

ST 17-0012-PLR 12/27/2017 TOBACCO PRODUCTS TAX ACT

The tax is imposed on any person engaged in business as a distributor of tobacco products. See 35 ILCS 145/10-10). (This is a PLR.) This PLR supplements and modifies ST 17-0010-PLR, dated September 22, 2017.

December 27, 2017

RE: COMPANY

Dear Xxxxx:

This letter is in response to your letter dated October 20, 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 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:

This firm represents COMPANY. I write on behalf of COMPANY in response to your letters dated September 22 and June 14, 2017. I apologize for the delay in responding to your June 14 Letter, and have included responses to the questions raised in that letter. In addition, we request the PLR Committee’s reconsideration of the determinations in your September 22 letter with the benefit of our responses as well as the supplemental analysis and enclosures herein.

For your consideration, please find enclosed the determination of the U.S. Department of Treasury’s Alcohol and Tobacco Tax and Trade Bureau (“TTB”) that PRODUCT is not a taxable “tobacco product,” the determination of the STATE Department of Business and Professional Regulation that PRODUCT is not a taxable “tobacco

product”: and renderings of PRODUCT’s packaging consistent with TTB’s determination.

SUPPLEMENTAL ANALYSIS

As an initial matter, we note that “[a] tax statute must be strictly construed against the government and in favor of the taxpayer.” Kankakee Cnty. Bd. of Review v. Prop. Tax Appeal Bd., 226 Ill. 2d 36, 52, 871 N.E.2d 38, 47 (2007). “The obligation of citizens to pay taxes is purely a statutory creation, and taxes can be levied, assessed and collected only in the manner expressly spelled out by statute.” Millennium Park Joint Venture, LLC v. Houlihan, 241 Ill. 2d 281, 295, 948 N.E.2d 1, 10 (2010).

The frame of reference here is the meaning of the “tobacco products” definition in 35 Ill. Comp. Stat. 143/10-5. We do not believe that PRODUCT falls within this definition.

Insofar as one might suggest a connection between PRODUCT and the term “granulated” tobacco, the statutory definition refers only to a specific sort of *smoking tobacco*. This is evident from the term’s appearance alongside “plug cut, crimp cut, ready rubbed” – all, specific smoking tobaccos – in a list culminating with “other smoking tobacco.” **See** 35 Ill. Comp. Stat. 143/10-5 (emphasis added); Envtl. Prot. Agency v. Pollution Control Bd., 186 Ill. App. 3d 995, 999, 542 N.E.2d 1141, 1143 (1989) (“[W]here two words or phrases of analogous meaning are employed together in a statute, they are understood to be used in their cognate sense, to express the same relations, and give color and expression to each other.”); cf., e.g., Venable v. Richards, 28 F. Cas. 1144, 1146 (C.C.E.D. Va. 1876) (No. 16,913) (observing, of the federal excise statute’s use of “granulated tobacco,” that the court “must interpret it according to the context” and, so doing, that “‘granulated tobacco’ must be classed as a species of chewing or smoking tobacco”), aff’d, 105 U.S. 636 (1881). No aspect of PRODUCT falls within this class of *smoking tobaccos* as PRODUCT involves no smoking of tobacco in a pipe, cigarette, cigar, or the like. The taxable *smoking tobaccos*, therefore, as something much different from PRODUCT’s tobacco. Cf. Karlheinz Millitzer, *Smoking Tobacco*, in Tobacco Encyclopedia pt. II, at 432 (Ernst Voges ed., 1984) (“The collective term ‘smoking tobacco’ can be understood to mean a) fine-cut for handmade cigarettes, and b) pipe tobacco for smoking in tobacco pipes.” (emphasis added)); Smoking tobacco, Webster’s Third New International Dictionary of the English Language 2152 (unabr. 2002) (“tobacco suitable for the manufacture of cigarettes and pipe tobacco – compare *BURLEY, MARYLAND*”)

Insofar as one might suggest a connection between PRODUCT and the possibility of smoking, the statutory inquiry is whether the product has been “prepared in such manner as to be suitable for ... smoking in a pipe or otherwise.” 35 Ill. Comp. Stat. 143/10-5 (emphasis added). PRODUCT’s tobacco capsules are suitable for use only with PRODUCT, and there is no lighting, no combustion, and no smoking with them. Simply put, there is no smoking with PRODUCT – and the capsules are neither suitable for smoking nor intended to be smoked. And even if this issue were unclear, any doubts must be resolved in COMPANY’s favor as the taxpayer. Kankakee Cnty. Bd. of Review, 226 Ill. 2d at 52, 871 N.E.2d at 47; e.g., Final Order, COMPANY, No. 2017-07497, ¶¶ 30-31 (Fla. Dep’t of Bus. & Prof’l Regulation Sept. 21, 2017) (enclosed)

(observing that “it is not clear that the product, as presented, qualifies as “loose tobacco *suitable* for smoking” and quoting the rule of tax statutes’ strict construction in the taxpayer’s favor).¹

The foregoing is even more compelling given TTB’s determination that PRODUCT includes no taxable “tobacco to be smoked in a pipe,” see 26 U.S.C. § 5702(n), or taxable “tobacco for making cigarettes or cigars,” see id. § 5702(o). Letter from Dir. Of TTB Regulations & Rulings Div. (enclosed). These federal definitions have a similar scope and are consistent with Illinois’s listing of *smoking tobaccos* and “other kinds and forms of tobacco, prepared in such manner as to be suitable for . . . smoking in a pipe or otherwise,” see 35 Ill. Comp. Stat. 143/10-5, evoking the Supreme Court of Illinois’s recognition that federal interpretations “are of course persuasive when they construe a statute similar to one of our own,” People ex rel. Lignoul v. Chicago, 67 Ill. 2d 480, 484, 368 N.E.2d 100, 103 (1977).

ANSWERS TO THE PLR COMMITTEE’S QUESTIONS

Further to your letter of June 14, please find below our answers to the questions (reproduced in bold) from the PLR Committee.

1. Will the product be sold [by] your company at retail over the internet? Will you sell to tobacco shops or other retailers?

PRODUCT will be sold to Illinois consumers over the Internet. PRODUCT also will be sold to various retailers through distributors. COMPANY also may sell PRODUCT directly to retailers for the purpose of resale.

2. Do you manufacture the product and the individual components of the product?

No. COMPANY imports PRODUCT and its components, and the products are manufactured by contract manufacturers.

3. Is nicotine extracted from the tobacco in the process of vaping? Or does the process only import taste to the vapor?

Consumer use of PRODUCT extracts both flavor and nicotine from the tobacco.

4. Explain the process how the nicotine is extracted from the tobacco capsule while the product is being used?

Vapor generated by the cartridge extracts nicotine and added flavors from the tobacco when the vapor passes over the tobacco. There is no burning or combustion of the tobacco.

¹ The general language of “kinds and forms of tobacco, prepared in such manner as to be suitable for . . . smoking in a pipe or otherwise” is not broadened by the preceding, specific language of “shorts; refuse scraps, clippings, cuttings, and sweeping of tobacco.”

5. Is the tobacco capsule purchased by the Company as a completed component or do you buy raw tobacco and make the capsules in-house?

COMPANY purchases the capsule packages as a completed component.

6. Is the tobacco suitable for smoking in a pipe?

No. As discussed in COMPANY's Request, the tobacco in PRODUCT is not suitable for "smoking" (as defined under Illinois law) at all. This is because PRODUCT is not lighted or combusted. Moreover, the tobacco capsule is suitable for use only with the PRODUCT device.

If there are any additional questions about this submission, please do not hesitate to contact me. Thank you for your time and attention to this matter.

DEPARTMENT'S RESPONSE:

The Tobacco Products Tax Act of 1995 imposes a tax 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; ...

As we noted previously, the definition must be construed broadly. However, you have provided a number of facts in your letter and the attachments that were not available to us when we made our earlier ruling. Based on your letter and the attachments, it is our understanding that the product is not made in Illinois, is imported into the United States and into Illinois as a completed product, or capsule, the completed product is made of plastic and is not suitable for chewing or smoking. Based on these additional facts, the Department has determined that the capsules and the tobacco contained in the capsules are not subject to Tobacco Products Tax. This letter ruling supplements and modifies our previous private letter ruling regarding the taxability of the tobacco contained in the capsules.

The factual representations upon which this ruling is based are subject to review by the Department during the course of any audit, investigation, or hearing and this ruling shall bind the

Department only if the factual representations recited in this ruling are correct and complete. This Private Letter Ruling is revoked and will cease to bind the Department 10 years after the date of this letter under the provisions of 2 Ill. Adm. Code 1200.110(e) or earlier if there is a pertinent change in statutory law, case law, rules or in the factual representations recited in this ruling.

I hope this information is helpful. If you have further questions related to the Illinois sales tax laws, please visit our website at 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