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Package of Cigar Wraps. A distributor sells three cigar wraps together in a single package. The package contains one natural leaf cigar wrap, composed entirely of tobacco, which meets the statutory definition of a tobacco product. The package also contains two homogenized tobacco leaf wraps that contain less than 50 percent tobacco and do not meet the statutory definition of tobacco products. If the distributor can establish through documentary evidence, such as purchase invoices, the actual wholesale cost of the natural leaf wrap, the Board would accept that the tax could be reported on the actual wholesale cost of the natural leaf wrap (the tobacco product). Because it is assumed that the cost of the natural leaf wrap is much higher than the wraps that are not tobacco products, if the distributor is unable to establish through documentary evidence the actual wholesale cost of the leaf wrap, the Board assumes the wholesale cost of the package is subject to tax. 10/22/09.

NOTE: For the purposes of defining "Tobacco Products" under Part 13, Division, 2, Chapter 2, Article 2 of the Revenue and Taxation Code, this Cigarette and Tobacco Products Tax, this Cigarette and Tobacco Products Tax annotation is valid and applicable through March 31, 2017. Effective April 1, 2017, Proposition 56 amended section 30121(b) of the Revenue and Taxation Code to change the definition of *tobacco products* to:

"Tobacco products" includes, but is not limited to, a product containing, made, or derived from tobacco that is intended for consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed or ingested by any other means, including, but no limited to, cigars, little cigars, chewing tobacco, pipe tobacco, or snuff, but does not include cigarettes. Tobacco Products shall also include electronic cigarettes. Tobacco products shall not include any product that has been approved by the United States Food and Drug Administration for a sale as a tobacco cessation product or for other therapeutic purposes where that product is marketed and sold solely for such approved use. Tobacco products does not include any food products as that term is defined pursuant to Section 6359.

October 22, 2009

Re: Tax Opinion Request 09-201

This is in response to your May 21, 2009, letter in which you request information as to the application of the Cigarette and Tobacco Products Tax Law (Tax Law) to your business.

You state in pertinent part:

“My question is regarding the applicability of tobacco taxes on some of our cigar wraps. It is my understanding that in order for a tobacco product to be subject to CA tobacco taxes, it must be comprised of at least 50% tobacco. One of our cigar wrap products is packaged in one individual package which contains 3 cigar wraps. The package contains one ‘natural leaf’ tobacco cigar wrap and two homogenized tobacco leaf cigar wraps. The ‘natural leaf’ wrap is an actual tobacco leaf which clearly contains more than 50% tobacco, however, the two homogenized tobacco leaf wraps do not contain more than 50% tobacco. The question that I have is do we simply pay tobacco taxes only on the natural leaf wrap since it is the only product where CA tobacco taxes would be appropriate or is the entire package (and therefore all three wraps) subject to the same tobacco tax?

“It is important to note that we have and continue to pay CA tobacco taxes on the entire individual package which includes all three cigar wraps. If you determine that the only way the natural leaf wrap is subject to a tobacco tax, we will simply file a claim with next month’s filing for the overpayment of past tobacco taxes paid on behalf of this product.”

DISCUSSION

This opinion is based solely upon the factual representations set forth above and any assumptions stated in this opinion.¹ If the actual facts differ from the facts summarized in this letter, or if any of the assumptions I have made are incorrect, the opinions expressed in this letter may not be reliable. Provided that the facts in this letter (both summarized and assumed) are accurate and verifiable by audit, the taxpayer may rely on this response for purposes of Revenue and Taxation Code section (section)30284. (See Cal. Code Regs., tit. 18, § 4098, subd. (b) [describing the circumstances under which relief from liability is available for reasonable reliance on written advice given by the Board].)

Your specific question relates to your company's cigar wrapper product and the applicable tobacco products tax. As you are aware, the Tax Law imposes a tax on the distribution of cigarettes and tobacco products. (Rev. & Tax. Code, §§ 30008, 30101, 30123, 30131.2.) The tax on tobacco products is based on the wholesale cost of tobacco products distributed, at a rate that is determined annually by the Board of Equalization (Board). (Reve. & Tax. Code, §§ 30123, 30126, 30131.2, 30131.5.) Effective July 1, 2009, through June 30, 2010, the rate is 41.11 percent. Sections 30121, subdivision (b), and 30131.1, subdivision (b), provide that "tobacco products" include, but are not limited to:

"all forms of cigars, smoking tobacco, chewing tobacco, snuff, and any other articles or products made of, or containing at least 50 percent, tobacco, but does not include cigarettes." (Emphasis added.)

The 50-percent threshold provided in the definition above is for articles or products other than "all forms of cigars, smoking tobacco, chewing tobacco or snuff..."

The product you have described is one package containing three cigar wraps. Specifically, "[t]he package contains one 'natural leaf' tobacco cigar wrap and two homogenized tobacco leaf cigar wraps." Based on your representations, we assume that the natural leaf tobacco cigar wrap is a tobacco product. We further assume that the two homogenized tobacco leaf wraps, viewed alone, would not be considered tobacco products pursuant to sections 30121, subdivision (b), and 30131.1, subdivision (b).

¹This letter will respond only to the payment of taxes under the Cigarette and Tobacco Products Tax Law and does not respond to and/or include any discussion regarding any federal laws that may related to taxes or labeling product you describe. Questions of that nature should be directed to the California Office of Attorney General and/or the federal Alcohol and Tobacco Tax and Trade Bureau.

You question the correct measure of tax when a tobacco product is sold in the same package as other products that include tobacco but which are not considered “tobacco products” under the Tax Law. The measure of tax is the wholesale cost of the tobacco product. (Rev. & Tax. Code, § 30017.) In this instance, the measure of tax is the wholesale cost of the natural leaf wrap. Given that the natural leaf wrap is 100 percent tobacco, we assume that the natural leaf wrap has much greater wholesale cost than the homogenized wraps, which we understand to be largely comprised of paper products. Therefore, we assume it would not be correct to report the wholesale cost of the tobacco product as one-third of the wholesale cost of the entire package, since we assume that most of the wholesale cost of the package relates to the natural leaf wrap. If you can establish through documentary evidence, such as purchase invoices, the actual wholesale cost of the natural leaf wrap, the Board would accept that tax could reported based on the actual wholesale cost of the natural leaf wrap (the tobacco product). If you are unable to establish through documentary evidence the actual wholesale cost of the natural leaf wrap, given our assumption that cost of a natural leaf wrap is much higher than that of the two homogenized wraps, we assume the entire wholes cost of the package is subject to tax. Therefore, we conclude that your company’s reporting and payment on the entire package is proper under the Tax Law, unless you provide documentary evidence to establish the actual wholesale cost of the natural leaf wrap.

I hope this answers your question. If you have further questions, please write again.

Sincerely,

Monica Gonzalez Silva

Tax Counsel III (Specialist)

MS/yg

cc: Mr. Randy Ferris (MIC:82)
Mr. Stephen Smith (MIC: 82)
Ms. Lynn Bartolo (MIC:56)