

Annotation: License Required to Store Untaxed Tobacco at  
California Warehouse-Backup Material



STATE OF CALIFORNIA

CALIFORNIA DEPARTMENT OF TAX AND FEE ADMINISTRATION

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GAVIN NEWSOM  
Governor

NICOLAS MADUROS  
Director

January 2, 2020

[REDACTED]

Re: Opinion Request 18-767  
[REDACTED]

Dear Mr. H:

This opinion is in response to your letter dated [REDACTED], in which you request advice concerning the application of the tobacco products tax to your client's storage in California of bulk tobacco intended for sale and further manufacturing in Mexico. The clients are [REDACTED]. Provided the facts described below are accurate and verifiable by audit, [REDACTED] may rely on this response for purposes of Revenue and Taxation Code section (Section) 30284.

In your letter, you state, in relevant part:

Facts

[REDACTED] sells bulk, cut filler tobacco to a cigarette factory located in [REDACTED]. The bulk tobacco is not in consumer packaging or portioning; it is transported in [REDACTED] containers. The tobacco is not intended nor suitable for human consumption in that it is not in consumer packaging or portioning, and is intended only for further manufacturing.

During transportation of the bulk tobacco to [REDACTED], the tobacco may be briefly stored at [REDACTED] warehouse in [REDACTED]. A question has arisen whether the bulk tobacco is a "tobacco product," as defined under Cal. Rev. & Tax Code § 30121:

...

We do not believe that the bulk tobacco is a "tobacco product" because it is not intended for human consumption. The bulk tobacco is intended only for further manufacturing. Nor is the bulk tobacco in consumer packaging.

To the best of my knowledge, no state revenue department has ever taken the position that tobacco intended for further manufacturing is a taxable "tobacco product." And I understand, for example, that the CDTFA does not take the

position that suppliers of unfinished tobacco must obtain tobacco products licenses or pay tobacco products excise taxes before the tobacco can be sold to California manufacturers. We believe our situation to be legally indistinguishable from this scenario.

I would therefore appreciate your confirmation that the bulk tobacco, if stored in [REDACTED] warehouse in [REDACTED] and intended for further manufacturing in [REDACTED], is not a “tobacco product” under Cal. Rev. & Tax Code § 30121, and that no tobacco products license is required for MPL or PCS to possess, transport or store the tobacco.

### **RESPONSE**

The threshold question presented in your request is whether bulk tobacco is a “tobacco product” as defined in Section 30121, which provides, in relevant part, as follows:

(b) “Tobacco products” includes, but is not limited to, a product containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to, cigars, little cigars, chewing tobacco, pipe tobacco, or snuff, but does not include cigarettes. Tobacco products shall also include electronic cigarettes. Tobacco products shall not include any product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product or for other therapeutic purposes where that product is marketed and sold solely for such approved use. Tobacco products does not include any food products as that term is defined pursuant to Section 6359.

You describe the product in question as bulk, filler tobacco that will be sold to a factory in [REDACTED] for further manufacturing. A product is a “tobacco product” if it contains tobacco and it is intended for human consumption, whether smoked or inhaled. To begin, bulk tobacco contains tobacco, so it meets the first part of the definition. As for the second part of the definition, the tobacco is intended to be smoked or inhaled by humans after the tobacco is manufactured into cigarettes. Therefore, bulk tobacco meets the definition of a tobacco product. It is not a statutory requirement that the tobacco be a finished product in order to be a tobacco product pursuant to Section 30121.

Having established that bulk tobacco is a tobacco product, we note that a tobacco products tax is imposed upon a distributor for each distribution of tobacco products. (Rev. & Tax. Code, §§ 30123, subd. (b), 30131.2, subd. (b).) A “distributor” includes any person who distributes tobacco products. (Rev. & Tax. Code, § 3011, subd. (b).) A “distribution” includes the sale or use or consumption of untaxed tobacco products in this state. (Rev. & Tax. Code, § 30008.) “Use or consumption” includes the exercise of any right or power over tobacco products incident to the ownership thereof, other than the sale of the tobacco products or the keeping or retention thereof by a licensed distributor for the purpose of resale. (Rev. & Tax. Code, § 30009.)

The sale of tobacco products by a manufacturer to a licensed distributor is exempt from the tobacco products tax. (Rev. & Tax. Code, § 30103). It is implicit in this exemption that a manufacturer may own and store untaxed tobacco products in this state without a tax being imposed on that use or consumption. Similarly, a licensed distributor may keep or retain untaxed tobacco products in this state for the purpose of resale without being subject to tax because such activity is excluded from the definition of “use or consumption.” (Rev. & Tax. Code, § 30009.) However, the storage of untaxed tobacco products in this state by any person other than a licensed manufacturer or a licensed distributor is subject to the tobacco products tax. (Rev. & Tax. Code, §§ 30008, 30009, 30011.) Moreover, we are authorized to seize from any person who possesses or stores in this state tobacco products on which tax is due but not paid. (Bus. & Prof. Code, § 22974.3, subd. (b).)

Your letter does not indicate whether your clients are engaged in manufacturing or distributing tobacco products. The website for one of your clients, however, states that “██████████ specializes in manufacturing and distribution of hemp based and tobacco smokable products and has strong relationships in mainstream retail such as duty free stores, supermarkets, convenience stores and smoke shops.” Based on ██████████ representations to the general public, it appears that it may be appropriate for ██████████ to obtain a license as a manufacturer or distributor. As for ██████████, if it simply operates a cold storage business, and it does not own or possess any of the tobacco products in question, ██████████ is not required to obtain a tobacco products license. Of course, as stated above, if the tobacco products stored at the ██████████ location are owned by an unlicensed person, the tobacco products are potentially subject to seizure.

I hope this answers your questions. If you have further questions, please write again.

Sincerely,

Stephen M. Smith  
Tax Counsel IV

SMS:yg

cc: Western States Office (OH)  
Ms. Debbie Kalfsbeek (MIC: 62)  
Ms. Sandy Barrow (MIC: 31)