

Fifty-eighth
Legislative Assembly
of North Dakota

ENGROSSED HOUSE BILL NO. 1431

Introduced by

Representative Belter

Senator Wardner

1 A BILL for an Act to create and enact a new subsection to section 57-36-01 and sections
2 57-36-08.1, 57-36-10.1, 57-36-11.2, 57-36-12.1, 57-36-13.1, 57-36-13.2, and 57-36-25.2 of the
3 North Dakota Century Code, relating to tobacco tax indicia and unfair and deceptive business
4 practices; to amend and reenact sections 57-36-02, 57-36-07, 57-36-09, 57-36-18, 57-36-25.1,
5 and 57-36-33 of the North Dakota Century Code, relating to tobacco tax indicia; to provide a
6 penalty; and to provide an effective date.

7 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

8 **SECTION 1.** A new subsection to section 57-36-01 of the North Dakota Century Code
9 is created and enacted as follows:

10 "Indicia" means the impression or mark made on the cigarettes or package
11 containing the cigarettes approved by the tax commissioner under sections
12 57-36-08.1 and 57-36-11.2.

13 **SECTION 2. AMENDMENT.** Section 57-36-02 of the North Dakota Century Code is
14 amended and reenacted as follows:

15 **57-36-02. Distributors and dealers to be licensed.** Each person engaged in the
16 business of selling cigarettes, cigarette papers, snuff, cigars, or tobacco in this state, including
17 any distributor or dealer, must secure a license from the attorney general before engaging or
18 continuing to engage in business. A separate application and license is required for each
19 distributor at each outlet or place of business within the state, and a separate dealer's license is
20 required for each retail outlet when a person owns or controls more than one place of business
21 dealing in cigarettes, cigarette papers, snuff, cigars, or tobacco. No retailer will be granted a
22 distributor's license except a retailer who, in the usual course of business, performed a
23 distributor's or wholesaler's function for at least one year prior to filing the license application.
24 The application prescribed by the attorney general must include the name and address of the

applicant, the address and place of business, the type of business, and other information as required for the proper administration of this chapter. Each application for a wholesale or distributor's outlet license must be accompanied by a fee of twenty-five dollars and a surety bond approved by the attorney general. Each application for a dealer's outlet license must be accompanied by a fee of fifteen dollars. A reinstatement fee of fifty dollars is required in addition to the annual license fee for each license renewal applied for after June thirtieth. The total reinstatement fee may not exceed five hundred dollars for any one licensee in any fiscal year. Indicia under this chapter may be sold to and affixed only in North Dakota by licensed distributors. Licensed dealers may sell, buy, or have in their possession only cigarettes upon which indicia were previously affixed. A distributor's license does not authorize the holder to make retail sales. Each license issued must be prominently displayed on the premises covered by the license.

SECTION 3. AMENDMENT. Section 57-36-07 of the North Dakota Century Code is amended and reenacted as follows:

57-36-07. Packaging - Presumption from possession - Stamps to be affixed.

Cigarettes must be packaged and marked with indicia as follows:

1. All cigarettes sold or distributed in this state must be in packages containing twenty or more cigarettes each.
2. Within seventy-two hours of receipt by the licensee, each package of cigarettes, except as otherwise provided in this chapter, must have a securely affixed indicia denoting the tax, and each indicia must be properly canceled prior to sale or removal for consumption, under rules adopted by the tax commissioner.
3. Each package of cigarettes displayed, exhibited, stored, or possessed in original cartons or containers upon the premises where consumer sales are made is conclusively presumed to be for sale to consumers.
- ~~3.~~ 4. All packages of roll-your-own tobacco sold or distributed in this state must be in packages containing at least 0.60 ounces [17 grams] of tobacco.
5. Each package of cigarettes displayed, exhibited, stored, or possessed in original cartons or containers upon the premises where consumer sales are made is conclusively presumed to be for sale to consumers. Each package of cigarettes, except as otherwise provided, must have a securely affixed indicia denoting the

1 tax. Indicia must be canceled as provided in this chapter and possession of any
2 unmarked package of cigarettes is prima facie evidence of a violation of this
3 chapter.

4 **SECTION 4.** Section 57-36-08.1 of the North Dakota Century Code is created and
5 enacted as follows:

6 **57-36-08.1. Indicia prepared by commissioner.** The tax commissioner shall prepare
7 indicia for use on each kind of package under this chapter and keep an accurate record of all
8 indicia received and delivered. The tax commissioner may sell the indicia only to a person
9 holding a distributor's license. Wholesale distributors of cigarettes located outside of this state
10 may apply for a distributor's license as provided in section 57-36-02 and may purchase indicia
11 from the tax commissioner. The indicia must be affixed on cigarettes to be sold in this state
12 and canceled pursuant to the tax commissioner's rules.

13 **SECTION 5. AMENDMENT.** Section 57-36-09 of the North Dakota Century Code is
14 amended and reenacted as follows:

15 **57-36-09. Records to be kept by distributors and reports made - Penalty.**
16 Distributors shall keep records and make reports relating to purchases and sales of cigarettes,
17 cigarette papers, cigars, pipe tobacco, or other tobacco products made by them, and must be
18 punished for failure so to do, as follows:

- 19 1. Each distributor who shall dispose of cigarettes, cigarette papers, cigars, pipe
20 tobacco, or other tobacco products shall keep and preserve for one year all
21 invoices of cigarettes, cigarette papers, cigars, pipe tobacco, or other tobacco
22 products and all receipts issued by the tax commissioner for indicia purchased by
23 the distributor and shall permit the state tax commissioner, and assistants,
24 authorized agents, or representatives of the state tax commissioner, to inspect and
25 examine all taxable merchandise, invoices, receipts, books, papers, and
26 memoranda as may be deemed necessary by the state tax commissioner, and
27 assistants, authorized agents, or representatives of the state tax commissioner in
28 determining whether the indicia required by this chapter have been purchased and
29 used and the amount of the tax as may be yet due. Each person selling or
30 otherwise disposing of cigarettes, cigarette papers, cigars, pipe tobacco, or other
31 tobacco products as a distributor shall keep a record of all sales made within the

state showing the name and address of the purchaser and the date of sale. For sales of other tobacco products, the records must also include the net weight in ounces, as listed by the manufacturer.

2. On or before the fifteenth day of each month, each licensed distributor, on such form as the state tax commissioner shall prescribe, shall report to the tax commissioner all purchases and sales of cigarettes, cigarette papers, cigars, pipe tobacco, or other tobacco products made from or to any persons either within or without this state during the preceding month. For sales of other tobacco products, each licensed distributor shall also report to the tax commissioner the net weight in ounces, as listed by the manufacturer. The tax levied by this chapter is payable monthly and must be remitted to the tax commissioner by each licensed distributor on or before the fifteenth day of the month following the monthly period.

3. Any person failing to file any prescribed form or return or to pay any tax within the time required or permitted by this section is subject to a penalty of five percent of the amount of tax due or five dollars, whichever is greater, plus interest of one percent of the tax per month or fraction of a month of delay except the first month after the return or the tax became due. The tax commissioner, if satisfied that the delay was excusable, may waive all or any part of the penalty. The penalty must be paid to the tax commissioner and disposed of in the same manner as are other receipts under this chapter.

SECTION 6. Section 57-36-10.1 of the North Dakota Century Code is created and enacted as follows:

57-36-10.1. Indicia may be purchased at discount. Any licensed distributor may purchase indicia for taxed cigarettes at a discount. The tax commissioner may allow the discount in the settlement of the account of the wholesale distributor upon the payment to the tax commissioner of any moneys due by reason of the sale, delivery, or consignment to the distributor of the indicia. The discount is computed as a percentage of the face value of the indicia at the following rates:

1. Five percent of the face value for the first one hundred thousand dollars purchased each fiscal year.

2. Four percent of the face value for the next one hundred twenty-five thousand dollars purchased each fiscal year.

3. Three percent of the face value for the next one hundred seventy-five thousand dollars purchased each fiscal year.

4. Two percent of the face value for purchases over four hundred thousand dollars for each fiscal year.

5. The total discount under this section for any distributor may not exceed twenty-five thousand dollars for each fiscal year.

A licensed distributor may purchase indicia for untaxed cigarettes at a cost not to exceed the cost of producing the indicia. A discount is not allowed for the purchase of untaxed cigarette indicia.

SECTION 7. Section 57-36-11.2 of the North Dakota Century Code is created and enacted as follows:

57-36-11.2. Tax meter machines. In lieu of selling indicia, the tax commissioner may authorize any manufacturer or distributor to mark cigarettes with an indicia with a tax meter machine. The tax commissioner may adopt rules for leasing a tax meter machine to any manufacturer or distributor and for supervising the operation of the meter. Meters may not be used to mark untaxed cigarettes. The tax commissioner shall collect and receive the tax prescribed by this chapter on all cigarettes sold in or delivered to dealers in this state for sale, barter, gifts, or any other purpose. Any cigarette marked with a tax meter machine need not have the indicia sold by the tax commissioner affixed and may be possessed and sold by any wholesale or retail dealer in this state. Any manufacturer or distributor marking cigarettes with a tax meter machine under this section is entitled to the discount provided in section 57-36-10.1.

SECTION 8. Section 57-36-12.1 of the North Dakota Century Code is created and enacted as follows:

57-36-12.1. Distributors may not sell indicia. A distributor or wholesale dealer may not resell to any other distributor or dealer any indicia purchased from the tax commissioner. Any distributor who has on hand any unused and canceled indicia at the time of discontinuing the business of selling cigarettes may return such indicia to the tax commissioner and receive ninety-seven percent of the face value of the indicia.

SECTION 9. Section 57-36-13.1 of the North Dakota Century Code is created and enacted as follows:

57-36-13.1. Unlawful to transport cigarettes without indicia. A person may not transport into, receive, carry, or move from place to place in this state any cigarettes without indicia by any means of transportation, except in the course of interstate commerce. Any automobile, truck, boat, airplane, conveyance, vehicle, or other means of transportation in which any cigarettes are transported or carried in violation of this chapter, and any cigarettes and other equipment or personal property used as an incident to such transportation and found in such means of transportation, is subject to seizure by the tax commissioner or by any sheriff or other police officer, with or without process, and is subject to forfeiture as provided in section 57-36-14.

SECTION 10. Section 57-36-13.2 of the North Dakota Century Code is created and enacted as follows:

57-36-13.2. Unfair and deceptive business practices. The advertising, offering for sale, or sale of cigarettes below cost to the retailer or cost to the wholesaler is an unfair and deceptive business practice. It is the policy of the state to promote the public welfare and it is the purpose of this chapter to carry out that policy in the public interest, stabilize the sale of cigarettes, and maximize and protect state revenues from this chapter. For purposes of this section:

1. "Cost to the retailer" means the cost to the wholesaler from whom the cigarettes were purchased by the retailer plus the cost of doing business by the retailer as evidenced by the standards and methods of accounting regularly employed by the retailer in the retailer's determination of costs for income tax reporting purposes for the total operations of the retailer's establishment. Cost of doing business by the retailer includes costs of:
 - a. Labor, including salaries of executives and officers;
 - b. Rent;
 - c. Depreciation;
 - d. Selling;
 - e. Maintenance of equipment;
 - f. Delivery;

- 1 g. Licenses;
2 h. Business taxes;
3 i. Insurance;
4 j. Advertising;
5 k. Any rebates, patronage dividends, or concessions, no matter how defined;
6 l. Expenses prior to opening for business, including costs of startup, land
7 acquisition, construction, marketing studies, and similar expenses;
8 m. Any district, central, regional, and national administrative and operation costs
9 and expenses; and
10 n. All other indirect or overhead costs with respect to the operation of the
11 business of the retailer.

12 The cost of doing business by the retailer must be expressed as a percentage
13 and applied to the cost to the wholesaler from whom the cigarettes were
14 purchased.

15 A retailer who purchases directly from a manufacturer or from any other
16 person at or at less than or about the price normally and usually charged for
17 purchases in wholesale quantities shall, in determining the cost to the retailer, add
18 the cost of doing business by the wholesaler, to the basic cost of cigarettes to the
19 retailer, as well as the cost of doing business by retailer.

20 In the absence of the filing with the commissioner of satisfactory proof of a
21 lesser or higher cost of doing business by the retailer making the sale, the cost of
22 doing business by the retailer is presumed to be eight percent of the cost to the
23 wholesaler.

- 24 2. "Cost to the wholesaler" means the basic cost of cigarettes purchased by the
25 wholesaler from a manufacturer plus the cost of doing business by the wholesaler
26 as evidenced by the standards and methods of accounting regularly employed by
27 the wholesaler in the wholesaler's determination of costs for income tax reporting
28 purposes for the total operation of the wholesaler's business. The cost of doing
29 business by the wholesaler includes costs of:

- 30 a. Labor, including salaries of executives and officers;
31 b. Rent;

- 1 c. Depreciation;
- 2 d. Selling;
- 3 e. Maintenance of equipment;
- 4 f. Delivery;
- 5 g. Licenses;
- 6 h. Business taxes;
- 7 i. Insurance;
- 8 j. Advertising;
- 9 k. Any rebates, patronage dividends, or concessions, no matter how defined;
- 10 l. Expenses prior to opening for business, including costs of startup, land
- 11 acquisition, construction, marketing studies, and similar expenses;
- 12 m. Any district, central, regional, and national administrative and operation costs
- 13 and expenses; and
- 14 n. All other indirect or overhead costs with respect to the operation of the
- 15 wholesaler.

16 The cost of doing business by a wholesaler must be expressed as a
17 percentage and applied to the basic cost of cigarettes.

18 In the absence of the filing with the commissioner of proof that the
19 commissioner declares to be satisfactory of a lesser or higher cost of doing
20 business by the wholesaler making the sale, the cost of doing business by the
21 wholesaler is presumed to be five percent of the basic cost of cigarettes to the
22 wholesaler.

23 **SECTION 11. AMENDMENT.** Section 57-36-18 of the North Dakota Century Code is
24 amended and reenacted as follows:

25 **57-36-18. Tax commissioner to administer chapter.** In administering this chapter,
26 the tax commissioner and agents of the tax commissioner shall exercise the following powers:

- 27 1. The tax commissioner and authorized agents of the tax commissioner shall
- 28 enforce the provisions of this chapter and have the powers of peace officers. They
- 29 may arrest violators of the provisions of this chapter and enter complaint before
- 30 any court of competent jurisdiction, and may seize without formal warrant, and use

as evidence, any forged, counterfeit, spurious, or altered license or indicia found in the possession of any person in violation of this chapter.

2. The tax commissioner may prescribe rules and regulations not inconsistent with the provisions of the chapter for its detailed and efficient administration.

SECTION 12. AMENDMENT. Section 57-36-25.1 of the North Dakota Century Code is amended and reenacted as follows:

57-36-25.1. Deduction to reimburse licensed distributor for administrative expenses.

4. A licensed distributor who pays the tax due under this chapter within the time limitations prescribed may deduct and retain ~~one and one-half~~ three percent of the tax due to reimburse the distributor for expenses incurred in affixing tax indicia to packages of cigarettes, keeping records, preparing and filing returns, collecting and remitting the tax, and supplying information requested by the commissioner.
- ~~2. The total deduction allowed by this section may not exceed one hundred dollars per month for each licensed distributor.~~

SECTION 13. Section 57-36-25.2 of the North Dakota Century Code is created and enacted as follows:

57-36-25.2. Bad debt deduction - Allowable.

1. A licensed distributor may deduct the amount of bad debts from the tax levied under sections 57-36-06 and 57-36-25. The amount deducted must be written off as uncollectible on the books of the licensed distributor. If a person pays all or part of a bad debt with respect to which a licensed distributor claimed a deduction under this section, the licensed distributor is liable for the amount of taxes deducted in connection with that portion of the debt for which payment is received and shall remit these taxes in the distributor's next payment to the state tax commissioner. Any claim for a bad debt deduction under this section must be supported by the following:
 - a. A copy of the original invoice;
 - b. Evidence that the cigarettes and tobacco products described in the invoice were delivered to the person who ordered the products; and

1 c. Evidence that the person who ordered and received the cigarettes and
2 tobacco products did not pay the licensee for the cigarettes and tobacco
3 products and that the licensee used reasonable collection practices in
4 attempting to collect the debt.

5 2. As used in this section, "bad debt" means the taxes attributable to any portion of a
6 debt that is related to a sale of cigarettes and tobacco products subject to tax
7 under sections 57-36-06 and 57-36-25 which is not otherwise deductible or
8 excludable, which has become worthless or uncollectible in the time period
9 between the date when taxes accrue to the state for the licensee's preceding tax
10 return and the date when taxes accrue to the state for the present return, and
11 which is eligible to be claimed, or could be eligible to be claimed if the licensee
12 kept accounts on an accrual basis, as a deduction pursuant to section 166 of the
13 Internal Revenue Code. A bad debt does not include any interest on the
14 wholesale price of a cigarette and tobacco product, uncollectible amounts on
15 property that remain in the possession of the licensee until the full purchase price
16 is paid, expenses incurred in attempting to collect any account receivable or any
17 portion of the debt recovered, any accounts receivable that have been sold to a
18 third party for collection, and repossessed property.

19 **SECTION 14. AMENDMENT.** Section 57-36-33 of the North Dakota Century Code is
20 amended and reenacted as follows:

21 **57-36-33. Penalties for violation of chapter.** Except as otherwise provided in this
22 chapter, ~~any~~:

23 1. Any person who violates any provision of this chapter is guilty of a class A
24 misdemeanor. All cigarettes, cigarette papers, cigars, pipe tobacco, or other
25 tobacco products in the possession of the person or in the place of business of the
26 person must be confiscated and forfeited to the state.

27 2. Any consumer who purchases any package of cigarettes that does not bear the
28 indicia placed on it under this chapter and any person who uses or consumes
29 within this state any cigarette, unless it was taken from a package or container
30 having attached the indicia required by this chapter, is guilty of a class B
31 misdemeanor.

1 **SECTION 15. EFFECTIVE DATE.** This Act is effective for taxable events occurring
2 after July 31, 2003.