STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULAT
DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO

BRANDY'S PRODUCTS, INC.,

Petitioner,

vs.

DOAH Case #: 14-3496
License #: 66-00115

DEP'T OF BUS. & PROF'L REGULATION, DIV. OF ALCOHOLIC BEVERAGES & TOBACCO,

Respondent.

_____/

FINAL ORDER

The above-styled matter has come before the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco ("the Division") for the purpose of considering Administrative Law Judge ("ALJ") John G. Van Laningham's Recommended Order, a copy of which is attached hereto as Exhibit A. The Division of Alcoholic Beverages and Tobacco's ("the Respondent") Exceptions to the ALJ's Recommended Order are attached hereto as Exhibit B. No Responses to the Respondent's Exceptions were filed.

After a review of the complete record in this matter, the Division makes the following determinations.

A. Rulings on the Respondent's Exceptions to the ALJ's Findings of Fact.

Section 120.57(1)(*l*), Florida Statutes (2014), governs the Division's review of the Findings of Fact in the Recommended Order. The statute mandates in pertinent part that "[t]he agency may not reject or modify the findings of fact unless the agency first determines from a

review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." "Competent substantial evidence is such evidence that is 'sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.'" Comprehensive Medical Access, Inc. v. Office of Ins. Regulation, 983 So. 2d 45, 46 (Fla. 1st DCA 2008) (quoting DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957)).

The Division's review is also governed by well-established precedent dictating that "[f]actual issues susceptible of ordinary methods of proof that are not infused with policy considerations are the prerogative of the hearing officer as the finder of fact." Heifetz v. Dep't of Bus. Regulation, Div. of Alcoholic Beverages & Tobacco, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). "It is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence." Id.

Ruling on Exception # 1: The Respondent takes exception to the portion of paragraph 5 in the Recommend Order in which the ALJ found that the Respondent's "position hardened in the first half of 2009 after a period of internal discussion triggered by Congress's enactment of legislation which expanded the Internal Revenue Code's definition of 'roll-your-own tobacco' to include tobacco-based wrappers for cigarettes or cigars, thereby subjecting blunt wraps purchased after March 31, 2009, to taxation at the federal level." The Respondent asserts the foregoing finding was based on e-mail correspondence that was erroneously admitted into evidence over a hearsay objection raised by the Respondent. The Respondent also asserts that there is no corroborating evidence to support the alleged hearsay. See §120.57(1)(c), Fla. Stat.

(2014) (providing that "[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.").

It is unclear from the Record whether the ALJ rejected the Respondent's hearsay objection because the e-mails were admissible under a hearsay exception or because hearsay is admissible in administrative proceedings. Nevertheless, the Division must deny this Exception. If the ALJ determined the e-mails were admissible under a hearsay exception, then the Division lacks the substantive jurisdiction to reject such an evidentiary ruling. See Barfield v. Dep't of Health, 805 So. 2d 1008, 1011-12 (Fla. 1st DCA 2001) (concluding that the Board of Dentistry "lacked the substantive jurisdiction to reject the ALJ's conclusion of law that the grading sheets were inadmissible hearsay evidence . . .").

However, the Division is of the opinion that this finding of fact has no bearing on the substantive issue of this case (i.e., whether a blunt wrap is "loose tobacco suitable for smoking" and thus subject to taxation as a "tobacco product" under section 210.25(11), Florida Statutes).

Ruling on Exception # 2: The Respondent takes exception to the portion of paragraph 6 in the Recommended Order in which the ALJ found that the Respondent did not "give any official notice to licensed distributors such as Brandy's that the state would start taxing blunt wraps on July 1, 2009." According to the Respondent, the foregoing finding contains an implied conclusion of law that liability for the payment of tobacco taxes is contingent on the receipt of notice.

The Division must deny this Exception because it is not a valid basis for rejecting a finding of fact. Section 120.57(1)(*l*), Florida Statutes (2014), clearly mandates that an agency "may not reject or modify the findings of fact unless the agency first determines from a review of

the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence . . ."

Ruling on Exception # 3: The Respondent takes exception to the portion of paragraph 7 in which the ALJ found that the Respondent engaged in an "expansive reinterpretation of section 210.25(11) in 2009 . . ." The Respondent further excepts to any finding that the Petitioner failed to remit taxes because of the Respondent's initial interpretation. In support thereof, the Respondent notes that it did not become aware of blunt wraps' existence until 2009. Therefore, the Respondent argues that the alleged "re-interpretation" was instead an initial interpretation.[1]

The Division denies this Exception because it is unclear what the ALJ meant by the term "expansive reinterpretation." If the ALJ meant that the Respondent had consciously or knowingly interpreted section 210.25(11), Florida Statutes, as not including blunt wraps prior to 2009, then the Respondent's exception would be meritorious. However, the plain language of the Recommended Order indicates it is also likely that the ALJ used the term "expansive reinterpretation" to describe the Respondent's conclusion that section 210.25(11), Florida Statutes, encompasses blunt wraps after the Respondent learned of their existence in 2009.

Nevertheless, the Division is of the opinion that this finding of fact has no bearing on the substantive issue of this case (i.e., whether a blunt wrap is "loose tobacco suitable for smoking" and thus subject to taxation as a "tobacco product" under section 210.25(11), Florida Statutes).

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[1] Blunt wraps are typically used to roll marijuana. See U.S. v. Cohen, 593 Fed. Appx. 196, 198 (4th Cir. 2014); Nat'l Tobacco Co., L.P. v. D.C., 2011 U.S. Dist. LEXIS 103491; 2011 WL 4442771 (Dist. of Columbia 2011); People v. Lopez, 2015 Cal. App. Unpub. LEXIS 1336, note 2 (Cal. 2015); State v. Hicks, 2008 Ohio App. LEXIS 3031 (Ohio, 3rd Appellate District 2008).

Ruling on Exception # 4: The Respondent takes exception to the portion of paragraph 8 in which the ALJ found that the Respondent's "auditors never asked to see records relating to blunt wraps . . ." In support thereof, the Respondent asserts this finding was unsupported by competent, substantial evidence.

The Division rejects this Exception because the finding of fact at issue can be reasonably inferred from the testimony of Mary Ann Palino (the President of the Petitioner) set forth on pages 203 through 206 of the Transcript. Nevertheless, it should be noted (as discussed in the Respondent's Exception) that the auditor's notes from a field audit in March of 2010 indicate that the auditor looked for blunt wraps in the Petitioner's warehouse and for blunt wrap invoices.

B. Rulings on the Petitioner's Exceptions to the ALJ's Conclusions of Law.

The Division's review of the ALJ's Conclusions of Law are governed by section 120.57(1)(*l*), Florida Statutes (2014), which provides in pertinent part that

> The agency in its final order may reject or modify the **conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction.** When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact.

(emphasis added).

Ruling on Exception # 5: The Respondent takes exception to the conclusion of law in paragraph 18 in which the ALJ interpreted section 210.25(11), Florida Statutes, as expressly listing all of the tobacco products subject to taxation. Under the ALJ's interpretation, any

tobacco item not expressly identified in section 210.25(11), Florida Statutes, would not be subject to taxation.

According to the Respondent, the plain language of section 210.25(11), Florida Statutes, refutes the ALJ's interpretation, and the Division agrees that the Florida Legislature did not write section 210.25(11), Florida Statutes, with the intent to explicitly identify every discreet tobacco product subject to taxation. Instead, the plain language of the statute indicates the Florida Legislature intended for section 210.25(11), Florida Statutes, to encompass tobacco products that are not explicitly identified within the statute. For instance, the statute uses very specific terms to explicitly identify certain kinds of tobacco products that are used for chewing and subject to taxation (i.e., snuff, cavendish, and plug and twist tobacco). But, the statute also utilizes a broad term that encompasses any loose tobacco product used for smoking (i.e., loose tobacco suitable for smoking). Then, as a final catch-all, section 210.25(11), Florida Statutes, subjects the by-products or left-overs from tobacco manufacturing to taxation (i.e., refuse scraps, clippings, cuttings, and sweepings of tobacco).

The Division agrees with the Respondent's analysis, adopts it, and grants this Exception. The Florida Legislature used broad terms in section 210.25(11), Florida Statutes, so that certain tobacco products not expressly identified in the statute would still be subject to taxation. Accordingly, if a particular tobacco product did not exist when the current version of section 210.25(11), Florida Statutes, was enacted, the statute would still cause that particular tobacco product to be subject to taxation if it was "loose tobacco suitable for smoking."

The Division further notes that section 210.25(11), Florida Statutes, expressly identifies the kinds of products not included within the definition of "tobacco products." See §210.25(11), Fla. Stat. (2014) (providing that "tobacco products" does "not include

cigarettes, as defined by s. 210.01(1), or cigars."). "[E]xpress exceptions made in a statute give rise to a strong inference that no other exceptions were intended." Biddle v. State Beverage Dep't, 187 So. 2d 65, 67 (Fla. 4th DCA 1966).

The Division rules that this interpretation of section 210.25(11), Florida Statutes, is as or more reasonable than the ALJ's. See §120.57(1)(*l*), Fla. Stat. (2014) (mandating that "[t]he agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.").

Ruling on Exception # 6: The Respondent takes exception to the Conclusion of Law in paragraphs 20, 33, 34, and 35 of the Recommended Order that the term "loose tobacco suitable for smoking" does not encompass blunt wraps.

The Division grants this exception and adopts the reasoning set forth by the Respondent. Furthermore, the Division adds that the ALJ's conclusion is based on a flawed conceptualization. In paragraph 33, the ALJ notes that no tobacco is visible when examining a blunt wrap. In the ALJ's opinion, "a blunt wrap is no more loose tobacco than a piece of writing paper is loose wood." But, this opinion overlooks the fact (set forth in paragraph 4 of the Recommended Order) that tobacco is one of the raw materials used to manufacture blunt wraps. It is wrong to conclude that a product taxable as loose tobacco would become exempt from taxation merely by combining it with other material to make a loose cigar wrapper. As the ALJ found in paragraph

4, tobacco is an ingredient of a blunt wrap, and that tobacco is obviously suitable for smoking because that blunt wrap is marketed for smoking as a cigar wrapper.

The Division rules that this substituted conclusion of law is as or more reasonable than the ALJ's. See §120.57(1)(*l*), Fla. Stat. (2014).[2]

Ruling on Exception # 7: The Respondent takes exception to the Conclusion of Law in paragraphs 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, and 32 of the Recommended Order that the Respondent has utilized an unadopted rule by concluding that a blunt wrap is "loose tobacco suitable for smoking."

The Division grants this exception because it was *sua sponte* raised by the ALJ in the Recommended Order, and the Respondent had no opportunity to present any argument to the ALJ. See Dep't of Fin. Serv. v. Mistretta, 946 So. 2d 79, 80 (Fla. 1st DCA 2006)(holding "that the ALJ who *sua sponte* raised and decided the issue of default after the final hearing without giving the parties an opportunity to present evidence and/or argument, departed from the essential requirements of law by denying DFS due process . . .").

The Division also adopts the reasoning set forth in the Respondent's exception. Specifically, the Division notes the phrase "loose tobacco suitable for smoking" clearly encompasses blunt wraps. Thus, it is unnecessary to use an unadopted rule to conclude that blunt wraps are tobacco products subject to tax. See Amerisure Mut. Ins. Co. v. Fla. Dep't of Fin. Serv., 156 So. 3d 520, 531 (Fla. 1st DCA 2015)(noting "[t]he Department simply applied the governing statute to the information Amerisure reported."); St. Francis Hosp., Inc. v. Dep't of

[2] The ALJ placed footnote 9 at the end of paragraph 34 and asserted in dicta that administrative law judges owe no deference to an agency's interpretation of a statute it administers. While the ALJ's assertion is based on a construction of Chapter 120, Florida Statutes, the Division affirmatively states that the ALJ's reasoning is not being adopted as its own. Furthermore, the Division affirmatively states that any other dicta set forth in the Recommended Order is not being adopted.

Health & Rehab. Serv., 553 So. 2d 1351, 1354 (Fla. 1st DCA 1989)(recognizing that "an agency interpretation of a statute which simply reiterates the legislature's statutory mandate and does not place upon the statute an interpretation that is not readily apparent from its literal reading, nor in and of itself purport to create rights, or require compliance, or to otherwise have the direct and consistent effect of the law, is not an unpromulgated rule, and actions based upon such an interpretation are permissible without requiring an agency to go through rule making.")(emphasis added).

Accordingly, the Division rules that this substituted Conclusion of Law is as or more reasonable than the ALJ's and that a review of the complete Record demonstrates that the ALJ's conclusion is clearly erroneous. See §120.57(1)(*l*), Fla. Stat. (2014).

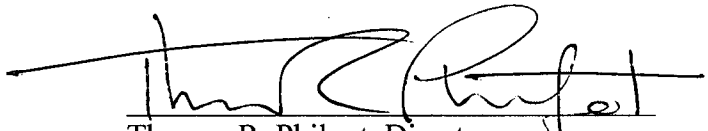
Ruling on Exception # 8: The Respondent takes exception to paragraphs 36, 37, and 38 in which the ALJ interpreted section 95.091(3), Florida Statutes (2014), as time barring the Respondent from recovering all but a small portion of the unpaid taxes at issue.

The Division grants this exception and adopts the reasoning set forth by the Respondent. Because the portion of section 95.091(3), Florida Statutes (2014), at issue pertains to the Division's taxing authority, this is a Conclusion of Law within the Division's substantive jurisdiction, and the Division rules that this substituted Conclusion of Law is as or more reasonable than the ALJ's. See §120.57(1)(*l*), Fla. Stat. (2014).

WHEREFORE, IT IS ORDERED AND ADJUDGED THAT:

The blunt wraps at issue in the instant case are "loose tobacco suitable for smoking" within the meaning of section 210.25(11), Florida Statutes. Accordingly, the Division orders that the Petitioner has 30 days from the issuance of this letter to remit the $71,868.23 that was the subject of the Division's assessment on March 1, 2013.

DONE AND ORDERED this 10TH day of June 2015 in Tallahassee, Florida.



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NOTICE OF RIGHT TO JUDICIAL REVIEW

Any party substantially affected by this Final Order may seek judicial review by filing an original Notice of Appeal with the Clerk of the Department of Business and Professional Regulation, and a copy of the Notice, accompanied with the filing fee prescribed by law, with the Clerk of the appropriate District Court of Appeal within thirty days of rendition of this order, in accordance with Rule 9.110, Florida Rules of Appellate Procedure and section 120.68, Florida Statutes (2014).

CERTIFICATE OF SERVICE

I hereby certify this 11th day of June, 2015, that a true copy of the foregoing Final Order has been provided by U.S. Mail to the following:

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