

It is made applicable to meter tax collection by N.J.S.A. 54:40A-17:

“* * * Any licensed distributor authorized * * * to affix evidence of tax payment to packages of cigarettes by means of a metering machine shall * * * make a prepayment, allowing for the discount * * * subject to the same conditions as in the case of the sale of [tangible] stamps * * *.”

It is apparent from the generality of N.J.S.A. 54:40A-11, applicable alike to all distributors, big and small, without regard to the manner of their operation, that this is not an attempt to compensate the distributors for the exact amount of expense incurred by them in the collection of the cigarette tax but provides only an approximately equivalent recompense. Viewed in this light, the statute does not intend that to be entitled to the discount the distributor must both “affix and handle” the stamps. It is enough if the distributor performs some substantial service or incurs some expense in implementing the collection process. In the case of the metered cigarettes it is apparent that the distributors had to perform substantial services in determining the number of packages in their inventory which had been already metered and in bringing the meters to the Cigarette Tax Bureau at a time when they still contained credits and would not have had to have been brought to the Cigarette Tax Bureau were it not for the increase in the tax rate. It is our opinion that the statute intends that the discount be allowed for these services and that the action taken by the Cigarette Tax Bureau was lawful.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: FRANK A. VERGA
Deputy Attorney General

SEPTEMBER 25, 1958

HONORABLE JOHN A. KERVICK
State Treasurer
State House
Trenton, New Jersey

MEMORANDUM OPINION—P-25

DEAR MR. KERVICK:

We have been asked whether proposed regulation CT 23, providing for the remission of tax liability on unstamped cigarettes stolen from a distributor is unlawful, and if so, whether the proposed regulation would be applied retroactively to entitle distributors to refunds who have paid a tax on stolen unstamped cigarettes under protest. Proposed regulation CT 23 reads as follows:

“Excluding internal pilferage and subject to such restrictions of proof as may be demanded by the director, tax liability shall not accrue in situations where unstamped cigarettes are stolen from the place of business of a licensed distributor.”

The tax on cigarettes imposed by N.J.S.A. 54:40A-8 is collected by the mechanism of requiring distributors to affix stamps (which they have purchased from the Director of the Division of Taxation, N.J.S.A. 54:40A-11, 17) to the packages of cigarettes either within 24 hours after receipt of the cigarettes and "prior to any and all deliveries" (with certain exceptions not here relevant), N.J.S.A. 54:40A-15. This mechanism is intended to implement the basic imposition of tax on "the sale, use or possession for sale or use" of cigarettes contained in N.J.S.A. 54:40A-8. "Sale" within the meaning of this section is expressly defined to include "theft." N.J.S.A. 54:40A-2(n).

Since the requirement in N.J.S.A. 54:40A-15 that cigarettes be stamped prior to delivery is intended to implement the more basic provision of section 54:40A-8 that a tax be imposed upon "sale," which includes theft, "delivery" in section 15 should be read to include theft. For this reason, the proposed regulation would conflict with the statutes.

While the collection of a tax on stolen unstamped cigarettes visits a burden on the distributor which he would not anticipate, since the law intends that ordinarily the ultimate burden of the tax shall fall upon the consumer, N.J.S.A. 54:40A-10.1, Rev. Rul. 13661, 1951-2 Cum. Bull. 24, this is not a justification for excusing the liability. The collection of a tax in respect of stolen cigarettes from any person earlier in the chain of distribution than the consumer visits the same sort of burden as that which is sought to be relieved by the proposed regulation. The effect of the statutory definition of "sale" to include theft, as discussed above, shows that the Legislature intends such burdens to be imposed. There is nothing in the statutory scheme to afford a basis for differentiating between particular instances of such burdens which result from the theft of cigarettes.

In light of the conclusion that the tax liability in question may not be excused, it is unnecessary to answer the second question presented, whether the proposed regulation may be applied retroactively.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: FRANK A. VERGA
Deputy Attorney General

SEPTEMBER 25, 1958

WILLIAM F. PARKER, *Sheriff*
Burlington County
Mount Holly, New Jersey

MEMORANDUM OPINION—P-26

DEAR SHERIFF PARKER:

You have inquired whether you, as county sheriff, or the county board of freeholders, constitute the "appointing authority" for appointment of deputy sheriffs.

The governing statutes are R.S. 40:41-31 and R.S. 11:19-1.