

Memorandum

To: Aimee Olhiser, Chief
Tax Policy Bureau (MIC:92)

Date: June 17, 2024

From: Stephen Smith, Attorney Supervisor *SMS*
Tax and Fee Programs Bureau (MIC:82)

Subject: Tobacco Products Tax Reimbursement
Assignment No. 24-113

This is in response to your memorandum dated March 21, 2024, in which you request a legal opinion regarding when a tobacco products distributor has collected tax reimbursement from its customer. Specifically, you ask:

[I]f the distributor's sales invoice states that the tobacco product is sold "tax paid," "CA tax paid," "CA tobacco tax paid," or in some other way states the tobacco product is sold for a tax-included price, has the distributor collected tobacco tax reimbursement from its customer?

Conclusion

For the reasons explained below, a distributor has collected tobacco tax reimbursement when it collects full payment for invoices stating the tobacco product is sold "tax paid," "CA tax paid," "CA tobacco tax paid," or in some other way states the tobacco product is sold for a tax-included price.

Applicable Law

As you know, every distributor that makes a sale of untaxed tobacco products in this state owes an excise tax based on the wholesale cost of the tobacco products. (Rev. & Tax. Code, §§ 30008, subd. (a), 30123, subd. (b), 30131.2, subd. (b).) Business and Professions Code section 22978.4 requires tobacco products distributors to provide certain information on each sales invoice including, but not limited to, the amount of excise tax due by the distributor on the sale of the tobacco products, or, in the case of a distributor that is also a retailer or manufacturer, a statement that reads: "All California cigarette and tobacco products taxes are included in the total amount of this invoice." (Bus. & Prof. Code, §22978.4, subds. (a)(3), (a)(7).) For out-of-state licensed distributors that are required to collect the tobacco products tax from their California purchasers, Regulation 4092 provides that the distributor's sales invoice must include, among other things, "the amount of tax collected by the distributor or statement indicating that the tobacco products tax has been paid." (Reg. 4092, subd. (f).)

Any untaxed tobacco products possessed by a retailer or wholesaler are subject to seizure. (Bus. & Prof. Code, § 22974.3, subd. (b).) All tobacco products in the possession of a retailer or wholesaler are presumed to be untaxed “until the contrary is established by . . . a purchase invoice that shows that the retailer . . . paid the tax included purchase price to a licensed distributor . . . as described in Section 22978.4.” (*Ibid.*) As a matter of administrative practice, CDTFA inspectors have always accepted the production of purchase invoices stating that the tobacco products were purchased “tax paid,” “CA tax paid,” “CA tobacco tax paid,” or something similar as sufficient documentation for the retailer or wholesaler under inspection to establish that it paid a tax-included purchase price to a licensed distributor as described in Section 22978.4.

Revenue and Taxation Code (RTC) section 30361.5 provides the following with respect to excess tax reimbursement:

When an amount represented by a person to a customer as constituting reimbursement for taxes upon the distribution of tobacco products pursuant to this part is computed upon an amount that is not taxable . . . and is actually paid by the customer to the person, the amount so paid shall be returned by the person to the customer upon notification by the State Board of Equalization or the customer that an excess has been ascertained. If the person fails or refuses to do so, the amount so paid, if knowingly or mistakenly computed by the person upon an amount that is not subject to the tax imposed by this part or that is in excess of the tax amount, shall be remitted by that person to this state.

RTC section 30361.5 was enacted in 2005 as part of a bill containing “clean-up” legislation following enactment of the Cigarette and Tobacco Licensing Act of 2003. The legislative history explicitly states the language in RTC section 30361.5 was modeled on the Sales and Use Tax Law (SUTL) excess tax reimbursement statute, RTC section 6901.5.

Under the SUTL, a retailer that sells tangible personal property for a tax-included sales price has collected tax reimbursement. (See Reg. 1700, subd. (a)(2)(C). See also, Annotations 460.0150 (9/9/93; 9/28/94) (“a statement such as ‘all sales include tax reimbursement’ creates a presumption that tax was charged on all sales and, to the extent there were exempt sales, excess tax reimbursement would exist.”), 460.0260 (1/7/94) (“A retailer who claims that its sales were on a tax-included basis must show that buyers were clearly informed of this method of charging at the time the sales were made.”) Whether property is considered sold at a tax-included price will depend on the facts and circumstances surrounding the sale. It shall be presumed that property is sold at a price which includes tax reimbursement if the retailer posts on the premises, includes on a price tag, or in an advertisement, a notice stating either of the following: (1) all prices of taxable items include sales tax reimbursement computed to the nearest mill, or (2) the price of this item includes sales tax reimbursement computed to the nearest mill. (Civil Code section 1656.1, Reg. 1700, subd. (a)(2)(C).)

Analysis

When a tobacco products distributor sells tobacco products and the sales invoice states that the products are sold “tax paid,” “CA tax paid,” “CA tobacco tax paid,” or something similar, the distributor is charging its customer tax reimbursement because the products are sold for a tax-included price.

As stated above, whether the tobacco products are sold at a tax-included price depends on the facts and circumstances surrounding the sale. When the facts are that the sales invoice states the distributor is charging the purchaser a sales price that is inclusive of the tax the distributor owes on the sale, the distributor is selling the product for a tax-included price. In other words, the distributor is charging the purchaser a price for which the distributor is reimbursed by the purchaser for the tax that applies to the sale. When the purchaser pays the full amount of the tax-included price, the purchaser has reimbursed the distributor for the tax it owes. Notably, this analysis is consistent with the SUTL, upon which the tobacco products tax excess tax reimbursement statute is modeled. Under the SUTL, a retailer that sells tangible personal property for a tax-included price has collected tax reimbursement, and we conclude the same holds true for the tobacco products excise tax.

Practical considerations unique to the tobacco industry bolster the conclusion that an invoice marked “tax paid,” “CA tax paid,” “CA tobacco tax paid,” or something similar, must indicate a tax-included sales price. Business and Professions Code section 22974.3, subdivision (b), requires retailers and wholesalers to maintain invoices for all purchases of tobacco products showing they paid a “tax-included purchase price to a licensed distributor . . . as described in Section 22978.4.” If a retailer or wholesaler under inspection cannot produce a tax-included purchase invoice for every tobacco product in its inventory, the tobacco product is subject to seizure. Production of an invoice showing that the tobacco products were sold by the distributor and purchased by the retailer or wholesaler “tax paid,” “CA tax paid,” “CA tobacco tax paid,” or something similar has always been regarded as proof that the tobacco products were purchased for a tax-included price. If such an invoice were somehow construed not to be evidence of a tax-included purchase price, the tobacco products described on the invoice would be subject to seizure, which would be extremely disruptive for tobacco products sellers. And as explained above, a purchaser’s payment of a tax-included purchase price includes the payment of tax reimbursement.

We hope this answers your question. Please let us know if you need further assistance.

SMS:yg

cc: Sandy Barrow (MIC:31)
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