



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Tax on Floor Stocks of Defense Commissary Agency Cigarettes

File: B-253946

Date: January 7, 1994

DIGEST

GAO will not review conclusion of the Bureau of Alcohol Tobacco and Firearms that the Defense Commissary Agency is liable for the cigarette floor stocks tax imposed under section 11202(i) of the Omnibus Budget Reconciliation Act of 1990 (Public Law 101-508, 104 Stat. 1328-420). DeCA should make arrangements to finance the tax payment with funds obtained through the sale of cigarettes.

DECISION

The Defense Commissary Agency (DeCA) has asked for our opinion on whether it is liable for a tax on floor stocks of cigarettes imposed under section 11202(i) of the Omnibus Budget Reconciliation Act of 1990 (Public Law 101-508, 104 Stat. 1328-420). If it is liable for the tax, DeCA also asks which funding source should be used to pay the tax.

For the reasons stated below, we will not review the conclusion of the Bureau of Alcohol Tobacco and Firearms (ATF) that DeCA is liable for the cigarette floor stocks tax. DeCA should make arrangements to finance the tax payment with funds obtained through the sale of cigarettes.

BACKGROUND

The Department of Defense operates commissary stores on many of its installations for the benefit of military personnel, their families, and selected other individuals. These stores may sell "merchandise similar to that sold in commercial grocery stores," including "tobacco products." 10 U.S.C. § 2486 (1988). Commissaries must operate under uniform pricing policies that afford the lowest practical price for items sold, but recoup the actual product costs (along with a uniform percentage surcharge to recover certain commissary operating costs). *Id.* As of October 1, 1991, the commissary stores operated by the Army, Navy, Air Force, and Marine Corps were consolidated into the DeCA. DeCA is operated as a component of the Defense Business Operations Fund, a revolving fund under 10 U.S.C. § 2208.

The Omnibus Budget Reconciliation Act of 1990 included a floor stock tax on cigarettes held by any person for resale. 104 Stat. 1388-420 to 1388-421. The amount of tax owed was based on the amount of cigarettes held for sale on January 1, 1993, and was payable on June 30, 1993. The date of, and the amount assessed for, the floor stock tax corresponded to an increase in the federal excise tax imposed on manufacturers and importers of cigarettes. See, Pub. L. 101-508, §§ 11202(b) and 11202(i), 104 Stat. 1388-419. Thus, the floor stock tax acted as a surrogate for the increase in the excise tax on manufacturers and importers of cigarettes.¹

As the 1993 tax assessment date approached, DeCA officials found that its predecessor commissary organizations did not uniformly pay a previous floor stocks tax assessed in 1991. On January 4, 1993, DeCA requested ATF's opinion on whether the Floor Stocks Tax applied to cigarettes held by commissaries for resale. In March 1993, ATF concluded that the tax applied to cigarettes held by DeCA's commissaries. DeCA then asked for our opinion on whether the ATF conclusion is correct. If DeCA must pay this tax, DeCA also asks which funding source DeCA should use to pay the tax.

DISCUSSION

This office has long declined to render decisions on what is or is not taxable under the internal revenue code.² Specifically regarding excise taxes, we stated in 12 Comp. Gen. 211 (1932) that the applicable federal taxing authorities should decide when an excise tax applies. More recently, we stated that "we of course accept the determinations of the [Internal Revenue Service] as to what is and is not taxable under the [federal employer excise] tax laws it administers." 65 Comp. Gen. 800, 802, (1986). ATF is responsible for administering and enforcing the portions of the internal revenue code that deal with excise taxes on tobacco products. 37 Fed. Reg. 11696 (1972). In this instance, therefore, we also will not review the conclusion of ATF that the cigarette floor stocks tax

¹Cigarettes held for sale to consumers on January 1, 1993, were not subject to the excise tax increase on cigarette manufacturers and importers. The floor stocks tax ensures that all cigarettes sold to the public after 1992 were assessed a uniform amount of federal excise taxes.

²This issue has most often come up with respect to income tax inquiries. E.g. B-222668, Sept. 8, 1986; B-219208, Aug. 7, 1985.

applied to cigarettes held for resale by DeCA commissaries on January 1, 1993.

Accordingly, the issue here becomes a question of what fund source DeCA should use to make these payments. We believe the statutory authority for commissary store operations provides adequate authority for DeCA to pay the floor stock tax out of its sales revenue. Under 10 U.S.C. § 2486(d), DeCA commissaries must set their prices to recoup actual product costs. On January 1, 1993, in our view, the "actual" cost of DeCA's cigarette stock included the excise tax on the commissaries' floor stocks. As stated above, the floor stocks tax acted as a surrogate for the increase in the excise tax on manufacturers and importers. Since the excise taxes assessed on manufacturers and importers become part of DeCA's costs of purchasing its cigarette stock, we think the floor stock tax assessed on DeCA should be treated the same way. Accordingly, DeCA could have adjusted its prices on January 1 to reflect the added costs, and used its sales revenue to pay the floor stocks tax. Therefore, we conclude that DeCA should arrange to pay the cigarette floor stocks tax and to finance those payments from funds obtained from the sale of cigarettes.

for James F. Hinckman
Comptroller General
of the United States