

DEPARTMENT OF STATE REVENUE

Revenue Ruling #2009-07 ST
October 25, 2009

NOTICE: Under [IC 4-22-7-7](#), this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

Tobacco Products Tax – Application of Tobacco Products Tax to Distribution of Tobacco Products

A company ("Taxpayer") is seeking an opinion as to whether, and under what terms or conditions, a distributor can sell and distribute "untaxed" tobacco products ("OTP") to Taxpayer in Indiana, as part of an interstate transaction for eventual shipment to Taxpayer's retail stores located both within Indiana and other states.

Authority: [IC 6-7-2-2](#); [IC 6-7-2-7](#); [IC 6-7-2-14](#).

STATEMENT OF FACTS

Taxpayer provides the following facts regarding its request for a revenue ruling. Taxpayer, which is located in Indiana, services retail stores both within and outside of Indiana. Taxpayer holds an appropriate distributor's and/or wholesaler's license in each of the states in which it operates, including Indiana. Taxpayer further provides that:

Currently, Taxpayer purchases untaxed OTP directly from various manufacturers or other suppliers affiliated with the manufacturers. Recent changes in purchasing requirements imposed by various manufacturers have resulted in a need for Taxpayer to modify its purchasing practices. Due to these changes Taxpayer wishes to continue to purchase untaxed product in the stream of interstate commerce, but rather than purchasing directly from the manufacturers at issue, would like to purchase directly from ["Distributor"].

Distributor is located outside of Indiana, but holds an appropriate Indiana distributor's license and provides services to many Indiana retailers. Taxpayer would like to enter into a relationship with Distributor, which Taxpayer describes thusly:

Taxpayer would order and purchase [untaxed] OTP in bulk from Distributor who would deliver the OTP from [outside Indiana] into the state of Indiana to [Taxpayer's] distribution center located [in Indiana]. Terms of the transaction would be F.O.B. [to Taxpayer's] Indiana distribution facility. Upon receipt of the bulk OTP shipment, [Taxpayer's] personnel would determine the ultimate state jurisdiction to which the product would be shipped. Consistent with current practice, Taxpayer will pay all Indiana and other jurisdictional excise taxes due once the ultimate delivery location is determined.

DISCUSSION

Taxpayer requests that the Department rule whether, and under what terms or conditions, Distributor can sell and distribute "untaxed" tobacco products to Taxpayer in Indiana, as part of an interstate transaction for eventual shipment to Taxpayer's retail stores located both within Indiana and other states.

Tax is imposed in Indiana on the distribution of OTP pursuant to [IC 6-7-2-7](#), which provides:

A tax is imposed on the distribution of tobacco products in Indiana at the rate of twenty-four percent (24%) of the wholesale price of the tobacco products. The distributor of the tobacco products is liable for the tax. The tax is imposed at the time the distributor:

- (1) brings or causes tobacco products to be brought into Indiana for distribution;
- (2) manufactures tobacco products in Indiana for distribution; or
- (3) transports tobacco products to retail dealers in Indiana for resale by those retail dealers.

[IC 6-7-2-2](#) defines a distributor in the following manner:

As used in this chapter, "distributor" means a person who:

- (1) manufactures, sells, barter, exchanges, or distributes tobacco products in Indiana to retail dealers for the purpose of resale;
- (2) purchases tobacco products directly from a manufacturer of tobacco products; or

(3) purchases for resale tobacco products from a wholesaler, jobber, or distributor outside of Indiana who is not a distributor holding a license issued under this chapter.

[IC 6-7-2-16](#) requires that:

Every manufacturer, importer, broker, or shipper of tobacco products that sells or otherwise distributes tobacco products to distributors shall, before the fifteenth day of each month, submit proof to the department of all of its sales or other distributions to distributors in the preceding month.

Distributor and Taxpayer are both distributors under the law. As stated previously, [IC 6-7-2-7](#) imposes tax on OTP when any one of three conditions has been met, when a distributor (1) brings or causes tobacco products to be brought into Indiana for distribution; (2) manufactures tobacco products in Indiana for distribution; or (3) transports tobacco products to retail dealers in Indiana for resale by those retail dealers.

However, [IC 6-7-2-14](#) provides:

The department shall credit or refund to a distributor the tax paid under this chapter on tobacco products that are:

- (1) shipped outside Indiana;
- (2) returned to the manufacturer; or
- (3) destroyed by the distributor in the presence of an employee or agent of the department.

In the instant case, if the Department were to impose tax on Distributor, and Taxpayer subsequently shipped some OTP outside Indiana (as it intends to do), Distributor, which would be the entity properly situated to request a refund pursuant to [IC 6-7-2-14](#), would have no way of knowing which OTP was shipped outside Indiana. Only Taxpayer would possess such information, but Taxpayer would not be properly situated to request the applicable refund.

Clearly, [IC 6-7-2-7](#) provides, and the Department recognizes as a general rule, that liability is imposed on a distributor that brings or causes tobacco products to be brought into Indiana for distribution. However, to read [IC 6-7-2-7](#) as requiring the Department in the instant case to assess tax when such a condition has been met would lead to absurd results. Rigid application of the provision would result in Taxpayer, as the end-distributor, being the only entity possessing information necessary to request a refund pursuant to [IC 6-7-2-14](#). However, Distributor, not Taxpayer, would be the entity situated to request any applicable refund. Therefore, because the Department will not interpret a statute in such a way as to render it absurd, the Department recognizes the following limited exception to the statute. In situations where an out-of-state licensed Indiana OTP distributor distributes such product to an in-state licensed Indiana OTP distributor that subsequently distributes any part of the product out of Indiana, the Department shall assess tax on the end-distributor.

RULING

Distributor can sell and/or distribute "untaxed" tobacco products to Taxpayer in Indiana, provided Distributor complies with the reporting requirements of [IC 6-7-2-16](#). Tax is imposed on Taxpayer at the time Taxpayer purchases the products from Distributor, and should be remitted monthly to the Department on Taxpayer's monthly return (Form OTP-906).

CAVEAT

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances as stated herein are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this ruling a change in statute, regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection.

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