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DEPARTMENT OF TAXATION ANNOUNCEMENT NO. 2004-08

RE: Act 157, Session Laws of Hawaii 2004, Relating to Tobacco (Act 157)

On June 30, 2004, the Governor signed S.B. No. 2840, S.D. 2, H.D. 2, C.D. 1 into law as Act 157, which prohibits the distribution of untaxed cigarettes via the telephone, mail order, the Internet, and other on-line sources.

Cigarette tax enforcement continues to pose a challenge to the State. Due to Hawaii's high cost of cigarettes it is only natural that some smokers will gravitate toward any available price advantage that lowers the cost of cigarettes, such as ordering cigarettes over the telephone, mail, Internet, or other online device.

Advertising to Hawaii consumers is done through mailings, newspaper advertisements, and electronic media. Many of these advertisements make false claims regarding the taxability of cigarettes and tobacco products. New technology appears to have created an unfair competitive advantage for unlicensed cigarette and tobacco products distributors located outside of Hawaii. Act 157 is meant to address this issue. Act 157, provides the Department of Taxation (Department) with a mechanism to collect unpaid taxes on cigarettes purchased out of state and shipped to Hawaii.

STATE LAW

Act 157, prohibits the distribution of untaxed cigarettes via the telephone, mail order, the Internet, or other on-line sources. It also revises provisions relating to the seizure and confiscation authority of the Department of the Attorney General.

Effective July 1, 2004, it shall be illegal for a person or an entity engaged in the business of selling cigarettes to ship or cause to be shipped any cigarettes to a person or entity in the State of Hawaii that is <u>not</u>:

- A licensee under Chapter 245, Hawaii Revised Statutes (HRS); or
- 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.

The Act also makes it illegal to ship or cause 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. The container or wrapping must be visibly marked with the word "cigarette."

The aforementioned prohibitions will not apply if any of the following conditions are met:

(1) The cigarettes are exempt from taxes as provided by section 245-3(b), HRS, or are otherwise exempt from the applicability of chapter 245, HRS, as provided by section 245-62, HRS;

(2) All applicable Hawaii taxes on the cigarettes are paid in accordance with the requirements of chapter 245, HRS; 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, a visible and legible notice located on the same side of the shipping container as the address, the following:

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.

The definition of "dealer" was also amended as follows:

> "Dealer" means any person coming into the possession of cigarettes or tobacco products which have not been acquired from an authorized permit holder or licensee under this chapter, 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.

LIST OF AUTHORIZED LICENSEES

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 at http://www.state.hi.us/tax/tobaccolic.html. This list may be updated at any time to add or remove names from the list as necessary. Please contact the Department's Licensing Section at 587-1455, if you have any questions regarding this list.

CRIMINAL SANCTIONS

All cigarettes are subject to the various provisions which make it unlawful to possess, keep, store, retain, transport, sell, or offer to sell, distribute, acquire, hold, own, import, or cause to be imported into the State any cigarettes that do not conform with the requirements of chapter 245, HRS.

The unlawful shipment of cigarettes in violation of this Act is subject to criminal penalties. It is a Class C felony to knowingly ship or cause to be shipped one thousand or more cigarettes in violation of this Act. It is a misdemeanor to knowingly ship or cause to be shipped less than one thousand cigarettes in violation of this Act.

TAX LIABILITY FOR UNPAID TAXES

Act 157 clarifies that 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, HRS, have not been paid, shall be liable for the applicable taxes, plus any penalty and interest as provided for by law.

JENKINS ACT COMPLIANCE

The Jenkins Act[1] requires that any person selling or transferring cigarettes for profit in interstate commerce or who advertises or offers the sale of such cigarettes, must:

1. File a statement with the Department setting forth the person's name or trade name (if any), the address of the principal place of business, and the address of any other place of business; and

2. Not later than the 10th day of each calendar month, file with the Department a memorandum or a copy of the invoice covering each and every shipment of cigarettes made into the State during the previous calendar month.

The memorandum or invoice in each case must include the name and address of the person to whom the shipment was made, the brand, and the quantity.

[1] Chapter 10A (commencing with section 375) of title 15 of the United States Code.

A violation of the Jenkins Act is a federal crime, punishable by a term of imprisonment of not more than 6 months, a fine of not more than $10,000, or both.

Act 157 makes it clear that under State law a person or entity that is required to comply with the Jenkins Act must provide the required information to the Department. Please send the required information to the Department's Licensing Section at P.O. Box 259, Honolulu, Hawaii 96809-0259.

Therefore, a person selling, transferring, advertising, or offering to sell cigarettes through interstate commerce to someone in Hawaii must file a memorandum or copy of the invoice to the Department, unless the cigarettes are shipped to a cigarette wholesaler or dealer licensed by the Department. The memorandum or invoice which is also referred to as the "Jenkins Report" must be filed by the 10th of each month for the prior month's shipments. Failure to do so may result in additional state criminal charges.

If you have made such shipments and have not filed such reports, you should immediately contact the Department at 587-3267.

DEPARTMENT CONTACT INFORMATION

If you have any questions regarding the licensing process or would like to add or remove your name from the list of authorized licensees, please call the Department's Licensing Section at 587-1455. You may also send email inquiries to taxpayer.services@hawaii.gov. Please type "Tobacco License Website" on the subject line of your email.

Current forms and other tax information are available at the Department's website at: www.state.hi.us/tax. If you know which tax form or publication you need, please call the Department's request line at 808-587-7572, or toll-free from the neighbor islands and continental U.S. at 1-800-222-7572. This service is available 24 hours a day, 7 days a week.



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HRS Section Explained: HRS Sections 245-__ (new section), 328L-__ (new section), 245-1, 245-40, and 245-62.