

18-5 June 1, 2018

## FINANCE MEMORANDUM

### Implementation of the Other Tobacco Products (OTP) Tax

Local Law 145/2017 added section 11-1302.1 to the Administrative Code of the City of New York (the “Ad. Code”), which imposes a tax on tobacco products other than cigarettes (“Other Tobacco Products” or “OTP”). Generally, the OTP tax must be paid by wholesaler dealers on OTP sold to retail dealers in the City of New York (the “City”). See Ad. Code §11-1302.1(f). Wholesale dealers must file tax returns and pay the tax on a monthly basis on or before the 20<sup>th</sup> day of the month following the month for which the tax return is required, unless the Commissioner of Finance (the “Commissioner”) has exempted the particular wholesale dealer from filing pursuant to Ad. Code section 11-1302.1(g)(2)(B).<sup>1</sup> Retail dealers are required to be able to prove that tax has been paid on tobacco products in their possession. They also are required to pass-on the tax on to their customers.

This Finance Memorandum provides additional information on the requirements at both the wholesale and retail levels.

#### Determination of the OTP Tax

The wholesale dealer pays the OTP tax on OTP shipped to retail dealers in the City. For OTP, other than cigars and little cigars, the wholesale dealer calculates the OTP tax based on the weight of the particular tobacco product sold to the retail dealer in accordance with the schedule provided in Ad. Code section 11-1302.1(a). For little cigars, the wholesale dealer calculates the OTP tax based on the number of packs of 20 little cigars sold to the retail dealer, multiplied by the amount stated on the schedule provided in section 11-1302.1(a).

For cigars, the wholesale dealer’s calculation of the OTP tax is based on the package sold by the wholesale dealer to the retail dealer in the City. (For further guidance, please see the instructions to the form that must be filled out by the wholesale dealer.) The tax is always 10% of the price floor

<sup>1</sup> The Commissioner may exempt a wholesale dealer from filing returns and paying the OTP tax only if he or she is satisfied that the OTP tax on products sold by such wholesale dealer are being paid by another wholesale dealer or by a distributor authorized under section 11-1302.1(g)(2)..

calculated for the package sold by the wholesale dealer. If N is the number of cigars in the package, the price floor, for purposes of calculation of the tax, is always  $\$8 + (\$1.75 \times (N-1))$ .<sup>2</sup>

Examples of the calculation of the tax are given in the instructions to the form that must be filled out by the wholesale dealer.

## Requirements for Retail Dealers

Pursuant to Ad. Code §11-1302.1(f)(2), the retail dealer is liable for tax on all tobacco products in its possession on which tax has not been paid by the wholesale dealer. In order to prove the tax has been paid, the retail dealer is required to produce invoices from licensed wholesale dealers for all tobacco products held by the retail dealer.

Although the price floor is used by the wholesale dealer to calculate the tax, the price floor is actually enforced at the retail level. In determining the total sales price, retail dealers must add the OTP tax amount to the price floor to ensure the passing-on of the OTP tax to the consumer. Sales tax, which is calculated on the basis of the total sales price including the OTP tax, must also be added on at the retail level.

Inasmuch as retail dealers can sell individual cigars, as well as cigars in packages that differ in size from the package in which the cigars are purchased, the calculation of the correct OTP tax pass-on to the consumer presents unique problems with regard to cigars. To simplify this problem, the Department of Finance will allow for a safe harbor of 25 cents per cigar.<sup>3</sup> Although the price floor is determined by the packaging in which the retail dealer sells cigars to the consumer, for purposes of the retail safe harbor it does not matter whether cigars are sold individually, by the box or by the sub-package. The safe harbor pass-on amount is always 25 cents per cigar.

<sup>2</sup> Alternatively, the price floor could be calculated as follows:  $(N \times \$1.75) + \$6.25$ . This alternative formula will yield the same result. If the wholesale dealer sells a package containing sub-packages, this result does not change, unless the wholesale dealer breaks down the larger packages and sells to the retail dealer by the sub-package.

<sup>3</sup> Alternatively, the retailer may start with the tax paid by the wholesaler for a specific box and then take the average per cigar amount and apply that to each cigar sold from that box. For example, the tax on a box of 20 would be \$4.12. This amount would be divided by 20, yielding a result of 20 cents (rounding down). The retailer could then add 20 cents to the price of each cigar that came from the box of twenty. The amount to be added would depend on the size of the box sold by the wholesaler to the retailer. The retailer would have to maintain records tracing the cigars back to their boxes. Of course, if the retailer sells the box of 20 in its entirety, the retailer would pass on the tax of \$4.12.