STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA BEE DISTRIBUTION, INC.,
d/b/a TOBACCO EXPRESS
DISTRIBUTORS,

Petitioner,

vs. Case No. 15-6108RU

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
DIVISION OF ALCOHOLIC BEVERAGES
AND TOBACCO,

Respondent.
_____/
PLANET TRADING, INC., AND
MELBOURNE, LLC,

Petitioners,

vs. Case No. 15-6148RU

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
DIVISION OF ALCOHOLIC BEVERAGES
AND TOBACCO,

Respondent.
_____/

FINAL ORDER

Pursuant to notice to all parties, a final hearing was conducted in this case on January 28, 2016, via video teleconference with sites in Tallahassee and Fort Lauderdale, Florida, before Administrative Law Judge R. Bruce McKibben of

the Division of Administrative Hearings ("DOAH"). The parties were represented as set forth below.

APPEARANCES

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For Respondent: William H. Stafford, III, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Department of Business and Professional Regulation, Division of Alcoholic Beverages & Tobacco (the "Department"), is operating under an unadopted rule in its application of sections 210.276 and 210.30, Florida Statutes, which impose a surcharge and an excise tax, respectively, on tobacco products other than cigarettes or cigars, commonly known as other tobacco products ("OTP"), by calculating "wholesale sales price" as the full invoice price charged by OTP manufacturers to distributors, including any federal excise taxes ("FET") and shipping charges reflected in the invoice price.

PRELIMINARY STATEMENT

On October 28, 2015, Petitioner, Florida Bee Distributors, Inc., d/b/a Tobacco Express Distributors ("Florida Bee"), filed a Petition to Determine Invalidity of Agency Statements. Similarly, Petitioners, Planet Trading, Inc., and Melbourne, LLC, jointly filed a Petition to Determine Invalidity of Agency Statements on October 30, 2015. On November 13, 2015, an Order of Consolidation was entered to combine the two cases into the instant case. Pursuant to a Pre-hearing Stipulation filed on January 26, 2016, the Petitioners timely filed their Petitions, the Petitioners have standing to initiate this proceeding, and DOAH has jurisdiction over the parties and subject matter in this consolidated proceeding.

The Petitioners alleged that in 2012, Micjo, Inc. v. Department of Business & Professional Regulation, 78 So. 3d 124 (Fla. 2d DCA 2012), interpreted the phrase "wholesale sales price" to exclude non-tobacco items such as FET and shipping charges from the taxable base of the wholesale tax imposed on other tobacco products. Following the issuance of the Micjo opinion, the Department stopped assessing tax on FET and shipping costs. It also began paying refunds to those who mistakenly paid tax on those non-tobacco charges. In early 2013, without adopting a formal rule, the Department changed its policy and unilaterally determined that FET and shipping charges

were not taxable when separately stated on the invoice. Around August 2013, the Department changed its policy yet again by re-interpreting "wholesale sales price" to exclude FET and shipping charges only when the tobacco was manufactured outside of the United States. The Petitioners alleged in their Petitions that the Department's actions were a policy of general application that substantially affected many wholesale tobacco distributors, including the Petitioners. Being that the Department never adopted a formal rule, the policy of general applicability would be an invalid, unpromulgated rule.

On November 23, 2015, upon agreement of counsel, the undersigned administrative law judge conducted a scheduling conference by telephone conference call. Counsel for the parties requested that the final hearing be set on a date beyond the 30-day period established by section 120.56(4), Florida Statutes. The final hearing was held on January 28, 2016, with all parties present and represented by counsel.

At the final hearing, the Petitioners called three witnesses: Robert Fuller, president of Florida Bee; Vihang Patel, president of Planet Trading, Inc., and vice-president of Melbourne, LLC.; and Ben Pridgeon, bureau chief of the Division of Alcoholic Beverages & Tobacco's bureau of auditing. Pridgeon was also called as the Department's only witness. Petitioners'

Exhibits 1, 2, 4-9, and 11-21 were admitted into evidence. The Department's Exhibits 1, 2, and 5 were also admitted.

A motion to compel discovery responses was renewed by the Petitioners at final hearing. They argued that documents requested from the Department had been withheld under a claim of privilege, but that the privilege log was insufficient to make a determination of what privilege may apply. The Petitioners were directed by the undersigned to identify a number of documents from the log which they felt were not subject to privilege. The Department was directed to submit the identified documents to the undersigned for in camera review. The documents were identified by the Petitioners and submitted for review on February 3, 2016. After review, an Order was entered on February 4, 2016, requiring the Department to produce a number of the exhibits to the Petitioners. The Department filed a motion seeking reconsideration of the Order; that motion was denied.

The parties advised that a transcript of the final hearing would be ordered. The parties were, by rule, allowed 10 days from the final hearing to submit proposed final orders. The Transcript was filed at DOAH on February 16, 2016, and each party timely submitted a proposed final order.

Unless otherwise stated herein, all references to Florida Statutes shall be to the 2015 codification.

FINDINGS OF FACT

1. Each of the Petitioners is a licensed business in the State of Florida engaged in the business of distributing tobacco products.

2. The Department is the government agency responsible for, inter alia, administering and enforcing chapter 210, Florida Statutes, related to the taxation of tobacco products other than cigarettes and cigars.

3. By way of general background, tobacco products are taxed at both the federal and state levels. The first company to produce or import the tobacco products into the United States must pay the federal government a federal excise tax which is based on weight. 26 U.S.C. § 5702.

4. Similarly, when the tobacco is produced or brought into Florida, Florida OTP tax applies at the rate of 85 percent of the "wholesale sales price." Technically, Florida OTP tax has two components: an excise tax and surcharge as defined by sections 210.30 and 210.276. Section 210.30 was first enacted in 1985; it imposes a 25-percent tax on OTP. Section 210.276 was enacted in 2009; it levies a 60-percent surcharge on OTP. For convenience, the excise tax and surcharge will be referred to collectively as the OTP tax.

5. The phrase "wholesale sales price" is defined as "the established price for which a manufacturer sells a tobacco

product to a distributor, exclusive of any diminution by volume or other discounts." § 210.25, Fla. Stat.

6. Section 210.25(11) defines "tobacco products" as follows:

> [L]oose tobacco suitable for smoking; snuff; snuff flour; cavendish; plug and twist tobacco; fine cuts and other chewing tobaccos; shorts; refuse scraps; clippings, cuttings, and sweepings of tobacco, and other kinds and forms of tobacco prepared in such manner as to be suitable for chewing, but 'tobacco products' does not include cigarettes . . . or cigars.

7. In 2012, the Second DCA interpreted "wholesale sales price" to apply to the price at which the manufacturer sells tobacco products to the distributor. Micjo, 78 So. 3d at 127. In that case, in which the Second DCA described the dispute as "not complicated," the Court determined that OTP tax applies only to the charge for tobacco and not to other charges to bring the tobacco to market, such as FET and shipping charges. Id. at 126-127.

8. There are no relevant adopted rules in which the Department has interpreted "wholesale sales price."

9. State agencies are required to follow the Courts' interpretations of statutes. See Costarell v. Fla. Unemplmt. App. Comm'n, 916 So. 2d 778, 782 (Fla. 2005). Subsequent to the ruling in Micjo, the Department followed the ruling set forth by

the Second DCA and stopped imposing a tax on distributors based upon on FET or shipping charges.

10. Beginning in 2013, the Department commenced enforcing a new "policy" interpreting Micjo to exclude FET and shipping charges only when such charges were separately stated. As a result of this policy, the Department paid some refunds and did not assess OTP tax if the FET and shipping charges were separately stated.

11. The Department began relying upon a new policy in mid-2013 to the effect that if the domestic manufacturer of the tobacco paid FET when it produced the product, Micjo did not apply and the phrase "wholesale sales price" included non-tobacco charges, such as FET and shipping charges. This was due to the fact that the manufacturer would pass down the cost of the FET and shipping charges to the distributor as part of the "wholesale sales price."

12. As for foreign manufacturers who did not pay FET, Micjo operated to exclude FET and shipping charges from the taxable base. That is because the distributor who purchased the tobacco products would be responsible for paying the FET separately; it would not be part of the "wholesale sales price."

13. In other words, the Department's policy was that "wholesale sales price," as interpreted by Micjo, applies differently depending on whether the tobacco is manufactured

foreign or domestically. The Petitioners seek to invalidate this non-rule policy.

14. The Department confuses wholesale sales price (i.e., "the established price for which a manufacturer sells a tobacco product to a distributor") with the invoice amount, which may or may not include something other than the price for the tobacco product. The Micjo decision clearly delineates the cost of the tobacco from "the various other distributor invoice costs for reimbursement of FET, shipping costs, and other charges [which are] not part of tobacco." Micjo, 78 So. 3d at 127.

15. After the Micjo ruling, the Department determined that it would not include FET and shipping charges in its determination of "wholesale sales price" for purposes of calculating OTP taxes. It did not promulgate a rule to that effect, but began nonetheless using the policy uniformly.

16. In early October 2013, when the Department decided to rescind its policy in favor of a new statement of general applicability, it again failed to promulgate the policy as a rule. Instead, it unilaterally began to impose the new policy on all distributors of OTP in the state.

17. It is clear from the record that the current policy is applicable to all distributors and that the policy delineates which distributors must pay taxes based on total invoice

amounts, including FET and shipping charges, and which distributors do not have to pay taxes based on those items.

18. It is not clear from the record how the domestic versus foreign manufacturer dynamic was argued to the Micjo Court or in the case from which the appeal arose. Micjo specifically addressed the domestic distributors, but did not make a distinction between domestic and foreign manufacturers.

19. To the extent the Department's position in the instant case seeks to revise the facts of Micjo, that argument is rejected.

CONCLUSIONS OF LAW

20. The Department of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.56(1)(c) and (4), 120.569, and 120.57(1), Florida Statutes.

21. The Petitioners allege the Department is relying upon a statement of general applicability that should have been promulgated as a rule. Section 120.56(4) states in part:

> (a) Any person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a). The petition shall include the text of the statement or a description of the statement and shall state with particularity facts sufficient to show that the statement constitutes a rule under s. 120.52 and that the agency has not adopted the statement by the rulemaking procedure provided by s. 120.54.

> (b) The administrative law judge may determine whether all or part of a statement violates s. 120.54(1)(a) . . . .
>
> * * *
>
> (d) If an administrative law judge enters a final order that all or part of a statement violates s. 120.54(1)(a), the agency must immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action.

22. Each of the Petitioners has standing to bring this proceeding pursuant to section 120.56(4)(a).

23. The term "rule" is defined in section 120.52(16) which states:

> "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of any agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or an existing rule. The term also includes amendment or repeal of a rule.

24. An "unadopted rule" is defined as an agency statement that meets the definition of the term "rule," but that has not been adopted pursuant to the requirements of section 120.54. § 120.52(20), Fla. Stat.

25. Florida case law has expanded on the definition of rule to include "[T]hose statements which are intended by their effect to create rights, or to require compliance, or otherwise

have the direct and consistent effect of law." Ag. for Health Care Admin. v. Harvey, 356 So. 2d 323, 325 (Fla. 1st DCA 1977).

26. An agency statement is any declaration, expression, or communication. It does not need to be in writing. See Dep't of High. Saf. & Motor Veh. v. Schluter, 705 So. 2d 81, 84 (Fla. 1st DCA 1997). To be a rule, the statement must be an "agency statement," that is, a statement which reflects the agency's position with regard to law or policy. A generally applicable statement purports to affect not just a single person or singular situations, but a category or class of persons and activities. See McCarthy v. Dep't of Ins., 479 So. 2d 135 (Fla. 2d DCA 1985). The statement need not apply universally to every person or activity within the agency's jurisdiction. It is sufficient that the statement apply uniformly to a class of persons or activities over which an agency may properly exercise authority. See Schluter, 705 So. 2d at 83.

27. The Petitioners have the burden of demonstrating that the agency statement regarding OTP taxes meets the definition of a rule, and that the Department has not adopted the statement by rulemaking procedures. S.W. Fla. Water Mgt. Dist. v. Charlotte Cnty., 774 So. 2d 903, 908 (Fla. 2d DCA 2001); see also Ag. for Pers. with Disab. v. C.B., 130 So. 3d 713, 717 (Fla. 1st DCA 2013).

28. The standard of proof is by a preponderance of the evidence. § 120.56(1)(e), Fla. Stat.

29. Petitioners have demonstrated, in this case, that the Department's policy regarding which distributors can be taxed on non-OTP items (e.g., FET, shipping charges) is a statement of general applicability that should be promulgated as a rule.

30. If the petitioner challenging an allegedly unadopted rule proves at final hearing that the agency statement is indeed a rule, the agency then has the burden of overcoming the presumptions that rulemaking was both feasible and practicable. As stated in section 120.54(1)(a)1.:

> Rulemaking shall be presumed feasible unless the agency proves that:
> a. The agency has not had sufficient time to require the knowledge and experience reasonably necessary to address a statement by rulemaking; or
> b. Related matter are not sufficiently resolved to enable the agency to address a statement by rulemaking.

31. No such proof of feasibility or practicality was offered by the Department at the final hearing in this matter. The presumption was not overcome.

32. The Department pointed out that in Micjo, the (Appellant) distributor was purchasing OTP from other distributors who, in turn, had purchased from a foreign manufacturer. Nonetheless, the Court still chose to delete the non-OTP costs (FET, shipping charges) from the amount to be

taxed. The suggestion by the Micjo Court that "the meaning of this statute and the legislature's language is clear," and the Department's statement that the term "established price" is "clear and unambiguous," is amusing. This case is obviously fraught with difficulty.

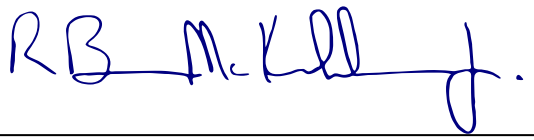
ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that the policy statement by the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, concerning the inclusion of federal excise tax and shipping charges for purposes of calculating the other tobacco products tax is an unadopted rule whose existence violates section 120.54(1)(a), Florida Statutes.

It is FURTHER ORDERED that Respondent shall pay to the Petitioners a reasonable attorney's fee and costs as authorized by section 120.595(4), Florida Statutes. Any request for fees (if an amount cannot be agreed upon) shall be filed within 60 days of the date of this Final Order.

DONE AND ORDERED this 3rd day of March, 2016, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.