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FISCAL AND POLICY NOTE
First Reader

Senate Bill 99
Finance

(Senator Kramer)

Cigarettes, Tobacco Products, and Electronic Smoking Devices – Local Law Authorization

This bill expressly authorizes a county or municipality to enact and enforce local laws that are at least as stringent as State laws that regulate the sale and distribution of cigarettes, other tobacco products (OTP), and electronic smoking devices (ESD), except for the issuance of cigarette, OTP, and ESD licenses and the taxation of cigarettes and OTP. The bill further states that it is the intent of the General Assembly that the bill be applied and interpreted to abrogate the holding of the Court of Appeals in *Altadis U.S.A., Inc. et al. v. Prince George’s County, Maryland* 431 Md. 307 (2013).

Fiscal Summary

State Effect: State general fund revenues may be affected, as discussed below.

Local Effect: Local government revenues and expenditures may increase, as discussed below.

Small Business Effect: Potential meaningful.

Analysis

Current Law: Titles 16, 16.5, and 16.7 of the Business Regulation Article govern tobacco licensing and the sale and distribution of cigarettes, OTP, and ESD. Chapters 767 and 768 of 2021 establish licensure requirements for specified remote (out-of-state) sellers of premium cigars and pipe tobacco under a new Title 16.9, effective July 1, 2022.

“ESD” is defined as a device that can be used to deliver aerosolized or vaporized nicotine to an individual inhaling from the device. It includes (1) an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, a vape pen, and vaping liquid and (2) any component, part, or accessory of such a device regardless of whether or not it is sold separately, including any substance intended to be aerosolized or vaporized during use of the device. “ESD” excludes a drug, device, or combination product authorized for sale by the U.S. Food and Drug Administration (FDA) under the Food, Drug, and Cosmetic Act.

“OTP” is defined as any product that is intended for human consumption or likely to be consumed, whether smoked, heated, chewed, absorbed, dissolved, inhaled, or ingested in any manner that is made of, derived from, or contains tobacco or nicotine, with specified exclusions. “OTP” (1) includes cigars, premium cigars, pipe tobacco, snuff, snus, filters, rolling papers, pipes, and hookahs and (2) excludes cigarettes, ESD, tobacco pipes (as defined in the Tax General Article), or drugs, devices, or combination products authorized for sale by the FDA under the federal Food, Drug, and Cosmetic Act.

Chapter 12 of 2019 and Chapters 359 and 360 of 2020 transferred alcohol and tobacco enforcement duties from the Comptroller’s Field Enforcement Division to the Alcohol and Tobacco Commission (ATC) effective January 1, 2021. Thus, ATC is responsible for monitoring and enforcement activity related to tobacco licenses. The Comptroller’s Office, however, retains duties related to enforcement of tobacco taxes.

Tobacco Product Taxes

Chapter 37 of 2021 increased (1) the tobacco tax rate for cigarettes from \$2.00 to \$3.75 per pack of cigarettes and (2) the tobacco tax rate for OTP other than cigars and pipe tobacco from 30% to 53% of the wholesale price. Generally, the tax rate for cigars is 70% of the wholesale price of the cigars. The tax rate for premium cigars is 15% of the wholesale price of the premium cigars, and the tax rate for pipe tobacco is 30% of the wholesale price of the pipe tobacco. Chapters 767 and 768 of 2021 make various modifications to tobacco tax provisions as they apply to out-of-state sellers of premium cigars and pipe tobacco, effective July 1, 2022.

ESD and their components are subject to the State sales and use tax but are not subject to a State excise tax. Chapter 37 of 2021 increased the sales and use tax rate that generally applies to these products to 12% and increased the sales and use tax rate for vaping liquid sold in a container that contains up to five milliliters of vapid liquid to 60% of the taxable price. Montgomery County imposes a 30% tax on the wholesale value of vaping products.

Altadis U.S.A., Inc. et al. v. Prince George's County, Maryland

In *Altadis U.S.A., Inc. et al. v. Prince George's County, Maryland* 431 Md. 307 (2013), the petitioners challenged the validity of two Prince George's County ordinances regulating the packaging, sale, or other distribution of cigars, contending that the ordinances conflicted with State statutes regulating the packaging and sale of cigars. The Court of Appeals held that State law occupied the field of regulating the packaging and sale of tobacco products, including cigars, and so preempted the two ordinances. Thus, the Prince George's County ordinances were invalid.

State/Local/Small Business Effect: The bill expressly authorizes a county or a municipality to enact and enforce local laws regulating the sale and distribution of tobacco products, as specified. Some jurisdictions in the State have considered and/or enacted local legislation relating to the sale and distribution of tobacco products. The bill's impact depends on the extent to which local governments enact local laws that are more stringent than State law and the extent to which such laws are successfully implemented as a result of the bill (or the extent to which such laws would be successfully *challenged* in the *absence of the bill*). As discussed above, in *Altadis* (2013), the Court of Appeals struck down two Prince George's County ordinances governing the distribution of cigars, holding that the ordinances were impliedly preempted by State law.

Thus, to the extent that local governments successfully enact and enforce local laws that are more stringent than State law as a result of the bill, local government revenues and expenditures may increase. Similarly, small businesses that sell tobacco products in jurisdictions that enact such laws are potentially affected to the extent they are subject to additional local regulation as a result of the bill.

Additionally, to the extent that local governments successfully enact and enforce local laws that have the effect of restricting or reducing the sale and consumption of tobacco products, State general fund revenues may be affected due to forgone tax revenues collected from the sale of these products. Any such impact, however, cannot be reliably predicted.

Additional Information

Prior Introductions: SB 410 of 2021 received a hearing in the Senate Finance Committee, but no further action was taken. Its cross file, HB 1011, received a hearing in the House Economic Matters Committee, but no further action was taken.

Designated Cross File: None.

Information Source(s): Comptroller's Office; Judiciary (Administrative Office of the Courts); Baltimore City; Kent, Montgomery, Washington, and Worcester counties; Maryland Association of Counties; Maryland Association of County Health Officers; Department of Legislative Services

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