

**New York State Department of Taxation and Finance
Office of Counsel**

TSB-A-20(1)M, (1)S
Excise Tax
Sales Tax
January 17, 2020

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks which New York State taxes apply to retail sales of chewing tobacco made to customers in New York State. Petitioner also asks if retail sales of chewing tobacco made to customers located outside of the State are subject to any New York State taxes.

We conclude that Petitioner's receipts from retail sales of tobacco products made to customers within the State are subject to New York State and local sales taxes. In addition, all tobacco products, including chewing tobacco, possessed by Petitioner in this State for sale are subject to New York State tobacco products excise tax. However, Petitioner may claim a refund of tobacco products excise tax paid on its receipts from retail sales of tobacco products made to customers outside of the State as long as possession of the tobacco products is transferred to the customer(s) at a point outside of the State and Petitioner properly documents the out-of-state sale.

Facts

Petitioner is licensed as a distributor and retail dealer of tobacco products in New York State and operates a chewing tobacco manufacturing facility located in New York State. Petitioner sells some of its product to retail customers both inside and outside of the State.

Analysis

Tax Law § 1105(a) subjects the sale of tangible personal property, including tobacco products, to New York State and local sales taxes. *See* Tax Bulletin TB-ST-740, *Quick Reference Guide for Taxable and Exempt Property and Services*. Because tobacco products are tangible personal property, Petitioner's receipts from retail sales of tobacco products made within this State are subject to New York State and local sales taxes. Receipts from Petitioner's retail sales of tobacco products delivered to customers located outside of the State are not subject to New York State and local sales taxes. *See* Tax Law § 1105(a).

Tax Law §§ 471 and 471-b impose an excise tax on both cigarettes and tobacco products that are possessed by any person for sale in New York State. Tax Law § 470(5) defines "retail sale" or "sale at retail" as a sale to a consumer or to any other person for any purpose other than resale. Tobacco products are any cigar or tobacco, other than cigarettes, intended to be smoked, chewed or used as snuff. *See* Tax Law § 470(2). Petitioner's chewing tobacco is considered a tobacco product and sales to its customers for any purpose other than for resale are considered retail sales. A retail

dealer is any person other than a wholesale dealer engaged in selling cigarettes or tobacco products. *See* Tax Law § 470(9). A distributor is any person who imports or causes to be imported into this State any tobacco product (in excess of fifty cigars or one pound of tobacco) for sale, or who manufactures any tobacco product in this State, and any person within or without the State who is authorized by the Commissioner of Taxation and Finance to make returns and pay the tax on tobacco products sold, shipped or delivered by him to any person in the State. *See* Tax Law § 470(12).

Based on the facts provided, Petitioner is both a distributor and retail dealer of tobacco products. As a licensed distributor and retail dealer of tobacco products in this State, Petitioner is liable for payment of the tobacco products excise tax on tobacco products which he “[i]mports or causes to be imported into the State, or which he manufactures in the State” regardless of whether the product is sold inside or outside of the State. *See* Tax Law § 471-b(1) and (2). Each month, Petitioner is required to file with the Department Form MT-203, *Distributor of Tobacco Products Tax Return*, showing the quantity and wholesale price of all tobacco products imported or caused to be imported, or manufactured in the State, and all tobacco products sold, shipped or delivered into New York State during the prior month. *See* Tax Law § 473-a. Petitioner must pay the excise tax due on tobacco products with the filing of the MT-203 return, and must file a return even if no tax is due. *See* MT-203-I, *Instruction for Form MT-203*.

Petitioner may claim a refund or take a credit on its MT-203 return for tobacco products excise tax paid on receipts from its retail sales of chewing tobacco made to customers outside of the State. Petitioner may only claim a refund or take a credit for tobacco products tax paid on receipts from retail sales to out-of-state customers if possession of the tobacco products is transferred to the customers at a point outside of the State and Petitioner properly documents the out-of-state sale. *See* Tax Law §§ 474 and 476. These out-of-state sales should be separately accounted for on Petitioner’s monthly MT-203 returns. *See* Tax Law § 473-a.

DATED: January 17, 2020

/S/

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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.