

IN THE COMMONWEALTH COURT OF PENNSYLVANIA  
WESTERN DISTRICT

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No. \_\_\_\_\_

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Kingdom Vapor & Smoke 4 Less, LLC, Plaintiffs/Petitioners

v.

Pennsylvania Department of Revenue, Defendant/Respondent

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**PETITION FOR REVIEW**

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Alexander H. Lindsay, Jr., Esquire  
Pa. I.D. No. 15088

J. Andrew Salemme, Esquire  
Pa. I.D. No. 208257

THE LINDSAY LAW FIRM, P.C.  
110 East Diamond Street  
Suite 301  
(724) 282-6600  
**Attorneys for Petitioners**  
**Kingdom Vapor and Smoke 4 Less, LLC**

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kingdom Vapor &  
Smoke 4 Less, LLC

Plaintiffs/Petitioners

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Defendant/Respondent

**NOTICE TO DEFEND**

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

MidPenn Legal Services  
213-A North Front Street  
Harrisburg, Pennsylvania 17101  
(717)232-0581

and

Dauphin County Lawyer Referral Service  
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213 North Front Street  
Harrisburg, Pennsylvania 17101  
(717)232-7536

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**PETITION FOR REVIEW PURSUANT TO Pa.R.A.P. 1513(e)**

AND NOW come the Plaintiffs/Petitioners, KINGDOM VAPOR and SMOKE 4 LESS, LLC, by and through their attorneys, THE LINDSAY LAW FIRM, P.C., and Alexander H. Lindsay, Jr., Esquire and J. Andrew Salemme, Esquire and file this Petition for Review with the Commonwealth Court under its original jurisdiction seeking a Preliminary Injunction and Declaratory Judgment and aver the following:

**STATEMENT OF JURISDICTION**

1. This Court has original jurisdiction over this Petition for Review pursuant to 42 Pa.C.S. § 761(a). *See also Keitt v. Ross*, 331 A.2d 582 (Pa. Cmwlth. 1975) (interpreting prior law).

**PARTY SEEKING REVIEW**

2. Plaintiff, Kingdom Vapor, is a Pennsylvania vapor product wholesaler with an address of 226 South 5<sup>th</sup> Avenue, Clarion, PA 16214.

3. Plaintiff, Smoke 4 Less, LLC, is a Pennsylvania vaping retail shop and limited liability company, with an address of 226 South 5<sup>th</sup> Avenue, Clarion, PA 16214.

### **GOVERNMENT UNIT INVOLVED**

4. Defendant, the Pennsylvania Department of Revenue, is part of the executive branch of government in the Commonwealth of Pennsylvania with an address of Strawberry Square, 1133 Strawberry St., Harrisburg, PA 17128.

### **GENERAL STATEMENT OF MATERIAL FACTS**

5. On or about October 1, 2016, Act 84 of 2016, (hereinafter the “Tobacco Products Act” or “the Act”) became effective in relevant part. *See* Attachment 1.

6. That legislation requires electronic cigarette (vaping) wholesalers to impose a forty-percent (40%) tax at the time an “electronic cigarette is first sold to a retailer in this Commonwealth[.]” *See* Section 1202-A(a.1).

7. The 40% tax on wholesalers became effective on October 1, 2016.

8. The wholesale tax does not technically apply to sales outside the Commonwealth. *See* Section 1202-A(d)(1). However, it is illegal, under the Act, for a person to possess an “electronic cigarette” in Pennsylvania without paying the 40% tax.

9. The Act also imposes a 40% “floor tax” on unsold inventory on retail shops, which includes items falling within the definition of an electronic-cigarette.

*See* Section 1203-A.

10. The floor tax becomes effective on December 30, 2016.

11. The Act defines “electronic cigarettes” as:

(1) An electronic oral device, such as one composed of a heating element and battery or electronic circuit, or both, which provides a vapor of nicotine or any other substance and the use or inhalation of which simulates smoking.

(2) The term includes:

(i) A device as described in paragraph (1), notwithstanding whether the device is manufactured, distributed, marketed or sold as an e-cigarette, e-cigar and e-pipe or under any other product, name or description.

(ii) A liquid or substance placed in or sold for use in an electronic cigarette.

12. The definition of electronic cigarette does not include the individual components of the electronic cigarette; rather, it encompasses the entire electronic cigarette as well as the liquid that is used inside of the electronic cigarette and any substance used for vaping.

13. The Act further defines a “wholesaler” as, “A person engaged in the business of selling tobacco products that receives, stores, sells, exchanges or distributes tobacco products to retailers or other wholesalers in this Commonwealth

or retailers who purchase from a manufacturer or from another wholesaler who has not paid the tax imposed by this article.”

14. Kingdom Vapor is a wholesaler of vaping products including e-cigarettes and e-cigarette products, located in Clarion County, Pennsylvania and is a tobacco licensee and is required to collect the tax under the Act.

15. Failure to pay taxes under the Act results in an “administrative penalty.” *See* Section 1203-A(b).

16. The administrative penalty is equal to the amount of tax not paid and can result in the suspension or revocation of the company’s license to sell electronic cigarettes. *See* Section 1203-A(b)(1)-(2).

17. The Act also contains a criminal penalty for those that willfully omit, neglect or refuse to collect taxes under the Act. *See* Section 1203-A(c). The crime is an ungraded misdemeanor for which the person can be sentenced to fifteen to thirty days incarceration and pay a fine of at least \$2500 and up to \$5000. *Id.*

18. Similarly, any person who sells or possesses tobacco products<sup>1</sup> for which a tax has not been paid commits a summary offense and must pay a fine of at

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<sup>1</sup> “Tobacco products” are defined as electronic cigarettes, roll-your own tobacco and “[p]eriques, granulated, plug cut, crimp cut, ready rubbed and other smoking tobacco, snuff, dry snuff, snuff flour, cavendish, plug and twist tobacco, fine-cut and other chewing tobaccos, shorts, refuse scraps, clippings, cutting prepared in such manner as to be suitable for chewing or ingesting or for smoking in a pipe or otherwise, or any combination of chewing, ingesting, or smoking.” The definition of tobacco products does not include cigars.

least \$100 up to \$1000 and is subject to possible imprisonment for sixty days. *See* Section 1207-A(a).

19. As a result, any person in Pennsylvania who purchases an electronic cigarette or other tobacco product outside of Pennsylvania and brings it into the Commonwealth will now be a criminal subject to a \$1000 fine and/or 60 days in jail, unless they pay a 40% tax on the out-of-state purchase.<sup>2</sup>

20. Further, there is a tax evasion crime included in the statute. *See* Section 1207-A(b). Someone who falsely, fraudulently, maliciously, intentionally or willfully with intent to evade the payment of the tax sells or **possess** any tobacco product upon which no tax has been paid commits a felony. This felony offense subjects the person to a fine of not more than \$5,000 and could include a term of imprisonment up to five years. *Id.*

21. It is also a crime to fail to keep or make a record, return, report, or inventory of the tobacco products sold and amount of tax due and paid. *See* Section 1214-A(a). This is a misdemeanor offense that requires a fine of \$500 and potential imprisonment up to one year.

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<sup>2</sup> Setting aside the unenforceability of such a provision, this aspect of the law is a violation of the Commerce Clause, the Fourteenth Amendment's Privileges and Immunities Clause and Due Process Clause, the Privileges and Immunities Clause of Article IV, § 2 of the federal constitution, and potentially Article I, § 8 of the federal constitution, which prohibits a state from taxing imports into the State without Congressional approval. The provision appears to be aimed at internet purchases from out-of-state.

22. On August 5, 2016, the Pennsylvania Department of Revenue issued a bulletin to tobacco licensees, including Kingdom Vapor. That bulletin noted that the e-cigarette tax would not apply to medical devices used to inhale or ingest prescription medication, including medical marijuana.

23. On August 29, 2016, Zach Oesterling of Kingdom Vapor and Smoke 4 Less, LLC submitted an e-mail to the Department of Revenue inquiring into what products are to be taxed under Act 84.

24. In this e-mail, Zach Oesterling included the following verbatim list of products:

- Loose Lithium Ion batteries (size 18350, 185000, 18650, 26650 etc.)
- Battery chargers
- Spools of resistance wire (kanthal, SS 316, Titanium, etc.)
- Cotton
- Replacement Coils/heating elements (sold individually/without a battery or tank)
- Regulated Mods (Sold with or without batteries)
- Mechanical Mods (Sold with or without batteries)
- Refillable tanks with replacement coil (sold separate from mods/batteries)
- Rebuild-able Dripping Atomizers or R.D.A. (No coils installed)
- Rebuild-able Tank Atomizers or R.T.A. (No coils installed)
- 0mg nicotine E-liquid
- Drip tips/mouth pieces
- Accessories like cases and lanyards.



25. On September 13, 2016, the Department of Revenue provided a response that any items sold for use in e-cigarettes are taxable, despite the plain language of the Act not supporting this overly inclusive interpretation. *See* Attachment 2, e-mail between Zach Oesterling and Valarie Hammaker.

26. Directly lifting from Zach Oesterling's e-mailed list, on September 19, 2016, the Department of Revenue provided updated information on the Tobacco Products Tax—Act 84. *See* Attachment 3, Pennsylvania Tobacco Products Tax, Updated September 19, 2016.

27. In its example of taxable products, it listed verbatim, in identical order, the list of items included in Zach Oesterling's e-mail, setting forth only that cases and lanyards were not taxable.

28. That the Department of Revenue used Zach Oesterling's e-mail is plainly evidenced by the fact that Mr. Oesterling's e-mail contained a typographical error regarding a 185000 lithium ion battery. Such a battery does not exist; rather, the proper number is 18500. Despite this fact, the Department of Revenue bulletin included the same typographical error.

29. The list provided by the Department of Revenue is constitutionally over-broad, over-inclusive and was directly taken from Zach Oesterling's e-mail and not reflective of the actual language of the governing statute.

30. Thereafter, on October 25, 2016, the Department of Revenue provided an additional update regarding the Pennsylvania Tobacco Products Tax. *See* Attachment 4.

31. The October 25, 2016 information sheet indicated in relevant part, under the heading, “What is taxable under the Tobacco Products Tax, that, “E-cigarettes, liquids or any other substance that goes into e-cigarettes[.]”

32. The October 25, 2016 information sheet also included the following example of taxable items:

Lithium-ion batteries, battery chargers, cables or spools of resistance wire if these items are sold with an e-cigarette or are integral to an e-cigarette device. Also included are components designed for use in e-cigarettes such as replacement coils/heating element (sold individually/without a battery or tank), regulated mods (sold with or without batteries), refillable tanks with replacement coil (sold separate from mods/batteries), rebuildable dripping atomizers or R.D.A. (No coils installed), rebuildable tank atomizers or R.T.A. (No coils installed), 0mg nicotine E-liquid, drip tips/mouth pieces.

Not taxable: Generic batteries, battery chargers, cables, cases or lanyards, or items not packaged with e-cigarettes and not integral to use in e-cigarettes.

*See* Attachment 4.

33. The components aspect of the above list is clearly not included in the definition of the statute and is an improper attempt by an executive branch of government to expand the legislative definition beyond its plain meaning and to re-

write the statute to cover components that were not explicitly included, a violation of the doctrine of separation of powers.

34. Indeed, the “2016 State Tax Summary: Act 84 of 2016” indicates that the tax applies to “Electronic cigarettes including both the liquid product and the delivery device[.]” *See* Attachment 5.

35. Smoke 4 Less is a retailer of vaping products and will be required to collect the floor tax under the Act.

36. According to news reports, 67 vape shops have already closed as a result of the Act. <https://www.heartland.org/publications-resources/publications/research--commentary-pennsylvanias-high-vaping-tax-needs-to-go>.<sup>3</sup>

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<sup>3</sup> The following is a list of seventeen customers of Kingdom Vapor that have closed as a result of the Act:

3-2-1 Vapel, 3545 W. 12 St., Unit 3, Erie, PA 16505.  
East Coast Vapors, 10859 Bustelton Ave., Philadelphia, PA 191116.  
Fresh Vapes, 21 Main St. Bradford, PA 16361.  
Guntown Vape, LLC, 121 West Pike St., Canonsburg, PA 15317.  
Guntown Vape, LLC, 5846 Library Rd., Bethel Park, PA 15102..  
Hippie and the Hound, 2412 Peach St., Erie, PA 16502.  
K&D Vape Shop, 206 N. Warren Ave., Apollo, PA 15213.  
Stars n Stripes Vapor, 151 S. Hanover St., Carlisle, Pa 17013.  
5<sup>th</sup> Avenue Vapor, 965 5<sup>th</sup> Ave., New Kensington, PA 15068.  
Steamworks Vapor Company, 4967 William Flynn Highway, Gibsonia, PA 15044.  
Valley Vapors, 3555 Margate Road, Bethlehem, PA 18020.  
Vape Fumo, 2331 State Route 209, Sciota, PA 18354.  
Vapor Connection, 79 Pittsburgh Road, Suite 3, Butler, PA 16002.  
Vapor Dog Pittsburgh, 4004 William Penn Highway, Monroeville, PA 15146.  
Vapor Lounge, LLC, 215 Corbet St., Tarentum, PA 15084.  
The Vapor Asylum, 102 S. Michale St., St. Mary's, PA 15857.  
Lancaster Steamworks, 1689 Crown Ave. #6, Lancaster, PA 17601

37. Similarly, the Pocono Record has reported that up to 92% of such businesses could close causing a loss of approximately 1500 jobs. <http://www.poconorecord.com/news/20160730/state-e-cigarette-shop-owners-react-to-new-taxes-and-regulations>.

38. Kingdom Vapor itself has suffered direct and immediate harm as a result of Act 84 and the interpretation of that law by the Department of Revenue since it is an e-cigarette wholesaler required to collect the tax.

39. Kingdom Vapor will also suffer direct, immediate and irreparable harm by the imposition of the floor tax, which will cause retail stores, *i.e.*, retail customers of Kingdom Vapor, to close.

40. Smoke 4 Less will suffer direct, immediate and irreparable harm by imposition of the floor tax on the over-broad and over-inclusive list of products as it requires a 40% tax on such inventory.

### **STATEMENT OF RELIEF SOUGHT**

#### **Count 1: Request for Declaratory Judgment**

41. Plaintiffs incorporate by reference the previous paragraphs.

42. Under the Declaratory Judgment Act, “Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance,

contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder.” 42 Pa.C.S. § 7533 (emphases added).

43. Provisions that impose a tax, as well as those provisions that involve criminal penalties are to be strictly construed. 1 Pa.C.S. § 1928.

44. In construing the meaning of a statute, the courts “look to ascertain and effectuate the intention of the General Assembly.” *Commonwealth v. Sarapa*, 13 A.3d 961, 964 (Pa. Super. 2011); 1 Pa.C.S. § 1921(a).

45. “Every statute shall be construed, if possible, to give effect to all its provisions. When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” *Id.*

46. The definition of electronic cigarette includes the phrase, “substance placed in or sold for use in an electronic cigarette[,]” the items in question do not fit neatly within the meaning of the term, “substance.”

47. “Substance” when read in conjunction with the word “liquid” demonstrates that its meaning relates to a substance that can be vaporized. This is evident from the first part of the definition which discusses “a vapor of nicotine or any other substance and the use or inhalation of which simulates smoking.”

48. Language in a statute is to be construed in *pari materia* with other parts of that statute.

49. Hence, the term “substance” relates to a chemical that can be vaporized to simulate smoking and not a component of the e-cigarette device. Indeed, if it were construed as including a “component” then there is no reason to distinguish between generic batteries and lithium-ion batteries or battery chargers, the latter of which is listed as both taxable and non-taxable.

50. Further, it would be nonsensical, unenforceable, and unconstitutional to criminalize possession of “electronic cigarettes” in which a tax has not been imposed if the interpretation of an electronic-cigarette includes components that are purchased out-of-state and brought into the Commonwealth, such as batteries, battery chargers, mods, atomizers, etc...

51. The letter of the statute, when strictly construed, demonstrates that the plain language does not cover batteries, battery chargers, cotton, resistance wire, replacement coils, mods, atomizers, and drip tips/mouth pieces, when not sold as part of a complete “electronic cigarette” that is sold as a unit.

52. Moreover, while the definition includes “A liquid or substance placed in or sold for use in an electronic cigarette[,]” when read in conjunction with the remainder of the definition, the word “substance” must be construed as consistent with an item that can be vaporized or used to simulate smoking. Indeed, mods,

batteries, battery chargers, replacement coils, etc... would not fall under the ordinary definition of a “substance” as used in the context of the statute as these items are not substances.

53. Even if one were to find that the statute is ambiguous as to whether it includes such items, interpreting it in such a manner as the Department of Revenue has done leads to absurd results and violations of the Uniformity Clause of the Pennsylvania Constitution, Pa.Const. Art. VIII, § 1 (“All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.”), the equal protection clause of the Fourteenth Amendment, the due process clause of the Fourteenth Amendment, the privileges and immunities clause of the Fourteenth Amendment, the Commerce Clause, Article IV, § 8 of the federal constitution, and due process under the Pennsylvania Constitution, as well as equal protection under the Pennsylvania Constitution.

54. For example, Kingdom Vapor and other “tobacco” wholesalers would be required to tax batteries, battery chargers, cables, wire, and cotton at 40% percent but other wholesalers and retailers of non-tobacco items would not. It is well-established that the General Assembly does not intend absurd results nor to violate the federal or Pennsylvania Constitution. 1 Pa.C.S. § 1922.

55. In this regard, 18650 batteries and chargers are used in flashlights and RC cars and can also be used for laptop battery packs, resistance wire is used to cut Styrofoam, and as a heating element in furnace products, and toasters. Cotton packs sold by vaping wholesalers are dental or facial cotton and sold by non-vapor product wholesalers.

56. In addition, Smoke 4 Less and other vaping retailers will be required to pay a floor tax of 40% on the same items in their inventory while other non-vaping retailers will not.

57. Moreover, medical marijuana devices sold in a dispensary are not subject to the tax; yet the only difference between medical marijuana vaping devices and an e-cigarette is the heating element used in the device. Thus, the legislature has arbitrarily elected not to tax medical marijuana smoking devices that are substantially identical to e-cigarette devices.

58. A substantial question regarding the constitutionality of the Act exists based on the Department of Revenue's interpretation and there is an absence of an adequate statutory remedy.

59. "When there exists no legitimate distinction between the classes, and, thus, the tax scheme imposes substantially unequal tax burdens upon persons otherwise similarly situated, the tax is unconstitutional." *Leonard v. Thornburgh*, 489 A.2d 1349, 1352 (Pa. 1985).



60. Had the legislature intended to include the aforementioned items in paragraph 36, it could have provided a definition such as:

“Electronic smoking device means any device that can be used to deliver aerosolized or vaporized nicotine to the person inhaling from the device, including, but not limited to an e-cigarette, e-cigar, e-pipe, vape pen or e-hookah. Electronic smoking device includes any component, part, or accessory of such a device, whether or not sold separately, that is used during the operation of the device.”

<http://publichealthlawcenter.org/sites/default/files/resources/tcl-c-fs-ecig-taxation-2015.pdf>.

61. Since the definition of electronic cigarette does not include “any component, part, or accessory of such a device, whether or not sold separately,” which could have easily been included, the only items that are taxable are e-liquids, the electronic cigarette device itself, and any other substance used to create vapor to simulate smoking.

62. Plaintiffs are seeking a Declaratory Judgment, *see* Pa.R.A.P. 1561(b), that the tax applies solely to e-liquid, substances used to create a vapor, and the electronic cigarette device itself but does not include batteries, battery chargers, cotton, resistance wire, replacement coils, mods, and atomizers, drip tips, and mouth pieces that are sold separately from the actual electronic cigarette and are not, by definition, “substances” that go into the e-cigarette device.

63. In the alternative, Plaintiffs request a Declaratory Judgment that the interpretation of the Act by the Department of Revenue is a violation of the

separation of powers, results in the definition of an electronic-cigarette being unconstitutionally overbroad, and the Tax is unconstitutional in violation of any and/or all of the following: the Uniformity Clause of the Pennsylvania Constitution, the Equal Protection Clause of the Fourteenth Amendment, the Due Process Clause of the Fourteenth Amendment, the Privileges and Immunities Clause of the Fourteenth Amendment, the Commerce Clause, Article IV, § 8 of the federal constitution, and due process under the Pennsylvania Constitution, as well as equal protection under the Pennsylvania Constitution.

#### Count II: Preliminary Injunction

64. Plaintiffs incorporates by reference all prior paragraphs.

65. Plaintiffs also requests a preliminary injunction to preclude the Department of Revenue from requiring the collection of a 40% tax on items sold or unsold inventory that are not e-liquid, the electronic cigarette device, or a substance used to create a vapor to simulate smoking.

66. In order to be awarded a preliminary injunction, a party must show that it is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; (2) greater injury would result from refusing an injunction than from granting it, and, the issuance of the injunction would not substantially harm other interested parties in the proceedings; (3) the injunction will properly restore the parties to their status as it existed before; (4) the party seeking

the injunction is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and (6) the injunction will not adversely affect the public interest. *Lindeman v. Borough of Meyersdale*, 131 A.3d 145, 151 (Pa. Cmwlth. 2015).

67. To be entitled to a permanent injunction, a party must establish a clear right to relief, but does not need to prove irreparable harm. Rather, such relief can be granted “to prevent a legal wrong for which there is no adequate redress at law.” *J.C. Ehrlich Co., Inc. v. Martin*, 979 A.2d 862, 864 (Pa. Super. 2009).

68. Plaintiffs meets all of the elements for the entering of a preliminary injunction.

69. First, an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages. The Tobacco Products Act threatens such harm by impermissibly burdening Kingdom Vapor and other e-cigarette wholesalers as well as Smoke 4 Less and other retailers with the collection of an astronomical tax on products not directly covered by law and potential criminal and administrative penalties.

70. Second, greater injury would result from allowing the Act to be implemented by requiring e-cigarette wholesalers and retailers to tax batteries, battery charges, cotton, and other items that can be sold and purchased by other entities without actual support in the legislative language for such collection.

71. Third, granting injunctive relief will restore the parties to the position they were in based on the proper construction of the law—which does not mandate collecting taxes on items sold or unsold inventory such as batteries, battery charges, cotton, and other items.

72. Fourth, Plaintiffs are likely to prevail on the merits of the underlying claims in this case. Interpreting the Act beyond its plain language to require taxing items not covered violates both statutory law and provisions of the federal and Pennsylvania Constitution.

73. Moreover, the test for a preliminary injunction is not whether Plaintiffs are “guaranteed to prevail,” but instead is whether there is sufficient evidence to show that “substantial legal questions must be resolved to determine the rights of the respective parties.” *Ambrogi v. Reber*, 932 A.2d 969, 980 (Pa. Super. 2007).

74. Fifth, the requested injunctive relief is reasonably suited to abate the offending activity in this case. Enjoining the Department of Revenue from requiring Plaintiffs from collecting a tax on items not expressly included in the Act will relieve Plaintiffs of the substantial burden of collecting and paying tax on items sold or unsold inventory that are not governed by the plain language of the statute and eliminate having to defend against criminal and administrative penalties.

75. Finally, the requested injunctive relief will not adversely affect the interests of the public. E-cigarette devices are less harmful than regular tobacco products and provide safer means of acquiring nicotine than do cigarettes, cigars, and actual tobacco products.<sup>4</sup> Moreover, the tax would still be imposed on e-liquid and e-cigarette devices.

76. Imposing the tax in a manner proposed by the Department of Revenue will cause and has already caused numerous small e-cigarette and vaping businesses to close. As a result, Big Tobacco companies, who have largely been behind the move to tax at high rates e-cigarettes, are able to fill the market.<sup>5</sup> The result is a less healthy public and more individuals relying on more harmful tobacco products.<sup>6</sup>

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<sup>4</sup> According to the American Association of Public Health Physicians, e-cigarettes, “could save the lives of 4 million to 8 million current adult American smokers who will otherwise die of a tobacco related illness over the next 20 years.” *See* <https://www.heartland.org/publications-resources/publications/research--commentary-pennsylvania-considers-unreliable-tobacco-tax-increase>. Additionally, according to one British study, a smoker is 60% more likely to succeed in quitting smoking when using an e-cigarette than with other over-the-counter nicotine replacements or willpower alone. <http://www.addictionjournal.org/press-releases/e-cigarette-use-for-quitting-smoking-is-associated-with-improved-success-rates->.

<sup>5</sup> Duquesne University economics professor, Antony Davies, has been quoted in the Pittsburgh Tribune Review as stating, “Vaping is a relatively small bit of the market, and it’s not a smart way to generate a large amount of revenue[.]” He added that the vaping tax looks like “a handout for big pharma and big tobacco.” Natasha Lindstrom, *Vaping proponents advocate for change to 40% tax*, Pittsburgh Tribune Review, October 4, 2016.

<sup>6</sup> Bill Godshall, Executive Director of SmokeFree Pennsylvania, an anti-smoking non-profit organization, has been quoted as saying, “This whole vapor tax is crazy. It’s really a disastrous public health policy and disastrous fiscal policy for the state[.]” *See id.* Public Health England has opined that e-cigarettes are 95% safer than regular cigarettes. <https://www.heartland.org/publications-resources/publications/research--commentary-study-reports-health-benefits-from-e-cigarette-use>. Similarly,

77. Plaintiffs aver that the Act would be unconstitutional if it is read to include batteries, battery chargers, cotton, resistance wire, replacement coils, mods, and atomizers, drip tips, and mouth pieces that are sold separately.

78. Accordingly, a preliminary injunction against the Department of Revenue should be granted, *see* Pa.R.A.P. 1532, to preclude it from collecting tax on items not expressly falling within the definition included in the Tobacco Products Act, *i.e.*, e-liquid, e-cigarette devices, and substances similar to e-liquid that can be used to vape.

Wherefore, Plaintiff requests that this Honorable Court grant declaratory relief by declaring that the plain language of the Tobacco Products Tax mandates only a tax on e-liquid or similar substances used for vaping and the e-cigarette device itself or declare the Act unconstitutional and a preliminary injunction enjoining the Department of Revenue from expanding the statutory language of the Tobacco

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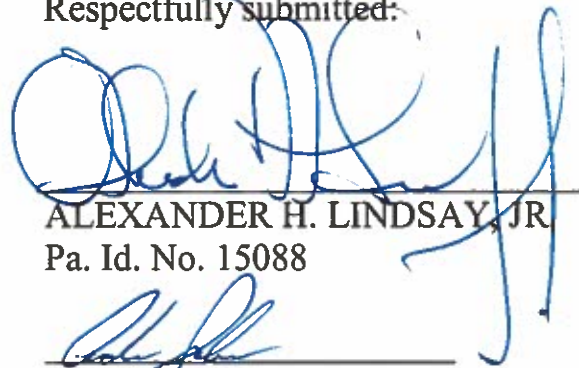
The Tobacco Advisory Group of the Royal College of Physicians published Nicotine without Smoke: Tobacco Harm Reduction in April 2016. The report found e-cigarettes helped to produce “a relatively high quit rate” for tobacco cigarette smokers, and it found, “The long-term health risks associated with smoking ... are unlikely to exceed 5% of those associated with smoked tobacco products.”

The report’s authors say the VNP products have not “attracted significant use among adult never-smokers” and that “promotion of the use of non-tobacco nicotine, including e-cigarettes ... as a substitute for smoking ... is therefore likely to generate significant health gains in the [United Kingdom].”

*Id.*

Products Tax and requiring wholesalers and retailers to collect tax on items not expressly covered by the Act.

Respectfully submitted:

A large, stylized handwritten signature in blue ink, likely belonging to Alexander H. Lindsay, Jr., is written over a horizontal line.

ALEXANDER H. LINDSAY, JR.

Pa. Id. No. 15088

A smaller, stylized handwritten signature in blue ink, likely belonging to J. Andrew Salemm, is written over a horizontal line.

J. ANDREW SALEMME

Pa. I.D. 208257

110 East Diamond Street, Suite 301

Butler, Pennsylvania 16001

Phone: 724.282.6600

[al.lindsay186@gmail.com](mailto:al.lindsay186@gmail.com)

[andrew@lindsaylawfirm.com](mailto:andrew@lindsaylawfirm.com)

VERIFICATION

I, Robert Oesterling do hereby verify that the statements contained in the foregoing document are true and correct to the best of my knowledge, information, and belief. I understand that false statements made herein are subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

A handwritten signature in cursive script, appearing to read "Robert Oesterling", is written over a horizontal line.

Bob Oesterling



## Attachment 1

**six thousandths** per cent of the total value of Pennsylvania cigarette tax stamps purchased by the agent from the department or its authorized agents to be used in the stamping of unstamped cigarettes for sale within this Commonwealth. The cigarette stamping agent may deduct from the moneys to be paid to the department or its authorized agents for the stamps an amount equal to [eighty-seven hundredths] **five hundred eighty-six thousandths** per cent of the value of the stamps purchased. This section shall not apply to purchases of stamps by a cigarette stamping agent in an amount less than one hundred dollars (\$100).

Section 17.1. Section 1296 of the act, amended June 29, 2002 (P.L.559, No.89), is amended to read:

Section 1296. Disposition of Certain Funds.--[Receipts from the tax imposed by this article shall be deposited into the General Fund. Twenty million four hundred eighty-five thousand dollars (\$20,485,000) of the receipts deposited into the General Fund in accordance with this section shall be transferred annually to the Agricultural Conservation Easement Purchase Fund. Thirty million seven hundred thirty thousand dollars (\$30,730,000) of the receipts deposited into the General Fund in accordance with this section shall be transferred annually to the Children's Health Fund for health care for indigent children. The transfers required by this section shall be made in two equal payments by July 15 and January 15.]

(a) Receipts from the tax imposed under this article shall be deposited into the General Fund and used as follows:

(1) Twenty-five million four hundred eighty-five thousand dollars (\$25,485,000) shall be transferred annually to the Agricultural Conservation Easement Purchase Fund.

(2) Thirty million seven hundred thirty thousand dollars (\$30,730,000) shall be transferred annually to the Children's Health Fund for health care for uninsured children.

(3) For the payments required under subsection (c).

(b) The transfers required under subsection (a)(1) and (2) shall be made in two equal payments by July 15 and January 15.

(c) For any fiscal year after the effective date of this subsection in which the revenue deposited into the Local Cigarette Tax Fund from an excise tax imposed and assessed upon the sale or possession of cigarettes within a school district that is coterminous with a city of the first class is less than fifty eight million dollars (\$58,000,000), the State Treasurer shall transfer receipts deposited into the General Fund in accordance with this section to the Local Cigarette Tax Fund in an amount equal to the difference between the revenue deposited during the fiscal year and fifty eight million dollars (\$58,000,000) to be disbursed as provided under 53 Pa.C.S. § 8722(i) (relating to local option cigarette tax in school districts of the first class). The Secretary of Revenue shall determine the amount to be transferred. The transfers required under this subsection shall be made annually by July 15.

Section 18. The act is amended by adding an article to read:

#### ARTICLE XII-A

#### TOBACCO PRODUCTS TAX

Section 1201-A. Definitions.

The following words and phrases when used in this article shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Cigar." Any roll for smoking that weighs more than four pounds per thousand and the wrapper or cover is made of natural leaf tobacco or of any substance containing tobacco.

"Cigarette." As defined in section 1201.

"Consumer." An individual who purchases tobacco products for personal use and not for resale.

"Contraband." Any tobacco product for which the tax imposed by this article has not been paid.

"Dealer." A wholesaler or retailer. Nothing in this article shall preclude any person from being a wholesaler or retailer, provided the person meets the requirements for a license in each category of dealer.

"Department." The Department of Revenue of the Commonwealth.

"Electronic cigarettes." As follows:

(1) An electronic oral device, such as one composed of a heating element and battery or electronic circuit, or both, which provides a vapor of nicotine or any other substance and the use or inhalation of which simulates smoking.

(2) The term includes:

(i) A device as described in paragraph (1), notwithstanding whether the device is manufactured, distributed, marketed or sold as an e-cigarette, e-cigar and e-pipe or under any other product, name or description.

(ii) A liquid or substance placed in or sold for use in an electronic cigarette.

"Manufacturer." A person that produces tobacco products.

"Person." An individual, unincorporated association, company, corporation, joint stock company, group, agency, syndicate, trust or trustee, receiver, fiduciary, partnership, conservator, any political subdivision of the Commonwealth or any other state. If used in any of the provisions of this article prescribing or imposing penalties, the term "person" as applied to a partnership, unincorporated association or other joint venture, shall mean the partners or members of the partnership, unincorporated association or other joint venture, and as applied to a corporation, shall mean each officer and director of the corporation.

"Purchase price." The total value of anything paid or delivered, or promised to be paid or delivered, money or otherwise, in complete performance of a sale or purchase, without any deduction on account of the cost or value of the property sold, cost or value of transportation, cost or value of labor or service, interest or discount paid or allowed after the sale is consummated, any other taxes imposed by the Commonwealth or any other expense.

"Retailer." A person that purchases or receives tobacco products from any source for the purpose of sale to a consumer, or who owns, leases or otherwise operates one or more vending machines for the purpose of sale of tobacco products to the ultimate consumer. The term includes a vending machine operator or a person that buys, sells, transfers or deals in tobacco products and is not licensed as a tobacco products wholesaler under this article.

"Roll-your-own tobacco." Any tobacco which, because of the tobacco's appearance, type, packaging or labeling, is suitable for use and is likely to be offered to, or purchased by, consumers as tobacco for making cigarettes.

"Sale." Any transfer of ownership, custody or possession of tobacco products for consideration; any exchange, barter or gift; or any offer to sell or transfer the ownership, custody or possession of tobacco products for consideration.

"Taxpayer." Any person subject to tax under this article.

"Tobacco products." As follows:

(1) Electronic cigarettes.

(2) Roll-your-own tobacco.

(3) Periques, granulated, plug cut, crimp cut, ready rubbed and other smoking tobacco, snuff, dry snuff, snuff flour, cavendish, plug and twist tobacco, fine-cut and other chewing tobaccos, shorts, refuse scraps, clippings, cuttings and sweepings of tobacco and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or ingesting or for smoking in a pipe or otherwise, or any combination of chewing, ingesting or smoking.

(4) The term does not include:

- (i) Any item subject to the tax under section 1206.
- (ii) Cigars.

"Unclassified importer." A consumer who purchases tobacco products using the Internet or mail-order catalogs for personal possession or use in this Commonwealth from persons that are not licensed.

"Vending machine operator." A person who places or services one or more tobacco product vending machines whether owned, leased or otherwise operated by the person at locations from which tobacco products are sold to the consumer. The owner or tenant of the premises upon which a vending machine is placed shall not be considered a vending machine operator if the owner's or tenant's sole remuneration therefrom is a flat rental fee or commission based upon the number or value of tobacco products sold from the machine, unless the owner or tenant actually owns the vending machine or leases the vending machine under an agreement whereby any profits from the sale of the tobacco products directly inure to the owner's or tenant's benefit.

"Wholesaler." A person engaged in the business of selling tobacco products that receives, stores, sells, exchanges or distributes tobacco products to retailers or other wholesalers in this Commonwealth or retailers who purchase from a manufacturer or from another wholesaler who has not paid the tax imposed by this article.

Section 1202-A. Incidence and rate of tax.

(a) Imposition of tax on certain tobacco products.--A tobacco products tax is imposed on the dealer or manufacturer at the time the tobacco product is first sold to a retailer in this Commonwealth at the rate of 55¢ per ounce for the purchase of any tobacco product other than electronic cigarettes. The tax rate shall include a proportionate tax at the rate of 55¢ per ounce on all fractional parts of an ounce. The tax imposed on tobacco products other than electronic cigarettes that weigh less than 1.2 ounces per container is equal to the amount of the tax imposed on tobacco products other than electronic cigarettes that weigh 1.2 ounces. The tax shall be collected from the retailer by whomever sells the tobacco product to the retailer and remitted to the department. Any person required to collect this tax shall separately state the amount of tax on an invoice or other sales document.

(a.1) Imposition of tax on electronic cigarettes.--A tobacco products tax is imposed on the dealer or manufacturer at the time the electronic cigarette is first sold to a retailer in this Commonwealth at the rate of 40% on the purchase price charged to the retailer for the purchase of electronic cigarettes. The tax shall be collected for the retailer by whomever sells the electronic cigarette to the retailer and remitted to the department. Any person required to collect this tax shall separately state the amount of tax on an invoice or other sales document.

(b) Retailer.--A retailer may only purchase tobacco products from a licensed dealer. If the tax is not collected by the seller from the retailer, the tax is imposed on the retailer at the time of purchase at the same rate as in subsections (a) and (a.1) based on the retailer's purchase price of the tobacco products. The retailer shall remit the tax to the department.

(c) Unclassified importer.--The tax is imposed on an unclassified importer at the time of purchase at the same rate as in subsections (a) and (a.1) based on the unclassified importer's purchase price of the tobacco products. The unclassified importer shall remit the tax to the department.

(d) Exceptions.--The tax shall not be imposed on any tobacco products that:

- (1) are exported for sale outside this Commonwealth; or

(2) are not subject to taxation by the Commonwealth pursuant to any laws of the United States.

Section 1203-A. Floor tax.

(a) Payment.--

(1) Any retailer that, as of the effective date of this paragraph, possesses tobacco products subject to the tax imposed by section 1202-A other than roll-your-own tobacco shall pay the tax in accordance with the rates specified in section 1202-A. The tax shall be paid and reported on a form prescribed by the department within 90 days of the effective date of this paragraph.

(2) Any retailer that, as of the effective date of this paragraph, possesses roll-your-own tobacco subject to the tax imposed by section 1202-A shall pay the tax in accordance with the rates specified in section 1202-A. The tax shall be paid and reported on a form prescribed by the department within 90 days of the effective date of this paragraph.

(b) Administrative penalty; license.--If a retailer fails to file the report required by subsection (a) or fails to pay the tax imposed by subsection (a), the department may, in addition to the interest and penalties provided in section 1215-A, do any of the following:

(1) Impose an administrative penalty equal to the amount of tax evaded or not paid. The penalty shall be added to the tax evaded or not paid and assessed and collected at the same time and in the same manner as the tax.

(2) Suspend, revoke or refuse to issue the retailer's license.

(c) Criminal penalty.--In addition to any penalty imposed under subsection (b), a person that willfully omits, neglects or refuses to comply with a duty imposed under subsection (a) commits a misdemeanor and shall, if convicted, be sentenced to pay a fine of not less than \$2,500 nor more than \$5,000, to serve a term of imprisonment not to exceed 30 days, or both.

Section 1204-A. Remittance of tax to department.

Wholesalers, retailers, unclassified importers and manufacturers shall file monthly reports on a form prescribed by the department by the 20th day of the month following the sale or purchase of tobacco products from any other source on which the tax levied by this article has not been paid. The tax is due at the time the report is due. The department may require the filing of reports and payment of tax on a less frequent basis at its discretion.

Section 1205-A. (Reserved).

Section 1206-A. Procedures for claiming refund.

A claim for a refund of tax imposed by this article under section 3003.1 and Article XXVII shall be in the form and contain the information prescribed by the department by regulation.

Section 1207-A. Sales or possession of tobacco product when tax not paid.

(a) Sales or possession.--Any person who sells or possesses any tobacco product for which the proper tax has not been paid commits a summary offense and shall, upon conviction, be sentenced to pay costs of prosecution and a fine of not less than \$100 nor more than \$1,000 or to imprisonment for not more than 60 days, or both, at the discretion of the court. Any tobacco products purchased from a wholesaler properly licensed under this article shall be presumed to have the proper taxes paid.

(b) Tax evasion.--Any person that shall falsely or fraudulently, maliciously, intentionally or willfully with intent to evade the payment of the tax imposed by this article sell or possess any tobacco product for which the proper tax has not been paid commits a felony and shall, upon conviction, be sentenced to pay costs of prosecution and a fine of not more than \$5,000 or to

imprisonment for not more than five years, or both, at the discretion of the court.

**Section 1208-A. Assessment.**

The department is authorized to make the inquiries, determinations and assessments of the tax, including interest, additions and penalties, imposed by this article.

**Section 1209-A. (Reserved).**

**Section 1210-A. (Reserved).**

**Section 1211-A. Failure to file return.**

Where no return is filed, the amount of the tax due may be assessed and collected at any time as to taxable transactions not reported.

**Section 1212-A. False or fraudulent return.**

Where the taxpayer willfully files a false or fraudulent return with intent to evade the tax imposed by this article, the amount of tax due may be assessed and collected at any time.

**Section 1213-A. Extension of limitation period.**

Notwithstanding any other provision of this article, where, before the expiration of the period prescribed for the assessment of a tax, a taxpayer has consented, in writing, that the period be extended, the amount of tax due may be assessed at any time within the extended period. The period so extended may be extended further by subsequent consents, in writing, made before the expiration of the extended period.

**Section 1214-A. Failure to furnish information, returning false information or failure to permit inspection.**

(a) **Penalty.**--Any taxpayer who fails to keep or make any record, return, report, inventory or statement, or keeps or makes any false or fraudulent record, return, report, inventory or statement required by this article commits a misdemeanor and shall, upon conviction, be sentenced to pay costs of prosecution and a fine of \$500 and to imprisonment for not more than one year, or both, at the discretion of the court.

(b) **Examination.**--The department is authorized to examine the books and records, the stock of tobacco products and the premises and equipment of any taxpayer in order to verify the accuracy of the payment of the tax imposed by this article. The person subject to an examination shall give to the department or its duly authorized representative the means, facilities and opportunity for the examination. Willful refusal to cooperate with or permit an examination to the satisfaction of the department shall be sufficient grounds for the suspension or revocation of a taxpayer's license. In addition, a person who willfully refuses to cooperate with or permit an examination to the satisfaction of the department commits a misdemeanor and shall, upon conviction, be sentenced to pay costs of prosecution and a fine of \$500 or to imprisonment for not more than one year, or both, at the discretion of the court.

(c) **Dealer or manufacturer records.**--A dealer or manufacturer shall keep and maintain for a period of four years records in the form prescribed by the department. The records shall be maintained at the location for which the license is issued.

(d) **Reports.**--A dealer or manufacturer shall file reports at times and in the form prescribed by the department.

(e) **Manufacturer, wholesaler or dealer records.**--A manufacturer, wholesaler or dealer located or doing business in this Commonwealth who sells tobacco products to a wholesale or retail license holder in this Commonwealth shall keep records showing:

- (1) A list by tobacco product and by brand family of the number and kind of tobacco products sold, the amount of tax due and the amount of tax paid. For roll-your-own tobacco, the records shall include the total weight and the equivalent stick count of roll-your-own tobacco by brand family which the manufacturer, wholesaler or dealer sold, the amount of tax due

and the amount of tax paid. For purposes of this paragraph, 0.09 ounces of roll-your-own tobacco shall constitute one stick.

(2) The date the tobacco products were sold.

(3) The name and license number of the dealer the tobacco products were sold to.

(4) The total weight of each of the tobacco products sold to the license holder.

(5) The place where the tobacco products were shipped.

(6) The name of the common carrier.

(f) Manufacturer, wholesaler or dealer.--A manufacturer, wholesaler or dealer shall file with the department, on or before the 20th day of each month, a report showing the information listed in subsection (e) for the previous month.

(g) Records.--Each manufacturer, wholesaler and dealer shall maintain and make available to the department and to the Office of Attorney General all invoices and documentation of sales of all tobacco products and any other information relied upon to prepare the reports required under subsection (f) for a period of five years after each report is filed with the department.

Section 1215-A. Other violations, peace officers and fines.

Sections 1278, 1279, 1280 and 1291 are incorporated by reference into and shall apply to the tax imposed by this article.

Section 1216-A. Sales reporting.

For purposes of reporting sales of roll-your-own tobacco under the act of June 22, 2000 (P.L.394, No.54), known as the Tobacco Settlement Agreement Act, 0.09 ounces of tobacco shall constitute one individual unit sold.

Section 1217-A. (Reserved).

Section 1218-A. (Reserved).

Section 1219-A. Records of shipments and receipts of tobacco products required.

The department may, in its discretion, require reports from any common or contract carrier who transports tobacco products to any point or points within this Commonwealth, and from any bonded warehouseman or bailee who has in the possession of the warehouseman or bailee any tobacco products. The reports shall contain the information concerning shipments of tobacco products that the department determines to be necessary for the administration of this article. All common and contract carriers, bailees and warehousemen shall permit the examination by the department or its authorized agents of any records relating to the shipment or receipt of tobacco products.

Section 1220-A. Licensing of dealers and manufacturers.

(a) Prohibition.--No person, unless all sales of tobacco products are exempt from Pennsylvania tobacco products tax, shall sell, transfer or deliver any tobacco products in this Commonwealth without first obtaining the proper license provided for in this article.

(b) Application.--An applicant for a dealer's or manufacturer's license shall complete and file an application with the department. The application shall be in the form and contain information prescribed by the department and shall set forth truthfully and accurately the information desired by the department. If the application is approved, the department shall license the dealer or manufacturer for a period of one year and the license may be renewed annually thereafter.

Section 1221-A. Licensing of manufacturers.

Any manufacturer doing business within this Commonwealth shall first obtain a license to sell tobacco products by submitting an application to the department containing the information requested by the department and designating a process agent. If a manufacturer designates no process agent, the manufacturer shall be deemed to have made the Secretary of State its agent for the service of process in this Commonwealth.

**Section 1222-A. Licensing of wholesalers.**

(a) Requirements.--Applicants for a wholesale license or renewal of that license shall meet the following requirements:

- (1) The premises on which the applicant proposes to conduct business are adequate to protect the revenue.
- (2) The applicant is a person of reasonable financial stability and reasonable business experience.
- (3) The applicant, or any shareholder controlling more than 10% of the stock if the applicant is a corporation or any officer or director if the applicant is a corporation, shall not have been convicted of any crime involving moral turpitude.
- (4) The applicant shall not have failed to disclose any material information required by the department, including information that the applicant has complied with this article by providing a signed statement under penalty of perjury.
- (5) The applicant shall not have made any material false statement in the application.
- (6) The applicant shall not have violated any provision of this article.
- (7) The applicant shall have filed all required State tax reports and paid any State taxes not subject to a timely perfected administrative or judicial appeal or subject to a duly authorized deferred payment plan.

(b) Multiple locations.--The wholesale license shall be valid for one specific location only. Wholesalers with more than one location shall obtain a license for each location.

**Section 1223-A. Licensing of retailers.**

Applicants for a retail license or renewal of that license shall meet the following requirements:

- (1) The premises in which the applicant proposes to conduct business are adequate to protect the revenues.
- (2) The applicant shall not have failed to disclose any material information required by the department.
- (3) The applicant shall not have any material false statement in the application.
- (4) The applicant shall not have violated any provision of this article.
- (5) The applicant shall have filed all required State tax reports and paid any State taxes not subject to a timely perfected administrative or judicial appeal or subject to a duly authorized deferred payment plan.

**Section 1224-A. License for tobacco products vending machines.**

Each tobacco products vending machine shall have a current retail license which shall be conspicuously and visibly placed on the machine. There shall be conspicuously and visibly placed on every tobacco products vending machine the name and address of the owner and the name and address of the operator.

**Section 1225-A. License fees and issuance and display of license.**

(a) Application.--At the time of making any application or license renewal application:

- (1) An applicant for a tobacco products manufacturers license shall pay the department a license fee of \$1,500.
- (2) An applicant for a wholesale tobacco products dealer's license shall pay to the department a license fee of \$1,500.
- (3) An applicant for a retail tobacco products dealer's license shall pay to the department a license fee of \$25.
- (4) An applicant for a vending machine tobacco products dealer's license shall pay to the department a license fee of \$25.

(b) Proration.--Fees shall not be prorated.

(c) Issuance and display.--On approval of the application and payment of the fees, the department shall issue the proper license which must be conspicuously displayed at the location for which it has been issued.

**Section 1226-A. Electronic filing.**



The department may at its discretion require that any or all returns, reports or registrations that are required to be filed under this article be filed electronically. Failure to electronically file any return, report, registration or other information the department may direct to be filed electronically shall subject the taxpayer to a penalty of 5% of the tax due on the return, up to a maximum of \$1,000, but not less than \$10. This penalty shall be assessed at any time and collected in the manner provided in this article. This penalty shall be in addition to any civil penalty imposed in this article for failure to furnish information or file a return. The criminal penalty for failure to file a return electronically shall be the same as the criminal penalty for failure to furnish information or file a return under this article.

**Section 1227-A. Expiration of license.**

(a) **Expiration.**--A license shall expire on the last day of February next succeeding the date upon which it was issued unless the department at an earlier date suspends, surrenders or revokes the license.

(b) **Violation.**--After the expiration date of the license or sooner if the license is suspended, surrendered or revoked, it shall be illegal for any dealer to engage directly or indirectly in the business heretofore conducted by the dealer for which the license was issued. Any licensee who shall, after the expiration date of the license, engage in the business theretofore conducted by the licensee either by way of purchase, sale, distribution or in any other manner directly or indirectly engaged in the business of dealing with tobacco products for profit shall be in violation of this article and be subject to the penalties provided in this article.

**Section 1228-A. Administration powers and duties.**

(a) **Department.**--The administration of this article is vested in the department. The department shall adopt rules and regulations for the enforcement of this article. The department may impose fees as may be necessary to cover the costs incurred in administering this section.

(b) **Joint administration.**--The department is authorized to jointly administer this article with other provisions of this act, including joint reporting of information, forms, returns, statements, documents or other information submitted to the department.

**Section 1229-A. Sales without license.**

(a) **Penalty.**--Any person who shall, without being the holder of a proper unexpired dealer's license, engage in purchasing, selling, distributing or in any other manner directly or indirectly engaging in the business of dealing with tobacco products for profit commits a summary offense and shall, upon conviction, be sentenced to pay costs of prosecution and a fine of not less than \$250 nor more than \$1,000 or to imprisonment for not more than 30 days, or both, at the discretion of the court.

(b) **Prima facie evidence.**--Open display of tobacco products in any manner shall be prima facie evidence that the person displaying such tobacco products is directly or indirectly engaging in the business of dealing with tobacco products for profit.

**Section 1230-A. Violations and penalties.**

(a) **Suspension.**--The license of any person who violates this article may be suspended after due notice and opportunity for a hearing for a period of not less than five days or more than 30 days for a first violation and shall be revoked or suspended for any subsequent violation.

(b) **Fine.**--In addition to the provisions of subsection (a), upon adjudication of a first violation, the person shall be fined not less than \$2,500 nor more than \$5,000. For subsequent

violations, the person shall, upon adjudication thereof, be fined not less than \$5,000 nor more than \$15,000.

(c) Civil penalty.--A person who violates section 1214-A (b), (c) or (d) or 1225-A(c) shall be subject to a civil penalty not to exceed \$300 per violation but shall not be subject to subsections (a) and (b).

#### Section 1231-A. Property rights.

(a) Incorporation.--Subject to subsection (b), section 1285 is incorporated by reference into and shall apply to this article.

(b) Alterations.--

(1) References in section 1285 to cigarettes shall apply to tobacco products in this article.

(2) References in section 1285 to 2,000 or more unstamped cigarettes shall apply to tobacco products worth at least \$500 in this article.

(3) References in section 1285 to more than 200 unstamped cigarettes shall apply to tobacco products worth at least \$50 in this article.

#### Section 1232-A. Sample of tobacco products.

(a) Samples.--The department shall, by regulation, govern the receipt, distribution of and payment of tax on sample tobacco products issued for free distribution.

(b) Construction.--Nothing in this article or the regulations promulgated under this article shall prohibit the bringing into this Commonwealth by a manufacturer samples of tobacco products to be delivered and distributed only through licensed dealers or the manufacturers or their sales representatives. The tax shall be paid by the manufacturer provided all such packs bear the legend "all applicable State taxes have been paid." Under no circumstances shall any untaxed tobacco products be sold within this Commonwealth.

#### Section 1233-A. Labeling and packaging.

It shall be unlawful to knowingly possess, sell, give, transfer or deliver to any person any tobacco product where the packaging of which has been modified or altered by a person other than the original manufacturer. Modification or alteration shall include the placement of a sticker, writing or mark to cover information on the packages. For purposes of this section, a tobacco product package shall not be construed to have been modified or altered by a person other than the manufacturer if the most recent modification or alteration was made by the manufacturer or person authorized by the manufacturer and approved by the department.

#### Section 1234-A. Information exchange.

The department is authorized to exchange information with any other Federal, State or local enforcement agency for purposes of enforcing this article.

Section 18.1. Section 1707-B of the act, amended July 12, 2006 (P.L.1137, No.116), is amended to read:

Section 1707-B. Time Limitations.--[A taxpayer is not entitled to a research and development tax credit for Pennsylvania qualified research and development expenses incurred in taxable years ending after December 31, 2015.] The termination date in section 41(h) of the Internal Revenue Code of 1986 (Public Law 99-514, 26 U.S.C. § 41(h)) does not apply to a taxpayer who is eligible for the research and development tax credit under this article for the taxable year in which the Pennsylvania qualified research and development expense is incurred.

Section 19. The heading of Article XVII-D of the act, added July 25, 2007 (P.L.373, No.55), is amended to read:

#### ARTICLE XVII-D

##### [FILM] ENTERTAINMENT PRODUCTION TAX CREDIT

Section 20. Article XVII-D of the act is amended by adding a subarticle heading to read:

#### SUBARTICLE A PRELIMINARY PROVISIONS

## Attachment 2



Zach Oesterling &lt;zachoesterling@gmail.com&gt;

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**E-Cigarette Taxable Products**

3 messages

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**Zach Oesterling** <zachoesterling@gmail.com>  
To: vhammaker@pa.gov

Mon, Aug 29, 2016 at 7:31 PM

Hi Valerie,

We spoke about a week ago and I was looking for more information on exactly what vapor products are required to be taxed come October 1st. The definition of "e-cigarettes" in the legislation was very broad along with the bulletin stating that "mods" and "e-liquid" are taxed. As you may be aware there are many more products that may or may not fall under the definition of "e-cigarettes" other than just mods and eliquid that the bulletin did not clarify on.

First, will there be a "grace period" after October 1st for businesses required to claim/collect the tax if the PA Department of Revenue can not provide proper clarification on what products are taxed and which are not?

Are these products required to be taxed?

- Loose Lithium Ion batteries (size 18350, 185000, 18650, 26650 etc.)
- Battery Chargers
- Spools of resistance wire (kanthal, SS 316, Titanium, etc.)
- Cotton
- Replacement Coils/heating elements (sold individually/without a battery or tank)
- Regulated Mods (Sold with or without batteries)
- Mechanical Mods (Sold with or without batteries)
- Refillable tanks with replacement coil (sold separate from mods/batteries)
- Rebuild-able Dripping Atomizers or R.D.A (No coils installed)
- Rebuild-able Tank Atomizers or R.T.A (No coils installed)
- 0mg nicotine E-liquid
- Drip tips/mouth peices
- Accessories like cases and lanyards.

Please included my list of products along with the answers to whether they are taxed or not in your reply.

Thank You,  
Zach Oesterling  
724-996-1880

---

**Hammaker, Valerie** <vhammaker@pa.gov>  
To: Zach Oesterling <zachoesterling@gmail.com>  
Cc: "Wagner, Cindy" <cwagner@pa.gov>

Tue, Sep 13, 2016 at 12:39 PM

Good afternoon Zach,

Our legal counsel has sent the below statement to answer the question. What is taxed for Vapor products? So if the items are sold for use in e-cigarettes, they are taxable.

E-cigarettes and their components commonly referred to as "mods" and any liquid or substance that is put in e-cigarettes or that is sold for use in e-cigarettes.

The tax should be collected beginning October 1<sup>st</sup>. The wholesalers and manufacturers are required to collect and remit the tax. The first report, return and tax will be due January 20<sup>th</sup> 2017. The tax collect for Oct/Nov and December will all be on the first return. The filing requirement will monthly after that.

Please let me know if you have any further questions, as I will do my best to get them answered.

Thank you,

Valerie

**Valerie Hammaker** | Tax Examiner Supervisor

PA Department of Revenue | Bureau of Business Trust Fund Taxes

0909 Strawberry Square | Hbg PA 17128

Phone: 717.787.5393 | Fax: 717.705.8413

[www.revenue.state.pa.us](http://www.revenue.state.pa.us)

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**From:** Zach Oesterling [<mailto:zachooesterling@gmail.com>]

**Sent:** Monday, August 29, 2016 7:31 PM

**To:** Hammaker, Valerie

**Subject:** E-Cigarette Taxable Products

Hi Valerie,

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First, will there be a "grace period" after October 1st for businesses required to claim/collect the tax if the PA Department of Revenue can not provide proper clarification on what products are taxed and which are not?

Are these products required to be taxed?

- Loose Lithium Ion batteries (size 18350, 185000, 18650, 26650 etc.)
- Battery Chargers
- Spools of resistance wire (kanthal, SS 316, Titanium, etc.)

- Cotton
- Replacement Coils/heating elements (sold individually/without a battery or tank)
- Regulated Mods (Sold with or without batteries)
- Mechanical Mods (Sold with or without batteries)
- Refillable tanks with replacement coil (sold separate from mods/batteries)
- Rebuild-able Dripping Atomizers or R.D.A (No coils installed)
- Rebuild-able Tank Atomizers or R.T.A (No coils installed)
- 0mg nicotine E-liquid
- Drip tips/mouth peices
- Accessories like cases and lanyards.

Please included my list of products along with the answers to whether they are taxed or not in your reply.

Thank You,

Zach Oesterling

724-996-1880

Zach Oesterling <zachoesterling@gmail.com>  
To: vhammaker@pa.gov

Tue, Sep 20, 2016 at 9:45 PM

Hi Valerie,

I'm sorry but this did not answer my question at all. I need to know the exact product categories that are going to be taxed. By your reply you are saying that cotton and lithium ion batteries are taxed. These same products used for electronic cigarettes are also used for many other reasons. Do you expect Walmart to claim their bags of cotton balls or lithium ion batteries on their floor tax form? The Department Of Revenues lack of clarity on my questions only leads me to believe they want me to tax every product I sell, whether it is taxable by this law or or not. As I said before please use my list of products and reply with the answer of "Taxable" or "Non-Taxable" for each individual category. I will make the list more clear.

In your reply please repeat my questions along with the answer of "Taxable" or "Non-Taxable"

- Taxable or Non-Taxable? - Individual Lithium Ion batteries (size 18350, 185000, 18650, 26650 etc.)
- Taxable or Non-Taxable? - Battery Chargers
- Taxable or Non-Taxable? - Spools of resistance wire (kanthal, SS 316, Titanium, etc.)
- Taxable or Non-Taxable? - Cotton
- Taxable or Non-Taxable? - Replacement Coils/heating elements (sold individually/without a battery or tank)
- Taxable or Non-Taxable? - Regulated Mods (Sold with or without batteries)
- Taxable or Non-Taxable? - Mechanical Mods (Sold with or without batteries)
- Taxable or Non-Taxable? - Refillable tanks with replacement coils (sold separate from mods/batteries)
- Taxable or Non-Taxable? - Rebuild-able Dripping Atomizers or R.D.A (No coils installed)
- Taxable or Non-Taxable? - Rebuild-able Dripping Atomizers or R.D.A (With coils pre-installed)
- Taxable or Non-Taxable? - Rebuild-able Tank Atomizers or R.T.A (No coils installed)
- Taxable or Non-Taxable? - Rebuild-able Tank Atomizers or R.T.A (With coils pre-installed)
- Taxable or Non-Taxable? - 0 mg nicotine E-liquid
- Taxable or Non-Taxable? - Drip tips/mouth pieces
- Taxable or Non-Taxable? - Accessories like cases, lanyards, tools, replacement glass for tanks, etc.
- Taxable or Non-Taxable? - Herbal/Tobacco Vaporizers

Thank You  
Zach Oesterling

724-996-1880

## Attachment 3

### **WHAT'S NEW?**

Act 84 of 2016, imposed tax on **Tobacco Products** other than cigarettes, including e-cigarettes, roll-your-own, and smokeless tobacco. It is commonly referred to as "other tobacco products" or OTP.

#### **When is the tax effective?**

The tax on e-cigarettes, chewing tobacco, snuff and pipe tobacco becomes effective at 12:01 AM on October 1, 2016.

The tax on roll-your-own tobacco is effective 60 days after the Office of the Attorney General publishes a bulletin that they have reached an agreement with the participating manufacturers under the Master Settlement Agreement.

#### **What is taxable under the Tobacco Products Tax?**

E-cigarettes, liquids or any other substance that goes into e-cigarettes, roll-your-own tobacco, pipe tobacco (including periques, granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco), and chewing tobacco (including snuff, dry snuff, snuff flour, cavendish, plug and twist tobacco, and fine cut tobacco).

The tax on e-cigarettes does not apply to prescription drugs or medical devices used to inhale or ingest prescription drugs, including medical marijuana and are sold at a licensed medical marijuana dispensary.

#### **Who is responsible for payment and reporting of the tax?**

Wholesalers and manufacturers are required to collect tax from retailers.

A consumer who purchases tobacco products using the internet or mail order catalogs for personal possession or use in Pennsylvania from persons or business without a Pennsylvania tobacco products license.

#### **How should the OTP tax be displayed on invoices?**

The distributor is required to display the tax being paid to the Department of Revenue on each invoice as a separate item.

#### **Is there a floor tax?**

Yes. See the "FLOOR TAX" section of this document for more information.

#### **Am I required to have a license to sell tobacco Products?**

Yes. See the "LICENSING" section for information.

#### **Are out-of-state manufacturers responsible to collect and remit the OTP tax if selling to a Pennsylvania retailer?**

Yes. The out-of-state manufacturer must have a valid Pennsylvania OTP license to sell product directly to a Pennsylvania retailer.

#### **Are wholesaler to wholesaler sales considered taxable?**

No. A wholesaler should not charge and collect tax on sales to another wholesaler, provided that there is a valid , to substantiate the transaction.

**Example:** A retailer has a 16 ounce bag of tobacco that was included in the floor stock tax return and payment. This product is damaged or is outdated and the retailer returns it to the distributor for credit. The distributor will issue a credit for the product as well as the  $15 \times \$0.55/\text{ounce} = \$8.80$  OTP tax to the retailer. On the monthly report, the distributor will reduce their tax liability to the Department of Revenue by that \$8.80.

#### **How are returned sales to be calculated in the remittance of OTP tax and the filing of monthly reports?**

The distributor will pay the difference between the calculated amount tax of outbound shipments less the calculated amount of tax on the returned product.

### **E-CIGARETTE/VAPE**

#### **What is the rate of taxation on e-cigarettes?**

The tax rate on the sale of e-cigarettes and the substances that go into them is 40 percent of the purchase price from the wholesaler or manufacturer. For example: If the retailer purchased an e-cigarette for \$10, the retailer would pay tax of \$4.

#### **What vapor products are covered by the tax?**

E-cigarettes and their components commonly referred to as "mods" and any liquid or substance that is put in e-cigarettes or that is sold for use in e-cigarettes.



**Examples:**

**Taxable:** Loose Lithium Ion batteries (size 18350, 185000, 18650, 26650 etc.), Battery Chargers, Spools of resistance wire (kanthal, SS 316, Titanium, etc.), Cotton, Replacement Coils/heating elements (sold individually/without a battery or tank), Regulated Mods (Sold with or without batteries), Mechanical Mods (Sold with or without batteries), Refillable tanks with replacement coil (sold separate from mods/batteries), Rebuild-able Dripping Atomizers or R.D.A (No coils installed), Rebuild-able Tank Atomizers or R.T.A (No coils installed), 0mg nicotine E-liquid, Drip tips/mouth pieces

**Not taxable:** A case or lanyard for the vaporizer.

**If I do custom vaporizer blends for my customers in my store, how do I calculate the tax?**

The tax is on the purchase price of the ingredients.

**ROLL-YOUR-OWN, CHEWING TOBACCO & PIPE TOBACCO**

**What is the rate of taxation on roll-your-own, chewing tobacco and pipe tobacco?**

The rate of tax on roll-your-own, chewing tobacco and pipe tobacco is \$0.55 per ounce. For tobacco products other than e-cigarettes that weigh less than 1.2 ounces per container the tax shall be not less than \$0.66 per package of these tobacco products. For example, if the retailer purchases 100 ounces of tobacco in two-ounce packages the tax due would be \$55. If the same quantity is purchased in one-ounce packages, the tax due would be \$66.

**How is the tax amount determined for individual units that weigh less than 1.2 ounces, packaged in a single container?**

The 1.2 ounce minimum is based upon the minimum selling container marked for resale to the consumer.

**Example 1:** Item comes in a 5/.82 can roll. Each individual can is taxed as if it is a 1.2 ounce can.

**Example 2:** Item comes in a tub of 5/.82 ounce cans where the minimum selling unit is the tub of 5 cans and/or each can is marked "Not for resale". Total tub is taxed at  $5 \times .82 = 4.1$  ounces.

**What distinguishes roll-your-own cigarette tobacco from pipe tobacco?**

The distinguishing factor to determine roll-your-own tobacco from pipe tobacco is how the product is

labeled for resale to the consumer. Anything labeled "Pipe Tobacco" will be taxed effective October 1, 2016 and the floor stock tax should be reported and paid. Anything labeled "Cigarette Tobacco" will be taxed, but the exact date has yet to be determined. As with pipe tobacco, there will be a floor stock tax.

**Are rolling papers, pipes and other accessories for smoking tobacco subject to the tax?**

No.

**Are cigar wraps or blunt wraps subject to the OTP tax?**

No.

**LICENSING**

**Will I need a license to sell OTP?**

Yes tobacco manufacturers, wholesalers and retailers including vending machines will need a license per location. Cigarette tax licensees will need a separate OTP license

**What is the OTP license fee?**

- The cost for a wholesaler or Manufacturer license is \$1500 per location.
- The cost of a retailer license is \$25 per location.
- The cost of a vending machine license is \$25 per location.

**How do I obtain a tobacco products license?**

If you are a current cigarette licensee, you will receive a temporary license for tobacco products that will be valid until February 28, 2017 at no cost. The cigarette license renewal process which will begin November 1, 2016, will include the tobacco license fee as well as cigarette license. This new combined license for cigarettes and tobacco products will expire February 28, 2018.

If you are a new registrant, you must complete the

application available at [www.revenue.pa.gov](http://www.revenue.pa.gov). This application and remittance of the fee associated with the type of license will be issued and valid until February 2018.

**I own a tobacco products business located in Pennsylvania and all of my products are sold to out-of-state businesses, do I need a license?**

Yes



pennsylvania

DEPARTMENT OF REVENUE

www.revenue.pa.gov

## TOBACCO PRODUCTS TAX

### **Do I need a license if my business is out-of-state and sells online to PA customers?**

Yes, depending on your business structure you will need the corresponding license. Manufacturers need a manufacturer's license and wholesalers need a wholesale license.

## FLOOR TAX

### **What is a floor tax?**

The floor tax is a tax imposed on untaxed inventory in the possession of the retailer on October 1, 2016. The retailer is responsible for the reporting and payment of the floor tax. Wholesalers are not responsible for floor tax on OTP.

### **Will the business owner's current inventory be taxable?**

The inventory in the retailer's business on October 1, 2016 is subject to the floor tax. The retailer is to take an inventory and remit the floor tax return and payment within 90 days to the department. For e-cigarettes, the floor tax is 40 percent of the wholesale price paid by the retailer for the products.

### **If I have outdated product that I can no longer sell in my store on October 1, 2016, will I have to pay tax on this even though I am already taking a loss on the product?**

If the product is in the store on October 1, 2016 and it is being offered for sale it is taxable and subject to the floor tax.

### **When is the floor tax due?**

An inventory of products held by each retailer must be taken on October 1, 2016. **The tax return reporting and paying tax on that inventory is due no later than December 29, 2016.**

The floor tax for the roll-your-own tobacco will be due 90 days after the publication of a notice by the Attorney General in the Pennsylvania Bulletin that it has reached an agreement with the participating manufacturers under the Master Settlement Agreement.

### **Where do I mail the floor tax return and the tax payment?**

PA DEPARTMENT OF REVENUE  
BUREAU OF IMAGING AND DOCUMENT  
MANAGEMENT (CIG)  
DEPT. 280408  
HARRISBURG PA 17128-0408

All checks should be made payable to:  
PA DEPARTMENT OF REVENUE

### **What if I do not file the floor tax return?**

Failure to file and pay the floor tax will result in the imposition of penalties and interest and may result in criminal prosecution.

### **Can I combine my payment for my OTP license and my OTP floor tax into one check?**

No. Each remittance and form must be returned to the department separately and the payments for a license fee and floor tax cannot be combined into one check.

### **How do I get a copy of the floor tax return?**

The department will mail floor tax returns to all retailers. For all others, or if you do not receive a return in the mail, returns will be available at

### **When is the tobacco products tax due?**

The first tax and return are to be remitted to the department, for the quarter ending December 31, 2016, on or before January 20, 2017. Subsequently, beginning January 2017 (due February 20, 2017), the tax and return will be due monthly, on or before the 20th day of the following month.

## Attachment 4

## PENNSYLVANIA TOBACCO PRODUCTS TAX

### WHAT'S NEW?

Act 84 of 2016, imposed tax on **Tobacco Products** other than cigarettes, including e-cigarettes, roll-your-own, and smokeless tobacco. It is commonly referred to as "other tobacco products" or OTP.

#### When is the tax effective?

The tax on e-cigarettes, chewing tobacco, snuff and pipe tobacco become effective on October 1, 2016. The tax on roll-your-own tobacco becomes effective on December 14, 2016.

#### What is taxable under the Tobacco Products Tax?

E-cigarettes, liquids or any other substance that goes into e-cigarettes, roll-your-own tobacco, pipe tobacco (including perique's, granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco), and chewing tobacco (including snuff, dry snuff, snuff flour, Cavendish, plug and twist tobacco, and fine cut tobacco).

The tax on e-cigarettes does not apply to prescription drugs or medical devices used to inhale or ingest prescription drugs, including medical marijuana and are sold at a licensed medical marijuana dispensary.

#### Who is responsible for payment and reporting of the tax?

Wholesalers and manufacturers are required to collect tax from retailers. Online sellers are required to collect the tax from Pennsylvania retailers or individual consumers in Pennsylvania.

Beginning January 1, 2017, you can visit e-TIDES, the department's electronic filing system, to register your other tobacco products tax account and begin filing returns and payments at [etides.state.pa.us](http://etides.state.pa.us)

A consumer who purchases tobacco products using the internet or mail order catalogs for personal possession or use in Pennsylvania from persons or business without a Pennsylvania tobacco products license, or where the tax has not been collected and remitted.

To file and remit the tax a consumer will complete the (REV-1809) Consumer Tobacco Products Use/Excise tax return, available at [revenue.pa.gov](http://revenue.pa.gov).

#### How should the OTP tax be displayed on invoices?

The distributor is required to display the tax being paid to the Department of Revenue on each invoice as a separate item.

#### Is there a floor tax?

Yes. See the "FLOOR TAX" section of this document for more information.

#### Am I required to have a license to sell tobacco Products?

Yes. See the "LICENSING" section for information.

#### Are out-of-state manufacturers responsible to collect and remit the OTP tax if selling to a Pennsylvania retailer?

Yes. The out-of-state manufacturer must have a valid Pennsylvania OTP license to sell product directly to a Pennsylvania retailer.

#### Are wholesaler to wholesaler sales considered taxable?

No. A wholesaler should not charge and collect tax on sales to another wholesaler, provided there is a valid exemption certificate to substantiate the transaction.

#### How are returned sales to be calculated in the remittance of OTP tax and the filing of monthly reports?

The distributor will pay the difference between the calculated tax amount of outbound shipments less the calculated amount of tax on the returned product.

**Example:** A retailer has a 16 ounce bag of tobacco that was included in the floor stock tax return and payment. This product is damaged or is outdated and the retailer returns it to the distributor for credit. The distributor will issue a credit for the product as well as the 15 x \$.55/ounce = \$8.80 OTP tax to the retailer. On the monthly report, the distributor will reduce their tax liability to the Department of Revenue by that \$8.80.

### E-CIGARETTES

#### Are online sellers of electronic cigarettes required to be licensed?

Yes. Any online seller that sells electronic cigarettes into Pennsylvania must be licensed and must collect the tax on sales to a Pennsylvania retailer or consumer.



## PENNSYLVANIA TOBACCO PRODUCTS TAX

### What is the rate of taxation on e-cigarettes?

The tax rate on the sale of e-cigarettes and the substances that go into them is 40 percent of the purchase price from the wholesaler or manufacturer. For example: If the retailer purchased an e-cigarette for \$10, the retailer would pay tax of \$4.

### What vapor products are covered by the tax?

E-cigarettes and their components commonly referred to as "mods" and any liquid or substance that is put in e-cigarettes or that is sold for use in e-cigarettes.

#### Examples:

**Taxable:** Lithium-ion batteries, battery chargers, cables or spools of resistance wire if these items are sold with an e-cigarette or are integral to an e-cigarette device. Also included are components designed for use in e-cigarettes such as replacement coils/heating elements (sold individually/without a battery or tank), regulated mods (sold with or without batteries), mechanical mods (sold with or without batteries), refillable tanks with replacement coil (sold separate from mods/batteries), rebuild-able dripping atomizers or R.D.A (No coils installed), rebuild-able tank atomizers or R.T.A (No coils installed), 0mg nicotine E-liquid, drip tips/mouth pieces.

**Not taxable:** Generic batteries, battery chargers, cables, cases or lanyards, or items not packaged with e-cigarettes and not integral to use in e-cigarettes.

### What is the tax basis for the tax on vapor products?

The tax is based upon the selling price from the distributor/manufacturer to the retailer. The distributor/manufacturer cannot arbitrarily reduce the price to the retailer and therefore lower the tax liability without the permission of the Department of Revenue.

### If I do custom vaporizer blends for my customers in my store, how do I calculate the tax?

The tax is on the purchase price of the ingredients.

## ROLL-YOUR-OWN, CHEWING TOBACCO & PIPE TOBACCO

### What is the rate of taxation on roll-your-own, chewing tobacco and pipe tobacco?

The rate of tax on roll-your-own, chewing tobacco and pipe tobacco is \$0.55 per ounce. For tobacco

products other than e-cigarettes that weigh less than 1.2 ounces per container the tax shall be not less than \$0.66 per package of these tobacco products. For example, if the retailer purchases 100 ounces of tobacco in two-ounce packages the tax due would be \$55. If the same quantity is purchased in one-ounce packages, the tax due would be \$66.

### How is the tax amount determined for individual units that weigh less than 1.2 ounces, packaged in a single container?

The 1.2 ounce minimum is based upon the minimum selling container marked for resale to the consumer.

**Example 1:** Item comes in a 5/.82 can roll. Each individual can is taxed as if it is a 1.2 ounce can.

**Example 2:** Item comes in a tub of 5/.82 ounce cans where the minimum selling unit is the tub of 5 cans and/or each can is marked "Not for resale". Total tub is taxed at  $5 \times .82 = 4.1$  ounces.

### What distinguishes roll-your-own cigarette tobacco from pipe tobacco?

The distinguishing factor to determine roll-your-own tobacco from pipe tobacco is how the product is labeled for resale to the consumer. Anything labeled "Pipe Tobacco" will be taxed effective October 1, 2016 and the floor stock tax should be reported and paid. Anything labeled "Cigarette Tobacco" will be taxed, but the exact date has yet to be determined. As with pipe tobacco, there will be a floor stocks tax.

### Are rolling papers, pipes and other accessories for smoking tobacco subject to the tax?

No.

### Are cigar wraps or blunt wraps subject to the OTP tax?

No.

### How do I get a copy of the roll-your-own floor tax return?

The department will mail roll-your-own floor tax returns to all retailers by December 1, 2016. For all others, or if you do not receive a return in the mail, returns will be available at [revenue.pa.gov](http://revenue.pa.gov).

## LICENSING

### Will I need a license to sell OTP?

Yes. Tobacco manufacturers, wholesalers and retailers including vending machines will need a license per location. Cigarette tax licensees will need a separate OTP license

**What is the OTP license fee?**

- The cost for a wholesaler or Manufacturer license is \$1500 per location.
- The cost of a retailer license is \$25 per location.
- The cost of a vending machine license is \$25 per location.

**How do I obtain a tobacco products license?**

If you are a current cigarette licensee, you will receive a temporary license for tobacco products that will be valid until February 28, 2017 at no cost. The cigarette license renewal process which will begin November 1, 2016, will include the tobacco license fee as well as cigarette license. This new combined license for cigarettes and tobacco products will expire February 28, 2018.

If you are a new registrant, you must complete the Tobacco Products Registration Form, REV-663, available at [revenue.pa.gov](http://revenue.pa.gov). This application and remittance of the fee associated with the type of license will be issued and valid until February 2018.

**I own a tobacco products business located in PA and all of my products are sold to out-of-state businesses, do I need a license?**  
Yes.

**Do I need a license if my business is out-of-state and sells online to PA customers?**

Yes, depending on your business structure you will need the corresponding license. Manufacturers need a manufacturer's license and wholesalers need a wholesale license.

**FLOOR TAX**

**What is a floor tax?**

The floor tax is a tax imposed on untaxed inventory in the possession of the retailer on the date the tax became effective. The retailer is responsible for the reporting and payment of the floor tax. Wholesalers are not responsible for floor tax.

**Will the business owner's current inventory be taxable?**

Yes. The inventory in the retailer's business on the effective date of the tax is subject to the floor tax. The retailer must take an inventory and remit the floor tax return and payment within 90 days.

**Do I pay the tax on outdated product that I'm not selling on the effective date of the tax?**

If the product is in the store on the effective date and it is being offered for sale it is taxable and subject to the floor tax.

**When is the floor tax due?**

An inventory of e-cigarettes, chewing tobacco, snuff and pipe tobacco products held by each retailer must be taken on October 1, 2016. **The tax return and payment on that inventory is due no later than December 29, 2016.**

An inventory of roll-your-own tobacco products held by each retailer must be taken on December 14, 2016. **The tax return and payment on that inventory is due no later than March 14, 2017.**

**Where do I mail the floor tax return and the tax payment?**

PA DEPARTMENT OF REVENUE  
BUREAU OF IMAGING AND DOCUMENT  
MANAGEMENT (CIG)  
DEPT. 280408  
HARRISBURG PA 17128-0408

All checks should be made payable to:  
PA DEPARTMENT OF REVENUE

**What if I do not file the floor tax return?**

Failure to file and pay the floor tax will result in the imposition of penalties and interest and may result in criminal prosecution.

**Can I combine my payment for my OTP license and my OTP floor tax into one check?**

No. Each remittance and form must be returned to the department separately and the payments for a license fee and floor tax cannot be combined into one check.

**How do I get a copy of the floor tax return?**

The department will mail floor tax returns to all retailers. For all others, or if you do not receive a return in the mail, returns will be available at [revenue.pa.gov](http://revenue.pa.gov).

**When is the tobacco products tax due?**

The first tax and return are to be remitted to the department, for the quarter ending December 31, 2016, on or before January 20, 2017. Subsequently, beginning January 2017 (due February 20, 2017), the tax and return will be due monthly, on or before the 20th day of the following month.

## Attachment 5

## 2016 STATE TAX SUMMARY: ACT 84 OF 2016

### Sales and Use Tax

- **Electronically or digitally delivered items (often called digital downloads):** Starting August 1, 2016, the sales and use tax specifically extends to items delivered to a customer electronically or digitally or by streaming unless the transfer is otherwise exempt. This includes music or any other audio, video such as movies and streaming services, e-books and any otherwise taxable printed matter, apps and in-app purchases, ringtones, online games, and canned software, as well as any updates, maintenance or support of these items.
- **Sales tax vendor discount:** For sales tax returns for periods ending after August 1, 2016, the sales tax vendor discount is capped at the lesser of one percent of the amount of sales tax collected or \$25 on a monthly return, \$75 on a quarterly return or \$150 on a semi-annual return.
- **Zappers and sales suppression devices and software:** Effective immediately, the possession, sale or distribution of zappers or sales suppression software with the intent to evade taxes is deemed an offense and individuals could be fined up to \$10,000 and one year in prison.
- **Snack Food Packaging:** Effective immediately, returnable corrugated boxes used to deliver snack food products when purchased by a manufacturer are exempt from the sales and use tax.
- **Convention Center Exemption:** Effective September 11, 2016, the sale at retail or use of services related to the setup, teardown, or maintenance of tangible personal property rented by an authority to exhibitors at the Pennsylvania Convention Center and the David L. Lawrence Convention Center is exempt from sales and use tax.
- **Timbering Exclusion:** Effective July 1, 2017, property and services directly and predominately used in timbering operations are exempt from sales and use tax when purchased by a company primarily engaged in the business of harvesting trees. Timbering does not include the harvesting of trees for clearing land for access roads.

### Cigarette and Tobacco Products Taxes

- **Cigarette Tax:** Starting August 1, 2016, the state tax on cigarettes is \$2.60 per pack, a \$1.00 per pack increase. In Philadelphia the tax will be \$4.60 per pack.
- **Tobacco Products:** Effective October 1, 2016, pipe tobacco, chewing tobacco, snuff, and any other tobacco products for chewing, ingesting or smoking, except cigars, will be subject to a \$0.55 per ounce tax, with a minimum tax per package of \$0.66. Electronic cigarettes including both the liquid product and the delivery device will be subject to a 40 percent tax on the wholesale price.



**CERTIFICATE OF SERVICE**

I, J. Andrew Salemme, Esquire, hereby certify that a true and correct copy of the foregoing document was served on the 30<sup>th</sup> day of December, 2016, via U.S. First Class mail, postage prepaid on the following:

Pennsylvania Office of Attorney General  
Strawberry Square  
Harrisburg, PA 17120

Pennsylvania Department of Revenue  
Strawberry Square  
1133 Strawberry Street  
Harrisburg, PA 17128

THE LINDSAY LAW FIRM, P.C.,



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J. Andrew Salemme, Esquire  
Counsel for Plaintiff