

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 2235 Session of
2003

INTRODUCED BY NICKOL, VANCE AND LaGROTTA, DECEMBER 9, 2003

AS RE-REPORTED FROM COMMITTEE ON APPROPRIATIONS, HOUSE OF
REPRESENTATIVES, AS AMENDED, DECEMBER 17, 2003

AN ACT

1 Amending the act of April 9, 1929 (P.L.343, No.176), entitled,
2 as amended, "An act relating to the finances of the State
3 government; providing for the settlement, assessment,
4 collection, and lien of taxes, bonus, and all other accounts
5 due the Commonwealth, the collection and recovery of fees and
6 other money or property due or belonging to the Commonwealth,
7 or any agency thereof, including escheated property and the
8 proceeds of its sale, the custody and disbursement or other
9 disposition of funds and securities belonging to or in the
10 possession of the Commonwealth, and the settlement of claims
11 against the Commonwealth, the resettlement of accounts and
12 appeals to the courts, refunds of moneys erroneously paid to
13 the Commonwealth, auditing the accounts of the Commonwealth
14 and all agencies thereof, of all public officers collecting
15 moneys payable to the Commonwealth, or any agency thereof,
16 and all receipts of appropriations from the Commonwealth,
17 authorizing the Commonwealth to issue tax anticipation notes
18 to defray current expenses, implementing the provisions of
19 section 7(a) of Article VIII of the Constitution of
20 Pennsylvania authorizing and restricting the incurring of
21 certain debt and imposing penalties; affecting every
22 department, board, commission, and officer of the State
23 government, every political subdivision of the State, and
24 certain officers of such subdivisions, every person,
25 association, and corporation required to pay, assess, or
26 collect taxes, or to make returns or reports under the laws
27 imposing taxes for State purposes, or to pay license fees or
28 other moneys to the Commonwealth, or any agency thereof,
29 every State depository and every debtor or creditor of the
30 Commonwealth," further DEFINING "COST OF THE STAMPING AGENT" <—
31 AND "DEALER"; AND FURTHER providing for delivery sales of
32 cigarettes and for violations. ~~and prescribing penalties.~~ <—

1 The General Assembly of the Commonwealth of Pennsylvania
2 hereby enacts as follows:

3 ~~Section 1. The act of April 9, 1929 (P.L.343, No.176), known~~ <—
4 ~~as The Fiscal Code, is amended by adding a section to read:~~

5 SECTION 1. THE DEFINITIONS OF "COST OF THE STAMPING AGENT" <—
6 AND "DEALER" IN SECTION 202-A OF THE ACT OF APRIL 9, 1929
7 (P.L.343, NO.176), KNOWN AS THE FISCAL CODE, ADDED JULY 2, 1993
8 (P.L.250, NO.46), ARE AMENDED TO READ:

9 SECTION 202-A. DEFINITIONS.--AS USED IN THIS ARTICLE--

10 * * *

11 "COST OF THE STAMPING AGENT" SHALL MEAN THE BASIC COST OF
12 CIGARETTES PLUS THE COST OF DOING BUSINESS BY THE CIGARETTE
13 STAMPING AGENT IN EXCESS OF THE BASIC COST OF CIGARETTES,
14 EXPRESSED AS A PERCENTAGE AND APPLIED TO THE BASIC COST OF
15 CIGARETTES. ANY FRACTIONAL PART OF A CENT IN THE COST PER CARTON
16 OF CIGARETTES SHALL BE ROUNDED OFF TO THE NEXT HIGHER CENT. IN
17 THE CASE OF SALES AT RETAIL BY CIGARETTE STAMPING AGENTS, THE
18 COST OF THE CIGARETTE STAMPING AGENT SHALL BE THE SAME AS THE
19 COST OF THE RETAILER. THERE SHALL BE DETERMINED A SEPARATE COST
20 OF THE CIGARETTE STAMPING AGENT FOR SALES TO WHOLESALE DEALERS
21 AND FOR SALES TO RETAIL DEALERS. IN THE ABSENCE OF FILING OF
22 SATISFACTORY PROOF OF A LESSER COST OF DOING BUSINESS OF THE
23 CIGARETTE STAMPING AGENT MAKING THE SALE, THE COST OF DOING
24 BUSINESS SHALL BE PRESUMED TO BE TWO PER CENTUM OF THE BASIC
25 COST OF CIGARETTES TO THE STAMPER FOR SALES TO WHOLESALE DEALERS
26 AND [FOUR PER CENTUM OF THE BASIC COST OF CIGARETTES] WITH
27 RESPECT TO SALES TO RETAIL DEALERS, THE COST OF THE STAMPING
28 AGENT PLUS THE COST OF THE WHOLESALER. WHEN A CIGARETTE STAMPING
29 AGENT ESTABLISHES A LESSER COST OF DOING BUSINESS THAN THE
30 PRESUMPTIVE COSTS CONTAINED HEREIN, SUCH LESSER COST OF DOING

BUSINESS MAY BE USED TO COMPUTE THE COST OF THE CIGARETTE
STAMPING AGENT FOR A PERIOD OF TIME NO GREATER THAN TWELVE
MONTHS, AT THE END OF WHICH TIME THE COST OF THE CIGARETTE
STAMPING AGENT SHALL BE COMPUTED USING THE PRESUMPTIVE COSTS
CONTAINED HEREIN, UNLESS THE CIGARETTE STAMPING AGENT AGAIN
ESTABLISHES A LESSER COST OF DOING BUSINESS.

* * *

"DEALER" SHALL MEAN ANY CIGARETTE STAMPING AGENCY, WHOLESALER
OR RETAILER AS THESE TERMS ARE MORE SPECIFICALLY DEFINED HEREIN.
WHEN USED IN THIS ARTICLE, THE TERM SHALL INCLUDE ALL OF THE
ABOVE-MENTIONED CATEGORIES. NOTHING CONTAINED IN THIS ARTICLE
SHALL PRECLUDE ANY PERSON FROM BEING A CIGARETTE STAMPING
AGENCY, WHOLESALER OR RETAILER: PROVIDED, THAT SUCH PERSON MEETS
THE REQUIREMENTS FOR EACH CATEGORY OF DEALER[.], AND THAT, WHERE
A PERSON HOLDS MORE THAN ONE LICENSE, THE PRESUMPTIVE MINIMUM
PRICE SHALL BE DETERMINED BY THE NATURE OF THE SALES TRANSACTION
AND NOT BY THE CLASS OF LICENSE INVOLVED IN THE TRANSACTION.

* * *

SECTION 2. THE ACT IS AMENDED BY ADDING A SECTION TO READ:

Section 228.1-A. Delivery Sales of Cigarettes.--(a) It
shall be unlawful for any person in the business of selling
cigarettes to take an order for cigarettes, other than from a
person who is a licensed dealer, through the mail or through any
telecommunications means, including by telephone, facsimile or
the Internet, if in providing for the sale or delivery of the
cigarettes in accordance with the order of the purchaser, the
person mails the cigarettes or ships the cigarettes sold by him
to the purchaser by carrier in or affecting interstate commerce
and the purchaser fails to comply with each of the following
provisions for the first delivery sales to the purchaser:

1 (1) Before mailing or shipping the cigarettes, the person
2 receives from the purchaser who places the order the following:

3 (i) A copy of a valid government-issued document, whether an
4 operator's permit or otherwise, that provides the name, address
5 and date of birth of the purchaser.

6 (ii) A written certification from the purchaser stating that
7 the purchaser:

8 (A) Is of legal minimum purchase age in this Commonwealth.

9 (B) Wants to receive mailings from a tobacco company.

10 (C) Understands that providing false information under the
11 certification is a criminal offense in this Commonwealth.

12 (2) Before mailing or shipping the cigarettes, the person:

13 (i) verifies the date of birth or age of the purchaser
14 against a commercially available database; or

15 (ii) obtains a photocopy or other image of the valid,
16 government-issued identification stating the date of birth or
17 age of the individual placing the order.

18 (3) In the case of an order for cigarettes that occurs
19 pursuant to an advertisement on the Internet or in any newspaper
20 or print media, the person receives payment by credit card or
21 check for the order before mailing or shipping the cigarettes.
22 Payment must be made by credit card issued to or check issued by
23 the purchaser of the cigarettes.

24 (4) (i) The person employs a method of mailing or shipping
25 the cigarettes requiring that the purchaser of the cigarettes:

26 (A) Be the addressee.

27 (B) Sign for delivery of the package.

28 (C) If the purchaser appears to the carrier making the
29 delivery to be under twenty-seven years of age, take delivery of
30 the package only after producing valid, government-issued

1 identification that:

2 (I) Bears a photograph of the individual.

3 (II) Indicates that the individual is not under the legal
4 age to purchase cigarettes.

5 (III) Indicates that the individual is not younger than the
6 age indicated on the government-issued document received under
7 clause (1).

8 (ii) The bill of lading clearly states the requirements in
9 subclause (i) and specifies that State law require compliance
10 with the requirements.

11 (5) The person notifies the carrier for the mailing or
12 shipping, in writing, of the age of the addressee as indicated
13 by the government-issued document received under clause (1).

14 (b) This section shall not be construed as imposing
15 liability upon any common carrier, or officers or employees
16 thereof, when acting within the scope of business of the common
17 carrier.

18 (c) Persons taking delivery sale orders may request that
19 prospective purchasers provide their e-mail addresses.

20 (d) (1) Prior to making delivery sales or shipping
21 cigarettes in connection with any sale subject to this section,
22 every person shall file with the department a statement setting
23 forth the person's name, trade name and the address of the
24 person's principal place of business and any other place of
25 business.

26 (2) Not later than the tenth day of each calendar month,
27 each person that has made a delivery sale or shipped or
28 delivered cigarettes in connection with any delivery sale
29 subject to this section during the previous calendar month shall
30 file with the department a memorandum or a copy of the invoice,

1 which provides for each and every delivery sale:

2 (i) The name and address of the individual to whom the
3 delivery sale was made.

4 (ii) The brand or brands of cigarettes that were sold in the
5 delivery sale.

6 (iii) The quantity of cigarettes that were sold in the
7 delivery sale.

8 (3) Any person that satisfies the requirements of section 2
9 of the act of October 19, 1949 (63 Stat. 884, 15 U.S.C. § 376)
10 shall be deemed to satisfy the requirements of this section.

11 (e) Each person making a delivery sale subject to this
12 section shall collect and remit to the department any taxes
13 levied by the Commonwealth with respect to the delivery sale
14 pursuant to law, except that such collection and remission shall
15 not be required to the extent the person has obtained proof, in
16 the form of the presence of applicable tax stamps or otherwise,
17 that the taxes already have been paid to the Commonwealth.

18 (f) (1) (i) Except as otherwise provided in this
19 subsection, any person who violates any provision of this
20 section shall be fined not more than one thousand dollars
21 (\$1,000) for a first offense.

22 (ii) In the case of a second or subsequent violation of this
23 act, this person shall be fined not less than one thousand
24 dollars (\$1,000) and not more than five thousand dollars
25 (\$5,000).

26 (2) Any person who knowingly violates any provision of this
27 section, or who knowingly and falsely submits a certification
28 under subsection (a)(1) in another person's name, shall, for
29 each such offense, be fined not more than ten thousand dollars
30 (\$10,000) or imprisoned not more than five years, or both.

1 (3) Any person who fails to pay any tax required in
2 connection with a delivery sale shall pay, in addition to any
3 other penalty, a penalty of fifty per centum of the tax due but
4 unpaid.

5 (4) Any cigarettes sold or attempted to be sold in a
6 delivery sale that does not meet the requirements of this
7 section shall be forfeited to the Commonwealth and destroyed,
8 pursuant to law.

9 (g) The department, or its designee, the Attorney General,
10 or his or her designee, or any person who holds a permit under
11 section 5712 of the Internal Revenue Code of 1986 (Public Law
12 99-514, 26 U.S.C. § 5712) or section 311 or 555 of the Tariff
13 Act of 1930 (46 Stat. 590, 19 U.S.C. §§ 1311 and 1555) may bring
14 an action in the appropriate court in this Commonwealth to
15 prevent or restrain violations of this section by any person or
16 any person controlling the person.

17 ~~Section 2. Section 229 A of the act is amended by adding a~~ <—
18 ~~subsection to read:~~

19 ~~Section 229 A. Violations and Penalties. * * *~~

20 ~~(f) (1) Failure of a licensee to pay in full for the~~
21 ~~cigarettes upon delivery or according to written terms and~~
22 ~~conditions of sale shall constitute a violation of this act and~~
23 ~~result in the suspension of the license until payment is made in~~
24 ~~full.~~

25 ~~(2) No person having a beneficial interest in the license~~
26 ~~shall have a beneficial interest in any other license issued or~~
27 ~~applied for under this article.~~

28 ~~(3) Terms and conditions of sale shall otherwise comply with~~
29 ~~the provisions of this article respecting sales below cost,~~
30 ~~shall be signed by both parties and be kept on file by each~~

1 ~~party at its principal place of business. The invoice evidencing~~
2 ~~the sale shall be generated by the selling licensee and~~
3 ~~presented at delivery and constitute the consummation of the~~
4 ~~sale.~~

5 ~~(4) Unless otherwise established by the board based upon~~
6 ~~standards and practices in the industry, terms and conditions of~~
7 ~~sale extending credit beyond fourteen days from the effective~~
8 ~~date of this subsection, ten days six months thereafter and~~
9 ~~seven days one year after the effective date of this subsection~~
10 ~~shall be prima facie a sale below cost.~~

11 Section 3. This act shall take effect in 60 days.