



STATE OF WEST VIRGINIA

Department of Revenue
State Tax Department

Joe Manchin III
Governor

Craig A. Griffith
State Tax Commissioner

ADMINISTRATIVE NOTICE 10-26

SUBJECT: Tobacco Products Excise Tax. Use by a consumer of a machine that manufactures cigarettes and is located at a retail dealer's place of business is considered to be the illegal manufacturing and sale of unstamped cigarettes.

FACTS:

Retail dealers of tobacco products subject to the tax imposed under West Virginia Code §§ 11-17-1 et seq., are making available at little or no charge to consumers a machine that rolls and therefore manufactures cigarettes. The customer purchases tobacco, cigarette paper and filters from the retail dealer, puts the tobacco, paper and filters into the appropriate locations on the machine and, after turning on the machine, the machine manufactures the cigarettes for the consumer. The consumer is then able to leave the business establishment with completely rolled cigarettes without the cigarettes having been stamped and, therefore, without having paid the cigarette tax.

DISCUSSION:

The Tobacco Products Excise Tax is imposed under the authority of West Virginia Code §§ 11-17-1 et seq., on sales of cigarettes at the rate of \$.55 on each 20 cigarettes or in like ratio on any part thereof (cigarette tax), and at the rate equal to 7% of the wholesale price of each article or item of tobacco product other than cigarettes ("other tobacco products" or OTP) sold by the wholesaler or subjobber dealer.

The cigarette tax is paid by the purchase of stamps that are affixed to the package of cigarettes. The OTP tax is paid using an invoice method prescribed by the Tax Commissioner. However, the cigarette tax is not paid on those cigarettes that are manufactured in the retail dealer's place of business.

The Tax Department has determined that the use in the retail dealer's place of business of the machine, whether owned or leased by the retail dealer, that manufactures cigarettes for the consumer is a ruse and an illegal attempt to evade the cigarette tax. The illegality of this activity does not change depending on whether the retail dealer charges a fee for usage of the machine or allows the machine to be used free of charge. In both situations, the retail dealer is providing the equipment and method for the manufacturing of cigarettes upon which the cigarette tax has not been paid.

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SECRETARY OF STATE
WEST VIRGINIA

Following are the specific violations occurring.

West Virginia Code

§11-17-19a. Criminal penalties.

(a) *Misdemeanor penalties.* -- If any person commits any act set forth in this subsection, the person shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than one thousand dollars nor more than twenty-five thousand dollars, or imprisoned in a county or regional jail for not more than one year, or both fined and imprisoned. Each act constitutes a separate misdemeanor:

...

(5) The person sells cigarettes in this state without there having been first affixed to each individual package of cigarettes the stamp or meter impression required to be affixed to the package by this article;

...

(7) The person, being a retail dealer or subjobber in this state, has in his or her possession packages of cigarettes not bearing the stamps or meter impression required to be affixed to the package by this article;

...

(13) The original wholesaler who purchases unstamped cigarettes or tax-not-paid other tobacco products from a manufacturer or other person fails to pay the excise tax imposed by this article and fails to affix the required stamps or meter impressions;

...

(14) A person who is not a wholesaler of tobacco products, as defined in this article, has in his or her possession within this state more than twenty packages of cigarettes, that do not bear cigarette tax paid indicia of this state, stamps or meter impressions, or other tax-not-paid tobacco products, if the retail value of the tobacco products is more than thirty dollars for all tax-not-paid tobacco products. The possession shall be presumed to be for the purpose of evading the payment of the taxes imposed or due on the tobacco products;

...

(15) The person violates any of the provisions of this article or any lawful rule promulgated by the commissioner under authority of article ten of this code.

§11-17-19b. Certain tax-not-paid tobacco products declared contraband.

(a) Whenever the commissioner or any of the commissioner's authorized deputies, agents or employees, or any law-enforcement officer in this state, discovers any tobacco products subject to tax, as provided by this article, and upon which the tax has not been paid, as required by this article, the tobacco products shall thereupon be considered to be contraband, and the commissioner, or the commissioner's authorized deputy, agent or employee, or any law-enforcement officer in this state, may immediately seize and take possession of the tobacco products without a warrant, and the tobacco products and related property shall be forfeited to the state as provided in article seven, chapter sixty-a of this code.

(b) Seizure of contraband shall not be considered to relieve any person from fine or imprisonment, as provided in section nineteen-a of this article, for any of the offenses set forth in said section.

§47-25-6. Penalties.

...

(b) A retail dealer who knowingly sells or offers to sell cigarettes in violation of section three of this article is subject to a civil penalty not to exceed \$100 for each pack of the cigarettes sold or offered for sale: *Provided*, That in no case shall the penalty against that retail dealer exceed \$25,000 for sales or offers to sell during any thirty-day period.

...

(e) In addition to any other remedy provided by law, the State Fire Marshal or the State Tax Commissioner may file an action in circuit court for a violation of this article, including petitioning for injunctive relief against any manufacturer, importer, wholesale dealer, retail dealer, agent or any other person or entity to enjoin that entity from selling, offering to sell, or affixing tax stamps to any cigarette that does not comply with the requirements of this article, or to recover any costs or damages suffered by the state because of a violation of this article, including enforcement costs relating to the specific violation and attorney's fees. Each violation of this article or of rules promulgated under this article constitutes a separate civil violation for which the State Fire Marshal or the State Tax Commissioner may obtain relief. Upon obtaining injunctive relief under this section, the State Fire Marshal or the State Tax Commissioner shall provide a copy of the judgment to all wholesale dealers and agents to which the cigarette has been sold.

(f) Whenever any law-enforcement personnel or duly authorized representative of the State Tax Commissioner discovers any cigarettes for which no certification has been filed as required by section four of this article or that have not been marked in the manner required by section five of this article, they may seize and take possession of the cigarettes. The cigarettes shall be forfeited to the state. The State Tax Commissioner shall destroy any cigarettes seized pursuant to this section: *Provided*, That prior to the destruction of any cigarette seized pursuant to these provisions, the true holder of the trademark rights in the cigarette brand may inspect the cigarette.

We also note that West Virginia Code § 47-25-4 requires the manufacturer to provide specific certifications relating to the propensity of cigarette paper to burn in a specific manner. No certifications have been provided that the cigarette paper sold by retail dealers in conjunction with the above described manufacturing operations satisfies the requirements of West Virginia Code §§ 47-25-1 et seq.

The West Virginia law recognizes traditional consumer use of tobacco and rolling papers in the context of "roll your own cigarettes," and the law classifies this type of tobacco use by the individual consumer as an OTP for purposes of the other tobacco products excise tax.

Given the statutory classification of roll your own tobacco as an OTP, this Administrative Notice does not apply to use of simple one at a time hand rolling machines intended to allow a single roll-your-own cigarette to be made by an individual smoker for immediate consumption by the smoker – such as pocket rollers, handheld rollers and cigarette rolling machines designed for use by the individual consumer in the home, which are in fact used in the home or in a place other than a tobacco retailer's place of business.

Simple consumer use of roll your own tobacco is readily distinguishable from larger scale on site machine assisted cigarette manufacturing on the premises of a tobacco retailer.

The Tax Department will aggressively enforce the Tobacco Products Excise Tax.

Notice of this determination will be filed in the State Register.

Issued: September 10, 2016



Craig A. Griffith
State Tax Commissioner

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