

The tax is on any person engaged in business as a distributor of tobacco products. See 35 ILCS 145/10-10). This PLR has been supplemented and modified by ST 17-0012-PLR. (This is a PLR.)

September 22, 2017

**Request for Confirmation of Product Tax Classification Under the Illinois Tobacco Products Act of 1995**

Dear Xxxxx:

This letter is in response to your letter dated April 12, 2017 in which you requested information. 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.

Review of your request disclosed that all the information described in paragraphs 1 through 8 of Section 1200.110 appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to COMPANY, for the issue or issues presented in this ruling, and is subject to the provisions of subsection (e) of Section 1200.110 governing expiration of Private Letter Rulings. Issuance of this ruling is conditioned upon the understanding that neither COMPANY, nor a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request. In your letter you have stated and made inquiry as follows:

On behalf of COMPANY (“COMPANY”), a registered Illinois business (Illinois Secretary of State File #####), I am writing to the Illinois Department of Revenue concerning tobacco product definitions and classification, for the purposes of taxation as outlined in the Tobacco Products Act of 1995, of a novel product known as “PRODUCT” that will enter commerce in the State of Illinois later this year.

The PRODUCT is similar to an e-cigarette, except it contains a capsule with granulated tobacco leaves. The product also contains a battery and cartridge. Vapor, in the form of an aerosol, is generated from the liquid in

the cartridge, which does not contain nicotine or tobacco. The vapor passes through the tobacco capsule, which the consumer then inhales.

Illinois' Tobacco Product Act of 1995 defines "tobacco products" as follows:

"[t]obacco products" means any cigars, including little cigars; cheroots; stogies; periques; granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco; snuff (including moist snuff) or snuff flour; cavendish; plug and twist tobacco; fine-cut and other chewing tobaccos; shorts; refuse scraps, clippings, cuttings, and sweeping of tobacco; and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking; . . . . [35 Ill. Comp. Stat. 143/10-5 (ellipses omitting impertinent exceptions)]

The PRODUCT device battery and cartridge do not contain tobacco, therefore we do not believe they are to be considered a tobacco product.

Although the capsules contain granules of tobacco, the term "granulated" in the Act does not appear to encompass them in the statutory context. Under *noscitur a sociis*, "[t]he meaning of questionable words or phrases in a statute may be ascertained by reference to the meaning of words or phrases associated with it." People v. Diggins, 919 N.E. 2d 327, 332 (Ill. 2009) (quoting Hayes v. Mercy Hosp. & Med. Ctr., 557 N.E.2d 873, 885 (Ill. 1990) (Calvo, J. dissenting)). The word "granulated" appears in this list: "granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco." 35 Ill. Comp. Stat. 143/10-5 (emphasis added). These are various pipe tobaccos, as further clarified by the use of "other smoking tobacco." See Webster's Third New International Dictionary of the English Language, supra, at 2152 (defining "smoking tobacco" as "tobacco suitable for the manufacture of cigarettes and pipe tobacco"). This class of tobaccos does not include the PRODUCT capsules.

Further, the statute's definitional language of "other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking;" 35 Ill. Comp. Stat. 143/10-5 does not fit as a classification for PRODUCT Capsules. Very clearly, PRODUCT capsules have not been "prepared in such a manner as to be suitable for chewing or smoking in a pipe" and have not been prepared "both for chewing and smoking."

To address any ambiguity resulting from the term “smoking”, which is undefined in the Tobacco Products Act of 1995, one may look to where the Illinois Legislature has elsewhere defined the term.

Under the Smoke Free Illinois Act definition:

“Smoke” or “smoking” means the carrying, smoking, burning, inhaling, or exhaling of any kind of lighted pipe, cigar, cigarette, hookah, weed, herbs, or any other lighted smoking equipment. “Smoke” or “smoking” means the carrying, smoking, burning, inhaling, or exhaling of any kind of lighted pipe, cigar, cigarette, hookah, weed, herbs, or any other lighted smoking equipment. . . [410 Ill. Comp. Stat. 82/10 (emphasis added)]

To similar effect is the first part of the Smoke-Free Campus Act: “‘Smoke’ or ‘smoking’ means the carrying, smoking, burning, inhaling, or exhaling of any kind of lighted pipe, cigar, cigarette, hookah, weed, herbs, or other *lighted* smoking equipment . . .” Id. 64/10 (emphasis added) (alteration in original) (ellipses omitting impertinent exceptions).

No aspect of PRODUCT involves “lighting” or as a consequence, “smoking” – at least as the term has been defined and understood by the Illinois Legislature.

COMPANY would like to understand if the Department of Revenue agrees with COMPANY and its guidance from outside counsel that, based on the facts outlined above, for the purposes of taxation and product classification, the PRODUCT, including individual elements of battery, cartridge and capsule, does not meet the statutory definition of “tobacco products”, as defined in the Illinois Tobacco Products Act of 1995, 35 Ill. Comp. Stat. 143/10-5.

Enclosed are renderings of the PRODUCT device, cartridge and capsule to illustrate the products specifications and operation.

There are currently no tax periods at issue, as the product has yet to enter commerce in the State of Illinois. However, 2017 is expected to be the applicable tax year in future.

To the best of COMPANY’s knowledge, the Department has not previously ruled on this specific matter concerning PRODUCT, nor on a materially similar issue given the novelty of the product in question.

To the best of COMPANY's knowledge, given the specificity and novelty of the product in question, the above represents a discussion of the relevant statutes and authorities in question, including those both favorable and contrary to the taxpayer's viewpoint.

Thank you in advance for your assistance in this matter. We would welcome the opportunity to discuss this matter verbally or in-person to provide greater clarity as necessary. Please do not hesitate to contact me if you have any questions about the product and/or its operation.

#### **DEPARTMENT'S RESPONSE:**

A tax is imposed on any person engaged in business as a distributor of tobacco products, as defined in Section 10-5, at the rate of 36% of the wholesale price of tobacco products sold or otherwise disposed of to retailers or consumers located in this State; except that, beginning on January 1, 2013, the tax on moist snuff shall be imposed at a rate of \$0.30 per ounce, and a proportionate tax at the like rate on all fractional parts of an ounce, sold or otherwise disposed of to retailers or consumers located in this State. 35 ILCS 143/10-10. The impact of the tax levied by this Act is imposed upon distributors engaged in the business of selling tobacco products to retailers or consumers in this State.

"Tobacco products" means any cigars, including little cigars; cheroots; stogies; periques; granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco; snuff (including moist snuff) or snuff flour; cavendish; plug and twist tobacco; fine-cut and other chewing tobaccos; shorts; refuse scraps, clippings, cuttings, and sweeping of tobacco; and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking; ...

"Distributor" means any of the following:

- (1) Any manufacturer or wholesaler in this State engaged in the business of selling tobacco products who sells, exchanges, or distributes tobacco products to retailers or consumers in this State.
- (2) Any manufacturer or wholesaler engaged in the business of selling tobacco products from without this State who sells, exchanges, distributes, ships, or transports tobacco products to retailers or consumers located in this State, so long as that manufacturer or wholesaler has or maintains within this State, directly or by subsidiary, an office, sales house, or other place

of business, or any agent or other representative operating within this State under the authority of the person or subsidiary, irrespective of whether the place of business or agent or other representative is located here permanently or temporarily.

- (3) Any retailer who receives tobacco products on which the tax has not been paid.

The tax is imposed on the distributors of tobacco products, not the retailer or consumer. At the time the distributor sells the tobacco product to a retailer or consumer, the distributor must determine whether the product meets the definition of “tobacco product.”

The definition of “tobacco products” identifies common types of products that are generally considered to be included within the definition: cigars; various forms or types of tobacco that are smoked, although the list is not all-inclusive; snuff; various forms of chewing tobacco, although the list is not all-inclusive; miscellaneous forms of tobacco, such as refuse or scraps; “and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise”.

The definition must be construed broadly. Although it identifies specific types of tobacco that are generally smoked or chewed, the definition explicitly includes “shorts; refuse scraps, clippings, cuttings, and sweeping of tobacco”. The definition concludes by including “other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise.” After reviewing the definition, the inescapable conclusion is, if one can possibly smoke or chew the tobacco, the product is a “tobacco product” and subject to tax. This is the analysis the distributor must make because the distributor is not in the position of knowing what the ultimate use of the product will be.

Your letter states that the capsules contain granulated tobacco leaves. Granulated tobacco is explicitly identified in the definition of the “tobacco products.” If you purchase the granulated tobacco from an Illinois distributor, the distributor must pay tax on the granulated tobacco leaves sold to COMPANY. The distributor may or may not elect to pass the tax to COMPANY. If it does, the distributor may not identify the reimbursement as a tax.

If the granulated tobacco leaves are purchased from an unlicensed out-of-State distributor and brought into Illinois by COMPANY, whether in bulk or contained in capsules, COMPANY must register as a distributor and pay tax on the wholesale price of the granulated tobacco leaves brought into Illinois.

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  
Chairman, Private Letter Ruling Committee

RSW:bkl