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The Application of the California Cigarette and Tobacco Products Tax Law to Inventory Seized

Untaxed cigarette and tobacco products held in retail stock and seized as part of investigations of tax evasion are subject to the Cigarette and Tobacco Products Tax. Generally, retail stock includes inventory located at the taxpayer's retail place of business such as product displayed for retail sale or stored beneath sales counters in back room offices, or in any other place on the premises of the retail establishment.

Generally, product found outside of the retail business, including product found at the taxpayer's residence, off-site public storage facilities or "in transit," is not considered part of retail stock.

Product seized in such small quantities as to clearly be for personal use is not considered part of retail stock. 7/18/97.

To: Monte Williams, Chief

Date: July 18, 1997

Excise Taxes Division MIC: 56

From: Monica Gonzalez Brisbane

Tax Counsel

I am writing in response to your March 10, 1997 memorandum requesting a legal opinion regarding the California Cigarette and Tobacco Products Tax Law (Part 13, Division 2, Revenue and Taxation Code) and its application to inventory seized as part of investigations of tax evasion. Specifically, you ask which portions of seized ending inventories of cigarette and tobacco products are subject to taxation within the meaning of section 30101¹ and 30123 as well as how Section 30474 applies to the seized inventories of untaxed cigarettes.

Both section 30101 and 30123 impose tax on every “distributor” for his or her “distributions” of cigarettes. Section 30011 provides that a “distributor” is anyone who, within the mean of “distribution”, distributes cigarettes. Under section 30008 subsection (c), “distribution” is defined to include “[t]he placing in this state of untaxed cigarettes or tobacco products...in *retail stock* for the purpose of selling the cigarettes or tobacco products to consumers.” (Emphasis added). Therefore, for the purposes of imposing the tax set forth in sections 30101 and 30123 to seized cigarettes and tobacco products, it much be determined which parts of the seized inventory would be considered “retail stock”.

Based on your memorandum, the ending inventories of taxpayers include product found, not only in business locations (e.g. in store displays, beneath sales counters, in back rooms and offices), but also in residences (e.g. attics, closets, garages and laundry rooms), off-site public storage facilities (e.g. behind a false wall) and automobiles (e.g. trunks and gloveboxes). In addition, you state that U.S. Customs has seized shipments of untaxed cigarettes and tobacco products consigned to taxpayers.

There is no statutory definition and/or case authority regarding the definition of “retail stock”. Nevertheless, based on the common meaning of the terms, I conclude that all cigarettes and tobacco products seized at the taxpayer’s retail place of business should be considered “retail stock”. This would include product displayed for retail sale and product stored beneath sales counters, in back room offices, or in any other place on the premises of the retail establishment, unless the amount of product is in such small quantities as to clearly be for personal use.

However, product found at the taxpayer’s wholesale business location, at his or her residence, at off-site public storage facilities or in-transit, should not be considered part of the taxpayer’s retail stock. Nor should product in such small amounts at be clearly be for personal use.

¹ Unless otherwise noted, all statutory references are to the Revenue and Taxation Code

With respect to criminal penalties, Section 30474 states, in pertinent part, that “[a]ny person who knowingly possesses, or keeps, stores, or retains for the purpose of sale, or sells or offers to sell, any package of cigarettes to which there is not affixed the stamp or meter impression required to be affixed under this part, when those cigarettes have been obtained from any source whatsoever, is guilty of a misdemeanor....” Based on this language it is my opinion that the criminal penalty for Section 30474 could be imposed for any untaxed cigarettes in the defendants’ possession, no matter where they are kept or stored. That would include cigarettes found not only at business locations, but also at residences, off-site public storage facilities, and in automobiles. However, it would generally not include in-transit shipments of cigarettes, never in the possession of the defendant.

If you have any questions, please contact me at 322-0438.

MGB:es

Cig.mem

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