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Federal & State Tobacco Taxes – On Fire or Just Smoking? Part I

For those in the business, manufacturers, wholesalers, distributors, importers, dealers and retailers of tobacco products, there are a staggering amount of Federal and state excise tax compliance obligations and responsibilities that must be fully considered prior to the commencing of such operations, as well as on an on-going basis. As Part I of a two-part overview and analysis of these considerations, this article will focus on all Federal excise tax (“FET”) obligations, as well as basic procedure for challenging assessments of such FET liabilities.

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Basics of Tobacco Products and Types of Businesses for Purposes of the FET

As an initial matter, when evaluating a business’ FET liability, if any, one must first determine the specific type of tobacco product being manufactured, imported, sold or otherwise distributed by same, as the tax rate and reporting responsibilities vary greatly for cigarettes, cigars and other tobacco products. The term tobacco products, for purposes of the FET, includes cigars, cigarettes, and several other tobacco products.^[i] While most think of cigarettes and cigars only in terms of the FET, many other tobacco products are also subject to the FET and related reporting requirements for same, including actual tobacco products such as chewing tobacco, snuff, pipe tobacco, roll-your-own tobacco, as well as tobacco components such as cigarette papers and tubes, all of which are statutorily defined.^[ii] There are, however, limited exemptions from the FET for certain types of tobacco products and cigarettes papers and tubes.^[iii]

In addition to these general categories of tobacco products, both cigarettes and cigars are further broken down into small and large classes based on weight per 1,000 units (cigars or cigarettes).^[iv] The importance of the distinction between small and large cigars has become an extremely hot topic over the past few years as

cigars have traditionally been taxed at a much lower rate than small (regular) cigarettes. Similar issues have also arisen due to the FET rate disparity between roll-your-own tobacco and pipe tobacco. As such, there has been a recent trend of persons intentionally misclassifying or mislabeling certain tobacco products to obtain a lower FET (and state excise tax) rate on same. As a result, several measures have been taken at the Federal and state level to prevent and punish such intentional misclassifications and schemes.^[v]

Once the type of tobacco product has been properly identified under the applicable statutory and regulatory definition, the next step is to determine the specific operation involved, as the FET applies primarily to domestic manufacturers and importers.^[vi] In general, any manufacturer or importer of such products (as well as an “export warehouse prospector”^[vii]) must qualify for and obtain a permit from the Alcohol and Tobacco Tax and Trade Bureau (“TTB”) to engage in such activities, all of which are subject to suspension or revocation if certain violations are committed by the permit holder.^[viii] The typical permit process through the TTB takes a minimum of sixty (60) days to process, and typically much longer, on average, based upon the documentation requested by the TTB.^[ix]

Overview of Applicable FET Rates, 2009 Floor Stock Tax and Related FET Requirements and Recent Legislative Changes to Same

Once the specific type of tobacco product and the exact operations involved with same have been identified, and the proper permits have been obtained, one can then look to the specific FET rate and Federal reporting, compliance, and other requirements for such products and activities.

As a general matter, the FET applies to and is imposed on tobacco products and cigarette papers and tubes that are manufactured in, or imported into, the United States pursuant to Chapter 52 of the Internal Revenue Code of 1986, as amended (“Code”).^[x] The FET is imposed on the manufacturer or importer of the tobacco product, and collected on the basis of a return filed based upon the time of removal from the manufacturer’s facilities, or in the case of importers, upon release from the customs custody or bond.^[xi] In

general, payment of the FET on tobacco products and cigarettes papers and tubes falls on the fourteenth day after the last day of each semimonthly period where such products are removed; certain timing requirements for imported products and other exceptions may, however, apply.^[xii] Upon removal, tobacco products (and cigarette papers and tubes) must be properly packaged and bear all marks, labels, and notices as required by relevant regulations.^[xiii] Additionally, strict record retention and inventory and sales reports must also be complied with on an ongoing basis.^[xiv]

The FET rate and related reporting requirements were drastically changed with the enactment of the Children's Health Insurance Program Reauthorization Act ("CHIPRA") in 2009, as it, among other things, increased the FET rate, effective April 1, 2009, on all tobacco products and related items (e.g., cigarette papers and tubes), as well as imposed what is known as a "floor stocks" tax on such products. CHIPRA also added new requirements for manufacturers and importers of certain processed tobacco products, and changed the authority and basis for an applicable tobacco product permit to be denied, suspended or revoked.^[xv] As a result of CHIPRA, the FET rate jumped over 158% from \$19.50 and \$40.95 per 1,000 for small and large cigarettes, respectively, to \$50.33 and \$105.69 per 1,000 units.^[xvi] The FET rate for small and cigars likewise substantially increased as of April 1, 2009, with small cigars being taxed at \$50.33 per 1000 (previously \$1.828 per 1000), while large cigars are taxed at 52.75% of sales price, not to exceed \$402.60 per 1,000 cigars (previously only 20.719% of sales price, not to exceed \$48.75 per 1,000).^[xvii] FET rates for other tobacco products like pipe tobacco, chewing tobacco, snuff, roll-your-own tobacco and cigarette paper and tubes were likewise adjusted and in Section 5701 of the Code, as well as on the TTB's website.^[xviii]

Note that unlike, cigarettes and small cigars, the FET on large cigars is based on the "sale price," which for FET purposes, is generally based on the actual sales price charged by the manufacturer to the purchaser,^[xix] unless the large cigars are sold: (i) at retail; (ii) on consignment; or (iii) other than through an arms-length transaction and at less than the fair market price (e.g., sales between affiliated parties at less than fair market price^[xx]). In such situations, the FET

on large cigars is computed using a “constructive sale price,” generally defined to be “the price for which articles are sold, in ordinary course of trade, by manufacturers or producers thereof, as determined by the [TTB]” and based on a number of applicable methodologies set forth in Section 4216 of the Code and relevant regulations and other administrative guidance.[\[xxi\]](#)

In addition to the increase in the FET rates for all tobacco products and cigarette papers and tubes, CHIPRA also imposed a “floor stocks tax” on all of these items held for sale on April 1, 2009, except for large cigars.[\[xxii\]](#) In general, a floor stocks tax was “a one-time excise tax placed on a commodity undergoing a tax increase,” and thus attempts to amount to the difference between the new FET rate and the prior rate.[\[xxiii\]](#) The one-time tax applied to any person in possession of these products for sale on April 1, 2009, including wholesalers, retail dealers, manufactures and importers.[\[xxiv\]](#) A full breakdown of the increased FET on all tobacco products, papers and tubes, as well as the applicable floor stocks tax rate, can be found on the Alcohol and Tobacco Tax and Trade Bureau’s website.[\[xxv\]](#)

Enforcement of the FET

The FET is unique from most Federal taxes as it is not enforced by the Internal Revenue Service, but instead by the Alcohol and Tobacco Tax and Trade Bureau (“TTB”). Pursuant to the Homeland Security Act of 2002,[\[xxvi\]](#) the TTB was created to be “responsible for the administration and enforcement of the tax laws relating to alcohol, tobacco, and firearms and certain non-tax laws relating to alcohol.”[\[xxvii\]](#) In contrast, the TTB’s counterpart, the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”), an agency of the Department of Justice, is instead responsible for the enforcement of criminal laws and regulations relating to, among other things certain situations involving tobacco, such as the trafficking of “contraband cigarettes” (i.e., cigarettes without affixation or payment of applicable State taxes).[\[xxviii\]](#)

Chapter 52 of the Code provides the statutory authority for the TTB to administer and enforce FET on tobacco products. Pursuant to such statutory authority, the TTB has promulgated regulations and

issued public guidance to provide more specifics regarding the applicable substantive and procedural rules for collection and enforcement of the FET on tobacco products.^[xxix] In addition to FET collection authority for domestically manufactured tobacco products, the TTB is also charged with permitting, registration and bonding authority over tobacco product manufacturers, importers and exporters, as well as Federal authority to regulate the production, packaging, labeling and storage of tobacco products.^[xxx] Note, however, that the enforcement agency is different for importers of tobacco products, as the U.S. Customs and Border Patrol is tasked with the responsibility for collecting the FET on such products at the border.^[xxxi]

In addition to the TTB's authority over these products, one must also be aware that there are other registration, payment, reporting, etc. requirements from other Federal (U.S. Department of Agriculture, the U.S. Food and Drug Administration, and Bureau of Alcohol, Tobacco, Firearms and Explosives) and state agencies and laws (Federal legislation requiring certain state reporting requirements, state departments of revenue, state attorney general offices, local government, Master Settlement Agreement, etc.) for the sale of such products, much of which will be discussed in more depth in Part II of this article.

Challenging FET Assessments

The TTB may conduct audits of taxpayers and if, as a result thereof, the TTB believes that a manufacturer failed to pay FET and/or that additional FET is due on its tobacco products and cigarette papers and tubes, the TTB will generally issue a Notice of Proposed Assessment.^[xxxii] TTB will ask for voluntary payment of the assessed amount (and any assessed penalties and interest) and also provide for a period (generally 45 days) to file a protest and request a conference with TTB.^[xxxiii] It is often preceded or accompanied by a letter of audit findings.

If a proposed assessment is not paid, TTB may issue a Notice and Demand of Taxes Due, which also requests payment, but generally provides for the right to file a Claim for Abatement. Filing a Claim for Abatement is essentially another method of administratively

protesting such a Notice.[\[xxxiv\]](#) If TTB denies the abatement, it will issue a Final Notice and Demand of Taxes Due (which will sometimes be combined with a Notice of Intent to Levy) which may be appealed within fifteen (15) days.[\[xxxv\]](#) Note that no notice is required when collection is decreed to be in jeopardy.[\[xxxvi\]](#)

As disputes with the TTB have become more and more common over the past few years, several options are available to administratively resolve same; these will also typically have the effect of suspending collection action (e.g., a levy). One option is that TTB may enter into a Closing Agreement with a taxpayer relating to the compromise of tax liability.[\[xxxvii\]](#) Another option, similar to the IRS, is that the TTB may accept an Offer In Compromise (“OIC”) for less than the amount due based on doubt as to liability or collectability.[\[xxxviii\]](#) No levy may be made when an OIC is pending; however, the TTB has previously stated that an OIC does not automatically suspend collection action and that its collection efforts can continue if the OIC is filed solely for delay or if delay would negatively affect collection.[\[xxxix\]](#) Similarly, an Installment Payment Agreement can also be made with the TTB and although a levy typically cannot be taken when an offer of same is pending, if collection is in jeopardy, the TTB’s position is that it can levy immediately.[\[xl\]](#)

Note that other less-traditional administrative options may also be employed to help forestall collection activities by the TTB, including payment of amounts sought and filing of refund claim with TTB,[\[xli\]](#) posting a bond to stay collection of a jeopardy assessment,[\[xlii\]](#) or potentially requesting a Collection Due Process Hearing.[\[xliii\]](#)

If administrative challenges to a TTB audit or assessment of additional tobacco FET stall, are unrealistic and/or do not provide adequate relief, several options exist to contest TTB’s action in judicial forums; however, the filing of a refund suit in either a federal district court or the Court of Federal Claims may be the only judicial options to challenge a TTB tax assessment. For example, it appears that an appeal to the United States Tax Court is unavailable, despite it being the only judicial venue in which prepayment of the amounts assessed is not the general rule, as the deficiency requirements and procedures of 26 U.S.C. §§ 6211 to 6216 do not apply in the context

of the FET, but instead only to certain enumerated taxes, and the FET does not appear to be one of them.[\[xliv\]](#)

As such, the United States District Court or Court of Federal Claims (located in Washington D.C.) appear to be the available options for the challenging of a FET assessment by the TTB. Such venues both have broad jurisdiction over “[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws....”[\[xlv\]](#) The Court of Federal Claims can hear “any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department...or for liquidated or unliquidated damages in cases not sounding in tort.”[\[xlvi\]](#) Moreover, TTB Publication No. 5610.1 (1/04) states that if the TTB rejects a taxpayer’s claim for refund, the taxpayer will receive a statutory notice of disallowance and it may then “file a suit for refund in a U.S. District Court or in the U.S. Claims Court.” Additional steps must also generally be taken in order to properly file a refund suit, including exhaustion of administrative remedies available, filing a refund claim with the TTB which it disallows, meeting the “full payment” rule, and filing a refund suit with the court within the applicable refund limitations period.

The general rule in Federal tax matters is that a taxpayer must exhaust certain administrative remedies by actively participated in an Appeals Office conference with the IRS, if available, prior to seeking judicial remedies;[\[xlvii\]](#) however, the TTB has not traditionally had an Appeals Office like the IRS, and its administrative procedure regulations[\[xlviii\]](#) and its regulations relating to tobacco taxes[\[xlix\]](#) do not provide additional insight on whether the TTB specifically requires any exhaustion of administrative remedies with the TTB. Regardless, there are certain exceptions to the IRS’s administrative exhaustion rules as the IRS may excuse this requirement if it notifies the taxpayer in writing that these administrative steps are unnecessary.[\[l\]](#) Moreover, the IRS may also waive these requirements in a number of situations, such as if the taxpayer: (1) did not receive a preliminary notice of

proposed disallowance prior to the Service's issuance of a statutory notice of claim disallowance or (2) did not receive either written or oral notification that an Appeals Office conference had been granted within six months from the date the claim was filed.^[li] Further, courts have held that the "futility doctrine" (i.e., not required to exhaust administrative remedies prior to filing suit if administrative relief would be futile) may apply to excuse the exhaustion of these administrative remedies where the IRS's position is well-known and is not likely to change.^[lii] These may apply to TTB assessed liabilities.

After administrative remedies, if any, have been exhausted, a tax refund action may be instituted in either a U.S. District Court or the Court of Federal Claims provided that: [1] the contested tax and contested penalties (but not interest)^[liii] be paid in full first (known as the full payment rule, though an exception exists for divisible taxes^[liv], such as excise taxes); and [2] a claim is timely filed with TTB (generally within 3 years and subsequent to the payment) ^[lv] on the required administrative form for same [Form 2635 (5620.8)].^[lvi]

Lastly, as in all tax refund suits, such suit cannot be brought "before the expiration of 6 months from the date of filing the claim...unless the Secretary renders a decision thereon within that time," but must be brought before "the expiration of 2 years from the date" a taxpayer receives a notice of the disallowance of the claim.^[lvii] In compliance therewith, TTB Publication No. 5610.1 (1/04) states that a taxpayer "may file suit within 2 years from the date the notice of disallowance is mailed to [the taxpayer]. Also, if [TTB] has not acted on [the taxpayer's] claim within six months from the date [the taxpayer] filed it, [the taxpayer] may then file suit for refund." Note, however, that if a taxpayer never receives a notice of disallowance, the statute of limitations for filing a refund suit cannot expire.^[lviii] But in general, a refund suit filed more than two years after the date of the notice of claim disallowance will likely be dismissed with prejudice for lack of jurisdiction.^[lix] The determinate date for timely filing a refund suit is the mailing date of a notice of claim disallowance by the IRS, not the date of receipt by the taxpayer.^[lx]

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[\[i\]](#) 26 U.S.C. § 5702(c) (defining tobacco products).

[\[ii\]](#) 26 U.S.C. § 5702 (a), (b), (e), (f), (m)–(o).

[\[iii\]](#) See U.S.C. § 5704.

[\[iv\]](#) 26 U.S.C. § 5701(a)(1) & (2).

[\[v\]](#) See e.g., Children’s Health Insurance Program Reauthorization Act, Pub. L. No. 111–3, H.R.2, 111th Cong. (Jan. 6, 2009) (significantly increasing FET rate on other tobacco products, including small cigars to have same FET rate as small cigarettes); Tobacco Tax Equity Act, S. 194, 113th Cong., 1st Session (proposed Jan. 31, 2013 to require the same FET rate on all tobacco products and cigarettes); “FDA Acts to Stop Tax-Evading Misbranding of Roll-Your-Own-Cigarette Tobacco as Pipe Tobacco,” Press Release from FDA Campaign for Tobacco-Free Kids (Aug. 12, 2013), *available at* http://www.bizjournals.com/prnewswire/press_releases/2013/08/12/DC62706 (last visited Jan. 5, 2014).

[\[vi\]](#) 26 U.S.C. § 5702(d) (g) (defining manufacturer of tobacco products and cigarettes, and importer).

[\[vii\]](#) 26 U.S.C. § 5702(h) & (i).

[\[viii\]](#) See 26 U.S.C. §§ 5712 & 5713; 27 CFR §§ 40.61(a), 41.190 & 191.

[\[ix\]](#) “Days to Process Permits Online Original Applications,” Alcohol and Tobacco Tax and Trade Bureau website, *available at* <http://www.ttb.gov/nrc/average-days.shtml> (last visited Jan. 4, 2014).

[\[x\]](#) See 26 U.S.C. § 5701.

[\[xi\]](#) 26 U.S.C. § 5703(a) & (b). Moreover, although outside the scope of this article, note that Sections 5731–34 of the Code imposes an annual special occupational tax on manufacturers and export warehouse proprietors (not importers).

[\[xii\]](#) 26 U.S.C. § 5703(b)(2)(A) & (B).

[\[xiii\]](#) 26 U.S.C. § 5723(a) & (b); 27 CFR §§ 40.211– 40.217, 41.71–41.75.

[xiv] 26 U.S.C. 5721-22 & 5741; 27 CFR §§ 40.181- 40.187, 40.201 & 40.202; 41.181-41.182.

[xv] Pub. L. No. 111-3, H.R.2, 111th Cong. (Jan. 6, 2009). *See also*, “Federal Excise Tax Increase and Related Provisions,” Alcohol and Tobacco Tax and Trade Bureau website, *available at* http://www.ttb.gov/main_pages/schip-summary.shtml (last visited Dec. 28, 2013).

[xvi] 26 U.S.C. § 5701(b)(1)&(2); “Federal Excise Tax Increase and Related Provisions,” *supra* note 16.

[xvii] 26 U.S.C. § 5701(a)(1)&(2); “Federal Excise Tax Increase and Related Provisions,” *supra* note 16.

[xviii] 26 U.S.C. § 5701(c)-(h); “Tax and Fee Rates,” Alcohol and Tobacco Tax and Trade Bureau website, *available at* http://www.ttb.gov/tax_audit/atftaxes.shtml (last visited Jan. 4, 2014).

[xix] 27 CFR § 40.22(a).

[xx] 27 CFR § 40.22(b)(1); Rev. Rul. 71-240, 1971-1 C.B. 372 (“any intercompany sale price which is less than 95 percent of the selling company’s lowest established resale price to unrelated wholesale distributors is considered less than fair market price....”); Rev. Rul. 76-182, 1976-1 C.B. 343 (“[T]he 95 percent rule stated in Rev. Rul. 71-240 is presumptive of fair market price”).

[xxi] 26 U.S.C. § 4216(b); 26 U.S.C. § 5702(l)(3); 27 CFR §§ 40.22(b) & 41.39; TTB Industry Circular No. 2011-03 (Apr. 26, 2011). *See also*, 26 CFR §§ 48.4216(b)-1 to (b)-4; Rev. Rul. 76-182, 1976-1 C.B. 343; Rev. Rul. 71-240, 1971-1 C.B. 372; Rev. Rul. 62-68, 1962-1 C.B. 216.

[xxii] Pub. L. No. 111-3, H.R.2, 111th Cong. (Jan. 6, 2009); TTB Form 5000.28T09 (03/2009).

[xxiii] “Floor Stocks Tax FAQ,” Alcohol and Tobacco Tax and Trade Bureau website, *available at* http://www.ttb.gov/tax_audit/floor-stocks-tax-faqs-answer.shtml#g1 (last visited Jan. 4, 2014).

[xxiv] Pub. L. No. 111-3, H.R.2, 111th Cong. (Jan. 6, 2009); TTB Form 5000.28T09 (03/2009).

[\[xxv\]](#) “Federal Excise Tax Increase and Related Provisions,” *supra* note 16.

[\[xxvi\]](#) Pub. L. No. 107–296, H.R.5005, 107th Cong. § 1111 (Nov. 25, 2002).

[\[xxvii\]](#) *Id.*; The Jurisdiction and Responsibilities of the Alcohol and Tobacco Tax and Trade Bureau, Joint Committee on Taxation, JCX–43–08, at 2 (May 19, 2008).

[\[xxviii\]](#) Pub. L. No. 107–296, *supra*. See also, The Jurisdiction and Responsibilities of the Alcohol and Tobacco Tax and Trade Bureau, Joint Committee on Taxation, JCX–43–08, at 2 (May 19, 2008).

[\[xxix\]](#) See 27 CFR Chap. 1, Subchapter B, Parts 40–46.

[\[xxx\]](#) See e.g., 27 CFR §§ 40.61 – 40.76; 40.161–40.257; 41.71–41.75; 41.181–182.

[\[xxxi\]](#) 27 CFR § 41.62.

[\[xxxii\]](#) See 26 U.S.C. § 6201; 27 CFR §§ 40.27 & 70.71 (authorizing the making of an assessment pursuant to 26 U.S.C. 6201); 26 U.S.C. § 6303, 27 CFR §§ 70.81 & 70.434 (requiring notice and demand of an assessment be given to a taxpayer).

[\[xxxiii\]](#) *Id.*

[\[xxxiv\]](#) See 26 U.S.C. § 6404 & 27 CFR § 70.125 (authorizing TTB to abate an assessment); 27 CFR §§ 70.435(b) & 27 CFR 40.281 (authorizing abatement of an assessment).

[\[xxxv\]](#) See 26 U.S.C. § 6331(d) (providing for 30 days’ notice prior to a levy, except when collection is in jeopardy, and that certain information regarding the levy and appeals be provided to the involved taxpayer); 27 CFR 70.161 (regarding levy and distraint); TTB Publication 5610.1 (1/04), *Notice to Delinquent Taxpayers*.

[\[xxxvi\]](#) See 26 U.S.C. § 6331(d)(3); 27 CFR § 70.161(a)(2).

[\[xxxvii\]](#) See 26 U.S.C. § 7121; see also 27 CFR § 70.485.

[\[xxxviii\]](#) 26 U.S.C. § 7122; 27 CFR §§ 70.482–484

[\[xxxix\]](#) 26 U.S.C. § 6331(k)(1); TTB Publication 5610.1 (1/04). See also 27 CFR § 70.482(d)(2).

[\[xl\]](#) 26 U.S.C. § 6331(k)(2). *See also* 27 CFR § 70.481.

[\[xli\]](#) *See* 26 U.S.C. § 6511(a); 27 CFR § 40.286; 27 CFR §§ 46.6 to 46.10.

[\[xlii\]](#) *See* 26 U.S.C. §§ 6862 & 6863(a). *See also* 27 CFR § 70.76.

[\[xliii\]](#) Although a Collection Due Process Hearing does not appear to be provided for in the TTB's Regulations, 26 U.S.C. § 6330(a)(1) provides that, "[n]o levy may be made on any property or right to property of any person unless the Secretary has notified such person in writing of their right to a hearing under this section before such levy is made."

[\[xliv\]](#) *See also*, 26 U.S.C. §§ 7441 to 7479.

[\[xlv\]](#) 28 U.S.C. § 1346(a)(1); 28 U.S.C. § 1340. *See also* 28 U.S.C. § 2463 ("All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.").

[\[xlvi\]](#) 28 U.S.C. § 1491(a)(1)

[\[xlvii\]](#) 26 CFR § 301.7430-1.

[\[xlviii\]](#) 27 CFR §§ 70.1-70.803.

[\[xlix\]](#) 27 CFR §§ 40.1-40.531, 41.1-41.273, 44.1-44.267, 45.1-45.51, and 46.1-46.274.

[\[l\]](#) 26 CFR § 301.7430-1(f)(1).

[\[li\]](#) 26 CFR § 301.7430-1(f)(3). *See e.g.*, Columbus Fruit & Vegetable Coop. Ass'n v. United States, 8 Cl.Ct. 525 (1985).

[\[lii\]](#) *See e.g.*, Phillips v. Commissioner, 88 TC 529, 533 (1987), *rev'd on other grounds*.

[\[liii\]](#) *See* Shore v. United States, 9 F.3d 1524, 1527-1528 (Fed. Cir. 1993) (holding that interest and penalties do not have to be prepaid if taxpayer only disputes the tax assessment); Flora v. United States, 362 U.S. 145, 171 n.31 (1960) (discussing full payment but suggesting that it does not require payment of interest); Kell-Strom Tool Co. v. United States, 205 F. Supp. 190 (D. Conn. 1962) (holding that full payment does not require payment of interest when taxpayer only

disputes tax assessment).

[liv] In Flora, the Supreme Court expressly recognized an exception to the full payment rule for divisible taxes. 362 U.S. 145, 171 n. 37. The holding in Flora has since been held to mean that “the full payment rule has no application to suits for refund of excise taxes, which may be divisible into a tax on each transaction or event and with respect to which the Tax Court has no jurisdiction.” It appears, however, that although the FET is an excise tax, there is no decision directly on point regarding whether an assessment of same by the TTB constitutes a divisible tax exempt from full payment.

[lv] In general, in order for a refund claim to be timely filed, it must be filed either within three (3) years from when the underlying return was filed or within two (2) years after the date of payment of the tax to be refunded, whichever period is longer [26 U.S.C. § 6511(a); 27 CFR § 70.261(a)], or for “any tax payable by means of a stamp, a claim for... within 3 years from the time the tax was paid” [27 CFR § 70.261(b)]. More specifically for tobacco taxes, the TTB’s regulations state: “Section 6511, 26 U.S.C., provides that, in most cases, any adjustment of claim for refund of an overpayment of tax on tobacco products must be made or filed within three years after the tax is paid.” 27 CFR. § 40.286. See also, 27 CFR 46.6 to 46.10; 26 U.S.C. § 7422(a). The burden of proof is on the taxpayer to establish that a proper claim was timely filed, but proof of proper and timely mailing creates a presumption of receipt by the Service [26 U.S.C. 7502(c)] and TTB [27 CFR § 70.305].

[lvi] 26 U.S.C. 7422(a); 26 CFR § 301.6402-2; 27 CFR § 40.286; 27 CFR § 70.123(c). See, e.g., Gluck v. United States, 84 Fed. Cl. 609 (2008) (holding that that court lacked jurisdiction over the taxpayer’s action because the full payment rule was not satisfied and the taxpayer failed to follow statutorily required refund procedures).

[lvii] 26 U.S.C. § 6532(a)(1).

[lviii] See Detroit Trust Co. v. United States, 130 F.Supp 815 (Ct. Cl. 1955).

[lix] See Taylor v. United States, 215 Ct. Cl. 1017 (1978); CCA 201110011 (Oct. 28, 2010).

[\[ix\]](#) 26 U.S.C. §§ 6511(a), 6402(a), 7422(f)(1); Fed. R. Civ. P. 17(a); Ct. Fed. Cl. R. 17(a).

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