

INTERNAL POLICY DIRECTIVE 2006-11

November 29, 2006

TOBACCO PRODUCTS TAX OTHER TOBACCO PRODUCTS (OTP) SEIZURE

POLICY ISSUE

When should the department refrain from seizing other tobacco products (“OTP”) despite the lack of an OTP stamp on the shipping case?

POLICY DETERMINATION

If the original manufacturer’s shipping case is marked with the name and address of the first purchaser, who is a licensed OTP wholesaler or unclassified acquirer, and the taxpayer has invoices substantiating purchase of the OTP on the premises, then the OTP should not be seized despite the lack of an OTP stamp located on the shipping case.

If a shipping box or container other than the original manufacturer’s shipping case is found in a place of business or otherwise in the possession of an OTP licensee or retailer without the OTP stamp, the other tobacco products should be seized unless a retailer in possession acquired the OTP from a secondary wholesaler.

DISCUSSION

The Tobacco Products Tax Act (“the Act”) was enacted to tax the sale and distribution of tobacco products as well as to regulate and license the industry. The Act sets out explicit statutory requirements, three of which are relevant to the present analysis.

MCL 205.423(1) provides that “a person shall not purchase, possess, acquire for resale, or sell a tobacco product as a manufacturer, wholesaler, secondary wholesaler, vending machine operator, unclassified acquirer, transportation company, or transporter in this state unless licensed to do so.” Thus, the purchaser must be a licensee for OTP.

MCL 205.426(1) provides: “A licensee shall keep as part of the records a true copy of all purchase orders, invoices, bills of lading, and other written matter substantiating the purchase or acquisition of each tobacco product at the location where the tobacco product is stored or offered for sale.” Thus, the licensee must keep proper invoices on the premises for the OTP. MCL 205.426(6) provides: “If a tobacco product other than cigarettes is received or acquired within this state by a wholesaler, secondary wholesaler, vending machine operator, unclassified acquirer, or retailer, each original manufacturer’s shipping case shall bear the name and address of the person making the first purchase **or** any other markings the department prescribes.” (Emphasis added). The clear language of the statute requires marking the original manufacturer’s shipping case with either the name and address of the first purchaser or other markings as the department prescribes (e.g., OTP stamp), but not both. An original manufacturer’s shipping case bearing either type of marking will be considered to bear the proper markings. Pursuant to the clear language of this statute, the department does not have the authority to require an OTP stamp on the original manufacturer’s shipping case if the case has been marked with the name and address of the first purchaser.

MCL 205.426(6) further provides that if “a tobacco product other than cigarettes is found in a place of business or otherwise in the possession of a wholesaler, secondary wholesaler, vending machine operator, unclassified acquirer, transporter, or retailer without proper markings

on the shipping case, box, or container of the tobacco product or if an individual package of cigarettes is found without a stamp affixed as provided under this act or if a tobacco product is found without proper substantiation by invoices or other records as required by this section, the presumption shall be that the tobacco product is kept in violation of this act." As explained above, OTP will be considered to bear the proper markings if the original manufacturer's shipping case contains the name and address of the first purchaser, even in the absence of an OTP stamp. As long as the taxpayer also keeps substantiating invoices on the premises for the OTP, there is no presumption that the OTP was kept in violation of the act, and seizure would not be appropriate.

Generally only licensed OTP wholesalers or unclassified acquirers receive other tobacco products in original manufacturers' shipping cases. Secondary wholesalers, vending machine operators, and retailers purchase OTP from wholesalers or unclassified acquirers that break down the products from the original manufacturers' shipping cases into smaller containers for shipment to their customers. Since secondary wholesalers, vending machine operators, or retailers are prohibited from possessing other tobacco products in containers that do not bear the proper markings, wholesalers or unclassified acquirers must mark containers they ship to their customers with their OTP stamp. It is a violation of the act for a secondary wholesaler, vending machine operator, or retailer to possess a shipping container without the OTP stamp of its supply source, and OTP conveyed in these containers should be seized. (Note, the name and address of the supplier is not required on the shipping container because the OTP stamp provides sufficient information regarding the wholesaler or unclassified acquirer).

Exception: Products in the possession of a retailer when the products were acquired from a licensed secondary wholesaler will not have an OTP stamp. Secondary wholesalers cannot purchase from the manufacturer, and are not required to have an OTP stamp. In these instances, the determination regarding seizure will be based upon a review of the retailer's records.

In summary, if the original manufacturer's shipping container is marked with the name and address of the first purchaser who is a licensed OTP wholesaler or unclassified acquirer, and the taxpayer has substantiating invoices on the premises for the OTP, then the OTP should not be seized despite the lack of an OTP stamp on the shipping case. OTP in the possession of a secondary wholesaler, vending machine operator, or retailer without the proper markings (OTP stamp) should be seized unless the products were acquired by a retailer from a licensed secondary wholesaler.