

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"). Petitioner asks whether its [REDACTED] product ("Product") is considered a tobacco product and subject to the excise tax on tobacco products.

We conclude that Petitioner's Product, consisting of the battery, vapor product liquid or gas cartridge, and granulated tobacco leaf capsule, when sold together, is subject to the tobacco products excise tax, State and local sales and use taxes, and the 20% supplemental tax on vapor products. Further, sales of Petitioner's granulated tobacco leaf capsules, when sold separately, are subject to the tobacco products excise tax. Further, retail sales on or after December 1, 2019, of Petitioner's vapor product liquid or gel cartridge are subject to the 20% supplemental tax on vapor products.

Facts

Petitioner is a supplier of electronic cigarettes in this State. Petitioner intends to introduce its electronic cigarettes into the market. Petitioner states that its vapor product is comprised of a battery, a cartridge containing liquid or gel, and a granulated tobacco leaf capsule. Petitioner states that its Product is similar to an electronic cigarette in that a battery heats the liquid or gel contained in the cartridge, creating vapors that the user then inhales. However, Petitioner states that its Product is different from other electronic cigarettes on the market in that Petitioner's Product allows the vapor to pass through a sealed capsule filled with granulated tobacco leaves ("tobacco capsule"). As a result, the user inhales the vapor through the tobacco capsule, giving the vapor a distinct tobacco flavor. The tobacco capsule is sealed by the manufacturer and cannot be burned or ignited in any way. Because the granulated tobacco contained in the sealed tobacco capsule is never ignited or burned, there is no combustion or smoke generated from the use of the product.

Analysis

Petitioner's Product constitutes tangible personal property. Tax Law § 1101(b)(6). Article 28 imposes sales tax on sales of tangible personal property. Petitioner's Product is subject to sales tax, whether sold as a single product or as separate components.

Petitioner's Product contains a sealed capsule of granulated or finely cut tobacco that is not burned, ignited or intended to be smoked. Tax Law § 470(2) defines tobacco products as "[a]ny cigar, including a little cigar, or tobacco, other than cigarettes, intended for consumption by smoking, chewing, or as snuff." Tax Law § 470(18) defines snuff as "[a]ny finely cut, ground, or powdered tobacco that is not intended to be smoked." The capsule incorporated into Petitioner's Product containing granulated tobacco is considered snuff for tax purposes. Snuff is a tobacco product subject to excise tax under Tax Law Article 20. Therefore, Petitioner's Product is subject to the tobacco products excise tax when sold as a single item. Further, if sold separately from the other components of the Product (i.e. the battery and vapor liquid or gel cartridge), the granulated tobacco capsules are subject to the tobacco products excise tax.

Article 28-C of the Tax Law imposes a supplemental tax of 20% on the receipts of retail sales of vapor products, which the law defines as:

"any noncombustible liquid or gel, regardless of the presence of nicotine therein, that is manufactured into a finished product for use in an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, vaping pen, hookah pen or other similar device."

Petitioner's Product contains a noncombustible liquid or gel for use in a device similar to an electronic cigarette. Therefore, Petitioner's Products contains vapor product, and any retail sales of Petitioner's Product are subject to the 20% supplemental tax on vapor products. If Petitioner sells the vapor product cartridges separately from the other components of the Product, the receipts from the sale of the vapor product cartridge alone are subject to the State and local sales tax, as well as the 20% supplemental sales tax on vapor products.

DATED: June 11, 2024

/s/

MARY ELLEN LADOUCEUR

Principal Attorney

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.