

Tobacco Wholesaler v. Retailer

Notice #13-10

Tobacco Tax and Sales Tax

October 2013



Highlights

INTRODUCTION

This notice is intended to provide tobacco wholesalers, distributors, and retailers, as well as the general public, with clarification regarding who may make wholesale sales of cigarettes and other tobacco products in Tennessee. It supplements the information previously published in Notice 13-07.

DISCUSSION**Tobacco Retailers, Wholesalers, and Distributors**

- Retailers do not require tobacco licenses

A person selling or making available tobacco products to the ultimate consumer is a retail dealer under Tennessee law. Retailers of tobacco products are not currently required to obtain a license to sell tobacco products.

"Retail dealer" means each tobacco vending machine, place, store, booth, concession, truck or vehicle, or person that in any way sells or makes available tobacco products directly to the ultimate consumer.

T.C.A. § 67-4-1001(18)

- Retailers can only sell directly to ultimate consumer

Some retailers mistakenly believe that it is acceptable to sell cigarettes and other tobacco products to other retailers as long as they obtain a resale certificate from those other retailers. However, a seller of cigarettes and other tobacco products may act as either a retailer or a wholesaler/distributor, but may not act as both. As a result, a retailer cannot legally accept a resale certificate for sales to other retailers. Such sales are retail sales that are subject to the Tennessee sales and use tax.

- Retailers cannot sell tobacco to other retailers

Any person that wishes to sell tobacco products to retailers must first be licensed and bonded in Tennessee as a tobacco wholesaler or be licensed as a tobacco distributor.

Wholesalers

A person who meets the definition of "wholesale dealer and jobber" must obtain a tobacco wholesaler's license and post a bond before engaging in business.

- Only properly licensed tobacco wholesalers or distributors can sell to retailers

"Wholesale dealer and jobber" means any person who maintains wholesale facilities in one (1) or more permanent locations, and engages in the business of receiving, storing, purchasing, selling at wholesale only, importing unstamped tobacco products, and otherwise handling tobacco products for resale at a wholesale price only to other licensed wholesale dealers and jobbers, or tobacco distributors or retail dealers as defined in this section, but does not sell tobacco products directly to the ultimate consumer.

T.C.A. § 67-4-1001(26)

➤ *Wholesalers cannot sell directly to ultimate consumer*

Wholesalers may sell tobacco products to other wholesalers, tobacco distributors, and retail dealers. Wholesalers may not also act as retailers. In other words, wholesalers are prohibited from selling cigarettes and other tobacco products to the ultimate consumer. A wholesaler who sells or makes available cigarettes and other tobacco products to an end consumer is subject to penalties and license revocation.

In addition to being bonded and licensed, wholesalers must comply with all reporting and sales requirements imposed by the State of Tennessee, including filing tax forms and licensed distributor reports (commonly known as "LDRs").

➤ *Wholesalers must also comply with all reporting requirements*

Wholesalers must also electronically upload invoice-level information for all tobacco sales to retailers. See additional information about this wholesale filing requirement is on our website at: <http://www.state.tn.us/revenue/misc/beertobaccorpts.shtml>.

Distributors

A person who meets the definition of "tobacco distributor" must obtain a tobacco distributor's license before engaging in business.

➤ *Distributors buy from wholesalers and sell to retailers*

"Tobacco distributor" means any person who receives, purchases, sells or otherwise handles tobacco products as a secondary wholesaler and who acquires all that person's tobacco products on which, prior to receipt by the person, the tobacco tax required by Tennessee and any other state has been previously paid by a Tennessee wholesaler that is also a Tennessee appointed and bonded affixing agent, and who sells or otherwise makes available such tobacco products to retailers in this and perhaps other states at a wholesale price for the purpose of resale to the consumer.

T.C.A. § 67-4-1001(21)

➤ *Distributors cannot sell directly to ultimate consumer*

Tobacco distributors may sell tobacco products to retailers and distributors but are prohibited from selling products directly to the ultimate consumer. The law treats tobacco distributors as secondary wholesalers for this purpose. A distributor who sells or makes available cigarettes and other tobacco products to an end consumer is subject to penalties and license revocation.

Tobacco distributors are distinct from wholesalers, however, because distributors do not pay tobacco tax on their products, but rather purchase from wholesalers stamped products or roll-your-own tobacco on which the Tennessee tobacco tax has already been paid. Distributors are not required to file licensed distributor reports; however, distributors are required to electronically upload invoice-level information for all tobacco sales to retailers.

Parties Wishing to Make Wholesale and Retail Sales

➤ *To engage in both retail and wholesale/distribution sales, two separate legal entities must be formed*

The same person cannot sell cigarettes and tobacco products both at retail and at wholesale, whether it be as a wholesaler or distributor. If a party wishes to engage in both retail sales and wholesale or distribution sales, that party must form separate legal entities for each activity – one to make retail sales and the other licensed to make wholesale or distribution sales. Each entity must also have its own fully partitioned space from which to conduct business. The Department will issue a tobacco wholesaler or distributor license only to a person with separate bookkeeping (which includes a separate cash register or device for tracking sales for resale) and a

separate tobacco inventory segregated from any tobacco inventory that is intended for sale to the ultimate consumer.

➤ *A tobacco wholesaler or distributor license may be revoked for making retail sales*

Consequences for Non-Compliance

The Department may revoke the tobacco wholesaler or distributor license of any wholesaler or distributor that makes retail sales.

The commissioner may revoke any license issued under this part upon the failure of the licensee to pay the tax or taxes imposed by this part, or for the violation of any provision of this part of any rule or regulation promulgated by the commissioner under the scrutiny vested in the commissioner.

T.C.A. § 67-4-1016

➤ *A penalty of \$250 per day may be imposed for making wholesale or distribution sales without a tobacco license*

If the wholesaler or distributor makes wholesale sales after license revocation (or without ever obtaining a license), the wholesaler or distributor may be subject to a penalty of up to \$250 a day. Additionally, if a retailer of cigarettes and other tobacco products makes sales of such products to other retailers, the retailer selling the products may be subject to a penalty of up to \$250 a day, until such activity ceases.

Any person who engages in any business or activity for which a license is required under this part without obtaining a license to do so, or who fails to file an application for renewal of a license before expiration of the current license, is subject to a specific penalty in the amount of the license fee for each month or part of a month during which the activity or failure continues. In addition to this specific penalty, the commissioner may impose a penalty of no more than two hundred fifty dollars (\$250) a day for each day during which the activity or failure occurs or continues. This discretionary penalty may also be imposed upon a person to whom a license has been issued, if the person continues to engage in the business or activity after receiving notice the license is revoked or suspended by the commissioner.

T.C.A. § 67-4-1015

➤ *A penalty of \$250 per day may also be imposed if a retailer sells to another retailer*

Additionally, a retailer of cigarettes and other tobacco products (or any person not properly licensed as a tobacco wholesaler or distributor) that makes sales of such products to other retailers purportedly for resale must collect and remit sales tax on such transactions. All sales for resale must be in strict compliance with the rules and regulations promulgated by the Commissioner of Revenue. *T.C.A. § 67-6-102(75)*. Purported wholesale sales made by retailers are not in compliance with the rules and are not exempt from sales tax even if the retailer obtains a resale certificate from the purchaser. *TENN. COMP. R. & REGS. 1320-4-3-.06*. A retailer who fails to collect and remit sales tax will be liable for the tax due, along with applicable penalties and interest. *T.C.A. § 67-6-501(a)*.

➤ *Retailers making wholesale sales are liable for sales tax on those sales*



References:

T.C.A. § 67-4-1001
T.C.A. § 67-4-1015
T.C.A. § 67-4-1016
T.C.A. § 67-6-102
T.C.A. § 67-6-501
TENN. COMP. R. & REGS. 1320-4-3-.06

The information provided here is current as of the date of publication but may change as a result of new statutes, regulations, or court decisions. While this notice is intended to be comprehensive, events and situations unanticipated by this notice may occur. In such cases you should contact the department or your tax professional for further guidance.