

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GRABBA-LEAF, LLC,

Petitioner,

vs.

Case No. 16-3160RU

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

Respondent.

_____ /

FINAL ORDER

On July 11, 2016, Administrative Law Judge J. Lawrence Johnston held the final hearing in this case by video teleconference between sites in Tallahassee and Lauderdale Lakes.

APPEARANCES

For Petitioner: Gerald J. Donnini, II, Esquire
Moffa, Sutton, and Donnini, P.A.
One Financial Plaza, Suite 2202
100 Southeast Third Avenue
Fort Lauderdale, Florida 33394

For Respondent: Elizabeth A. Teegen, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-2202

Andrew Rubin Fier, Esquire
Department of Business and
Professional Regulation
Capital Commerce Center
2601 Blair Stone Road
Tallahassee, Florida 32399-2202

STATEMENT OF THE ISSUE

The issue is whether the Respondent has made a statement regarding the taxability of "whole leaf, non-homogenized" cigar wraps that meets the definition of a rule, without adopting the statement as a rule, as required by sections 120.54 and 120.56(4), Florida Statutes (2016).^{1/}

PRELIMINARY STATEMENT

The Petitioner filed a petition challenging the validity of the statement. The Petitioner contends that the statement meets the definition of a rule and was not adopted as a rule as required by statute. The Respondent contends that the statement merely gives cigar wrap distributors notice of the holding in Brandy's Products, Inc. v. Department of Business and Professional Regulation, 188 So. 3d 130 (Fla. 1st DCA 2016), and does not meet the definition of a rule.

At the final hearing, the Petitioner called as witnesses its owner and president, Michael Robinson, and the chief of the Respondent's Bureau of Auditing, Benjamin Pridgeon, who also testified for the Respondent via cross-examination beyond the scope of direct testimony. The Petitioner's Exhibits 1, 2, 3, 5, and 8 through 11 were received in evidence, as were the Respondent's Exhibits 1, 3A, 3B, 3C, 5 and 6.^{2/}

The Transcript of the final hearing was filed on August 2, and the parties filed proposed final orders, which have been considered.

FINDINGS OF FACT

1. The Respondent administers the Florida tax and surcharge on the tobacco products defined in section 210.25(12), Florida Statutes. See §§ 210.30(1) and 210.276, Fla. Stat. The definition excludes cigarettes and cigars, and is referred to as the "other tobacco products" or OTP tax.

2. The Petitioner sells "whole leaf, non-homogenized" cigar wraps and is substantially affected by the imposition of the OTP tax on the products it sells.

3. The OTP tax was first imposed in 1985 at a rate of 25% of the wholesale price. It was not collected on cigar wraps until 2009, which is when the federal government began taxing them, their widespread distribution in Florida came to the attention of the Respondent, and Florida added a 60% surcharge to the OTP tax (making the total tax rate 85% of the wholesale price).

4. In 2013, Brandy's Products disputed the imposition of the tax on the cigar wraps it sold. Brandy's Products, Inc. v. Dep't of Bus. & Prof'l Reg., Case No. 14-3496 (Fla. DOAH Feb. 24, 2015; Fla. DBPR June 11, 2015).

5. The Brandy's cigar wraps are different from cigar wraps sold by the Petitioner in this case.^{3/} They are made in a uniform size from a composite product that was manufactured in a process that combined tobacco, wood pulp, and certain chemicals. The cigar wraps distributed by the Petitioner are whole or partial leaf cigar wraps.

6. The Petitioner's cigar wraps are made of a variety of tobacco specifically grown for use as a cigar wrap. The leaves are picked and "cured" (air-dried) on-site. (Some people call this "fermenting" the leaves. Uncured (also called "raw" or "green") tobacco is not suitable for smoking and cannot be used as cigar wraps.) The cured whole leaf is either packaged by itself with stem intact, or is destemmed and cut in two pieces, and each piece is wrapped around a plastic straw for packaging together as two partial leaf cigar wraps. After purchase, the end user removes the contents from the package, unrolls the partial leaf wraps from the straws, fills them with smoking tobacco (e.g., pipe tobacco), and rolls them into cigars for smoking (the same way the Brandy's-style cigar wraps are filled, rolled, and smoked). The end user of the whole leaf product removes the leaf from the package, destems the leaf, cuts or tears it to the desired sizes, and fills, rolls, and smokes the smaller pieces the same way the partial leaf wraps and the Brandy's products are filled, rolled, and smoked.

7. In DOAH case 14-3496, Judge Van Laningham recommended that the assessment against Brandy's Products be set aside because the definition of "loose tobacco suitable for smoking" in section 201.25(11), Florida Statutes (2014),^{4/} could not be interpreted to include the cigar wraps at issue in that case.^{5/} The Respondent rejected the Recommended Order, but on April 6, 2016, the First District Court of Appeal reversed the Respondent's Final Order, and the OTP tax was set aside. Brandy's Products, Inc. v. Dep't of Bus. and Prof'l Reg., 188 So. 3d 130 (Fla. 1st DCA 2016).

8. In response to the court's decision in Brandy's, the Respondent issued a memorandum to distributors of cigar wraps in Florida that described the kind of cigar wraps before the court in Brandy's, called them "homogenized tobacco wraps," and announced how the Respondent would be treating them:

Effective April 6, 2016, the Division will no longer assess excise taxes or surcharge on homogenized tobacco wrap products. Distributors shall not include homogenized tobacco wrap products brought or caused to be brought into Florida for sale, or made[,] manufactured, or fabricated in Florida for sale in the state, on the monthly return required pursuant to section 210.55, Florida Statutes.

Whole leaf, non-homogenized tobacco products were not analyzed by the court. Accordingly, licensed distributors must continue to report whole leaf non-homogenized tobacco wrap products for purposes of taxation through the required monthly return.

This is the statement challenged by the Petitioner as a rule that was not adopted as required by statute.

CONCLUSIONS OF LAW

9. Under sections 120.54 and 120.56(4), agency statements meeting the definition of a rule must be adopted (unless the agency proves that rulemaking is not feasible or practicable, which the Respondent has not attempted to do in this case).

10. "'Rule' means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule." § 120.52(16), Fla. Stat.

11. An agency statement that applies a clear and unambiguous statute in accordance with its plain meaning is not a rule. See Brandy's Products, Inc. v. Dep't of Bus. & Prof'l Reg., Case 14-3496, at ¶28 (DOAH Feb. 24, 2015) (and cases cited). An agency statement of general applicability also would be a rule if it applies a clear and unambiguous statute in an unexpected way that is contrary to the plain meaning of the statute. Id. at ¶35. If the statute is not clear and unambiguous, an agency statement of general applicability is a rule because it would resolve the ambiguity by the way it

interprets or implements the statute. Id. at ¶24 (and cases cited).

12. The section 210.30(1) tax and section 210.276 surcharge are levied on "tobacco products" brought into the state, made in the state, or shipped or transported to retailers in the state. "'Tobacco products' means loose 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, as defined by s. 210.01(1), or cigars." § 210.25(12), Fla. Stat. (Cigarettes are taxed under sections 210.001 and 210.02. There is no Florida cigar tax.)

13. In the Brandy's case, the Respondent assessed the OTP tax and surcharge on "loose tobacco suitable for smoking." When Brandy's challenged the assessment in DOAH case 14-3496, the Respondent took the position that the statutory language was clear and unambiguous, and included the Brandy's product. Judge Van Laningham disagreed. To the contrary, he held the statutory definition to be clear and unambiguous, and that it did not cover the Brandy's product because the tobacco in the Brandy's product was not loose but was a composite of tobacco, wood pulp and other materials. The Brandy's court agreed.

14. As Judge Van Laningham wrote, it was practically self-evident that the Respondent's interpretation of the statutory language to include the Brandy's product was a rule that had to be adopted under sections 120.54(1) and 120.56(4). Brandy's Products, Inc. v. Dep't of Bus. & Prof'l Reg., supra at ¶35. The Brandy's court did not address that part of the Recommended Order directly, but its holding would support this conclusion.

15. Turning to the agency statement at issue in this case, the first part merely acknowledges what Judge Van Laningham and the Brandy's court held, using the shorthand "homogenized" to describe the Brandy's product. This part of the statement is not a rule.

16. The Respondent seems to take the position that the second part of the agency statement at issue in this case also is not actually a statement because it merely observes that the Brandy's holdings only analyzed the Brandy's kind of cigar wrap, and does not prevent a taxpayer from claiming a refund and having its refund claim adjudicated. Actually, it states that the OTP tax is due on whole leaf, non-homogenized cigar wraps (and that sales must be reported on monthly tax returns). The refund claim process does not affect the question in this case, which is whether the statement is a rule that must be adopted.

17. As stated by the Brandy's court: "The dictionary defines 'loose' to mean 'not rigidly fastened or securely

attached,' 'not brought together in a bundle, container, or binding,' 'not dense, close, or compact in structure or arrangement,' and 'not solid.' See Loose, *Merriam-Webster Online Dictionary*, www.merriam-webster.com/dictionary/loose (last visited Mar. 14, 2016).” Whole leaf, non-homogenized cigar wraps consist entirely of tobacco leaves. Unlike the Brandy’s product, the tobacco leaves are not combined with anything else and are not pressed or densely packed together with other leaves. It is readily apparent that they are loose in the usual sense of the word.

18. The Petitioner argues that only shredded or chopped tobacco (i.e., filler tobacco) can be called loose tobacco. While filler tobacco is loose tobacco, it is not readily apparent from the plain meaning of the words that only filler tobacco can be loose tobacco.

19. Whole leaf, non-homogenized cigar wraps are not smoked without filler tobacco, the same as the Brandy’s product. This gave rise to the questions discussed by Judge Van Laningham in endnote 7 at paragraph 33 of his Recommended Order, and by the Brandy’s court in footnote 2 of its opinion, as to whether the Brandy’s wraps were suitable for smoking “on their own.”

20. In his discussion, Judge Van Laningham stated there was “insufficient persuasive evidence to support a finding one way or the other . . . , which means that the Department failed, in this

separate instance, to carry its burden of establishing all of the factual grounds supporting the assessment." He said this failure of proof, "while independently fatal to the assessment, is so completely overshadowed by the conclusion that blunt wraps are not loose tobacco as to be superfluous to the outcome."

21. The Brandy's court did not overlook the taxpayer's argument that its product also was not suitable for smoking by itself but agreed with Judge Van Laningham that the issue was superfluous to the outcome. The court cited Creager Mercantile Company, Inc. v. Colorado Department of Revenue, __ P.3d __, 2015 Colo. App. LEXIS 190 (Colo. Ct. App. 2015), which is now being reviewed by the Colorado Supreme Court, en banc, on a petition for certiorari.

22. The discussions by both Judge Van Laningham and the Brandy's court added words to the statutory language. Filler tobacco also is not suitable for smoking on its own. It requires a pipe or similar device or a wrapper of some kind.

23. "Suitable" means "having the qualities that are right, needed, or appropriate for something." Merriam-Webster on-line dictionary, www.merriam-webster.com/dictionary/suitable (last visited Aug. 22, 2016). While neither filler tobacco nor tobacco wraps are suitable for smoking "on their own," it is readily apparent that both are suitable for smoking in the usual sense of the word suitable.

24. Taking the plain meaning of the words in the statutory definition, it is readily apparent that whole leaf, non-homogenized cigar wraps meet the statutory definition of loose tobacco suitable for smoking. They have been taxed since 2009 without a rule and can continue to be taxed without a rule.^{6/}

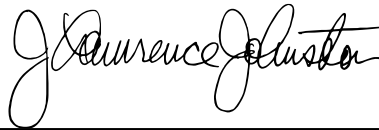
25. The Petitioner attempts to support its argument with a 2012 declaratory statement issued by the Respondent to another taxpayer that the product distributed by that taxpayer was not taxable. However, that taxpayer asked for a declaration regarding the taxability of "whole leaf tobacco with the stem intact in the same condition as when it is harvested." Raw (green) tobacco leaves would not be taxable under sections 210.30(1) and 210.276 because they are not suitable for smoking.

26. Finally, it is recognized that bills were introduced in the 2015 and 2016 sessions of the Florida Legislature that would have amended the statutory definition of "tobacco products" in section 201.25 to specifically include wraps made in whole or in part from tobacco leaves. See Brandy's Products, Inc. v. Dep't of Bus. and Prof'l Reg., 188 So. 3d at 133 n.4. However, no legislative intent helpful to deciding the issues in this case can be discerned from the death of the 2015 bill in committee, or the removal of the language from the 2016 bill on the floor of the Senate.

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, the petition challenging the validity of the Respondent's statement regarding the taxability of whole leaf, non-homogenized cigar wraps as "tobacco products" defined in section 210.25(12) is dismissed because the statement does not meet the definition of a rule.

DONE AND ORDERED this 26th day of August, 2016, in Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of August, 2016.

ENDNOTES

^{1/} Statutory references are to the 2016 Florida Statutes, unless otherwise indicated.

^{2/} The numbers given to the exhibits in the Transcript are incorrect.

^{3/} In case 14-3496, the term "blunt wraps" was used to describe the Brandy's product. The evidence in this case was that the

term "blunt wrap" is a colloquial expression that refers to any kind of cigar wrap.

^{4/} Subsection (11) was renumbered as (12) in 2016.

^{5/} Judge Van Laningham's decision primarily was based on his conclusion that the Brandy's product was not "loose tobacco." He also questioned whether the Brandy's product, on its own, was "suitable for smoking." See Conclusion of Law 19-20, infra.

^{6/} In paragraph 35 of his Recommended Order, Judge Van Laningham called the delay between the original enactment of the statutory definition of "tobacco products" in 1985 and the start of taxation of cigar wraps in 2009 a "dead giveaway that the Department's authority for imposing the taxes is actually the agency statement, not the statute, which means that the Department is imposing the taxes on its own authority without an adequate legislative basis." That sweeping conclusion would mean any and all agency statements on cigar wraps would, of necessity, be rules having no legislative authority, and would gloss over the evidence that the Respondent was not aware of the widespread distribution of cigar wraps in Florida until 2009. See Finding of Fact 3, supra.

COPIES FURNISHED:

Gerald J. Donnini, II, Esquire
Moffa, Sutton, and Donnini, P.A.
One Financial Plaza, Suite 2202
100 Southeast Third Avenue
Fort Lauderdale, Florida 33394
(eServed)

Elizabeth A. Teegen, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32308
(eServed)

Andrew Rubin Fier, Esquire
Department of Business and
Professional Regulation
Capital Commerce Center
2601 Blair Stone Road
Tallahassee, Florida 32399-2202
(eServed)

Ken Lawson, Secretary
Department of Business and
Professional Regulation
Capital Commerce Center
2601 Blair Stone Road
Tallahassee, Florida 32399-2202
(eServed)

Thomas Philpot, Director
Division of Alcoholic Beverages
and Tobacco
Department of Business
and Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399
(eServed)

Jason L. Maine, General Counsel
Department of Business and
Professional Regulation
Capital Commerce Center
2601 Blair Stone Road
Tallahassee, Florida 32399-2202
(eServed)

Ken Plante, Coordinator
Joint Administrative Procedures Committee
Room 680, Pepper Building
111 West Madison Street
Tallahassee, Florida 32399-1400
(eServed)

Ernest Reddick, Chief
Alexandra Nam
Department of State
R. A. Gray Building
500 South Bronough Street
Tallahassee, Florida 32399-0250
(eServed)

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.