

ST 14-0042-GIL 08/11/14 TOBACCO PRODUCTS TAX

This letter rescinds General Information Letter ST 14-0038. This letter clarifies that federal excise tax is imposed on the manufacturer, is a cost of doing business of the manufacturer and is included in the manufacturer's wholesale price of tobacco products sold to distributors for purposes of calculating the Tobacco Products Tax. 35 ILCS 143/10-5. (This is a GIL.)

August 11, 2014

Dear Xxxx:

This letter is in response to your letter dated February 10, 2014, in which you request information and supersedes the letter to you dated August 6, 2014 (ST-14-0005-PLR). The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at [www.tax.illinois.gov](http://www.tax.illinois.gov) to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

My office has been retained to request a private letter ruling on behalf of my client, COMPANY. An executed power of attorney is attached. Please accept this letter as a request for a private letter ruling by the Illinois Department of Revenue regarding the determination of the appropriate tax base with respect to the Tobacco Products Tax Act of 1995, 35 ILCS 143/10-1.

The applicable tax year for this fact pattern is 2014, however this has been an ongoing matter for several years. To the best of counsel and client's knowledge, the Illinois Department of Revenue has not previously ruled on the same or a similar issue for the taxpayer or a predecessor. The taxpayer has not directly or indirectly submitted the same or similar issue to the Illinois Department of Revenue. No audit or litigation is pending with the Illinois Department of Revenue.

**Statement of Facts**

COMPANY is an active Illinois domestic corporation located at ADDRESS in CITY, Illinois. The President of COMPANY is NAME.

COMPANY is a pipe tobacco distributor. In previous years, COMPANY has received invoices from pipe tobacco manufacturers which contained a total invoice price that incorporated the Federal tax amount due into the total invoice price without any distinction between list price, Federal tax due, and total invoice price. Illinois taxes under the Tobacco Products Tax Act were paid on the total invoice price, which included the Federal tax. This resulted in taxes being paid to the Illinois Department of

Revenue which included as part of the tax base a significant portion of Federal taxation, which caused COMPANY to pay Illinois tax on top of Federal tax.

On Month XX, 20XX, COMPANY received an invoice from COMPANY A for \$X,XXX.XX. COMPANY A is not an affiliated company of COMPANY. The invoice from COMPANY A has been attached to this request as Exhibit A. The actual list of the pipe tobacco sold to COMPANY was \$X,XXX.XX. The Federal tax amount was \$X,XXX.XX. The total invoice price was \$X,XXX.XX.

Under a taxation scheme that permits Illinois Tax to be levied upon Federal Tax, COMPANY would pay 36% of the wholesale price of tobacco products according to 35 ILCS 143/10-10(a)(i). Hence, the total Illinois tax COMPANY would pay is \$X,XXX.XX \* 36% = \$X,XXX.XX. Under taxation scheme that does not permit Illinois Tax to be levied upon Federal Tax, COMPANY would pay 36% of \$X,XXX.XX, or \$X,XXX.XX, resulting in a tax differential of \$XXX.XX.

### **Applicable Rules**

35 ILCS 143/10-10 dictates that 36% of the “wholesale price of tobacco products sold” is the proper taxation rate. “Wholesale Price” is defined according to 35 ILCS 143/10-5 as “[T]he established list price for which a manufacturer sells tobacco products to a distributor, before the allowance of any discount, trade allowance, rebate, or other reduction. In the absence of such an established list price, the manufacturer’s invoice price at which the manufacturer sells the tobacco product to unaffiliated distributors, before any discounts, trade allowances, rebates, or other reductions, shall be presumed to be the wholesale price.” However, such tax “[I]s not imposed upon any activity in that business in interstate commerce or otherwise, to the extent to which the activity may not, under the Constitution and the Statutes of the United States, be made the subject of taxation by this State.” 35 ILCS 143/10-5 (2014). (Emphasis added)

86 Il. Adm. Code 660.5 (a) states that “[T]he Tobacco Products Tax is imposed upon the last distributor [. . .] at a rate of 18% of the wholesale price of Tobacco products sold or otherwise disposed of in this state. (eff. 2010). 18% is the previous statutory tax rate prior to the amount increasing in July of 2012 to 36%, and the reference represents a non-updated administrative code provision.

86 Il. Adm. Code 660.5 (d)(1) states that “[T]he Wholesale price for purpose of imposing the Tobacco Products Tax on the last distributor is the invoice price at which products are sold by the last distributor, before the allowance of any discount, trade allowance, rebates, or other reductions. Surcharges added by distributors are considered part of the wholesale price subject to tax. (Emphasis added) (Contrary statement of authority)

### **Analysis**

Under 86 Il. Admin. Code 660.5 (d)(1), the “Wholesale Price” is the invoice price, including any surcharges added by the distributor. However, under 35 ILCS 143/10-10, the “Wholesale Price” is the list price, and does not make reference to any surcharges added by distributors. Therefore, under 86 Il. Admin. Code 660.5 (d)(1), the “Wholesale Price” of the COMPANY A invoice is \$X,XXX.XX. The “Wholesale Price” of the

COMPANY A invoice according to 35 ILCS 143/10-10 is the established list price of the pipe tobacco, or \$X,XXX.XX.

Although the Illinois Tobacco Products Tax act [sic] does not make any reference to any “surcharges” being included as part of the “Wholesale Price”, the Illinois Administrative Code purports to include all “surcharges added by the distributors.” A “surcharge” is defined as “to charge an extra fee.” (Webster 2014). The Federal Tax appears to be a “surcharge” that has been added by a distributor on behalf of the Federal government.

“List Price” is defined by Webster as “The basic price of an item as published in a catalog, price list, or advertisement before any discounts are taken.”

Therefore, under the definition of “wholesale price” as provided for under the Illinois Administrative Code, the Wholesale Price is the total invoice price which includes the surcharge of Federal taxation. Under the definition of “wholesale price” as provided for under the Illinois Tobacco Products Tax Act, the wholesale price is the established list price, prior to the addition of any surcharges.

There do [sic] not appear to be any decisions or rulings from the Illinois Department of Revenue that explicitly answer what the proper calculation of “wholesale price” should be. Although not directly on point, a supportive previous Illinois Department of Revenue private letter ruling on March 11, 2009 indicates that the proper tax base for the Tobacco Products Tax should be the “established list price” equal to the actual invoice price. A copy of the private letter ruling is attached as Exhibit B.

COMPANY asserts that the proper definition of “wholesale price” should be as provided for under the Illinois Tobacco Products Tax Act, and not as provided for under the Illinois Administrative Code. In further support of COMPANY’s assertion, we submit Micjo v. AB & T, 78 So. 3d 124 (2012), a Florida decision that interprets a similar contrast between the Florida Definition statutory definition of “wholesale” and the administrative definition of “wholesale”. A copy of the decision is attached as Exhibit C.

COMPANY believes the Florida decision is the correct structural analysis framework for interpreting the different definitions of “wholesale price”. In addition to the administrative code contravening the express statement of the statute, the administrative code interpretation includes as part of the “cost of pipe tobacco” federal taxation, resulting in a state tax levied upon a federal tax which bears no actual relation to the actual cost of the good sold.

### **Request for Ruling**

COMPANY respectfully requests the Illinois Department of Revenue rule that the proper interpretation of “wholesale price” should be as provided for by statute: “The established list price.”

**DEPARTMENT’S RESPONSE:**

The Department's regulation "Public Information, Rulemaking and Organization" provides that "[w]hether to issue a private letter ruling in response to a letter ruling request is within the discretion of the Department. The Department will respond to all requests for private letter rulings either by issuance of a ruling or by a letter explaining that the request for ruling will not be honored." 2 Ill. Adm. Code 1200.110(a)(4). The Department recently met and determined that it would decline to issue a Private Letter Ruling in response to your request. We hope however, the following General Information Letter will be helpful in addressing your questions.

The Tobacco Products Tax Act of 1995 imposes a tax upon any person engaged in the business as a distributor of tobacco products at the rate of 36% of the wholesale price of tobacco products sold or otherwise disposed of to retailers or consumers located in Illinois. 35 ILCS 143/10-10. "Wholesale price" means the established list price for which a manufacturer sells tobacco products to a distributor, before the allowance of any discount, trade allowance, rebate, or other reduction. In the absence of such an established list price, the manufacturer's invoice price at which the manufacturer sells the tobacco product to unaffiliated distributors, before any discounts, trade allowances, rebates or other reductions, shall be presumed to be the wholesale price. 35 ILCS 143/10-5.

The Tobacco Products Tax is paid on the wholesale price. The wholesale price is the established list price for which a manufacturer sells tobacco products to a distributor, or for which the last distributor sells tobacco products to a retailer or consumer located in Illinois, before the allowance of any discounts, trade allowances, rebates or other reductions. Surcharges added by manufacturers or distributors are considered part of the wholesale price subject to tax. 86 Ill. Adm. Code 660.5.

The federal government imposes an excise tax on cigars and cigarettes manufactured in or imported into the United States. 26 U.S.C § 5701. The manufacturer or importer is liable for the tax. 26 U.S.C § 5703. The federal excise tax is a cost of doing business of the manufacturer and is included in the manufacturer's wholesale price of tobacco products sold to distributors for purposes of calculating the Tobacco Products Tax, regardless of whether the manufacturer includes the tax in the wholesale price to a distributor or states it separately on an invoice provided to a distributor.

I hope this information is helpful. If you have further questions, you may contact me at 782-2844. If you have further questions related to the Illinois sales tax laws, please visit our website at [www.tax.illinois.gov](http://www.tax.illinois.gov) or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Richard S. Wolters  
Associate Counsel

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