



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II
Attorney General

September 2, 2011

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

The Honorable Terry G. Kilgore
Member, House of Delegates
Post Office Box 669
Gate City, Virginia 24251

Dear Delegate Kilgore:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You inquire whether a retail tobacco shop is a “tobacco product manufacturer” within the meaning of the Virginia Tobacco Escrow Statute¹ when the retail tobacco shop allows customers to use an on-premises machine to make roll-your-own (“RYO”) cigarettes for personal use but does not use that machine to produce any cigarettes for sale.

Response

It is my opinion that a retailer who allows customers to use an on-premises machine to make RYO cigarettes for that customer’s personal use is not a “tobacco product manufacturer” under the Virginia Escrow Statute.²

Background

You relate a scenario in which customers can purchase loose tobacco and cigarette paper from a retailer and then uses a roll-your-own cigarette machine (“RYO machine”) at that retail establishment to roll their own cigarettes for personal use. The retailer leases or purchases the RYO machine, which allows customers to roll approximately 200 cigarettes every 10 minutes. You note that these RYO machines are used only by consumers in rolling cigarettes for personal use and not for commercial resale. You further note that retailers do not use the RYO machines to produce cigarettes for consumers and that the retailer’s involvement in the operation of the RYO machines is limited to repairs and maintenance.

¹ VA. CODE ANN. §§ 3.2-4200 through 3.2-4219 (2008 & Supp. 2011). The provisions compose Chapter 42 of Title 3.2; the chapter is entitled “Implementation of Tobacco Master Settlement Agreement.”

² I note that this opinion addresses the scope of the term only as it is defined by Virginia law. Other jurisdictions may use a broader definition.

Applicable Law and Discussion

The Virginia Tobacco Escrow Statute imposes certain requirements on tobacco product manufacturers, including the payment of funds into an escrow account.³ Section 3.2-4200 defines a “tobacco product manufacturer” as “an entity that . . . directly . . . [m]anufactures cigarettes anywhere that such manufacturer intends to be sold in the United States.”⁴ You ask whether the shop in the scenario you present constitutes such a manufacturer.

“In deciding the meaning of the statute, we must consider the plain language that the General Assembly employed in enacting this statute.”⁵ Specifically, because the legislation does not go on to define “manufacture,” its ordinary meaning must be applied.⁶ To “manufacture” is “to make into a product suitable for use” or “to make from raw materials by hand or by machinery[.]”⁷ Accordingly, a retailer who makes a RYO machine available to consumers is not a “tobacco manufacturer” under the definition set forth in § 3.2-4200. The retailer does not “manufacture” cigarettes for sale. Rather, in the situation you describe, consumers purchase their own tobacco and tubes and then rent the use of the RYO machine to make cigarettes for their own personal use. After that, the consumer – not the retailer – operates the RYO machine by putting tobacco in the top of the machine, putting tubes in the side, and collecting the cigarettes. The retailer does not “directly”⁸ manufacture the cigarettes and cannot become a manufacturer indirectly based upon a consumer’s use of the RYO machines.

Further, by limiting its definition to cigarettes “intend[ed] to be sold,”⁹ the General Assembly exempts cigarettes produced for personal use. You note that consumers are permitted to produce cigarettes by use of the RYO machine only for their personal use; thus, cigarettes produced by RYO machines fall outside the scope of the statute’s definition of “tobacco product manufacturers.”

³ Section 3.2-4201 (2008).

⁴ Section 3.2-4200 (2008).

⁵ *Haislip v. So. Heritage Ins. Co.*, 254 Va. 265, 268, 492 S.E.2d 135, 137 (1997).

⁶ *See, e.g., Protestant Episcopal Church v. Truro Church*, 280 Va. 6, 21, 694 S.E.2d 555,563 (2010) (“the use of ‘plain and ordinary meaning’ is, of course, a fundamental rule of statutory construction to be applied where a word or phrase is not otherwise defined by the Code”).

⁷ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 707 (10th ed. 1998).

⁸ Section 3.2-4200. *Black’s Law Dictionary* (6th ed.) defines “directly” as “[i]n a direct way without anything intervening; not by secondary, but by direct means.” *Cf. Commonwealth v. Cmty. Motor Bus Co.*, 214 Va. 155, 157, 198 S.E.2d 619, 620 (1973) (“‘Directly’ is usually defined as ‘without intervention.’”) (citation omitted). *See also Carolina Tobacco Co. v. Baker*, 670 S.E.2d 811, 814-15 (Ga. Ct. App. 2008) (interpreting identical language in Georgia statute and concluding: “‘Directly’ means ‘without any intervening agency or instrumentality.’ Thus, by using the adverb ‘directly’ to modify ‘manufactures,’ the legislature clearly intended to define as tobacco product manufactures only those entities that physically fabricate cigarettes themselves. Otherwise, the words ‘directly (and not exclusively through any affiliate)’ would be mere surplusage.”) (footnotes omitted). *But see New Hampshire v. North of the Border Tobacco, LLC*, 2011 N.H. LEXIS 87 (N.H. June 30, 2011). In the scenario you present, the customer who actually uses the machine “intervenes” between the sale of the tobacco and the “manufacture” of the cigarette. Accordingly, the retailer is not “directly” engaged in the manufacturing of cigarettes as required by § 3.2-4200.

⁹*Id.*

Conclusion

Accordingly, it is my opinion that a retailer who allows customers to use an on-premises machine to make RYO cigarettes for that customer's personal use is not a "tobacco product manufacturer" under the Virginia Escrow Statute.¹⁰

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II
Attorney General

¹⁰ While, based on the facts you provide, I conclude that the retailer is not a "tobacco product manufacturer" for purposes of § 3.2-4200, I note that even a small change in the facts could change the analysis. For instance, if the retailer were to operate the machine for the customer or sell sticks made on the machine, it may become a "tobacco product manufacturer." Nonetheless, because your request is limited to the facts as you present them, no such scenario is not before me, and therefore, I offer no definitive opinion on it.