



TAX BULLETIN 20-11

Virginia Department of Taxation

December 1, 2020

IMPORTANT INFORMATION REGARDING VIRGINIA'S TOBACCO PRODUCTS TAX

Heated Tobacco Products Subject to Tax and Economic Nexus for Tobacco Products Distributors

This bulletin is intended to notify taxpayers of changes to the Tobacco Products Tax. Section 3-5.21 of the Appropriation Act enacted during the 2020 Special Session (House Bill 5005, 2020 Special Session I, Chapter 56) imposes the Tobacco Products Tax on any heated tobacco product at the rate of 2.25 cents per stick beginning January 1, 2021 for taxable sales or purchases occurring on and after such date.

Section 3-5.21 of the Appropriation Act also clarifies that beginning January 1, 2021, for purposes of the Tobacco Products Tax, out-of-state distributors will be deemed to have sufficient activity within the Commonwealth to require registration if the distributor meets certain sales thresholds.

Taxation of Heated Tobacco Products

Pursuant to Va. Code § 58.1-1021.01, a "heated tobacco product" is defined as a product containing tobacco that produces an inhalable aerosol:

1. By heating the tobacco by means of an electronic device without combustion of the tobacco, or
2. By heat generated from a combustion source that only or primarily heats rather than burns the tobacco.

Beginning January 1, 2021, heated tobacco products will be taxed at the rate of 2.25 cents per stick for taxable sales or purchases occurring on and after January 1, 2021. Heated tobacco products will not be subject to the stamping requirements imposed on cigarettes under the Virginia Cigarette Tax.

Economic Nexus

In *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the United States Supreme Court held that the Constitutional principle of “substantial nexus” required a merchant to have a physical presence within a state before the merchant could be compelled to collect the state’s sales tax. The 2018 U.S. Supreme Court decision in *South Dakota v. Wayfair*, No. 17–494, however, reversed the holding from *Quill* and held that physical presence is no longer a prerequisite for a state to require a merchant to collect its tax. The Court in *Wayfair* endorsed South Dakota’s economic nexus standard when coupled with administrative simplification measures aimed at easing the burden on remote sellers. In 2019, the Virginia General Assembly enacted economic nexus legislation (House Bill 1722 and Senate Bill 1083, 2019 *Acts of Assembly*, Chapters 815 and 816) for purposes of Virginia’s Retail Sales and Use Tax. The Department subsequently issued guidance regarding the economic nexus law in the Guidelines for Remote Sellers and Marketplace Facilitators (June 27, 2019).

During the 2020 Special Session, the Virginia General Assembly adopted economic nexus for purposes of the Tobacco Products Tax. The Appropriation Act enacted during the 2020 Special Session provides that, beginning January 1, 2021, a distributor shall be deemed to have sufficient activity within the Commonwealth to require registration if such distributor:

1. Receives more than \$100,000 in gross revenue from sales of tobacco products in the Commonwealth in the previous or current calendar year; or
2. Engages in 200 or more separate tobacco products sales transactions in the Commonwealth in the previous or current calendar year.

In determining these sales thresholds, the sales made by all commonly controlled persons will be aggregated. Also, all sales of tobacco products into Virginia must be counted, regardless of whether they are at wholesale or retail. Taxpayers seeking guidance regarding the application of economic nexus should consult the Retail Sales and Use Tax Guidelines for Remote Sellers and Marketplace Facilitators.

The tobacco products tax is generally paid by licensed distributors. If a previously unregistered distributor establishes economic nexus, the distributor is required to register with the Department no later than 30 days from the day that the distributor establishes economic nexus with the Commonwealth. Distributors who establish economic nexus as of January 1, 2021 must register to begin collecting the tax for transactions occurring on or after January 1, 2021.

New distributors required to collect tobacco products tax as a result of this legislation may sell tobacco products on and after January 1, 2021 but prior to July 1, 2021 without having obtained a distributors license on the following conditions:

1. The person files their return and pays the Tobacco Products Tax to the Department; and
2. The person files their distributor's application with the Department and pays their application fee prior to April 1, 2021.

Licensed distributors must pay the tax when selling to consumers or any other purchaser who is not a licensed distributor. The Department maintains a list of licensed distributors that is updated on a monthly basis and posted on its website. Distributors may sell tobacco products, with proper documentation, to other licensed distributors and affiliates exempt from the tax. The purchasing distributor is liable for the tax when it sells the products to a retailer within the Commonwealth. Each distributor who sells tobacco products to another licensed distributor or an affiliate must render with each sale itemized invoices showing the distributor's name and address, the purchaser's name and address, the date of sale, all prices, and the wording "Virginia Tobacco Products Tax NOT Paid." The seller must preserve legible copies of invoices for three years after the date of sale. Taxpayers seeking guidance about the Tobacco Products Tax should consult the Guidelines and Rules for the Tobacco Products Tax (May 4, 2020).

Additional Information

This Tax Bulletin is available online in the Laws, Rules & Decisions section of the Department's website. If you have additional questions, please visit the Department's website at <https://www.tax.virginia.gov>, or contact the Tobacco Tax Unit at (804) 371-0730.