

ATF Ruling 73-22 — Cigar and Cigarette Determinations

Changing technology and merchandising methods have caused the Bureau to reappraise and update the criteria for determining whether a tobacco product wrapped in a "substance containing tobacco" is a cigar or a cigarette for tax purposes as contemplated by 26 U.S.C. 5702(a) and (b). This ruling therefore restates the basic provisions of Revenue Ruling 69-198, C.B. 1969-1, 359 (Internal Revenue), with amplification and clarification based on developments since that ruling was issued.

As amended by Public Law 89-44 (79 Stat. 136), 26 U.S.C. 5702(a) and (b) read as follows:

(a) Cigar.--"Cigar" means any roll of tobacco wrapped in leaf tobacco or in any substance containing tobacco (other than any roll of tobacco which is a cigarette within the meaning of subsection (b)(2)).

(b) Cigarette. -- "Cigarette" means

(1) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and

(2) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by; consumers as a cigarette described in paragraph (1).

The legislative history concerning Public Law 89-44 indicates the terms "substance containing tobacco" as used in 26 U.S.C. 5702 and "reconstituted tobacco" were used synonymously. In the trade and in general terminology, "reconstituted tobacco" is ground or pulverized tobacco mixed with various adhesive agents and/or cellulose fibers derived from tobacco or other sources and formed into sheets.

For a wrapper material to be considered a "substitute containing tobacco" as used in 26 U.S.C. 5702(a), the finished wrapper must (1) be approximately two-thirds or more tobacco which did not in the reconstitution process lose its tobacco character (e.g., taste, aroma, identifiable chemical components), and (2) be of a color consistent with that of the natural leaf tobaccos traditionally used as a wrapper for American cigars.

A combination of other factors must also be considered in determining whether a product wrapped in a "substance containing tobacco" is a cigar or a cigarette. Any such roll of tobacco which is not a cigar as defined in 26 U.S.C. 5702(a) is a cigarette as defined in 26 U.S.C. 5702(b). For a product to be a cigar the filler must be substantially of tobaccos unlike those in ordinary cigarettes and must not have any added flavorings which would cause the tobaccos to have the taste or aroma generally attributed to cigarettes. The inclusion of flue-cured or aromatic (Oriental) tobaccos--which traditionally have been the primary constituents of cigarette filler--can contribute significantly to making a product cigarette-like, and if the product also is of the typical cigarette size and shape, has a typical cigarette-type filter, and is in a cigarette-type package, the inclusion of these tobaccos could cause the product to be classified as a cigarette rather than a cigar. Conversely, if a product is made predominantly of cigar-type tobaccos with distinctive cigar taste and aroma, if it does not resemble a cigarette (such as most large cigars do not), and if it is not to be marketed in a cigarette-type package, it would probably be classified as a cigar.

Two other factors which are relevant under the Code in determining the tax category of a product are whether the product is likely to be offered to, or purchased by, consumers as a cigarette. It is, therefore, important that the package for a product to be offered as a cigar conspicuously declare it to be a cigar and that all marketing materials and advertising clearly present the product to the consumer as a cigar and not as a cigarette. There must be no representations or implications on the package or in other merchandising or advertising materials which tend to negate the tax declaration that the product is a cigar. If the package for a cigar product is comparable to the traditional 20-cigarette soft (cup) pack or the similar hard pack, the declaration "cigars", "small cigars", or "little cigars" must appear in direct conjunction with, parallel to, and in substantially the same conspicuousness of type and background as

the brand name each time the brand name appears. A conspicuous "cigar" declaration must appear on the front, back, and bottom panels of such a typical cigarette-type package even if the brand name does not appear on any of these panels. Cartons must similarly declare the product to be a cigar in conjunction with the brand name and a conspicuous cigar declaration must appear on each panel of the carton which is likely to be visible in a retail sale display.

Any product currently on the market which is properly classified as a cigar and so labeled, but not labeled in the manner or as conspicuously as specified in the preceding paragraph, may continue to be so packaged and removed subject to the cigar tax through April 30, 1974, if all advertising materials are presented to the Bureau--prior to use if not already in use--and such materials are determined by the Director to convey adequately to the consumer or potential consumer that the product is being offered as a cigar and not a cigarette. Otherwise, such products are held likely to be offered to or purchased by consumers as a cigarette and are consequently held to be subject to tax as a cigarette under 26 U.S.C. 5701(b) and 5702(b).

Manufacturers and importers have the initial responsibility for (1) determining whether material intended for use as a wrapper for rolls of tobacco is a "substance containing tobacco," (2) determining whether a roll of tobacco wrapped in such material has the characteristics of a cigar or a cigarette, (3) knowing whether the product is likely to be offered to or purchased by consumers as a cigar or a cigarette, and (4) paying the tax at the proper rate. Because of the importance of proper tax classification the Bureau will, on request, issue an advance ruling on the taxable status of any product a manufacturer or importer wishes to market as a cigar. Such requests should be sent to the Director, Bureau of Alcohol, Tobacco and Firearms, Attention: Washington, D.C. 20226, and should be accompanied by the following:

- (1) The package and any larger consumer container such as the carton, or the detailed graphics for these if they have not been printed;
- (2) A statement of the merchandising theme and samples of the consumer oriented advertising;
- (3) Four ounces of the prepared filler;
- (4) A statement of composition of the filler including the type, geographic origin, treatment, age, and percentage of each tobacco used;
- (5) 2,500 square inches (17 square feet) of the wrapper material;
- (6) A statement of the materials and proportion of each used in the wrapper, and the production process; and
- (7) 400 of the finished product if weighing not more than 10 pounds a thousand, or 200 of the finished product if weighing more than 10 pounds a thousand.

The Bureau will continually monitor advertising, point of sale merchandising materials, and purchasing patterns of consumers to determine whether it is likely that any product classified as a cigar is being offered to or purchased by consumers as a cigarette. Additionally, officers of the Bureau will occasionally pick up samples of products and wrapper and filler materials for testing and examination.

Revenue Ruling 69-198, C.B. 1969-1, 359 (Internal Revenue), is superseded.

25 CFR 270.11, 275.11

(Source: <https://www.ttb.gov/rulings/73-22.htm>, October 17, 2017.)