

HOUSE No. 4033

By Mr. Binienda of Worcester, petition of John J. Binienda and others relative to the taxation of cigarettes and other tobacco products. Revenue.

The Commonwealth of Massachusetts

PETITION OF:

John J. Binienda
Joseph F. Wagner

William M. Straus

In the Year Two Thousand and Seven.

1 *Whereas*, the deferred operation of this act would tend to defeat its
2 purpose, which is forthwith to strengthen the collection of the excise
3 on cigarettes and other tobacco products in the Commonwealth, there-
4 fore it is hereby declared to be an emergency law, necessary for the
5 immediate preservation of the public convenience.

AN ACT RELATIVE TO THE TAXATION OF CIGARETTES AND OTHER TOBACCO PRODUCTS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. The General Laws are hereby amended by adding
2 after Chapter 64C the following chapter:—

3 **Chapter 64C½.**
4 **Tobacco Products Excise.**

5 Section 1. Whenever used in this chapter, unless the context shall
6 otherwise require, the following words or terms shall have the
7 following meanings:—

8 “Business”, any trade, occupation, activity or enterprise engaged
9 in for the purpose of selling or distributing cigarettes or tobacco
10 products in the Commonwealth.

11 “Distributor”, any person engaged in the business of producing or
12 manufacturing cigarettes or tobacco products in the Commonwealth
13 for sale in the Commonwealth, any person engaged in the business
14 of selling cigarettes or tobacco products in the Commonwealth who
15 brings, or causes to be brought, into the Commonwealth any ciga-
16 rettes or tobacco products for sale to a retailer, or any person
17 engaged in the business of selling cigarettes or tobacco products
18 who ships or transports tobacco products to retailers for sale in the
19 Commonwealth or any retailer who imports, receives or acquires,
20 from a person other than a licensed distributor, cigarettes or tobacco
21 products for sale within the Commonwealth.

22 “Licensed”, licensed as a manufacturer, wholesaler, vending
23 machine operator, unclassified acquirer, transportation company or
24 retailer pursuant to Section 67 of chapter 62C.

25 “Licensee”, a person licensed as a manufacturer, wholesaler,
26 vending machine operator, unclassified acquirer, transportation com-
27 pany or retailer pursuant to Section 67 of chapter 62C. Whenever
28 used in this chapter, unless the context shall otherwise require, the
29 words “sales” or “sale” in addition to their ordinary meaning shall
30 include or apply to use, gifts, exchanges and barter.

31 “Manufacturer”, (a) any entity which manufactures or otherwise
32 produces cigarettes or causes cigarettes to be manufactured or pro-
33 duced anywhere that such manufacturer intends to be sold in the
34 Commonwealth, including cigarettes intended to be sold in the
35 United States through an importer; (b) the first purchaser anywhere
36 that intends to resell in the United States cigarettes manufactured
37 anywhere that the original manufacturer or maker does not intend to
38 be sold in the United States; or (c) any entity that becomes a suc-
39 cessor of an entity described in clause (a) or clause (b) of this defini-
40 tion.

41 “Person”, any individual, firm, fiduciary, partnership, corporation,
42 trust or association, however formed, club, trustee, agency or
43 receiver.

44 “Place of business”, any place where tobacco products are sold or
45 where tobacco products are brought or kept for the purpose of sale or
46 consumption, including so far as applicable any vessel, vehicle, air-
47 plane, train or cigarette vending machine.

48 “Retailer”, any entity, other than a transportation company but
49 including a manufacturer or wholesaler, who operates a store or con-

50 cession for the purpose of making sales of tobacco products at retail,
51 and any person selling tobacco products through vending machines.

52 “Retail outlet”, a place of business from which tobacco products
53 are sold to consumers. Vending machines shall be considered a retail
54 outlet.

55 “Sale”, in addition to its ordinary meaning, any transfer of title or
56 possession or both, use, gift, exchange, or barter in any manner or by
57 any means whatsoever, for a consideration. “Sale” includes the
58 giving or cigarettes or other tobacco products as samples, prizes, or
59 gifts for advertising by a person engaged in the business of selling
60 tobacco products.

61 “Smokeless tobacco”, snuff, snuff flour and any other tobacco or
62 tobacco product prepared in such manner as to be suitable for
63 chewing, including, but not limited to cavendish, plug and twist
64 tobacco, fine-cut and other chewing tobaccos, shorts, refuse scraps,
65 clippings, cuttings, and sweepings of tobacco.

66 “Stamper”, any person authorized by the commissioner to pur-
67 chase and affix adhesive or meter stamps under this chapter.

68 “Tobacco products”, cigars, cheroots, stogies, periques, granu-
69 lated, plug cut, crimp cut, ready rubbed, and other smoking tobacco.
70 “Tobacco products” also includes smokeless tobacco, as well as
71 other kinds and forms of tobacco, prepared in such manner as to be
72 suitable for chewing or smoking in a pipe or otherwise, or both for
73 chewing and smoking.

74 “Transportation company”, any person operating, or supplying to
75 a common carrier, cars, boats or other vehicles for the transportation
76 or accommodation of passengers and engaged in the sale of tobacco
77 products at retail.

78 “Unclassified acquirer”, any person, other than a transportation
79 company or other than a purchaser at retail from a licensed retailer,
80 who imports or acquires tobacco products from any one other than a
81 licensed manufacturer, a licensed wholesaler or a licensed vending
82 machine operator.

83 “Vending machine operator”, any person other than a manufac-
84 turer or a wholesaler who operates one or more vending machines
85 for the sale of tobacco products at retail and who purchases his
86 tobacco products from a manufacturer or licensed wholesaler.

87 “Wholesaler”, any person who purchases directly from the manu-
88 facturer at least 75 per cent of all tobacco products purchased by him

89 and who sells at least 75 per cent of all tobacco products purchased
90 by him to others for resale, and any other person who purchases
91 from a manufacturer or person so purchasing and selling and
92 licensed as a wholesaler, provided such other person maintains an
93 established place of business where substantially all of the business
94 is the sale of tobacco products and related merchandise at wholesale
95 to licensees and where at all times a substantial stock of tobacco
96 products and related merchandise is available to all retailers for
97 resale; and any chain of stores retailing tobacco products to the con-
98 sumer, provided 75 per cent of its purchases are made direct from
99 the manufacturer.

100 “Wholesale sales price”, the price for which a manufacturer sells
101 tobacco products to a distributor, exclusive of any discount or other
102 reduction.

103 Section 2. (a) Every distributor shall obtain a license from the
104 commissioner of Revenue before engaging in business. A retailer
105 required to be licensed as a distributor pursuant to this chapter must
106 also hold a current retail tobacco license issued under Section 67 of
107 chapter 62C.

108 (b) Every license application must be made on a form prescribed
109 by the commissioner and must state the name and address of the
110 applicant, the address of the applicant’s principal place of business
111 and such other information as the assessor may require for the
112 proper administration of this chapter. A person outside the Common-
113 wealth who ships or transports tobacco products to a retailer in the
114 Commonwealth must make application as a distributor and be
115 granted by the commissioner a license subject to all the provisions of
116 this chapter and agree, upon applying for a license, to submit that
117 person’s books, accounts and records to examination by the bureau
118 during reasonable business hours and to accept service of process by
119 mail when service is made in any proceeding involving enforcement
120 of this chapter.

121 (c) A license issued pursuant to this section expires on June 30th
122 of each year, unless sooner revoked by the commissioner. The
123 license must be prominently displayed on the premises covered by
124 the license and may not be transferred to any other person.

125 (d) The following penalties apply to a violation of this section:—

126 i. A distributor that imports into the Commonwealth any tobacco
127 product without holding a distributor’s license issued by the com-

128 missioner pursuant to his section commits a civil violation for which
129 a fine of not less than \$250 and not more than \$500 must be
130 adjudged.

131 ii. A distributor that violates Section (d)(i) of this section after
132 having been previously adjudicated as violating Section (d)(i) com-
133 mits a civil violation for which a fine of not less than \$500 and not
134 more than \$1,000 must be adjudged for each subsequent violation.

135 iii. A distributor that sells at wholesale or retail, offers for sale at
136 wholesale or retail or possesses with intent to sell at wholesale or
137 retail any tobacco product without holding a distributor's license
138 issued by the commissioner pursuant to this section commits a civil
139 violation for which a fine of not less than \$250 and not more than
140 \$500 must be adjudged.

141 iv. A distributor that violates Section (d)(iii) after having been
142 previously adjudicated as violating Section (d)(iii) commits a civil
143 violation for which a fine of not less than \$500 and not more than
144 \$1,000 must be adjudged for each subsequent violation.

145 (b) The commissioner may revoke or suspend the license of any
146 distributor for failure to comply with any provision of this chapter or
147 if the person no longer imports or sells tobacco products. A person
148 aggrieved by a revocation or suspension may petition the commis-
149 sioner for a hearing as provided in Section 68 of chapter 62C.

150 (c) The commissioner shall maintain a directory of distributors
151 licensed pursuant to this chapter. The commissioner shall update the
152 directory as necessary, but not less than annually. Notwithstanding
153 the provisions of Section 47A of chapter 62C, the list must be avail-
154 able to the public and must be posted on a publicly accessible web-
155 site maintained by the commissioner. The directory must be mailed
156 annually to all retailers at or near the time of renewal of a retail
157 tobacco license issued under Section 67 of chapter 62C.

158 (d) A licensed distributor that does not renew or maintain a
159 license, or that has its license suspended or revoked, shall inform in
160 writing all its accounts in the Commonwealth that it no longer holds
161 a valid license under this section. The licensed distributor shall
162 inform its accounts in the Commonwealth within 10 business days
163 of the event giving rise to such notice. Notwithstanding the provi-
164 sions of Section 47A of chapter 62C, the commissioner may publish
165 the names of distributors that have not renewed or maintained a
166 license or that have had a license suspended or revoked.

167 Section 3. (a) An excise is imposed on all smokeless tobacco,
168 including chewing tobacco and snuff, at the rate of 90 per cent of the
169 wholesale sales price. Of the revenues received pursuant to this
170 section, together with any penalties, forfeitures, interest, cost of suits
171 and fines collected in connection therewith, less all amounts
172 refunded or abated in connection therewith, 27.77 per cent shall be
173 credited to the Children's and Seniors' Health Care Assistance Fund,
174 established pursuant to Section 2FF of chapter 29. An additional
175 27.77 per cent of the revenues received pursuant to this section shall
176 be credited to the Health Protection Fund, established pursuant to
177 Section 2GG of Chapter 29. The balance remaining after crediting
178 the amount required under this subsection (a) shall be credited to the
179 General Fund.

180 (b) An excise is imposed on cigars, pipe tobacco and other
181 tobacco intended for smoking at the rate of 30 per cent of the whole-
182 sale sales price. Of the revenues received pursuant to this section,
183 together with any penalties, forfeitures, interest, cost of suits and
184 fines collected in connection therewith, less all amounts refunded or
185 abated in connection therewith, 50 per cent shall be credited to the
186 Children's and Seniors' Health Care Assistance Fund, established
187 pursuant to Section 2FF of Chapter 29. The balance remaining after
188 crediting the amount required under this subsection (b) shall be cred-
189 ited to the General Fund.

190 (c) The excise is imposed at the time the distributor brings or
191 causes to be brought into the Commonwealth tobacco products that
192 are for sale to consumers or to retailers or for use or at the time
193 tobacco products are manufactured or fabricated in the Common-
194 wealth for sale in the Commonwealth.

195 (d) The excise imposed on tobacco products does not apply to
196 those products exported from the Commonwealth or to any tobacco
197 products which under laws of the United States may not be subject
198 to taxation by the Commonwealth.

199 Section 4. Every distributor subject to the licensing requirement
200 of Section 2 of this Chapter 64C½ shall on or before the last day of
201 each month submit, on a form prescribed and furnished by the com-
202 missioner of Revenue, a report together with payment of the excise
203 due under this chapter stating the quantity and the wholesale sales
204 price of all tobacco products held, purchased, manufactured, brought
205 in or caused to be brought in from outside the Commonwealth or

206 shipped or transported to retailers with the Commonwealth during
207 the preceding calendar month. Every such distributor shall keep a
208 complete and accurate record at its principal place of business to
209 substantiate all receipts of tobacco products.

210 Such monthly reports must contain such further information as
211 the commissioner of Revenue may prescribe and must show a credit
212 for any tobacco products exempted as provided in Section 3 of this
213 Chapter 64C½. Records must be maintained to substantiate the
214 exemption. Tobacco products previously taxed that are returned to a
215 manufacturer because the product has become unfit for use, sale or
216 consumption may be taken as a credit on a subsequent return upon
217 receipt of the credit notice from the original supplier.

218 A person who is not a distributor licensed pursuant to this chapter
219 who imports, receives or otherwise acquires tobacco products for
220 use or consumption in the Commonwealth from a person other than
221 a licensed distributor shall file, on or before the last day of the
222 month following each month in which tobacco products were
223 acquired, a return on a form prescribed by the commissioner
224 together with payment of the excise imposed by this chapter at the
225 rate provided in Section 3 of this Chapter 64C½. The return must
226 report the quantity of tobacco products imported, received or other-
227 wise acquired from a person other than a licensed distributor or
228 retailer during the previous calendar month and additional informa-
229 tion the assessor may require.

230 Section 5. (a) Except as provided in subsections (b) and (c) of this
231 section, only a person licensed pursuant to Section 2 of this chapter
232 64C½ may import tobacco products into the Commonwealth.

233 (b) A manufacturer may transport tobacco products into the Com-
234 monwealth and may transport tobacco products from place to place
235 within the Commonwealth in quantities greater than those excepted
236 in Section (c) of this section for the purpose of marketing and sales
237 if the sale or distribution of those tobacco products is accounted for
238 and the excises are paid by a person licensed pursuant to Section 2
239 of this Chapter 64C½.

240 (c) A person who is not a licensed distributor may transport
241 tobacco products into the Commonwealth and may transport tobacco
242 products from place to place within the Commonwealth for personal
243 use in a quantity not greater than 50 cigars or 1 pound of other
244 tobacco product.

245 (d) The possession by a person who is not licensed pursuant to
246 Section 2 of this Chapter 64C½ of more than 50 cigars or 1 pound of
247 other tobacco product for which the excise imposed by this chapter
248 has not been paid is prima facie evidence of a violation of this
249 section.

250 (e) A person who violates this section commits a misdemeanor.
251 Violation of this section by a person other than a retailer is a strict
252 liability crime. It is an affirmative defense to a prosecution under
253 this section that a retailer, alleged to have imported tobacco products
254 or caused tobacco products to be imported, reasonably relied on
255 licensing information annually mailed to the retailer pursuant to sub-
256 section (f) of Section 2 of this Chapter 64C½ that listed the company
257 from which the retailer obtained tobacco products as being a
258 licensed distributor.

259 Section 6. (a) A distributor may not offer for sale or sell tobacco
260 products if the package containing the tobacco products:—

261 i. Is subject to and does not comply with 15 U.S.C. Section 4401,
262 et seq., for the placement of labels, warnings or any other informa-
263 tion for a package of tobacco products to be sold within the United
264 States and 26 U.S.C. Section 5723;

265 ii. Is labeled “For Export Only,” “U.S. Tax Exempt,” “For Use
266 Outside U.S.” or with other wording indicating that the manufacturer
267 did not intend that the product be sold in the United States;

268 iii. Has been altered by adding or deleting wording, labels or
269 warnings described in paragraphs (i.) and (ii.) of this section

270 iv. Has been imported into the United States in violation of 26
271 U.S.C. Section 5754; or

272 v. In any way violates federal trademark or copyright laws.

273 (b) A distributor may not sell or offer to sell tobacco products to a
274 retailer unless the retailer has provided documentation to the distrib-
275 utor that the retailer holds a current retail tobacco license issued
276 under Section 67 of Chapter 62C.

277 (c) A distributor that sells tobacco products described in subsec-
278 tion (a), with or without having paid the appropriate excise, commits
279 an unfair or deceptive act or practice under Chapter 93A, the Massa-
280 chusetts Regulation of Business Practice and Consumer Protection
281 Act.

282 (d) A distributor that violates this section commits a misde-
283 meanor. Violations of this section constitute a strict liability crime.

284 Section 7. (a) Except as provided in subsection (b), any tobacco
285 products for which the excise imposed by this chapter has not been
286 paid or tobacco products described in subsection (a) of Section 6 of
287 this Chapter 64C½ that are found in the Commonwealth are contra-
288 band goods subject to seizure by and forfeiture to the Common-
289 wealth. A law enforcement officer or a duly authorized agent of the
290 Commissioner pursuant to Section 26 of Chapter 64C may seize
291 contraband tobacco products under the process described in subsec-
292 tion (c).

293 (b) The following tobacco products are not subject to seizure:—

294 i.) Tobacco products in the possession of a licensed distributor or
295 manufacturer for which the excise imposed by this chapter has not
296 been paid;

297 ii.) Tobacco products for which the excise imposed by this
298 chapter has not been paid that are in the course of transit from
299 without the Commonwealth and:—

300 A.) consigned to a licensed distributor; or

301 B.) in transit by common carrier or contract carrier.

302 i.) Tobacco products in a quantity of no more than 50 cigars or 1
303 pound of other tobacco product in the possession of an individual
304 who is not a licensed distributor for which the excise imposed by
305 this chapter has not been paid.

306 Notwithstanding paragraphs (i.), (ii.) and (iii.), tobacco products
307 described in subsection (a) of Section 6 of this Chapter 64C½ are
308 subject to seizure under the process described in subsection (c) of
309 this section, unless the distributor can prove the tobacco products are
310 to be exported out of the country.

311 (b) Contraband tobacco products may be seized by a law enforce-
312 ment officer or a duly authorized agent of the Commissioner pur-
313 suant to Section 26 of chapter 64C who has probable cause to
314 believe that the tobacco products are untaxed or are tobacco prod-
315 ucts described in subsection (a) of Section 6 of this chapter 64C½
316 under the following circumstances:—

317 i.) When the tobacco products are discovered in a place where the
318 law enforcement officer or agent has the lawful right to be in the
319 performance of official duties; or

320 ii.) When the seizure is incident to a search under a valid search
321 warrant or an inspection under a valid administrative inspection war-
322 rant.

323 (b) A petition for forfeiture must be filed as provided in this sub-
324 section.

325 i.) A district attorney or an assistant district attorney, or the
326 Attorney General or an assistant attorney general, may petition the
327 District Court in the name of the Commonwealth in the nature of a
328 proceeding in rem to order the forfeiture of contraband tobacco
329 products.

330 ii.) There may be no discovery other than under the Massachu-
331 setts Rules of Civil Procedure, Rule 36 except by order of the court
332 upon a showing of substantial need. An order permitting discovery
333 must set forth in detail the areas in which substantial need has been
334 shown and the extent to which discovery may take place.

335 iii.) A petition for forfeiture filed pursuant to this section must be
336 accepted by the District Court without the assessment or payment of
337 civil entry or filing fees otherwise provided for by rule of court.

338 (b) Tobacco products subject to forfeiture under this section must
339 be declared forfeited by the District Court having jurisdiction over
340 the tobacco products. Venue is in the location where the contraband
341 tobacco products are seized or in Suffolk County.

342 (c) A proceeding instituted pursuant to this section is an in rem
343 civil action. The Commonwealth has the burden of proving all mate-
344 rial facts by a preponderance of the evidence. The owner of the
345 tobacco products or other person claiming the tobacco products has
346 the burden of proving by a preponderance of the evidence 1 of the
347 exceptions set forth in subsection (b) of this Section 7.

348 (d) At a hearing other than a default proceeding, the court shall
349 hear evidence, make findings of fact, enter conclusions of law and
350 file a final order to which the parties have the right of appeal. When
351 tobacco products are ordered forfeited, the final order must provide
352 for the disposition of the tobacco products by the Commissioner by
353 public auction or by the State Purchasing Agent. Proceeds must be
354 deposited in the General Fund. Tobacco products described in sub-
355 section (a) of Section 6 must be destroyed by the Commissioner in a
356 manner that prevents their reintroduction into the marketplace.

357 (e) Default proceedings must be held in the same manner as
358 default proceedings in other civil actions, except that service of
359 motions and affidavits related to the default proceedings need not be
360 served upon any person who has not answered or otherwise
361 defended in the action under this section.

1 SECTION 2. Section 5A of chapter 64C, as appearing in the 2004
2 Official Edition, is hereby amended by striking out in line 3 the
3 words “and tobacco products”.

1 SECTION 3. Section 6 of said chapter 64C, as so appearing, is
2 hereby amended by striking out the second and last paragraphs,
3 inclusive.

1 SECTION 4. Subsection (a) of Section 7A of said chapter 64C, as
2 so appearing, is hereby amended by striking out the last sentence.

1 SECTION 5. Section 7B of said chapter 64C, as so appearing, is
2 hereby repealed.

1 SECTION 6. Subsection (a) of Section 7C of said chapter 64C, as
2 so appearing, is hereby amended by striking out the last sentence.

1 SECTION 7. Subsection (a) of Section 14 of said chapter 64C, as
2 so appearing, is hereby amended by striking out the last sentence and
3 inserting in place thereof the following:—

4 Any such wholesaler violating this subsection shall be punished
5 by:—

6 (1) a fine of not more than \$10,000 for a first offense and a 7-day
7 suspension of their license to distribute.

8 (2) a fine of not more than \$25,000 and a 14-day suspension of
9 their license to distribute for a second offense.

10 (3) a fine of not more than \$50,000 and revocation of their license
11 to distribute for each subsequent offense.