

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JEMCO ENTERPRISES, INC. d/b/a,
PAYLESS TOBACCO SOURCE,

Petitioner,

Case No. 18-3853

vs.

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

Respondent.

_____ /

RECOMMENDED ORDER

A hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2018),^{1/} before Cathy M. Sellers, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"), on September 26, 2018, by video teleconference at sites in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: Bernard Hershewsky
Mario Solis
Jemco Enterprises, Inc.
11521 Southwest 98th Street
Miami, Florida 33176

For Respondent: Alicia Bhambhani, Esquire
Courtney Rae Conner, Esquire
Department of Business and
Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399-2202

STATEMENT OF THE ISSUE

Whether, pursuant to section 210.30, Florida Statutes (2016),^{2/} Petitioner, Jemco Enterprises, Inc., d/b/a Payless Tobacco Source ("Jemco"), owes a tax deficiency in the amount of \$5,582.73 for the audit period from July 1, 2016, to October 31, 2016, plus \$558.27 in penalties and \$144.43 in interest, for a total amount due of \$6,285.43.

PRELIMINARY STATEMENT

On April 27, 2017, Respondent, Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco ("Division"), notified Jemco that it had completed a periodic audit for the period between July 1, 2016, and October 31, 2016, which revealed that Jemco was deficient in paying taxes in the amount of \$5,582.73, and that it also owed penalties and interest, for a total of amount due of \$6,285.43.

Jemco timely requested a hearing pursuant to section 120.57(1), and the matter was referred to DOAH to conduct an evidentiary hearing on the amount of taxes, penalties, and interest, if any, that Jemco owes to the Division. The hearing originally was scheduled for August 20,

2018, but pursuant to Jemco's request, was continued until September 26, 2018.

The hearing was conducted on September 26, 2018. The Division presented the testimony of Alma Cortez and Julio Cesar Torres, both employed with the Division. Respondent's Exhibits 1 through 7 and 9 were admitted into evidence without objection, and Respondent's Exhibits 8, 10, and 11 were admitted into evidence over objection. Jemco's co-owners, Bernard Hershewsky and Mario Solis, testified on behalf of Jemco. Jemco did not tender any exhibits for admission into evidence.

The one-volume Transcript was filed on October 19, 2018. Pursuant to Jemco's request, the time for filing proposed recommended orders was extended to December 3, 2018. The Division filed its Proposed Recommended Order on October 29, 2018, and Jemco filed its Proposed Recommended Order on December 3, 2018. Both proposed recommended orders were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

1. Jemco is a Florida corporation that is a distributor of tobacco products in Florida, pursuant to Wholesale License No. WDE1614464.

2. The Division is the state agency charged with administering and enforcing chapter 210, related to the taxation of tobacco products.

3. It is undisputed that Jemco is a distributor of tobacco products in Florida, and that it engaged in the distribution of tobacco products during the period of July 1, 2016, through October 31, 2016.

4. It also is undisputed that Jemco was engaged in the distribution of tobacco products, on which it paid an applicable excise tax and surcharge, before July 1, 2016.

5. As discussed in greater detail below, pursuant to section 210.30, an excise tax is imposed on all tobacco products and on any person engaged in business as a distributor in Florida at the rate of 25 percent of the wholesale sales price of such tobacco products. This excise tax is due to be paid during the month in which the licensed distributor purchases the tobacco products and brings them in state for sale in Florida.

6. Additionally, pursuant to section 210.276, a surcharge is imposed on all tobacco products and on any person engaged in business as a distributor in Florida at the rate of 60 percent of the wholesale sales price of such tobacco products. This surcharge is due to be paid during the month in which the licensed distributor purchases the tobacco products and brings them in state for sale in Florida.

7. In 2016, the Florida Legislature amended the definition of "wholesale sales price" in chapter 210. This amendment, which went into effect on July 1, 2016, changed the assessment of the excise tax and surcharge on the distribution of tobacco products.

8. At some point—and the evidence does not establish when—the Division posted notice of this statutory amendment to the definition of "wholesale sales price" on its website. However, it did not notify distributors, including Jemco, by regular or electronic mail. Consequently, Jemco was unaware of this change in the law.

9. On or about February 16, 2017, Alicia Cortez, an auditor employed by the Division, conducted a tax audit on Jemco for the audit period between July 1, 2016, and October 31, 2016.

10. In conducting the audit, Cortez reviewed copies of out-of-state supplier invoices for tobacco products sold by the out-of-state suppliers to Jemco. These documents showed the total amount of the sales of tobacco products by out-of-state suppliers to Jemco. She verified these purchases by reviewing Jemco's bank statements.

11. Cortez also reviewed the In-State Tobacco Products Wholesale Dealer's Reports ("Monthly Report") submitted by Jemco to the Division on a monthly basis. These Monthly Reports, which are submitted in electronic format, show the net taxable

purchases, excise tax amount, surcharge amount, and total amount—which consists of the excise tax and surcharge—due for that particular month, as calculated by Jemco. The Monthly Reports also show the amount of excise tax and surcharge paid by Jemco for purchases of tobacco products from out-of-state suppliers for that month.

12. Cortez compared the total amount of taxable purchases of tobacco products, as determined by a review of the out-of-state supplier invoices, with the taxable purchases and excise tax and surcharge paid by Jemco for the particular month, as reported in its Monthly Reports.

13. Here, the audit showed that Jemco did pay some excise tax and surcharge for the period between July 1, 2016, and October 31, 2016, but that it also had a tax deficiency of \$5,583.73 for failure to pay the full amount of the excise tax and surcharge due during the audit period. With the imposition of \$144.43 in interest and a penalty of \$558.27, Jemco was determined to owe a total of \$6,285.43.

14. At Jemco's request, an audit conference between the Division and Jemco was conducted on June 19, 2017. The conference did not result in any change to the total amount of excise tax, surcharge, penalty, and interest that Jemco was determined to owe.

15. As more fully discussed below, pursuant to section 120.80(14), which governs taxpayer contest proceedings under chapter 210, the Division has the initial burden in this proceeding to demonstrate the factual and legal grounds for the tax assessment. Once the Division makes that showing, the entity contesting the assessment—here, Jemco—has the burden to show the assessment was incorrect.

16. Jemco contends that it did not intentionally try to evade paying its taxes due for the audit period, and asserts two grounds for disputing the assessed amount of \$6,285.43.

17. First, Jemco contends that, in addition to the period between July 1, 2016, and October 31, 2016, the audit also covered the months of May and June 2016.

18. However, all of the documentary evidence admitted into the record of this proceeding, including the supplier invoices, Monthly Records, audit report, and auditor's summary sheet clearly shows that the Division audited only the period consisting of July 1, 2016, through October 31, 2016. The evidence shows that the Division purposely chose to audit only this four-month period, rather than a typical six-month audit period, specifically because the amended definition of "wholesale sales price" went into effect on July 1, 2016, and the Division decided to "have a clean cut off" in conducting audits. The evidence clearly and uniformly refutes Jemco's

argument that the audit actually covered a six-month period, from May 1, 2016, to October 31, 2016.^{3/}

19. Jemco also asserts that it should not be held liable for the tax deficiency for the audit period because it was unaware of the amended definition of "wholesale sales price" that went into effect on July 1, 2016. It characterizes the Division's assessment of tax deficiency, penalties, and interest based on the 2016 amendment to that definition as a "got-you attack."

20. The undersigned finds the testimony of Solis and Hershewsky credible and sympathetic that Jemco never intended to avoid paying the excise taxes and surcharges that it owed under the law, and that Jemco only found out that it was not paying the correct amount of taxes and surcharge for the audit period when the audit commenced in early 2017. It is understandable that a small business like Jemco could be caught unaware of a change in the law—particularly when it was not directly notified by regular or electronic mail of the changed law.

21. However, as a wholesale distributor licensee subject to chapter 210, Jemco is nonetheless presumed to be aware of, and required to follow, this statute in accurately paying its excise taxes and surcharges. To that point, Florida case law states that "[a]s to notice, publication in the Laws of Florida or the Florida Statutes gives all citizens constructive notice

of the consequences of their actions.” L & L Docs, LLC v. Div. of Alcoholic Bevs. & Tobacco, 882 So. 2d 512, 515 (Fla. 4th DCA 2004) (quoting State v. Beasley, 580 So. 2d 139, 142 (Fla. 1991)). Thus, “ignorance of the law is no excuse.” Davis v. Strople, 158 Fla. 614, 29 So. 2d 364 (Fla. 1947). Here, after the Legislature amended the definition of “wholesale sales price” in 2016, this amended definition was published as part of chapter 2016-220, Laws of Florida, and also as subsection 210.25(14), in the 2016 version of Florida Statutes, which remains in effect to date.^{4/} Under Florida law, Jemco, as a regulated licensed wholesale distributor of tobacco products, is responsible for being aware of, and complying with, the applicable law—here, the amended definition of “wholesale sales price” that went into effect on July 1, 2016.

22. Nevertheless, it is noted that had the Division directly—by electronic mail or regular mail—informed wholesale distributors of tobacco products of the changed definition of “wholesale sales price” after it was enacted by the Legislature during the 2016 Legislative Session and before it went into effect on July 1, 2016, Jemco—and, presumably other distributors of wholesale tobacco products, some of which are small businesses—would have been informed of the change, so may not have incurred a tax deficiency, with accompanying penalty and interest. This is mentioned for the Division's

consideration in informing licensees of significant future changes in the law that could affect their liability for tax deficiencies, penalties, and interest.

23. Based on the foregoing findings, it is determined that the Division met its burden, pursuant to section 120.80(14)(b), to establish the factual and legal grounds on which the assessment of \$6,285.43 was made. It is further determined that Jemco did not meet its burden under section 120.80(14)(b) to show that the assessment was incorrect.

24. The clear and convincing evidence supports the Division's imposition of the proposed penalty and interest.

CONCLUSIONS OF LAW

25. DOAH has jurisdiction over the parties to, and subject matter of, this proceeding pursuant to sections 120.569 and 120.57(1).

26. Pursuant to section 120.80(14)(b)2., the Division has the burden in this taxpayer contest proceeding to show that a tax assessment against Jemco has been made, and to establish the factual and legal grounds upon which that assessment was made. Jemco then has the burden, by a preponderance of the evidence, to demonstrate that the assessment is incorrect. Global Hookah Distrib., Inc. v. Dep't of Bus. & Prof'l Reg., Case No. 15-6901 (Fla. DOAH Oct. 20, 2016; Fla. DBPR Apr. 18, 2017).

27. Additionally, because the Division is seeking to impose a penalty, it bears the burden, by clear and convincing evidence, to show that the penalty is factually and legally justified. See Dep't of Bus. & Prof'l Reg. v. Discount Zone, Inc., Case No. 10-9281 (Fla. DOAH May 12, 2011).

28. The tax on tobacco products is levied pursuant to section 210.30, which states, in pertinent part:

Tax on tobacco products; exemptions.—

(1) A tax is hereby imposed upon all tobacco products in this state and upon any person engaged in business as a distributor thereof at the rate of 25 percent of the wholesale sales price of such tobacco products. Such tax shall be imposed at the time the distributor:

(a) Brings or causes to be brought into this state from without the state tobacco products for sale;

(b) Makes, manufactures, or fabricates tobacco products in this state for sale in this state; or

(c) Ships or transports tobacco products to retailers in this state, to be sold by those retailers.

29. In addition to the excise tax, the state imposes a surcharge on tobacco products pursuant to section 210.276, which states, in pertinent part:

Surcharge on tobacco products.—

(1) A surcharge is levied upon all tobacco products in this state and upon any person engaged in business as a distributor of

tobacco products at the rate of 60 percent of the wholesale sales price. The surcharge shall be levied at the time the distributor:

(a) Brings or causes to be brought into this state from without the state tobacco products for sale;

(b) Makes, manufactures, or fabricates tobacco products in this state for sale in this state; or

(c) Ships or transports tobacco products to retailers in this state, to be sold by those retailers. A surcharge may not be levied on tobacco products shipped or transported outside this state for sale or use outside this state.

30. Section 210.25(12) defines the term "tobacco products," for purposes of the tax and surcharge, as:

[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, as defined by s. 210.01(1), or cigars.

31. The term "wholesale sales price" is defined in section 210.25(14) as:

(a) The full price paid by the distributor to acquire the tobacco products, including charges by the seller for the cost of materials, the cost of labor and service, charges for transportation and delivery, the federal excise tax, and any other charge, even if the charge is listed as a separate item on the invoice paid by the distributor, exclusive of any diminution by volume or

other discounts, including a discount provided to a distributor by an affiliate; and

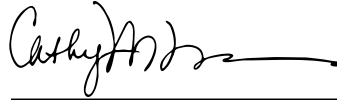
(b) The federal excise tax paid by the distributor on the tobacco products if the tax is not included in the full price under paragraph (a).

32. As discussed above, the evidence shows that the Division correctly conducted the audit in this case according to the foregoing statutes, and accurately determined that Jemco owes a tax deficiency of \$5,582.73, interest in the amount of \$144.43, and a penalty in the amount of \$558.27, for a total amount due of \$6,285.43.^{5/}

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, issue a final order imposing an excise tax and surcharge assessment of \$6,285.43 on Jemco.

DONE AND ENTERED this 14th day of February, 2019, in
Tallahassee, Leon County, Florida.



CATHY M. SELLERS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of February, 2019.

ENDNOTES

- ^{1/} All references to chapter 120, Florida Statutes, and all provisions therein, are to the 2018 codification.
- ^{2/} All references to chapter 210, Florida Statutes, and all provisions therein, are to the 2016 codification, which was in effect at the time the audit in this case was conducted.
- ^{3/} Although the Division requested that the undersigned take official recognition of Emergency Rule 61AER16-1 - Definition of Established Price ("Emergency Rule"), the evidence clearly establishes that the Division did not apply or rely on this rule in conducting the audit of Jemco at issue in this case. The Emergency Rule went into effect on March 9, 2016, and it expired on June 7, 2016—before the audit period for the Jemco audit commenced on July 1, 2016. The Emergency Rule was not renewed, so was not in effect—and, therefore, not applied—in conducting the audit of Jemco. It is further noted that the Division filed a Motion to Take Judicial Notice requesting the undersigned to take judicial notice—the administrative version of which is official recognition—of the Emergency Rule and pertinent statutes on August 14, 2018. Specifically to afford Jemco, who was being represented by its co-owners, sufficient time to respond to the motion, the undersigned delayed ruling on the

motion until September 25, 2018, even though Florida Administrative Code Rule 28-106.204(1) establishes a seven-day response period in which to file a written response in opposition to a motion, and further states: "[w]ritten motions normally will be disposed of after the response period has expired." Here, Jemco was given over a month in which to file a written response in opposition to the motion, and it did not do so.

^{4/} Jemco also argues that "[t]he state itself had not yet determined the final interpretation of the emergency rule that went into effect in March 2016, as there was a case on appeal regarding the tobacco tax." In the case to which Jemco apparently refers, Florida Bee Distribution, Inc. v. Department of Business and Professional Regulation, Case No. 15-6108RU (Fla. DOAH Mar. 3, 2016), the ALJ determined that the Division's interpretation of the "wholesale sales price" definition then-codified in section 210.25(13)—and specifically, the term "established price" within that definition—was an unadopted rule, so that the Division could not rely on or apply that interpretation in tax assessments. The Division appealed the ALJ's decision, and the court affirmed the ALJ's decision in October 2016. Dep't of Bus. & Prof'l Reg. v. Fla. Bee Distrib., Inc., 2016 Fla. App. LEXIS 15685 (Fla. 1st DCA 2016). However, in the meantime, the Legislature amended the definition of "wholesale sales price" during the 2016 Session of the Florida Legislature to, among other things, eliminate the term "established price." Ch. 2016-220, § 9, Laws of Fla. (2016). This amended definition of "wholesale sales price" went into effect on July 1, 2016. Therefore, regardless of the court's subsequently-issued decision affirming the ALJ's final order in Florida Bee Distribution, the amended statutory definition of "wholesale sales price" that went into effect on July 1, 2016, applied to all audit periods commencing on or after July 1, 2016.

^{5/} Jemco presented compelling testimony that being required to pay an assessed deficiency of \$6,285.43 would cause it to suffer significant financial hardship and could result in it being forced to go out of business. The undersigned is sympathetic to this argument, and strongly urges the Division, to the extent allowed by its applicable statutes, rules, and operating policies, to work with Jemco to develop a feasible payment plan for paying the tax deficiency over a period of time.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.