

# Martens Law

## Texas Tax Update: Tobacco and Tobacco Substitutes

### What Taxpayers and Businesses Need to Know About *Hancock v. RJR Vapor Co.*

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The Supreme Court of Texas recently released its decision in *Hancock v. RJR Vapor Co., LLC*, (Tex. May 8, 2026).

In an opinion delivered by Justice Busby, who was joined by Justices Blacklock, Devine, Bland, Huddle, and Young, the Supreme Court of Texas concluded that oral nicotine pouches constitute taxable tobacco products under Texas Tax Code Chapter 155. The court remanded the case to the court of appeals to address constitutional arguments raised by RJR Vapor.

The Supreme Court's decision is available in its entirety here: [Hancock v. RJR Vapor Co., LLC](#)

Note to Retailers: The information contained herein pertains exclusively to the State's cigar and tobacco products excise tax. Oral nicotine products are tangible personal property and are therefore subject to sales and use tax, unless an exemption applies.

Here's what this means for distributors<sup>1</sup> of tobacco products in Texas:

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<sup>1</sup> "Distributor" means a person who "(A) receives untaxed tobacco products for the purpose of making a first sale in this state from a manufacturer outside the state or within the state or otherwise brings or causes to be brought into this state untaxed tobacco products for sale, use, or consumption; (B) manufactures or produces tobacco products; or (C) is an importer." See Texas Tax Code § 155.001(6).

## 1. Trial and Appellate Background

RJR Vapor sells oral nicotine pouches sold under the brand name VELO. These pouches are comprised of cellulose and nicotine isolate extracted from tobacco leaves. RJR Vapor's products are similar to many other nicotine pouches sold under various brand names.

When RJR Vapor brought VELO to market in Texas, it sought information from the Comptroller addressing whether its VELO pouches are taxable tobacco products. The Comptroller concluded that VELO pouches are taxable because they contain nicotine extracted from tobacco leaves.

RJR Vapor paid the tax and filed suit, asserting that its VELO pouches did not meet the definition of taxable tobacco products. RJR Vapor further asserted constitutional challenges to the Comptroller's application of Texas Tax Code Chapter 155, which imposes the Cigars and Tobacco Products Tax.

The trial court held that VELO pouches are not taxable tobacco products and that the phrase "made of tobacco or a tobacco substitute" as contained in Texas Tax Code § 155.001(15)(E) is unconstitutional.

The Court of Appeals for the Third District of Texas affirmed the trial court's holding that VELO pouches are not taxable tobacco products. It held that VELO pouches are not "made of tobacco" because no part of the tobacco plant remains in the nicotine isolate. It also held that VELO pouches are not "made of ... a tobacco substitute" because nicotine isolate alone cannot take the place or function of tobacco leaves. Due to its decision that VELO pouches do not constitute a taxable tobacco product, the court of appeals found RJR Vapor's constitutional challenges to be moot.

## 2. Texas Supreme Court Decision - Summary

Texas imposes a weight-based tax on "tobacco products other than cigars"<sup>2</sup> including "an article or product that is *made of tobacco or a tobacco substitute* and that is not a cigarette or an e-cigarette as defined by Section 161.081, Health and Safety Code." See Texas Tax Code §§ 155.0211(a) and 155.001(15) (emphasis added).

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<sup>2</sup> A separate, non-weight-based tax is applied to cigars. See Texas Tax Code § 155.021.

The Comptroller asserted that VELO pouches constitute a “tobacco substitute” because nicotine consumed recreationally is a replacement for tobacco. Conversely, RJR Vapor asserted that nicotine alone cannot replace tobacco and that “tobacco substitute” has a specific and limited definition in the tobacco industry which does not apply to VELO pouches.

While it ultimately held that VELO pouches are taxable under Texas Tax Code Chapter 155, the Supreme Court of Texas found neither party’s definition of the term “tobacco substitute” to be entirely accurate.

### **3. The Comptroller’s Proposed Definition of Tobacco Substitute**

In its analysis of the Comptroller’s interpretation, the Supreme Court of Texas found that whether nicotine products are used as a substitute for tobacco is not determinative of its tax treatment, because the statute instead inquires whether the product is “made of” a substitute for tobacco. According to this reasoning, a product can be made of a tobacco substitute regardless of what it is used for.

The Court held that nicotine isolate alone is not a “tobacco substitute” because it “cannot physically take the place or function of tobacco in any of the products taxed under [Texas Tax Code § 155.001(15)] subsections (A) through (D).” The Court explained that a person could not roll, smoke, chew, dip, or snuff just nicotine isolate and that a pouch could not be filled with nicotine isolate alone.

The Court also rejected the Comptroller’s assertion that the Legislature intended to tax products which allow users to consume nicotine recreationally, as the statute’s text is silent on its purpose. Furthermore, the Court found that the statutory exclusion of e-cigarettes from taxation contradicted this assertion. *See* Texas Tax Code § 155.001(15)(E) and 154.001(2).

### **4. RJR Vapor’s Proposed Definition of Tobacco Substitute**

RJR Vapor asserted that the historic industry definitions of the term “tobacco substitute” limits the products which are taxable under Texas Tax Code § 155.001(15)(E) to either “(1)

reconstituted tobacco sheets or (2) plant material that either partially or completely replaces tobacco leaf in certain products.” The Supreme Court of Texas declined to adopt the industry definitions proposed by RJR Vapor.

As to the first proposed definition, the Court determined that reconstituted tobacco sheets are tobacco, rather than a “tobacco substitute.”

The Court found that the second proposed definition aligns with the plain meaning of the statute but disagreed with RJR Vapor’s position that said definition excludes VELO pouches.

### **5. Are Nicotine Pouches a Tobacco Substitute?**

In its decision, the Court applied the rule of *ejusdem generis*<sup>3</sup> to the construction of the statute, as the term “tobacco substitute” follows an enumerated list of traditional tobacco products. See Texas Tax Code § 155.001(15)(A)–(E).

The Court found that cellulose acts as a filler in VELO pouches, resulting in a product with similar weight and feel compared to finely ground tobacco. Since the State’s tax on tobacco products other than cigars is weight-based, the Court found this factor especially important. Furthermore, the Court found that the consumption of nicotine isolate within VELO pouches provides the same experience and chemical response compared to the consumption of traditional tobacco pouches.

In applying the plain meaning of each of the words in the phrase “made of ... a tobacco substitute,” the Court found that the combination of cellulose and nicotine isolate (i.e., what the VELO pouches were “made of”) took the place and served a similar function to (i.e., replaced) snuff or other preparations of pulverized tobacco taxed under Texas Tax Code § 155.001(15)(D). Thus, the Court found VELO pouches to be taxable tobacco products as defined in Texas Tax Code § 155.001(15)(E).

Based on its determination that the VELO pouches were “made of a tobacco substitute” the Court ultimately concluded that they are subject to the tax.

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<sup>3</sup> *Ejusdem generis* is a Latin phrase meaning “of the same kind” which limits the scope of broad or general words to things that share the same characteristics or class as the specific list of items that immediately preceded them.

## 6. RJR Vapor’s Constitutional Challenges

RJR Vapor raised two constitutional challenges to Texas Tax Code § 151.001(15)(E). First, RJR Vapor argued that the Comptroller’s interpretation of the statute generated unconstitutional vagueness. Second, RJR Vapor argued that the application of tax to VELO pouches, but not to nicotine replacement therapies, violates the right to “equal and uniform” taxation under the Texas Constitution. *See* Tex. Const. art. VIII, § 1(a).

RJR Vapor raised these arguments in the court of appeals, but that court did not decide them because it concluded that the tax did not apply to VELO pouches.<sup>4</sup> Because the Supreme Court of Texas reversed the appellate court’s decision on taxability, these constitutional arguments became ripe for determination (no longer “moot”). Thus, the Court found that RJR Vapor’s constitutional challenges must now be considered.

The Court held RJR Vapor’s void-for-vagueness argument to be duplicative, as the Court determined that VELO pouches were unambiguously taxable. Therefore, the Court found further analysis of RJR Vapor’s vagueness challenge to be unnecessary.

Since the court of appeals did not reach RJR Vapor’s “equal and uniform” challenge, the Supreme Court of Texas remanded for the court of appeals to assess whether the Cigars and Tobacco Products Tax violates the right to “equal and uniform” taxation under the Texas Constitution.<sup>5</sup>

## 7. Conclusion

As a result of the Supreme Court of Texas’ decision, distributors and others who receive VELO or similar products for the purpose of making a first sale in Texas should consult their advisers to determine whether they should pay the State’s excise tax on tobacco products as calculated by Texas Tax Code § 151.0211.

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<sup>4</sup> Texas has long applied the principle of constitutional avoidance, which dictates that courts should avoid ruling on constitutional issues if a case can be resolved on other grounds. *See* S.A. *Gen. Drivers, Helpers Loc. No. 657 v. Thornton*, 299 S.W.2d 911, 915 (Tex. 1957).

<sup>5</sup> *See In re Troy S. Poe Tr.*, 646 S.W.3d 771, 780-81 (Tex. 2022) (explaining the Court’s ordinary practice of remanding unaddressed questions, especially constitutional questions of widespread import, to the court of appeals to be addressed in the first instance).

In the coming months, our eyes will be on the court of appeals for the remanded issue of “equal and uniform” taxation, and perhaps the Supreme Court of Texas yet again once the appellate court renders its decision.

### **About Martens Law**

Martens Law is a trial and appellate law firm headquartered in Austin, Texas. It handles only Texas tax cases, specifically those involving the Texas sales tax and Texas franchise tax. The firm’s attorneys have handled cases all the way through the Texas Supreme Court and U.S. Supreme Court. They speak and write frequently on a variety of Texas sales tax and franchise tax topics and have published articles in publications such as the Journal of State Taxation, the Texas Bar Journal, the Texas Lawyer, and the Texas Tech Administrative Law Journal. For more information, please visit [texastaxlaw.com](http://texastaxlaw.com).

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