

This letter provides guidance on the manner in which to calculate the wholesale price for promotional tobacco products which are sold in larger, pre-packaged units. See 35 ILCS 143/10-5. (This is a PLR).

March 11, 2009

Dear Xxxxx:

This letter is in response to your letter dated October 29, 2008 in which you request 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:

Please accept this letter as a request for a ruling by the Illinois Department of Revenue (the 'Department') regarding the determination of the appropriate tax base with respect to Other Tobacco Products tax ('OTP tax') applicable to specific offers of smokeless tobacco products sold by COMPANY.

FACTS

COMPANY is engaged in the sales and marketing of smokeless tobacco products in the State of Illinois and elsewhere throughout the United States. COMPANY's customers are licensed wholesale distributors who typically resell the products to retailers and remit the tax on tobacco products. COMPANY sells a variety of brands of smokeless tobacco products.

In an effort to provide increased value to its adult consumers, COMPANY routinely offers its customers various offers of specialty products of smokeless tobacco products.

These offers are typically offered for an indefinite period of time. Currently, these offers fall into the following categories:

I. *Single Can Cents-Off Offers*

Under the terms of this offer, COMPANY will offer its adult consumers single cans of smokeless tobacco products. COMPANY sells these items to distributors by master carton, as a separate invoiced line item, with a separate product code and at a separate list price. Each master carton contains a fixed number of display units which contains individual cans of smokeless tobacco product. Each display contains individual cans of smokeless tobacco. Each can has a UPC that is separate and distinct from a can of straight stock product and is separately identified with distinguishable labeling 'Save \$X.XX'. Retailers can only purchase these products from distributors by master carton or by display unit (not by individual can). In addition, this offer will be offered to Illinois customers on a regular, on-going, and continuous basis.

The established list price for this offer will be reflected on COMPANY's regular smokeless tobacco sell sheets (see attached exhibit).

II. *Single Can Pre-Priced Offers*

COMPANY offers its adult consumers single cans of smokeless tobacco products at pre-established retail price. COMPANY sells these items to distributors by master carton, as a separate invoiced line item, with a separate product code and at a separate list price. Each master carton contains a fixed number of display units containing individual cans of smokeless tobacco product. Each can within the display has a UPC that is separate and distinct from that of a can of straight stock product and is separately identified with distinguishable labeling '\$X.XX per can'. Retailers can only purchase these products from distributors by master carton or by display unit (not by individual can). In addition, this offer will be offered to Illinois customers on a regular, on-going, and continuous basis.

The established list price for this offer will be reflected on COMPANY's regular smokeless tobacco sell sheets (see attached exhibit).

III. *Specialty Products*

Under the terms of this offer, COMPANY will offer its adult consumers a pre-packaged specialty unit of smokeless tobacco product. These products have separate and distinct characteristics from straight stock products. COMPANY sells these items to distributors by master carton, as a separate invoiced line item, with a separate product code and at a separate list price. Each master carton contains a fixed number of display units which contain pre-packaged units of smokeless tobacco product. Each display unit is a pre-packaged unit with a UPC that is separate and distinct from that of a can of straight stock product and is separately identified with distinguishable labeling 'Buy 2 Save \$X.XX'. Note that each individual can within the unit cannot be sold separately, is labeled 'Not For Individual Sale or Credit' and does not have a separate UPC. COMPANY's credit policy applies only to the 2-can pre-packaged unit and not to an individual can of smokeless tobacco product. For financial accounting purposes, sale of the specialty unit is recorded by COMPANY at the sale price of the pre-packaged unit and not at some higher price less a discount.

Retailers can only purchase these products from distributors by master carton or display unit (not by individual can). In addition, this offer will be offered to Illinois customers on a regular, on-going, and continuous basis. The established list price for this offer will be reflected on COMPANY's regular smokeless tobacco sell sheets (see attached exhibit).

IV. *Value Pack*

COMPANY offers its adult consumers a separate and distinct pre-packaged unit of smokeless tobacco product at a pre-established retail price. COMPANY sells value packs to distributors by master carton, as a separate invoiced line item, with a separate product code and at a separate list price. Each master carton contains a fixed number of display units containing individual 2-can pre-packaged units of smokeless tobacco product. Each display contains a UPC that is separate and distinct from that of a can of straight stock product and is separately identified with distinguishable labeling '2 Cans For \$X.XX', representing the pre-established retail price for the Value Pack unit. Note, that each individual can within the Value Pack unit cannot be sold separately, is labeled 'Not For Individual Sale or Credit' and does not have a separate UPC. COMPANY's credit policy applies only to the 2-can pre-packaged unit and not to an individual can of smokeless tobacco product. Retailers can only purchase these products from distributors by master carton or by display unit (not by individual can). The Value Pack offer will be offered to Illinois customers on a regular, on-going, and continuous basis. Value packs are unique in that they typically represent a significant portion (up to 20%) of a customer's inventory.

The established list price for this offer will be reflected on COMPANY's regular smokeless tobacco sell sheets (see attached exhibit).

With respect to all of the above offers, COMPANY, its wholesale customers and retail accounts, all consider these items as separate units for all purposes. In addition to the UPC and unique labeling, there are additional manufacturing processes associated with these offers that are separate and distinct from the manufacturing process associated with straight stock product offered by COMPANY.

ILLINOIS LAW

The relevant Illinois law governing the taxation of tobacco products, states:

...a tax is imposed...at the rate of 18% of the wholesale price of tobacco products sold or otherwise disposed of to retailers or consumers located in this State.¹

Illinois law defines *wholesale price* to mean:

the established list price for which a manufacturer sells tobacco products to a distributor, before the allowance of any discount, trade allowance, rebate, or other reduction.²

REQUEST FOR RULING

We respectfully request a ruling regarding the determination of the appropriate tax base with respect to OTP tax, applicable to each of the following specifically referenced offers:

- I. Single Can Cents-Off
- II. Single Can Pre-Priced
- III. Specialty
- IV. Value Pack

ANALYSIS

We believe that the appropriate tax base with respect to OTP tax that should be applied to the above offers should be no more than the actual invoice price of the offer. Illinois law defines 'wholesale price' to mean *the established list price for which a manufacturer sells tobacco products to a distributor, before the allowance of any discount, trade allowance, rebate, or other reduction.*³ The determination of the 'established list price' depends on the facts and circumstances surrounding the sale of the particular product.

The following characteristics of the above mentioned offers indicate that the appropriate tax base should be no more than the actual invoice price and not a hypothetical imputed list price.

- Each offer will be offered for sale to customers within the State of Illinois at a price that is separate and distinct from the price charged on an individual per can basis.
- COMPANY sells these items to its customers by master carton only and not by individual can. Retailers can only purchase these items from wholesalers by master carton or display unit and not by individual can.
- Each unit has a UPC that is separate and distinct from the UPC on individual straight stock cans.
- Each unit within each respective display is separately identified with distinguishable labeling: 'Save \$X.XX' (Single Can Cents-off); '\$X.XX Per Can' (Pre-priced); 'Buy 2 Save \$X.XX' (Specialty); and '2 Cans for \$X.XX' (Value Pack).
- Each offer will be offered for sale to Illinois customers at only one price with only the standard discount for cash payments. No volume discounts are offered to customers.
- There is additional manufacturing associated with these offers that are separate and distinct from the manufacturing associated with other products offered by COMPANY.
- COMPANY's credit policy for [sic] applies only to the pre-packaged unit and not to an individual can of smokeless tobacco product.
- Where applicable, individual cans cannot be sold separately and are specifically marked '*NOT FOR INDIVIDUAL SALE OR CREDIT*' and do not have separate UPC.
- For financial accounting purposes, sale of each respective offer is recorded at the sales price of the specific offer and not at some higher price less a discount.
- The established list price of these offers will be reflected on COMPANY's regular smokeless tobacco 'sell sheets'
- The above offers are offered to Illinois customers on a regular, on-going and continuous basis.

All of the facts surrounding the above referenced offers indicate that each offer should be viewed as a separate and distinct unit. As such, we believe the facts demonstrate

that the tax should be based on no more than the actual invoice price of the offer as the invoice price provides the most accurate, verifiable and auditable taxing methodology.

PRIOR RULING

Note that during 1997 the Department issued COMPANY a ruling concerning the appropriate tax base that should be applied to a pre-packaged unit containing four cans of smokeless tobacco products. The Department concluded that:

Generally, when manufacturers sell pre-packaged units of tobacco products which cannot be purchased in any form other than the pre-packaged unit (e.g. each component of such pre-packaged unit is marked 'Not For Individual Sale'), the wholesale price is the list price established for the pre-packaged unit before the allowance of any discounts, trade allowances, rebates or other reductions.

Applying COMPANY's actual invoice price of the above offers as the appropriate tax base would be consistent with the Department's prior ruling. A copy of this ruling is attached for your reference.

A detailed presentation on this matter is attached for your reference. As COMPANY anticipates launching new offers in the very near future, we would greatly appreciate your expedience in this matter. If you have any questions or require any additional information regarding this matter, please do not hesitate to call me.

DEPARTMENT'S RESPONSE:

The Tobacco Products Tax Act of 1995 imposes a tax upon any person engaged in the business as a distributor of tobacco products at the rate of 18% of the wholesale price of tobacco products sold or otherwise disposed of to retailers or consumers located in Illinois. 35 ILCS 143/10-10. "Wholesale price" means the established list price for which a manufacturer sells tobacco products to a distributor, before the allowance of any discount, trade allowance, rebate, or other reduction. In the absence of such an established list price, the manufacturer's invoice price at which the manufacturer sells the tobacco product to unaffiliated distributors, before any discounts, trade allowances, rebates or other reductions, shall be presumed to be the wholesale price. 35 ILCS 143/10-5.

The Department believes that the appropriate Tobacco Products Tax base for the "Single Can Cents-Off Offers," the "Single Can Pre-Paid Offers," the "Specialty Products," and the "Value Packs" sold by COMPANY, as described in your letter, is the established list price for each offer reflected on its regular smokeless tobacco sell sheets, before the allowance of any discount, trade allowance, rebate, or other reduction. This ruling is based on the representations contained in your letter that each item is offered for sale to distributors by master carton or display unit as a separate item on COMPANY's "sell sheets" and is sold at a separate list price. In addition, this ruling is based on the representations contained in your letter that the individual cans of tobacco products contain a different product code (UPC) from "straight stock." This ruling applies only to tobacco products that are sold in their original promotional packaging and are not broken out from that original promotional packaging.

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. This ruling shall bind the Department only for the product offers identified in this ruling.

I hope this information is helpful. If you have questions concerning this Private Letter Ruling, you may contact me at (217) 782-2844. 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,

Terry D. Charlton
Chairman, Private Letter Ruling Committee

TDC:msk

¹ 35 Ill. Comp. Stat. 143/10-10

² 35 Ill. Comp. Stat. 143/10-5

³ *Id.*