

By: Thierry

H.B. No. 4353

A BILL TO BE ENTITLED

AN ACT

relating to taxes on e-cigarettes and alternative nicotine products; imposing taxes; imposing reporting and recordkeeping requirements.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subtitle E, Title 2, Tax Code, is amended by adding Chapter 164 to read as follows:

CHAPTER 164. NONCOMBUSTIBLE NICOTINE PRODUCTS TAX

Sec. 164.0001. DEFINITIONS. In this chapter:

(1) "Alternative Nicotine Product" means any noncombustible product containing nicotine that is intended for human consumption, whether chewed, absorbed, dissolved, ingested, inhaled, or consumed by any other means. "Alternative Nicotine Product" does not include any cigarettes, tobacco products or e-cigarettes as defined this code, or any product regulated as a drug or device by the United States Food and Drug Administration under Chapter V of the Food, Drug and Cosmetic Act.

(2) "Commercial business location" means the entire premises occupied by a person required to hold an e-cigarette retailer permit under Chapter 147, Health and Safety Code, or a person who sells alternative nicotine products.

(3) "E-cigarette" means a non-combustible product that produces vapor or aerosol for inhalation from the application of a heating element to a liquid substance containing nicotine,

1 derived from tobacco or any other source, and includes an
2 e-cigarette pod or a consumable nicotine liquid suitable for use in
3 an electronic smoking device, whether sold with the product or
4 separately.

5 (4) "E-cigarette pod" means a sealed, prefilled, and
6 disposable container of nicotine in solution for use in an
7 e-cigarette, and in which the solution in the container is
8 inaccessible to the consumer through customary or reasonably
9 foreseeable handling or use.

10 (5) "First sale" means, except as otherwise provided
11 by this chapter:

12 (A) the first transfer of possession in
13 connection with a purchase, sale, or any exchange for value of
14 e-cigarettes or alternative nicotine products in or into this
15 state, which:

16 (i) includes the sale of e-cigarettes or
17 alternative nicotine products by:

18 (a) a distributor in or outside this
19 state to a distributor, wholesaler, or retailer in this state; and

20 (b) a manufacturer in this state who
21 transfers the e-cigarettes or alternative nicotine products in this
22 state; and

23 (ii) does not include:

24 (a) the sale of e-cigarettes or
25 alternative nicotine products by a manufacturer outside this state
26 to a distributor in this state;

27 (b) the transfer of e-cigarettes or

1 alternative nicotine products from a manufacturer outside this
2 state to a bonded agent in this state; or

3 (c) the sale of e-cigarettes or
4 alternative nicotine products by a manufacturer, bonded agent,
5 distributor, or importer to an interstate warehouse in this state;

6 (B) the first use or consumption of e-cigarettes
7 or alternative nicotine products in this state; or

8 (C) the loss of e-cigarettes or alternative
9 nicotine products in this state whether through negligence, theft,
10 or other unaccountable loss.

11 (6) "Manufacturer's representative" means a person
12 employed by a manufacturer to sell or distribute the manufacturer's
13 e-cigarettes or alternative nicotine products for which the tax
14 imposed under this chapter has been paid.

15 Sec. 164.0002. STORAGE.

16 (a) The commercial business location where e-cigarettes or
17 alternative nicotine products are stored or kept cannot be a
18 residence or a unit in a public storage facility.

19 (b) This section does not apply to a manufacturer's
20 representative.

21 Sec. 164.0003. IMPOSITION AND RATE OF TAX.

22 (a) A tax is imposed and becomes due and payable when a
23 person or entity receives e-cigarettes or alternative nicotine
24 products for the purpose of making a first sale in this state.

25 (b) The tax rates are:

26 (1) on all e-cigarettes that use an e-cigarette pod, 5
27 cents per e-cigarette pod;

1 (2) on all e-cigarettes that do not use an e-cigarette
2 pod, 5 percent of the wholesale cost price, exclusive of any trade,
3 cash, or other discounts or any promotion, advertising, display, or
4 similar allowances; and

5 (2) on alternative nicotine products, \$1.23 per ounce.
6 The tax shall be imposed based on the net volume as listed by the
7 manufacturer.

8 Sec. 164.0004. IMPOSITION AND RATE OF USE TAX.

9 (a) A tax is imposed on the storage, use, or other
10 consumption in this state of e-cigarettes and alternative nicotine
11 products purchased for storage, use, or other consumption in this
12 state.

13 (b) The tax rates are the same as is provided by Section
14 164.003 of this code.

15 Sec. 164.0005. PAYMENT OF TAX.

16 (a) A person or entity shall pay the tax on e-cigarettes and
17 alternative nicotine products received for the purpose of making a
18 first sale at the time when filing the report required by Section
19 164.0009. The tax shall be paid by cashier's check payable to the
20 comptroller, by electronic funds transfer to the comptroller, or by
21 any other method of payment authorized by the comptroller.

22 (b) The person or entity in possession of e-cigarettes and
23 alternative nicotine products has the burden to prove payment of
24 the tax on the products.

25 Sec. 164.006. PENALTY FOR FAILURE TO PAY TAX.

26 (a) A person or entity who fails to timely pay the tax when
27 due shall pay five percent of the amount of tax then due as a

1 penalty, and if the person or entity fails to pay the tax on or
2 before the 30th day after the day on which the tax is due, the person
3 or entity shall pay an additional five percent.

4 (b) The minimum penalty imposed by this section is \$50.

5 (c) The dishonor of a check delivered to the treasury for
6 payment of taxes constitutes a failure to pay the tax when due.

7 (d) Venue of a suit for collection of a penalty for late
8 payment of taxes is in Travis County.

9 Sec. 164.007. IMPACT OF TAX.

10 The ultimate consumer or user in this state bears the impact
11 of the tax imposed by this chapter. If another person pays the tax,
12 the amount of the tax is added to the price charged to the ultimate
13 consumer or user.

14 Sec. 164.008. RECORD OF PURCHASE OR RECEIPT.

15 Each person or entity who receives e-cigarettes or
16 alternative nicotine products for the purpose of making a first
17 sale shall keep records at each place of business of all such
18 products purchased or received. Each retailer shall keep records at
19 a single commercial business location, which the retailer shall
20 designate as its principal place of business in the state, of all
21 e-cigarettes or alternative nicotine products purchased and
22 received. These records must include:

23 (1) the name and address of the shipper or carrier and
24 the mode of transportation;

25 (2) all shipping records or copies of records,
26 including invoices, bills of lading, waybills, freight bills, and
27 express receipts;

1 (3) the date and the name of the place of origin of the
2 e-cigarettes or alternative nicotine products shipment;

3 (4) the date and the name of the place of arrival of
4 the e-cigarettes or alternative nicotine products shipment;

5 (5) a statement of the number, kind, and price paid for
6 the e-cigarettes or alternative nicotine products;

7 (6) the name, address, and tax identification number
8 of the seller;

9 (7) in the case of a distributor, the manufacturer's
10 list price for the e-cigarettes or alternative nicotine products;
11 and

12 (9) any other information required by rules of the
13 comptroller.

14 Sec. 164.0009. REPORT OF SALE OR USE.

15 (a) Each person or entity who receives e-cigarettes or
16 alternative nicotine products for the purpose of making a first
17 sale shall keep at each place of business in this state records of
18 each sale, distribution, exchange, or use of e-cigarettes or
19 alternative nicotine products whether taxed under this chapter or
20 not. Each such person or entity shall prepare and retain an original
21 invoice for each transaction involving e-cigarettes or alternative
22 nicotine products, and shall keep any supporting documentation,
23 including bills of lading, showing shipment and receipt used in
24 preparing the invoices at the place of business. A duplicate
25 invoice shall be delivered to the purchaser.

26 (b) The records for each sale, distribution, exchange, or
27 use of e-cigarettes or alternative nicotine products must show:

1 (1) the purchaser's name and address, permit number,
2 or tax identification number;

3 (2) the method of delivery and the name of the common
4 carrier or other person delivering the e-cigarettes or alternative
5 nicotine products;

6 (3) the date, amount, and type of e-cigarettes or
7 alternative nicotine products sold, distributed, exchanged, or
8 used;

9 (4) the price received for the e-cigarettes or
10 alternative nicotine products;

11 (5) the number and kind of e-cigarettes or alternative
12 nicotine products on which the tax has been paid;

13 (6) for sales from a manufacturer to a person or entity
14 who receives e-cigarettes or alternative nicotine products for the
15 purpose of making a first sale, the manufacturer's list price for
16 the e-cigarettes or alternative nicotine products;

17 (7) the net weight as listed by the manufacturer for
18 each unit; and

19 (8) any other information required by rules of the
20 comptroller.

21 (c) Records shall be kept for inspection and copying by the
22 comptroller and the attorney general for at least four years, and
23 copies of records shall be provided to the comptroller on demand.

24 (d) A person's failure to produce the records required by
25 this subchapter or a person's inability to provide other proof of
26 tax payment, on demand by the comptroller, is prima facie evidence
27 that e-cigarettes and alternative nicotine products possessed by

1 the person were received for the purpose of making a first sale
2 without payment of the tax imposed by this chapter. This provision
3 does not apply to a failure to produce records or provide other
4 proof of tax payment if the failure results from an occurrence
5 beyond the person's control.

6 Sec. 164.0009. MONTHLY REPORT.

7 (a) A person or entity who receives e-cigarettes or
8 alternative nicotine products for the purpose of making a first
9 sale shall file with the comptroller on or before the 25th day of
10 each month a report for the preceding month.

11 (b) The report must show:

12 (1) the date the report was made;

13 (2) the filer's name and address;

14 (3) the month the report covers;

15 (4) the amount of e-cigarettes and alternative
16 nicotine products purchased, received, and acquired;

17 (5) the manufacturer's list price of e-cigarettes and
18 alternative nicotine products purchased, received, and acquired;

19 (6) the amount of e-cigarettes and alternative
20 nicotine products sold, distributed, used, lost, or otherwise
21 disposed of;

22 (7) the amount of e-cigarettes and alternative
23 nicotine products on hand at the beginning and the end of the month;

24 (8) the net weight as listed by the manufacturer for
25 each unit of e-cigarettes and alternative nicotine products that is
26 purchased, received, or acquired; and

27 (9) any other information the comptroller requires

1 relating to e-cigarettes and alternative nicotine products and to
2 the payment of taxes due on them.

3 (c) The comptroller shall prescribe the form and content of
4 the report.

5 (d) If more than 50 percent of all untaxed e-cigarettes and
6 alternative nicotine products received by the person or entity in
7 this state are actually sold outside of this state, the person or
8 entity shall include in the report only e-cigarettes and
9 alternative nicotine products that are sold in this state.

10 Sec. 164.0010. DISPOSITION OF PROCEEDS.

11 The comptroller shall deposit the proceeds from taxes imposed
12 under this chapter to the credit of the foundation school fund.

13 Sec. 164.0011. ENFORCEMENT AND ADMINISTRATION.

14 (a) The comptroller shall adopt rules for the enforcement
15 and administration of this chapter. The rules shall be
16 substantially similar to the provisions in Subchapter E and
17 Subchapter F, Chapter 155, Tax Code.

18 (b) The comptroller may adopt other reasonable rules
19 necessary to carry out the purposes of this subchapter.

20 (c) All rules issued under this subchapter must be adopted
21 and published in accordance with state requirements.

22 SECTION 2. This Act takes effect September 1, 2023.