

◆◆4-9,11 -
 Title 54.
 Subtitle 7A.
 Chapter 40B.
 (Rename)
 Tobacco and
 Vapor Products
 Tax
 C.54:40B-3.3 to
 54:40B-3.9
 ◆12 - Note

(CORRECTED COPY)

P.L. 2019, CHAPTER 147, *approved June 30, 2019*
 Assembly No. 5385 (*Second Reprint*)

AN ACT concerning the sale ¹[and] ¹, ¹ taxation ¹, and forfeiture¹ of container e-liquid, supplementing and amending P.L.1990, c.39 ¹,¹ and amending ¹N.J.S.2C:64-1 and¹ P.L.2018, c.50.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. Section 1 of P.L.1990, c.39 (C.54:40B-1) is amended to read as follows:

1. Sections 1 through 14 of P.L.1990, c.39 (C.54:40B-1 et seq.) shall be known and may be cited as the "Tobacco and **[Nicotine]** Vapor Products **[Wholesale Sales and Use]** Tax Act."
 (cf: P.L.2018, c.50, s.2)

2. Section 2 of P.L.1990, c.39 (C.54:40B-2) is amended to read as follows:

2. As used in sections 2 through 14 and section 20 of P.L.1990, c.39 (C.54:40B-1 et seq.):

"Consumer" means a person except a distributor, manufacturer, or wholesaler who acquires a tobacco product for consumption, storage, or use in this State;

"Container e-liquid" means a container of liquid nicotine or other liquid where the liquid is marketed, sold, or intended for use in an electronic smoking device, but does not include a prefilled cartridge or other container where the cartridge or container is marketed, sold, or intended for use as, or as a part of, an electronic smoking device;

"Director" means the Director of the Division of Taxation in the Department of the Treasury;

"Distributor" means:

a person engaged in the business of selling tobacco products in this State who brings, or causes to be brought into this State from without the State a tobacco product for sale within this State,

a person who makes or manufactures tobacco products in this State for sale in the State,

a person engaged in the business of selling tobacco products without this State who ships or transports tobacco products to a person in this State to be sold to a retail dealer, or

a person who receives tobacco products without receiving proof that the tax has been or will be paid by another distributor;

"Dry snuff" means any finely cut, ground, or powdered smokeless tobacco that is intended to be sniffed through the nasal cavity, but does not include moist snuff;

"Electronic smoking device" means a nonlighted, noncombustible device that may be used to simulate smoking and that employs a mechanical heating element, battery, or circuit, regardless of shape or size, to produce aerosolized or vaporized nicotine or other substance for inhalation into the body of a person, including but not limited to a device that is manufactured, distributed, marketed, or sold as an e-cigarette, e-cigar, e-pipe, e-hookah, vape pen, or any other similar product with any other product name or descriptor;

"Liquid nicotine" means any solution containing nicotine that is designed or sold for use with an electronic smoking device;

"Manufacturer" means a person, wherever resident or located, who manufactures or produces, or causes to be manufactured or produced, a tobacco product and sells, uses, stores, or distributes the product regardless of whether it is intended for sale, use, or distribution within or without this State;

"Moist snuff" means any finely cut, ground, or powdered smokeless tobacco that is intended to be placed or dipped in the oral cavity, but does not include dry snuff;

"Person" means an individual, firm, corporation, copartnership, joint venture, association, receiver, trustee, guardian, executor, administrator, or any other person acting in a fiduciary capacity, or an estate, trust, or group or combination acting as a unit, the State Government and any political subdivision thereof, and the plural as well as the singular, unless the intention to give a more limited meaning is disclosed by the context;

"Place of business" means a place where a tobacco product is sold or where a tobacco product is brought or kept for the purpose of sale or consumption, including so far as may be applicable a vessel, vehicle, airplane, train or vending machine;

"Retail dealer" means a person who is engaged in this State in the business of selling any tobacco product at retail. A person placing a tobacco product vending machine at, or on any premises shall be deemed to be a retail dealer for each vending machine;

"Sale" means any sale, transfer, exchange, barter, or gift, in any manner or by any means whatsoever;

"Tobacco product" means any product containing, made, or derived from any tobacco, nicotine, or other chemicals or substances for consumption by a person, including, but not limited to, cigars, little cigars, cigarillos, chewing tobacco, pipe tobacco, smoking tobacco and their substitutes, dry and moist snuff, and liquid nicotine, but does not include cigarette as defined in section 102 of the "Cigarette Tax Act," P.L.1948, c.65 (C.54:40A-1 et seq.);

"Treasurer" means the State Treasurer;

"Use" means the exercise of any right or power incidental to the ownership of a tobacco product, including a sale at retail;

"Vapor business" means a retail business where more than 50 percent of its retail sales are derived from electronic smoking devices, related accessories, and liquid nicotine, but does not include a retail business that does not sell container e-liquid;

"Wholesale price" means the actual price for which a manufacturer sells tobacco products to a distributor; and

"Wholesaler" means a person, wherever resident or located, other than a distributor as defined herein, who:

a. purchases tobacco products from any other person who purchases from the manufacturer and who acquires tobacco products solely for the purpose of bona fide resale to retail dealers or to other persons for the purposes of resale only; or

b. services retail outlets by the maintenance of an established place of business for the purchase of tobacco products including, but not limited to, the maintenance of warehousing facilities for the storage and distribution of tobacco products.

(cf: P.L.2018, c.50, s.3)

3. Section 5 of P.L.2018, c.50 (C.54:40B-3.2) is amended to read as follows:

5. a. There is imposed a tax upon the sale, use, or distribution of liquid nicotine within this State by a distributor or wholesaler to a retail dealer or consumer at the rate of \$0.10 per fluid milliliter on the volume of

the liquid nicotine as listed by the manufacturer, and a proportionate rate on all fractional parts of a fluid milliliter of volume of liquid nicotine as listed by the manufacturer.

b. Unless liquid nicotine has already been or will be subject to the tax imposed in subsection a. of this section, if a distributor or wholesaler uses the liquid nicotine within the State, there is imposed upon the distributor or wholesaler a compensating use tax of \$0.10 per fluid milliliter of the volume of liquid nicotine as listed by the manufacturer, and a proportionate rate on all fractional parts of a fluid milliliter of the volume of liquid nicotine as listed by the manufacturer.

c. Unless a tax is due pursuant to subsection b. of this section, if a distributor or wholesaler has not paid the tax imposed in subsection a. of this section upon a sale that is subject to the tax imposed in that subsection a., there is imposed upon the retail dealer or consumer chargeable for the sale a compensating use tax of \$0.10 per fluid milliliter on the volume of the liquid nicotine as listed by the manufacturer, and a proportionate rate on all fractional parts of a fluid milliliter of the volume of liquid nicotine as listed by the manufacturer, which shall be collected in the manner provided in subsection b. of section 5 of P.L.1990, c.39 (C.54:40B-5).

d. The tax imposed pursuant to this section shall not apply to the ¹[retail]¹ sale ¹, use, or distribution¹ of container e-liquid.

(cf: P.L.2018, c.50, s.5)

4. (New Section) a. After the effective date of P.L. , c. (C.)(pending before the Legislature as this bill), container e-liquid shall not be sold at retail in the State except by a licensed vapor business.

b. ¹[A vapor business operating in the State shall be required to be licensed as such. The director shall make rules and regulations respecting applications to be licensed as a vapor business in the State. For each license issued to a vapor business the vapor business shall pay to the director a fee of \$50 annually.] Vapor business licenses shall be issued by the director, who shall make rules and regulations respecting application and issuance. Each such license shall lapse on March 31 of the period for which it is issued, and each such license shall be continued annually upon the conditions that the licensee shall have paid the required fee and complied with the provisions of P.L. , c. (C.)(pending before the Legislature as this bill) and the rules and regulations of the director made pursuant thereto.

If a vapor business sells or intends to sell container e-liquid at two or more places of business, whether established or temporary, or whether in the same building or not, a separate license shall be required for each place of business. Each license, or certificate thereof, and such other evidence of license shall be exhibited in the place of business for which it is issued and in such manner as may be prescribed by the director.

No license shall be issued to any person except upon the payment of a \$50 fee. No license shall be assignable or transferable, but in the case of death, bankruptcy, receivership, or incompetency of the licensee, or if, for any other reason whatsoever, the business of the licensee shall devolve upon another by operation of law, the director may, in the director's discretion, extend said license for a limited time to the executor, administrator, trustee, receiver, or person upon whom the same has devolved.

The director shall require an applicant for a vapor business license, to include on the application the address of the place of business where the container e-liquid will be sold. If the place of business is moved to a different address than that provided on the license application, the licensee shall notify the director within 30 days of the change of address.

c. The director may, upon notice and after hearing, suspend or revoke the license or all licenses under this section issued to any person who violates any of the provisions of P.L. , c. (C.)(pending before the Legislature as this bill), or who, after being issued a license becomes disqualified for licensure pursuant to P.L. , c. (C.)(pending before the Legislature as this bill) or of any rule or regulation of the director made pursuant thereto or if the licensee has ceased to act in the capacity for which the license was issued or for other good cause. No person whose license has been suspended or revoked shall sell container e-liquid or permit container e-liquid to be sold during the period of such suspension or revocation on the premises occupied by that person or upon other premises controlled by that person or others, or in any other manner or form whatever. No disciplinary proceeding or action shall be barred or abated by the expiration, transfer, surrender, continuance,

renewal, or extension of a license issued under the provisions of P.L. , c. (C.)(pending before the Legislature as this bill).¹

5. (New Section) a. There is imposed a tax at the rate of 10 percent of the listed retail sale price of container e-liquid sold within the State.

b. The tax imposed pursuant to this section shall be collected by the seller.

c. The seller shall be personally liable for the tax required to be collected pursuant to this section.

d. The director shall prescribe the manner and method that the tax shall be payable. The director may require such information and records necessary for administration of the tax, including for the purpose of consistent administration with other provisions of the "Tobacco and Vapor Products Tax Act," P.L.1990, c.39 (C.54:40B-1 et seq.).

¹6. (New Section) a. The director is authorized to administer and enforce the provisions of P.L. , c. (C.) (pending before the Legislature as this bill) and in accordance with the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), to adopt rules and regulations as the director deems necessary.

b. Every vapor business shall keep complete and accurate records of all sales. The kind and form of such records may be prescribed by the director and all records shall be so kept as to be adequate to enable the director to determine the tax required to be collected. The director or any authorized assistant may, during reasonable business hours and without prior notice, make or cause to be made physical inventories and examinations of all container e-liquid and records in the possession of a vapor business. All such records shall be safely preserved for a period of four years in such a manner to ensure their security and accessibility for inspection by the director, supervisor, or any authorized assistant engaged in the administration of P.L. , c. (C.)(pending before the Legislature as this bill). The director may consent to the destruction of any such records at any time within the four-year period.¹

¹7. (New Section) a. Any person who engages in any business or activity for which a license is required under the provisions of P.L. , c. (C.)(pending before the Legislature as this bill), without first having obtained a license to do so, or who, having had such a license, shall continue to engage in or conduct such business after any such license shall have been revoked, or during a suspension thereof, shall be liable to a penalty of not more than \$1,000, which penalty shall be sued for, and shall be recoverable in the name of the director; and each day that any such business is so engaged in or conducted shall be deemed a separate offense.

b. The Superior Court and every municipal court within their respective jurisdictions, and with respect to offenses occurring within the territorial jurisdiction of the court, shall have jurisdiction over proceedings to enforce and collect the penalty. The proceedings shall be brought by and in the name of the director. They shall be summary and in accordance with the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.). Process shall be either in the nature of a summons or warrant.

If judgment be rendered for the plaintiff, the court shall cause any defendant who refuses or fails to pay forthwith the amount of the judgment rendered against the defendant and all costs and charges incident thereto, to be committed to the county jail for such period as the court shall determine, not exceeding 60 days.

c. In case a person shall, after conviction of any violation of P.L. , c. (C.) (pending before the Legislature as this bill), be again convicted of violating the same provision thereof, the person may be liable to a penalty for such further violation, in double the maximum penalty which might have been imposed on the first conviction, to be sued for and recovered in the manner above set forth. In case any defendant against whom judgment has been rendered for a money penalty under this subsection, shall fail or neglect to pay forthwith the amount of said penalty, the court shall commit him to jail for such number of days not exceeding 180 days, as the court shall determine.

d. All penalties recovered for violations of this act shall be paid to the director and by the director accounted for and paid to the State Treasurer as in the case of State taxes.

e. The costs recoverable in any such proceeding shall be recovered by the director in the event of judgment in the director's favor. If the judgment be for the defendant it shall be without costs against the director. All

expenses incident to the recovery of any penalty pursuant to the provisions of this section shall be paid for as any other expense incident to the administration of P.L. , c. (C.)(pending before the Legislature as this bill).¹

¹18. (New section) a. Every vapor business required to collect tax under P.L. , c. (C.)(pending before the Legislature as this bill) shall on or before the 20th day of each month, make and file a return for the preceding month with the director. The return shall show the total receipts from sales of container e-liquid and the amount of tax required to be collected and paid with respect to such amount.

b. The director may permit or require returns to be made covering other periods and upon such dates as the director may specify. In addition, the director may require payments of tax liability at such intervals and based upon such classifications as the director may designate. In prescribing other periods to be covered by the return or intervals or classifications for payment of tax liability, the director may take into account the dollar volume of tax involved as well as the need for ensuring the prompt and orderly collection of the taxes imposed.

c. The form of returns shall be prescribed by the director and shall contain such information as the director may deem necessary for the proper administration of this act. The director may require amended returns to be filed within 20 days after notice and to contain the information specified in the notice.¹

¹19. (New section) a. All container e-liquid possessed for retail sale by a person that is not licensed as a vapor business pursuant to section 4 of P.L. , c. (C.)(pending before the Legislature as this bill) are declared to be prima facie contraband goods and may be seized by the director, the director's agents or employees, or by any peace officer of this State, when so ordered by the director, without a warrant.

b. The director may direct the return of any unlawfully possessed container e-liquid upon reasonable belief that the owner has not willfully or intentionally evaded any licensing requirement imposed by P.L. , c. (C.)(pending before the Legislature as this bill).

c. The director may authorize the use for law enforcement purposes the use of any container e-liquid forfeited in accordance with this section.

d. The seizure of any unlawfully possessed container e-liquid shall not relieve any person from a fine, imprisonment or other penalty for violation of any of the provisions of P.L. , c. (C.)(pending before the Legislature as this bill). The director, the director's agents, employees, and any peace officer of this State, when directed so to do, shall not in any way be responsible in any court for the seizure or the confiscation of any unlawfully possessed container e-liquid.¹

¹10. N.J.S.2C:64-1 is amended to read as follows:

2C:64-1. Property Subject to Forfeiture.

a. Any interest in the following shall be subject to forfeiture and no property right shall exist in them:

(1) Controlled dangerous substances, firearms which are unlawfully possessed, carried, acquired or used, illegally possessed gambling devices, untaxed or otherwise contraband cigarettes or tobacco products, unlawfully possessed container e-liquid, untaxed special fuel, unlawful sound recordings and audiovisual works and items bearing a counterfeit mark. These shall be designated prima facie contraband.

(2) All property which has been, or is intended to be, utilized in furtherance of an unlawful activity, including, but not limited to, conveyances intended to facilitate the perpetration of illegal acts, or buildings or premises maintained for the purpose of committing offenses against the State.

(3) Property which has become or is intended to become an integral part of illegal activity, including, but not limited to, money which is earmarked for use as financing for an illegal gambling enterprise.

(4) Proceeds of illegal activities, including, but not limited to, property or money obtained as a result of the sale of prima facie contraband as defined by subsection a. (1), proceeds of illegal gambling, prostitution, bribery and extortion.

b. Any article subject to forfeiture under this chapter may be seized by the State or any law enforcement officer as evidence pending a criminal prosecution pursuant to section 2C:64-4 or, when no criminal proceeding is instituted, upon process issued by any court of competent jurisdiction over the property, except that seizure

without such process may be made when not inconsistent with the Constitution of this State or the United States, and when

(1) The article is prima facie contraband; or

(2) The property subject to seizure poses an immediate threat to the public health, safety or welfare.

c. For the purposes of this section:

"Items bearing a counterfeit mark" means items bearing a counterfeit mark as defined in N.J.S.2C:21-32.

"Unlawful sound recordings and audiovisual works" means sound recordings and audiovisual works as those terms are defined in N.J.S.2C:21-21 which were produced in violation of N.J.S.2C:21-21.

"Unlawfully possessed container e-liquid" means container e-liquid as defined in section 2 of P.L.1990, c.39 (C.54:40B-2) that is possessed for retail sale by a person that is not licensed as a vapor business pursuant to section 4 of P.L. , c. (C.)(pending before the Legislature as this bill).

"Untaxed special fuel" means diesel fuel, No. 2 fuel oil and kerosene on which the motor fuel tax imposed pursuant to R.S.54:39-1 et seq. is not paid that is delivered, possessed, sold or transferred in this State in a manner not authorized pursuant to R.S.54:39-1 et seq. or P.L.1938, c.163 (C.56:6-1 et seq.).¹

(cf: P.L.2011, c.80, s.4)

²11. In addition to the license required by section 4 of P.L. , c. (C.)(pending before the Legislature as this bill), a municipality may adopt an ordinance concerning the licensure and regulation of a vapor business. Nothing in P.L. , c. (C.)(pending before the Legislature as this bill) shall be construed to preempt the provisions of any existing or new municipal ordinance concerning the licensure and regulation of a vapor business.²

¹[6.] ²[^{11.1}] ^{12.}² This act shall take effect ¹[60 days] on the first day of the fifth month¹ following enactment, but the director may take anticipatory administrative action necessary to implement this act.

Concerns sale, taxation, and forfeiture of container e-liquid.