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## ARIZONA LUXURY TAX RULING LTR 20-2

**This substantive policy statement is advisory only. A substantive policy statement does not include internal procedural documents that only affect the internal procedures of the agency and does not impose additional requirements or penalties on regulated parties or include confidential information or rules made in accordance with the Arizona administrative procedure act. If you believe that this substantive policy statement does impose additional requirements or penalties on regulated parties, you may petition the agency under Arizona Revised Statutes § 41-1033 for a review of the statement.**

### **ISSUE:**

The classification of whole leaf tobacco under Arizona Revised Statutes (A.R.S.) § 42-3052.

### **APPLICABLE LAW:**

A.R.S. §§ 42-3051, 42-3251, 42-3251.01, 42-3302, and 42-3371 levy Arizona state tobacco taxes on, *inter alia*, smoking tobacco as defined in A.R.S. § 42-3001.

A.R.S. § 42-3001(23) defines “smoking tobacco” for the purposes of taxation and regulation under A.R.S. Tit. 42, Ch. 3, “as any tobacco that, because of its appearance, type, packaging, labeling or promotion, is suitable for use and likely to be offered to or purchased by consumers as tobacco for making cigarettes or otherwise consumed by burning. Smoking tobacco includes pipe tobacco and roll-your-own tobacco.”

A.R.S. § 42-3052(6) imposes a luxury tax on “smoking tobacco, snuff, fine cut chewing tobacco, cut and granulated tobacco, shorts and refuse of fine cut chewing tobacco, and refuse, scraps, clippings, cuttings and sweepings of tobacco, excluding tobacco powder or tobacco products used exclusively for agricultural or horticultural purposes and unfit for human consumption, two cents per ounce or major fraction of an ounce.”

A.R.S. § 36-798.06 imposes a ban on delivery sales—which includes online, mail-order, and telephone orders delivered to Arizona purchasers who are not licensed distributors—of all tobacco products, except cigars and pipe tobacco.

### **DISCUSSION:**

#### **Categorization of Whole Leaf Tobacco**

For the purposes of this ruling, “whole leaf tobacco” refers generally to a category of tobacco products that consists of physical tobacco leaves in their entirety, including both the blade and stem, and that have not been cut, threshed, or stripped. The leaves can be either cured or raw.

Smoking tobacco is always subject to Arizona tobacco taxes.<sup>1</sup> It is the department's position that cured whole leaf tobacco will always be classified as smoking tobacco, due to its suitability and likeliness to be purchased or offered to consumers as tobacco for making cigarettes or otherwise consumed by burning. Further, the department will also consider raw whole leaf tobacco to be smoking tobacco, due to the ease of curing the product and its likeliness to be consumed by burning.

#### Catch-All Provision

While Arizona luxury privilege tax is generally imposed on all tobacco products, tobacco that is used exclusively for agricultural or horticultural purposes and unfit for human consumption is exempt from Arizona tobacco taxes.<sup>2</sup> It is the department's position that whole leaf tobacco will never meet the narrow exception of this catch-all provision. Whole leaf tobacco meets the statutory definition of smoking tobacco and, based on its physical characteristics, could not be considered to be both used exclusively for agricultural or horticultural purposes and unfit for human consumption.

The terms "agricultural," "horticultural," and "unfit for human consumption" are not defined by statute, and "as a result the words used are to be given their ordinary meaning unless it appears from the context or otherwise that a different sense was intended."<sup>3</sup> In this context, it appears that the legislature intended to create a narrow carveout from an all-encompassing catch-all provision for tobacco products that are subject to Arizona tobacco taxes.

Agriculture is defined as "the science, art, or practice of cultivating the soil, producing crops, and raising livestock and in varying degrees the preparation and marketing of the resulting products."<sup>4</sup> Further, horticulture is defined as "the science and art of growing fruits, vegetables, flowers, or ornamental plants."<sup>5</sup> In considering these terms in the common and ordinary sense, whole leaf tobacco would be unlikely to ever be used exclusively for horticultural or agricultural purposes. However, the department will consider, on a case-by-case basis, whether actual exclusive use for these purposes exists, if substantiation is provided by a licensed distributor.

However, regardless of whether the tobacco product is being used exclusively for agricultural or horticultural purposes, the distributor would also have to show that whole leaf tobacco is of such a condition as to be unfit for human consumption before the department would conclude that the tobacco is exempt from tobacco taxes.

Under Food and Drug Administration (FDA) regulations, "intended use" can be demonstrated by labeling claims, advertising matter, or oral or written statements made on or behalf of the manufacturer. Existing regulations also state that the manufacturer's actual knowledge of the article's use for a purpose for which is it neither labeled nor advertised may be evidence of intended use.<sup>6</sup>

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<sup>1</sup> See A.R.S. § 42-3052(6), 42-3251(A)(2), and 42-3371(2).

<sup>2</sup> *Id.*

<sup>3</sup> *State v. Curry*, 97 Ariz. 191, 194 (1965) (en banc); see also *Wilderness World, Inc. v. Dep't of Revenue*, 182 Ariz. 196, 198 (1995) (en banc) (words in tax statutes are construed using their "plain and ordinary" meanings).

<sup>4</sup> "Agriculture." *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/agriculture>. Accessed 9 Mar. 2020.

<sup>5</sup> "Horticulture." *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/horticulture>. Accessed 9 Mar. 2020.

<sup>6</sup> 21 C.F.R. §§ 201.128 and 801.4.

It is common knowledge that whole leaf tobacco will be generally purchased by a consumer for human consumption. If a product is in such a condition as it can be consumed by a human, the department will conclude the product is fit for human consumption.

Consequently, whole leaf tobacco does not fall within the carveout from the catch-all provision for tobacco products and is subject to Arizona tobacco taxes as smoking tobacco.

**RULING:**

The department rules that, based on the viability of whole leaf tobacco for human consumption, it is considered "smoking tobacco" as defined in A.R.S. § 42-3001(23). Therefore, it is subject to Arizona tobacco taxes under A.R.S. §§ 42-3052(6), 42-3251(A)(2), 42-3251.01(A), 42-3302(A), and 42-3371(2) as applicable, and regulation under A.R.S. Tit. 42, Ch. 3. As whole leaf tobacco products are considered "smoking tobacco" that has not been processed into pipe tobacco, they are subject to the delivery sales ban under A.R.S. § 36-798.06.

Signed: Grant Nülle, Deputy Director

Date: June 12, 2020

**Explanatory Notice**

**The purpose of a tax ruling is to provide interpretive guidance to the general public and to department personnel. A tax ruling is intended to encompass issues of law not adequately covered in statute, case law or administrative rules. A tax ruling is a position statement that provides interpretation, details or supplementary information concerning the application of the law. Relevant statute, case law or administrative rules, as well as a subsequent ruling, may modify or negate any or all of the provisions of any tax ruling. See GTP 96-1 for more detailed information regarding documents issued by the Department of Revenue.**