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## REVENUE ADMINISTRATIVE BULLETIN 2009-2

**Approved:** April 6, 2009

### **Tobacco Products Tax Secondary Wholesaler Licensure**

Pursuant to MCL 205.6a, a taxpayer may rely on a Revenue Administrative Bulletin issued by the Department of Treasury after September 30, 2006, and shall not be penalized for that reliance until the bulletin is revoked in writing. However, reliance by the taxpayer is limited to issues addressed in the bulletin for tax periods up to the effective date of an amendment to the law upon which the bulletin is based or for tax periods up to the date of a final order of a court of competent jurisdiction for which all rights of appeal have been exhausted or have expired that overrules or modifies the law upon which the bulletin is based.

### **RAB 2009-2 Tobacco Products Tax, Secondary Wholesaler Licensure**

This Bulletin explains how a secondary wholesaler meets the licensure and reporting requirements under the Tobacco Products Tax Act.

#### **ISSUES**

- I. What are the licensing requirements for secondary wholesalers?
- II. Can a secondary wholesaler who operates out of a van and stores product in a secure storage facility meet the licensing requirements under the Tobacco Products Tax Act (“TPTA”)?
- III. Is there a reporting requirement for a secondary wholesaler under Section 7 of the TPTA, MCLA 205.427(2)?

#### **CONCLUSIONS**

- I. The licensing requirements for a secondary wholesaler under the TPTA are as follows:
  - A. The secondary wholesaler must maintain an “established place of business;”
  - B. A substantial portion of the secondary wholesaler’s established place of business must be the sale of tobacco products;
  - C. The place of business must make tobacco products available to retailers for resale;

- D. The place of business must be a secure nonresidential facility;
- E. The secondary wholesaler must maintain records for four years at the location where the tobacco product is “stored or offered for sale;” and
- F. The place of business must be accessible to the Michigan State Police during regular business hours to permit the inspection of records and products for compliance with the TPTA.

II. A secondary wholesaler who operates out of a van and stores product in a secure storage facility can meet the licensing requirements under the TPTA if he/she treats the secure storage facility as his/her established place of business. In order for the secure storage facility to meet all of the requirements under the TPTA i) the facility must be open during regular business hours to permit inspections, ii) the seller must make tobacco products available to retailers at the secure storage location, and iii) the seller must maintain and store all tobacco products as well as records pertaining to sales in the storage facility.

III. Yes, a secondary wholesaler is required to file a return under Section 7 of the TPTA, MCLA 205.427(2), for periods beginning on or after January 9, 2009.

## **ANALYSIS**

**I. Licensing Requirements.** The licensing requirements for a secondary wholesaler under the TPTA are discussed below.

**A. Definition of Secondary Wholesaler.** The Tobacco Products Tax Act (“Act”) sets forth the definition of a secondary wholesaler as follows:

MCL 205.422(r). “‘Secondary wholesaler’ means a person who sells a tobacco product for resale, who purchases a tobacco product from a wholesaler or unclassified acquirer licensed under this act, and who maintains an established place of business in this state where a substantial portion of the business is the sale of tobacco products and related merchandise at wholesale, and where at all times a substantial stock of tobacco products and related merchandise is available to retailers for resale.”

Essentially the definition requires that a person meet the following criteria in order to qualify as a secondary wholesaler:

- a. Maintain an “established place of business;”
- b. A substantial portion of the business must be the sale of tobacco products; and
- c. A stock of tobacco products must be available to retailers for resale.

**B. Requirement of “Secure Nonresidential Facility”.** MCL 205.423 sets forth the licensure requirements for secondary wholesalers and confers discretion on the Department of Treasury (“Department”) to determine if adequate “proof” has been provided. The statute states that a secondary wholesaler must maintain a facility for the purpose of conducting business that is 1) “secure” and, 2) “nonresidential” in order to be licensed to sell tobacco products. The relevant sections of the statute follow:

“(6) Applications from persons applying for an initial license under this act shall be accompanied by satisfactory proof, as determined by the department, of all the following:

...

(b) That the applicant owns, or has an executed lease for, a secure nonresidential facility for the purpose of receiving and distributing cigarettes and conducting its business if the applicant owns or has an executed lease for such a facility. If the applicant carries on another business in conjunction with the secure nonresidential facility, the other business shall also be identified.”

**C. Inspection and Record Maintenance Requirements.** The TPTA sets forth additional requirements that secondary wholesalers must comply with in order to hold a license. These requirements include the maintenance of records and the availability of records and products for inspection by the Department.

**1. Records.** The TPTA requires that a secondary wholesaler retain complete and accurate records of each tobacco product acquired for resale, including copies of invoices and names and addresses of purchasers. These records must be maintained for four years at the location where the tobacco product is “stored or offered for sale.”

MCL 205.426(1).“ A manufacturer, wholesaler, secondary wholesaler, vending machine operator, transportation company, unclassified acquirer, or retailer shall keep a complete and accurate record of each tobacco product manufactured, purchased, or otherwise acquired. Except for a manufacturer, the records shall include a written statement containing the name and address of both the seller and the purchaser, the date of delivery, the quantity, the trade name or brand, and the price paid for each tobacco product purchased. 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.

(5) All statements and other records required by this section shall be in a form prescribed by the department and shall be preserved for a period of 4 years and offered for inspection at any time upon oral or written demand by the department or its authorized agent by every wholesaler, secondary wholesaler, vending machine operator, unclassified acquirer, and retailer.”

**2. Inspection.** The TPTA also requires that a secondary wholesaler permit the Department to inspect the “operations” of the secondary wholesaler during “regular business hours”. The Department may inspect the records required to be maintained under MCL 205.426, as well as the tobacco products themselves to verify that the items are properly stamped. This function has been assigned to the Michigan State Police (“MSP”) under Executive Order No. 1992-25. Secondary wholesalers using a storage facility for storage of products and records must meet this requirement. Specifically, they must be available during regular business hours to permit the MSP to inspect the storage unit for compliance with the TPTA. To the extent the storage facility is not available to the MSP, the secondary wholesaler would not be in compliance with the TPTA.

MCL 205.426a(6). “The department or its authorized agents may inspect the operations of a secondary wholesaler, vending machine operator, or retailer, or the contents of a specific vending machine, during regular business hours. This inspection shall include inspection of all statements and other records required by section 6 of this act, of packages of cigarettes and tobacco products other than cigarettes, and of the contents of cartons and shipping or storage containers to ascertain that all individual packages of cigarettes have an affixed stamp of proper denomination as required by this act. This inspection may also verify that all the stamps were produced under the authority of the department.”

Further, as noted above, MCL 205.426(5) requires that secondary wholesalers offer records for inspection “at any time upon oral or written demand by the department or its authorized agent.”

**II. Operating Out of a Secure Storage Facility.** A secondary wholesaler who operates out of a van and stores product in a storage facility can meet the licensing requirements under the TPTA if he/she treats the secure storage facility as his/her established place of business. In order for the secure storage facility to meet all of the requirements under the TPTA as discussed in Section I. the secondary wholesaler must operate as follows: i) the secure storage facility must be open during regular business hours to permit inspections, ii) the seller must make tobacco products available to retailers at the secure storage location, and iii) the seller must maintain and store all tobacco products as well as records pertaining to sales in the storage facility.

**III. Reporting Requirements.** Section 7 of the TPTA, MCLA 205.427(2), was amended effective January 9, 2009 to require that a secondary wholesaler file a monthly report that includes the following information:

- A. Wholesale price of tobacco products other than cigarettes;
- B. Quantity of cigarettes purchased;
- C. Wholesale price charged on tobacco products other than cigarettes sold;
- D. Quantity of cigarettes sold; and
- E. Any other information the Department requires.

The Department of Treasury will be providing further information regarding the form and type of reporting that will be required, as well as when filings will be due. Filings for the first few months will be delayed pending development of returns and processing systems. Secondary wholesalers should retain records necessary to file returns for all transactions for periods beginning January 9, 2009.

Questions may be directed to:

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