two or more gambling offenses; (e) have been convicted of crimes relating to prostitution; (f) have been convicted of crimes relating to loaning money, or anything of value, to persons holding alcohol beverage licenses or permits; (g) do not hold a retail sellers permit, if the person is a retailer; or (h) do not hold a valid business tax registration certificate with DOR. Additional permit requirements that apply to nonresident distributors under current law would apply for nonresident sellers.

If DOR were to deny a permit, the Department would be required to immediately notify the applicant in writing of the denial and the reasons for the denial. Both DOR's decisions to deny or grant a permit would be subject to judicial review. Consistent with current law treatment of distributor permits for tobacco products, there would not be a fee for remote retail sellers to obtain a permit under the substitute amendment. At least quarterly, DOR would be required to publish a list of all permits issued to remote retail sellers on its website. Remote retail sellers would be required to file monthly returns with DOR and pay the tobacco products tax incurred by the deadline for filing those returns. In addition, remote retail sellers are required to keep records of purchases and sales of tobacco products, including cigars and pipe tobacco, and vapor products.

The substitute amendment would impose the excise tax on the "actual cost" of cigars and pipe tobacco to the distributor or remote retail seller, rather than on the manufacturer's established list price. Defining "actual cost" in statute would codify DOR's current administrative practice as it relates to the manufacturer's list price of cigars and pipe tobacco under current law, and would clarify the treatment of the cost between related parties. With respect to sales of cigars and pipe tobacco sold by a remote retail seller, the tax would attach at the time the remote retail seller makes the remote retail sale to a consumer. "Actual cost" would mean the total price of cigars or pipe tobacco charged by the manufacturer or other seller to an "unrelated distributor or remote retail seller". The total price would include all charges by the manufacturer or other seller that are necessary to

complete the sale. The total price would not include a reduction for any cost or expense, regardless of whether the cost or expense is separately stated on an invoice, that is incurred by the manufacturer or other seller, including fees, delivery, freight, transportation, packaging, handling, or marketing costs, federal excise taxes, import fees, or duties. The total price would also not include a reduction for the value or cost of discounts or free promotional or sample products. An "unrelated distributor or remote retail seller" would mean a distributor or remote retail seller that does not have significant common purposes and substantial common membership or, directly or indirectly, substantial common direction or control as the manufacturer or other seller.

The provisions of the substitute amendment would take effect on January 1, 2025.

## **FISCAL EFFECT**

It is estimated that imposing the tobacco products tax on remote retail sellers of cigars and pipe tobacco would increase excise tax revenues by \$380,000 in 2024-25 and \$760,000 in 2025-26. Imposing the tax on the "actual cost" of cigars and pipe tobacco, rather than the "manufacturer's established list price", could impact revenues to the extent that these amounts are different.

DOR estimates \$439,490 of one-time administrative costs for the Division of Technical Services and \$32,200 of one-time costs for the Division of Income, Sales, and Excise Tax for programming costs to update the state's tax processing system and to process new applications and forms. DOR states that administration of the bill would require additional staffing of one revenue agent and one auditor, and estimates \$219,870 of ongoing administrative expenses to support these positions. DOR states that these costs cannot be absorbed with current resources. Neither the bill or the substitute amendment provide additional funding for administrative costs to the Department.

Prepared by: Sydney Emmerich