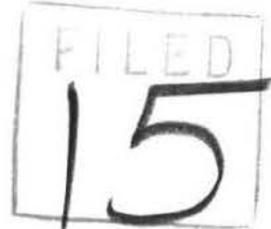


CIGARETTE TAX:

Cigarette tax paid by wholesaler on cigarettes sold by him and later returned may be refunded to wholesaler in certain circumstances.

Opn. No. 335(1961)
No. 15(1962)

February 16, 1962



Mr. R. B. Browning, Supervisor
Cigarette Tax Division
Department of Revenue
Jefferson City, Missouri

Dear Mr. Browning:

This refers to your letter requesting an opinion concerning cigarette tax refunds, which letter reads as follows:

"I should like to request an opinion from your department as to the effect the insertion of paragraph 4 of Section 149.020 will have on the previous ruling from your office relative to refunds."

The prior opinion of this office to which you refer is one addressed to you under date of November 17, 1958, in which we concluded as follows:

"It is the opinion of this office that no refund of the State cigarette tax may be made to a wholesaler with respect to cigarettes which have been sold by the wholesaler within the State of Missouri and which are subsequently returned to him."

The statutory provision for the refund of cigarette taxes, which has not been amended since the date of our prior opinion, now appears in Section 149.040, RSMo 1959, which reads as follows:

"Whenever any cigarettes upon which stamps have been placed have been sold or shipped into another state for sale or use there or have become

unfit for use and consumption or unsalable, or have been destroyed, the wholesaler shall be entitled to a refund of the actual amount of the tax paid with respect to such cigarettes. If the division is satisfied that any wholesaler is entitled to a refund it shall issue to the wholesaler stamps of sufficient value to cover the refund. The division may redeem unused stamps lawfully in the possession of any person; and may prescribe necessary rules and regulations concerning refunds and redemptions."

Section 149.020, RSMo Cum. Supp. 1961, reads in part as follows:

"1. A tax shall be paid on the sale of cigarettes made of tobacco, or any substitute for tobacco, of two mills per cigarette.

"2. This tax shall be paid by affixing stamps in the manner and at the time set forth in this chapter. The stamps shall be affixed to each individual package of cigarettes by the person who first sells the cigarettes within this state. All cigarettes must be stamped before being sold in this state.

* * * * *

"4. Every person required to pay this tax shall add the amount of the tax to the sales price of the cigarettes, it being the purpose and intent of this law that the tax is in fact a levy on the consumer or user with the person first selling the cigarettes acting merely as an agent of the state for the payment and collection of the tax to the state."

As noted in your letter, paragraph 4 was added to Section 149.020 by an amendment enacted in 1961; and your question is whether the addition of said paragraph affects our prior opinion concerning refunds. The only other amendment to the above quoted provisions of Section 149.020 subsequent to our prior opinion was the increase in the rate of tax from one mill to two mills per cigarette.

In our prior opinion we stated in part as follows:

"By the express terms of section 149.040, refunds may be made only to wholesalers; and the reasonable construction of the words, 'the wholesaler', in the context in which they appear in that section, is that the wholesaler entitled to a refund is the one who paid the tax by affixing stamps to the cigarettes with respect to which the refund is sought. This is in accordance with the usual meaning of the term 'refund', namely, that it is a payment of something back to the party from whom it was received.

* * * * *

"One of the definitions given for the term 'refund' in the above quotation is, 'to pay back by the party who has received it, to the party who has paid it, money which ought not to have been paid.' It is believed that it is in this sense that provision is made for the refunds of the cigarette tax.

"Section 149.020, quoted above, provides that the tax shall be paid by affixing stamps and that the stamps shall be affixed by the person who first sells the cigarettes within this state. In other words, the first sale of cigarettes within this state is a taxable transaction and the tax is due and payable through the affixing of stamps at the time of such first sale.

"In normal operation, in anticipation of sales which will be made, it is necessary

for wholesalers to affix stamps to cigarettes which may never become the subject of taxable sales because after affixing the stamps the wholesaler may sell the cigarettes outside the State of Missouri or, prior to sale by the wholesaler, the cigarettes may become unfit for use and consumption or unsalable or be destroyed. In such cases, by affixing the stamps, the wholesaler will have paid a tax which ought not to have been paid; and the statutory provisions for refunds make it possible for him to obtain reimbursement for the tax which he has paid but did not owe. That, we believe, is the sole purpose and effect of the provision for refunds. After the cigarettes have once been sold by the wholesaler within the State of Missouri, there has been a taxable transaction and there is nothing to be refunded which ought not to have been paid."

We still are of the opinion that a refund can be made only to the wholesaler who paid the tax. Also, the law is still clear that the tax must be paid by the person who first sells the cigarettes within this state.

However, by the addition of paragraph 4 to Section 149.020, the law now provides that the person paying the tax shall add the tax to the sales price of the cigarettes, and that it is the intent that the tax shall be a levy on the consumer or user, with the first seller acting as an agent of the state in paying and collecting the tax.

In view of this change in law, it is believed that, where cigarettes are returned to the wholesaler who paid the tax and the wholesaler refunds the tax to the person returning the cigarettes, the wholesaler is in substantially the same position as though he had not sold the cigarettes and should be entitled to a refund of the tax paid by him if the cigarettes become unfit for use or consumption or unsalable or are destroyed. The wholesaler will have paid a tax which the law contemplates shall be "passed on" to the ultimate consumer but, in the circumstances just stated there can be no recovery of the tax by the wholesaler through a sale of the cigarettes.

CONCLUSION

It is the opinion of this office that, where cigarettes are returned to the wholesaler who first sold the cigarettes in this state and who paid the state cigarette tax thereon and the wholesaler refunds the cigarette tax to the person returning the cigarettes, the tax paid by the wholesaler on such cigarettes may be refunded to him by the state if the cigarettes become unfit for use and consumption or unsalable or are destroyed.

The foregoing opinion, which I hereby approve, was prepared by assistant, John C. Baumann.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JCB lc