

# MAINE STATE LEGISLATURE

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# 122nd MAINE LEGISLATURE

## SECOND REGULAR SESSION-2006

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Legislative Document

No. 2093

H.P. 1485

House of Representatives, March 28, 2006

### **An Act To Strengthen the Collection of the Tax on Tobacco Products**

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Reference to the Committee on Taxation suggested and ordered printed.

*Millicent M. MacFarland*  
MILLICENT M. MacFARLAND  
Clerk

Presented by Representative CUMMINGS of Portland. (GOVERNOR'S BILL)

Be it enacted by the People of the State of Maine as follows:

2  
4       **Sec. 1. 36 MRSA §4401, sub-§2**, as enacted by PL 1985, c. 783, §16, is amended to read:

6       **2. Distributor.** "Distributor" means any person engaged in  
8       the business of producing or manufacturing tobacco products in  
10       this State for sale in this State, any person engaged in the  
12       business of selling tobacco products in this State who brings, or  
14       causes to be brought, into this State any tobacco products for  
16       sale to a retailer or any person engaged in the business of  
18       selling tobacco products who ships or transports tobacco products  
20       to retailers for sale in this State or any retailer who imports,  
22       receives or acquires, from a person other than a licensed  
24       distributor, tobacco products for sale within the State.

16       **Sec. 2. 36 MRSA §4401, sub-§7**, as enacted by PL 1985, c. 783,  
18       §16, is amended to read:

20       **7. Sale.** "Sale" means any transfer, exchange, barter or  
22       gift in any manner or by any means whatsoever, for a  
24       consideration. ~~It--shall--include~~ "Sale" includes a gift for  
advertising by a person engaged in the business of selling  
tobacco products.

26       **Sec. 3. 36 MRSA §4401, sub-§8**, as enacted by PL 1985, c. 783,  
28       §16, is repealed.

30       **Sec. 4. 36 MRSA §4401, sub-§9**, as enacted by PL 1985, c. 783,  
§16, is amended to read:

32       **9. Tobacco products.** "Tobacco products" means cigars;  
34       cheroots; stogies; ~~periques~~ periques, granulated, plug cut,  
36       crimp cut, ready rubbed, and other smoking tobacco; snuff; snuff  
38       flour; cavendish; plug and twist tobacco; finecut and other  
40       chewing tobaccos; shorts; refuse scraps, clippings, cuttings and  
42       sweepings of tobacco; and other kinds and forms of tobacco,  
prepared in such manner as to be suitable for chewing or smoking  
in a pipe or otherwise, or both for chewing and smoking; but  
~~shall does~~ not include tobacco products ~~which~~ that are subject to  
the tax provided by chapter 703.

44       **Sec. 5. 36 MRSA §4401, sub-§10**, as enacted by PL 1985, c. 783,  
§16, is repealed.

46       **Sec. 6. 36 MRSA §4401, sub-§11**, as enacted by PL 1985, c. 783,  
48       §16, is amended to read:

50       **11. Wholesale sales price.** "Wholesale sales price" means  
the established price for which a manufacturer sells tobacco

2 products to a distributor, exclusive of any discount or other  
reduction.

4 **Sec. 7. 36 MRSA §4402**, as amended by PL 2003, c. 439, §4, is  
repealed and the following enacted in its place:

6 **§4402. Licenses**

8  
10 1. Generally. Every distributor shall obtain a license  
12 from the State Tax Assessor before engaging in business. A  
14 retailer required to be licensed as a distributor pursuant to  
this chapter must also hold a current retail tobacco license  
issued under Title 22, section 1551-A.

16 2. Applications; forms. Every license application must be  
18 made on a form prescribed by the assessor and must state the name  
20 and address of the applicant, the address of the applicant's  
22 principal place of business and such other information as the  
24 assessor may require for the proper administration of this  
26 chapter. A person outside the State who ships or transports  
28 tobacco products to a retailer in this State must make  
application as a distributor and be granted by the assessor a  
license subject to all the provisions of this chapter and agree,  
upon applying for a license, to submit that person's books,  
accounts and records to examination by the bureau during  
reasonable business hours and to accept service of process by  
mail when service is made in any proceeding involving enforcement  
of this chapter.

30 3. Expiration and reissuance. A license issued pursuant to  
32 this section expires on June 30th of each year unless sooner  
34 revoked by the assessor. The license must be prominently  
displayed on the premises covered by the license and may not be  
transferred to any other person.

36 4. Penalties. The following penalties apply to a violation  
38 of this section.

40 A. A distributor that imports into this State any tobacco  
42 product without holding a distributor's license issued by  
44 the assessor pursuant to this section commits a civil  
violation for which a fine of not less than \$250 and not  
more than \$500 must be adjudged.

46 B. A distributor that violates paragraph A after having  
48 been previously adjudicated as violating paragraph A commits  
a civil violation for which a fine of not less than \$500 and  
not more than \$1,000 must be adjudged for each subsequent  
violation.

2 C. A distributor that sells at wholesale or retail, offers  
3 for sale at wholesale or retail or possesses with intent to  
4 sell at wholesale or retail any tobacco product without  
5 holding a distributor's license issued by the assessor  
6 pursuant to this section commits a civil violation for which  
7 a fine of not less than \$250 and not more than \$500 must be  
8 adjudged.

9  
10 D. A distributor that violates paragraph C after having  
11 been previously adjudicated as violating paragraph C commits  
12 a civil violation for which a fine of not less than \$500 and  
13 not more than \$1,000 must be adjudged for each subsequent  
14 violation.

15  
16 5. Revocation or suspension. The assessor may revoke or  
17 suspend the license of any distributor for failure to comply with  
18 any provision of this chapter or if the person no longer imports  
19 or sells tobacco products. A person aggrieved by a revocation or  
20 suspension may petition the assessor for a hearing as provided in  
21 section 151.

22 6. License directory maintained. The assessor shall  
23 maintain a directory of distributors licensed pursuant to this  
24 chapter. The assessor shall update the directory as necessary,  
25 but not less than annually. Notwithstanding the provisions of  
26 section 191, the list must be available to the public and must be  
27 posted on a publicly accessible website maintained by the  
28 assessor. The directory must be mailed annually to all retailers  
29 at or near the time of renewal of a retail tobacco license issued  
30 under Title 22, section 1551-A.

31  
32 7. Notification. A licensed distributor that does not  
33 renew or maintain a license, or that has its license suspended or  
34 revoked, shall inform in writing all its accounts in this State  
35 that it no longer holds a valid license under this section. The  
36 licensed distributor shall inform its accounts in this State  
37 within 10 business days of the event giving rise to such notice.  
38 Notwithstanding the provisions of section 191, the assessor may  
39 publish the names of distributors that have not renewed or  
40 maintained a license or that have had a license suspended or  
41 revoked.

42  
43 **Sec. 8. 36 MRSA §4403, sub-§§1 and 2, as amended by PL 2005, c.**  
44 **457, Pt. AA, §6 and affected by §8, are further amended to read:**

45  
46 **1. Smokeless tobacco. A tax is imposed on all smokeless**  
47 **tobacco, including chewing tobacco and snuff, at the rate of 78%**  
48 **of the wholesale sales price beginning October 1, 2005.**

2           **2. Other tobacco.** A tax is imposed on cigars, pipe tobacco  
and other tobacco intended for smoking at the rate of 20% of the  
wholesale sales price beginning October 1, 2005.

4           **Sec. 9. 36 MRSA §4403, sub-§3,** as amended by PL 2001, c. 382,  
§2, is further amended to read:

8           **3. Imposition.** The tax is imposed at the time the  
distributor,~~retailer or unclassified importer~~ brings or causes  
to be brought into this State tobacco products that are for sale  
to consumers or to retailers or for use or at the time tobacco  
products are manufactured or fabricated in this State for sale in  
this State.

14           **Sec. 10. 36 MRSA §4404,** as amended by PL 2001, c. 382, §3, is  
further amended to read:

18           **§4404. Returns; payment of tax and penalty**

20           Every distributor,~~retailer and unclassified importer~~  
subject to the licensing requirement of section 4402 shall on or  
before the last day of each month submit, on a form prescribed  
and furnished by the State Tax Assessor, a report together with  
payment of the tax due under this chapter stating the quantity  
and the wholesale sale sales price of all tobacco products held,  
purchased, manufactured, brought in or caused to be brought in  
from outside the State or shipped or transported to retailers  
within the State during the preceding calendar month. Every such  
distributor,~~retailer and unclassified importer~~ shall keep a  
complete and accurate record at its principal place of business  
to substantiate all receipts of tobacco products.

32           Such monthly reports must contain such further information  
as the State Tax Assessor may prescribe and must show a credit  
for any tobacco products exempted as provided in section 4403.  
Records must be maintained to substantiate the exemption.  
Tobacco products previously taxed that are returned to a  
manufacturer because the product has become unfit for use, sale  
or consumption may be taken as a credit on a subsequent return  
upon receipt of the credit notice from the original supplier.

42           A person who is not a distributor licensed pursuant to this  
chapter who imports, receives or otherwise acquires tobacco  
products for use or consumption in the State from a person other  
than a licensed distributor shall file, on or before the last day  
of the month following each month in which tobacco products were  
acquired, a return on a form prescribed by the assessor together  
with payment of the tax imposed by this chapter at the rate  
provided in section 4403. The return must report the quantity of  
tobacco products imported, received or otherwise acquired from a

2 person other than a licensed distributor or retailer during the  
3 previous calendar month and additional information the assessor  
4 may require.

5 **Sec. 11. 36 MRSA §§4404-A, 4404-B and 4404-C** are enacted to  
6 read:

7 **§4404-A. Importation of tobacco products**

8  
9  
10 **1. Generally.** Except as provided in subsections 2 and 3,  
11 only a person licensed pursuant to section 4402 may import  
12 tobacco products into this State.

13  
14 **2. Manufacturers.** A manufacturer may transport tobacco  
15 products into this State and may transport tobacco products from  
16 place to place within this State in quantities greater than those  
17 excepted in section 3 for the purpose of marketing and sales if  
18 the sale or distribution of those tobacco products is accounted  
19 for and the taxes are paid by a person licensed pursuant to  
20 section 4402.

21  
22 **3. Exception for personal use.** A person who is not a  
23 licensed distributor may transport tobacco products into this  
24 State and may transport tobacco products from place to place  
25 within this State for personal use in a quantity not greater than  
26 50 cigars or one pound of other tobacco product.

27  
28 **4. Evidence.** The possession by a person who is not  
29 licensed pursuant to section 4402 of more than 50 cigars or one  
30 pound of other tobacco product for which the tax imposed by this  
31 chapter has not been paid is prima facie evidence of a violation  
32 of this section.

33  
34 **5. Penalties.** The following penalties apply to violations  
35 of this section.

36  
37 **A.** A person who violates this section commits a Class E  
38 crime.

39  
40 **B.** A person who violates this section when the person has  
41 one or more prior convictions for violation of this section  
42 commits a Class D crime. Title 17-A, section 9-A governs the  
43 use of prior convictions when determining a sentence.

44  
45 Violation of this section by a person other than a retailer  
46 is a strict liability crime as defined in Title 17-A, section 34,  
47 subsection 4-A. It is an affirmative defense to a prosecution  
48 under this section that a retailer, alleged to have imported  
49 tobacco products or caused tobacco products to be imported,  
50 reasonably relied on licensing information annually mailed to the

2 retailer pursuant to section 4402, subsection 6 that listed the  
3 company from which the retailer obtained tobacco products as  
4 being a licensed distributor.

6 **§4404-B. Sales of tobacco products in contravention of law**

8 **1. Tobacco products.** A distributor may not offer for sale  
9 or sell tobacco products if the package containing the tobacco  
10 products:

12 A. Is subject to and does not comply with 15 United States  
13 Code, Section 4401, et seq., for the placement of labels,  
14 warnings or any other information for a package of tobacco  
15 products to be sold within the United States and 26 United  
16 States Code, Section 5723;

18 B. Is labeled "For Export Only," "U.S. Tax Exempt," "For Use  
19 Outside U.S." or with other wording indicating that the  
20 manufacturer did not intend that the product be sold in the  
21 United States;

22 C. Has been altered by adding or deleting wording, labels or  
23 warnings described in paragraphs A and B;

24 D. Has been imported into the United States in violation of  
25 26 United States Code, Section 5754; or

26 E. In any way violates federal trademark or copyright laws.

28 **2. Shipment only to licensed retailers.** A distributor may  
29 not sell or offer to sell tobacco products to a retailer unless  
30 the retailer has provided documentation to the distributor that  
31 the retailer holds a current retail tobacco license issued under  
32 Title 22, section 1551-A.

34 **3. Deceptive practice.** A distributor that sells tobacco  
35 products described in subsection 1, with or without having paid  
36 the appropriate tax, commits an unfair or deceptive act or  
37 practice under the Maine Unfair Trade Practices Act.

38 **4. Penalties.** The following penalties apply to violations  
39 of this section.

40 A. A distributor that violates this section commits a Class  
41 E crime.

42 B. A distributor that violates this section when the  
43 distributor has one or more prior convictions for violation  
44 of this section commits a Class D crime. Title 17-A, section



2        9-A governs the use of prior convictions when determining a  
3        sentence.

4        Violation of this section is a strict liability crime as  
5        defined in Title 17-A, section 34, subsection 4-A.

6        **§4404-C. Seizure and forfeiture of contraband tobacco products**

7        **1. Generally.** Except as provided in subsection 2, any  
8        tobacco products for which the tax imposed by this chapter has  
9        not been paid or tobacco products described in section 4404-B,  
10       subsection 1 that are found in this State are contraband goods  
11       subject to seizure by and forfeiture to the State. A law  
12       enforcement officer, including a contract officer pursuant to  
13       Title 22, section 1556-A, and a duly authorized agent of the  
14       State Tax Assessor may seize contraband tobacco products under  
15       the process described in subsection 3.

16       **2. Exceptions.** The following tobacco products are not  
17       subject to seizure:

18       A. Tobacco products in the possession of a licensed  
19       distributor or manufacturer for which the tax imposed by  
20       this chapter has not been paid;

21       B. Tobacco products in the course of transit from without  
22       the State and consigned to a licensed distributor for which  
23       the tax imposed by this chapter has not been paid; and

24       C. Tobacco products in a quantity of no more than 50 cigars  
25       or one pound of other tobacco product in the possession of  
26       an individual who is not a licensed distributor for which  
27       the tax imposed by this chapter has not been paid.

28       Notwithstanding paragraphs A, B and C, tobacco products described  
29       in section 4404-B, subsection 1 are subject to seizure under the  
30       process described in subsection 3 unless the distributor can  
31       prove the tobacco products are to be exported out of the country.

32       **3. Procedure for seizure.** Contraband tobacco products may  
33       be seized by a law enforcement officer or duly authorized agent  
34       of the assessor who has probable cause to believe that the  
35       tobacco products are untaxed or are tobacco products described in  
36       section 4404-B, subsection 1 under the following circumstances:

37       A. When the tobacco products are discovered in a place  
38       where the law enforcement officer or agent has the lawful  
39       right to be in the performance of official duties; or

2        B. When the seizure is incident to a search under a valid  
3        search warrant or an inspection under a valid administrative  
4        inspection warrant.

5        4. Procedure for forfeiture. A petition for forfeiture  
6        must be filed as provided in this subsection.

7        A. A district attorney or an assistant district attorney,  
8        or the Attorney General or an assistant attorney general,  
9        may petition the District Court in the name of the State in  
10       the nature of a proceeding in rem to order the forfeiture of  
11       contraband tobacco products.

12       B. There may be no discovery other than under the Maine  
13       Rules of Civil Procedure, Rule 36 except by order of the  
14       court upon a showing of substantial need. An order  
15       permitting discovery must set forth in detail the areas in  
16       which substantial need has been shown and the extent to  
17       which discovery may take place.

18       C. A petition for forfeiture filed pursuant to this section  
19       must be accepted by the District Court without the  
20       assessment or payment of civil entry or filing fees  
21       otherwise provided for by rule of court.

22       5. Jurisdiction and venue. Tobacco products subject to  
23       forfeiture under this section must be declared forfeited by the  
24       District Court having jurisdiction over the tobacco products.  
25       Venue is in the location where the contraband tobacco products  
26       are seized or in Kennebec County.

27       6. Type of action; burden of proof. A proceeding  
28       instituted pursuant to this section is an in rem civil action.  
29       The State has the burden of proving all material facts by a  
30       preponderance of the evidence. The owner of the tobacco products  
31       or other person claiming the tobacco products has the burden of  
32       proving by a preponderance of the evidence one of the exceptions  
33       set forth in subsection 2.

34       7. Hearings; disposition; deposit of funds. At a hearing  
35       other than a default proceeding, the court shall hear evidence,  
36       make findings of fact, enter conclusions of law and file a final  
37       order to which the parties have the right of appeal. When tobacco  
38       products are ordered forfeited, the final order must provide for  
39       the disposition of the tobacco products by the assessor by public  
40       auction or by the State Purchasing Agent. Proceeds must be  
41       deposited in the General Fund. Tobacco products described in  
42       section 4404-B, subsection 1 must be destroyed by the assessor in  
43       a manner that prevents their reintroduction into the marketplace.  
44         
45         
46         
47         
48         
49         
50

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

## SUMMARY

This bill strengthens the ability of the State to enforce the collection of the tax on tobacco products. The bill also permits the seizure and forfeiture of contraband tobacco products within the State. The bill also strengthens and clarifies the penalties for distributing or selling tobacco products in contravention of the law.