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March 31, 2016

OPINION NO. 2016-02

TOBACCO; LICENSES; TAXATION:

When transferred to a consumer in exchange for some form of consideration, cigarettes manufactured with a cigarette rolling machine must be affixed with a Nevada cigarette revenue stamp pursuant to NRS 370.170. The owner of the machine may not transfer the cigarettes, or cause them to come into the possession of a consumer, unless the owner of the machine has precollected the excise tax described in NRS 370.165, and has satisfied all applicable federal and state licensing and regulatory requirements, including the requirements of NRS 370.385.

Deonne Contine
Executive Director
Nevada Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706

Dear Ms. Contine:

On behalf of the Nevada Department of Taxation (Department), you have requested an opinion from the Office of the Attorney General as to whether Assembly Bill No. 83 (A.B. 83), enacted during the 78th Session of the Nevada Legislature (2015),

Ms. Deonne Contine
March 31, 2016
Page 2

regulates the activity of persons who own and operate, or allow others to operate, cigarette rolling machines within the State of Nevada. See Act of June 9, 2015, ch. 488, §§ 1-2, 4-9, 11, 2015 Nev. Stat. 2957-2960. More specifically, you have asked whether, or under what circumstances the owner of a cigarette rolling machine must secure a manufacturer's license from the Department before using, or permitting others to use, the machine to produce cigarettes for the personal consumption of a person other than the owner of the machine. Additionally, you have asked whether the owner of the machine must precollect cigarette excise taxes on cigarettes produced in this manner.

In your request letter dated August 24, 2015, you described several situations in which the owner of a cigarette rolling machine might use the machine to produce cigarettes for sale to, or consumption by others. In this regard, you have asked about (1) licensing and (2) tax precollection in situations in which the consumer of the cigarettes pays no charge for the final, rolled cigarettes; supplies the raw materials for the production of the cigarettes; provides his own labor to operate the machine; or operates the machine and takes possession of the cigarettes at a location not open to the general public.

QUESTION ONE

When a person owns and operates, or allows others to operate a cigarette rolling machine for the purpose of producing cigarettes within the state of Nevada, must that person be licensed by the Department as a tobacco manufacturer? If so, must the person be licensed even if the person: (a) levies no charge for the production of the final, rolled cigarette; (b) furnishes no employees or contract labor for the purpose of loading the machine with tobacco and tubes; (c) supplies no raw materials for the production of the cigarettes; or (d) operates or allows others to operate the machine at a non-retail location, including private property?

SUMMARY CONCLUSION TO QUESTION ONE

When the owner of a cigarette rolling machine operates, or allows others to operate, the machine to produce cigarettes for sale to, or consumption by someone other than the owner of the machine, the owner of the machine must be licensed as a tobacco manufacturer regardless of who loads the machine or furnishes the raw materials, whether or not there is a charge to the consumer for the final, rolled cigarette, and whether or not the machine is located on private property.

ANALYSIS

Chapter 370 of the Nevada Revised Statutes (NRS) governs the manufacture, possession and distribution of cigarettes. Under NRS 370.010, a "cigarette" includes "all rolled tobacco or substitutes therefor wrapped in paper or any substitute other than

tobacco, irrespective of size or shape and whether or not the tobacco is flavored, adulterated or mixed with any other ingredient."

Effective June 9, 2015, A.B. 83 amended chapter 370 of NRS to add provisions governing the possession and operation of cigarette rolling machines. 2015 Nev. Stat. 2957-2960. Section 2 of A.B. 83 adopts the following definition:

1. "Cigarette rolling machine" means any machine that:
 - (a) May be loaded with loose tobacco, cigarette tubes, cigarette papers or any other component related to the production of cigarettes;
 - (b) Is designed to automatically or mechanically produce, roll, fill, dispense or otherwise manufacture cigarettes;
 - (c) Is of a commercial grade or otherwise designed or suitable for commercial use; and
 - (d) Is designed to be powered or operated by a primary source of power other than human power.
2. The term does not include any handheld or manually operated machine or device if the machine or device is:
 - (a) Used to make cigarettes for the personal consumption of the owner of the machine or device; or
 - (b) Held by a retail establishment solely for sale to a consumer for the purpose of making cigarettes off the premises of the retail establishment and for personal consumption

2015 Nev. Stat. 2957.

Additionally, NRS 370.0315 defines a "manufacturer" as anyone "who . . . [m]anufactures, fabricates, assembles, processes or labels a finished cigarette . . ." Section 5 of A.B. 83 supplements this definition to include "any person who . . . [o]wns, maintains, operates or permits any other person to operate a cigarette rolling machine for the purpose of producing, filling, rolling, dispensing or otherwise manufacturing cigarettes." 2015 Nev. Stat. 2957 (amending NRS 370.0315).

As indicated above, a cigarette rolling machine does not include a "handheld or manually operated machine or device . . . [u]sed to make cigarettes for the personal consumption of the owner of the machine or device. . . ." 2015 Nev. Stat. 2957. Likewise, it does not include a machine or device held by a seller in the seller's inventory and not used by the seller to produce cigarettes. *Id.* Consequently, the owner of a handheld or manually operated device is not a manufacturer if the owner uses the device to roll cigarettes for the owner's personal consumption, or possesses the device only for purposes of selling the device in the ordinary course of business.

"When a statute's language is plain and unambiguous and the statute's meaning [is] clear and unmistakable, the courts are not permitted to look beyond the statute for a different or expansive meaning or construction." See *DeStefano v. Berkus*, 121 Nev. 627, 629, 119 P.3d 1238, 1239, 1240 (2005). As it pertains to the owner of a cigarette rolling machine, the language of A.B. 83 is plain and unambiguous. If the owner of the machine uses the machine, or permits another person to use the machine, to produce cigarettes for sale to, or consumption by someone other than the owner of the machine, the owner of the machine is a manufacturer. 2015 Nev. Stat. 2957. As a manufacturer, the owner of the machine must secure a manufacturer's license from the Department. 2015 Nev. Stat. 2958. The requirement to secure a manufacturer's license under these circumstances is unconditional. There are no exceptions for machines operated on private property or by consumers who supply their own labor, tobacco, or rolling materials.

QUESTION TWO

When the owner of a cigarette rolling machine uses the machine, or allows others to use the machine, to produce cigarettes for sale to, or consumption by a consumer who is not the owner of the machine, must the owner of the machine precollect cigarette taxes on the sale or consumption of the final, rolled cigarettes?

SUMMARY CONCLUSION TO QUESTION TWO

Under the circumstances as described above, the owner of a cigarette rolling machine must precollect cigarette taxes if he collects from the consumer a charge or fee for: (a) the final, rolled cigarettes; (b) the privilege of using the machine to produce the cigarettes; (c) the raw materials used in the production of the cigarettes; or (d) some comparable aspect of the production cycle. This is true regardless of whether the owner of the machine furnishes the labor or the materials for the production of the cigarettes, or places the machine at a location not open to the general public.

ANALYSIS

Nevada imposes an excise tax "upon the purchase or possession of cigarettes by a consumer in the State of Nevada at the rate of 40 mills per cigarette." NRS 370.165 (emphasis added). "The tax must be precollected by the wholesale or retail dealer, and must be recovered from the consumer by adding the amount of the tax to the selling price." *Id.* Although the tax must be precollected by the wholesale or retail dealer, the tax itself is imposed "upon the consumer and is precollected for convenience only." NRS 370.077.

The precollection of the tax is represented by a Nevada cigarette revenue stamp purchased from the Department and affixed to any package of cigarettes held for sale or

distribution within the State. NRS 370.165. Except as otherwise provided by law, it is unlawful for a wholesale or retail dealer to distribute cigarettes within the State unless the cigarettes have been properly packaged with a revenue stamp affixed. NRS 370.170.

A “wholesale dealer” includes “[a]ny person who manufactures or produces cigarettes within this State *and* who sells or distributes them within the State.” NRS 370.055 (emphasis added). Similarly, a “retail dealer” includes anyone “who sells or distributes cigarettes to a consumer within the State.” NRS 370.033 (emphasis added). Under the circumstances as described above, the owner of a cigarette rolling machine is a manufacturer of cigarettes and must secure a manufacturer’s license from the Department. As to the obligation to precollect the excise tax, the owner of the machine functions simultaneously as the wholesale and retail dealer of the cigarettes if the owner collects a charge or fee for the cigarettes or some aspect of their production cycle. In other words, if the owner of the machine collects such a charge or fee, the owner is reasonably characterized as having “sold” or “distributed” cigarettes to the consumer.

Chapter 370 of NRS does not provide a statutory definition of “distribute” but does provide a definition of the terms “sale” and “to sell.” As they pertain to transactions between a manufacturer and a consumer of cigarettes, these terms mean: “[t]o exchange, barter, possess or traffic in; . . . [t]o deliver for value; . . . [t]o peddle; . . . [t]o traffic in for *any consideration*, promised or obtained directly or indirectly; or . . . [t]o procure or allow to be procured for any reason.” NRS 370.035 (emphasis added). The terms “value” and “consideration” indicate that a transfer of cigarettes between a manufacturer and consumer is not to be considered a sale unless the transfer is supported by consideration. Likewise, the terms “peddle,” “traffic” and “procure” all connote a transfer for consideration.

NRS 370.077 further supports the proposition that a transfer of cigarettes between a manufacturer and consumer must be supported by consideration in order to be characterized as a sale. This provision states that after the excise tax has been precollected by the wholesale or retail dealer, it “shall be added to the selling price of the cigarettes.” NRS 370.077 (emphasis added). This obligation to add the tax to the “price” presupposes that the cigarettes have been transferred for quantifiable value.

When interpreting statutes, a court should view related statutory provisions as a whole. *International Game Technology, Inc. v. Second Judicial District Court*, 122 Nev. 132, 152, 127 P.3d 1088, 1102 (2006). When viewed in its entirety, the language of NRS 370.035 and 370.077 indicates that the term “sale” means a transfer for consideration. While not statutorily defined, the term “distribute” appears in the same context as does the term “sale.” Moreover, terms not statutorily defined “should be given their plain meaning unless it would violate the spirit of the act.” *In re Petition of*

Phillip A.C., 122 Nev. 1284, 1293, 149 P.3d 51, 57 (2006). In a commercial setting, “distribute” refers to a transfer of goods between different points in the supply chain, namely between “stores and other businesses that sell to consumers.” NEW OXFORD AMERICAN DICTIONARY 505 (3d ed. 2010). The distribution of goods between different points in the supply chain most commonly involves an exchange of value or consideration. As a person who transfers cigarettes to another, the owner of cigarette rolling machine has no obligation to precollect tax pursuant to NRS 370.165 unless the owner has sold or distributed them to the consumer. Accordingly, the owner has no obligation to precollect tax unless the owner has transferred the cigarettes, or otherwise caused their transfer for consideration.

Aside from the issue of consideration, however, there remains a question whether the owner of the cigarette rolling machine must precollect tax in the absence of a specific charge to the consumer for the final, rolled cigarettes. In other words, there remains a question as to whether the owner of the machine must precollect tax if the owner purportedly charges the consumer only for the privilege of using the machine, or only for the raw materials used in the production of the cigarettes.

Given the circumstances described in Question Two, the true object of the transaction between the owner of the machine and the consumer is the transfer and acquisition of the final, rolled cigarettes produced by the machine. Although the owner of the machine may purport to levy a charge or fee only for the privilege of using the machine, or only for the cost of the raw materials used in the production of the cigarettes, that charge or fee is properly recharacterized as a charge for the final, rolled cigarettes. See, e.g., *Federated Dept. Stores, Inc., F & R Lazarus Co. Div. v. Lindley*, 456 N.E.2d 1209, 1210 (Ohio 1983) (in evaluating applicability of sales tax, one must draw “a distinction . . . as to the true object of the transaction contract; that is, is the real object sought by the buyer the service per se or the property produced by the service”); *Quotron Systems, Inc. v. Comptroller of Treasury*, 411 A.2d 439, 443 (Md. 1980) (an analysis of the “dominant purpose of the contract . . . is applicable when characterizing the overall function of a company which provides both a service and related equipment”); *Dechert LLP v. Commonwealth*, 942 A.2d 210, 212 (Pa. Cmwlth. Ct. 2007) (holding that the purpose of a sale of canned computer software was the acquisition of the software, not the acquisition of the license to use the software).

Although the courts have applied this true object rationale to questions involving the applicability of sales tax, the rationale is equally persuasive as it applies to Nevada’s cigarette excise tax. Indeed, the Legislature has deemed the owner of a cigarette rolling machine to be a “manufacturer” of the cigarettes produced by the machine. 2015 Nev. Stat. 2957. This holds true regardless of who supplies the labor or the raw materials used for the production of the cigarettes. Accordingly, the owner of the machine is properly characterized as a seller of cigarettes, not a seller of services or materials associated with the production of cigarettes.

Ms. Deonne Contine
March 31, 2016
Page 7

In summary, when transferred to a consumer in exchange for some form of consideration, cigarettes manufactured with a cigarette rolling machine must be affixed with a Nevada cigarette revenue stamp pursuant to NRS 370.170. It follows that the owner of the machine may not transfer the cigarettes, or otherwise cause them to come into the possession of a consumer, unless the owner of the machine has precollected the excise tax in the manner described in NRS 370.165, and has satisfied all applicable federal and state licensing and regulatory requirements, including the requirements of NRS 370.385.¹

Sincerely,

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GLZ/GLZ

¹ NRS 370.385 sets forth packaging and labeling requirements, among others, and incorporates certain federal requirements and restrictions by reference to various provisions of the U.S. Code. Except as it pertains to the manufacturer's license required by NRS 370.080 (as amended by A.B. 83), this opinion does not address licensing, packaging or labeling requirements.