STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BRANDY'S PRODUCTS, INC.

Petitioner, DOAH CASE NO.: 14-3496

vs.

Florida Department of Business &Professional Regulation, Division Of Alcoholic Beverages and Tobacco

Respondent.
_____/

PETITIONER'S PROPOSED RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case via teleconference on January 9, 2015, with Petitioner appearing in Fort Lauderdale, Florida, and Respondent appearing Tallahassee, Florida before John G. Van Laningham, a duly designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues in this case are 1) whether blunt wraps or cigar wraps ("Blunt Wraps") meet the definition of a "tobacco product" under section 210.25, Florida Statutes ("F.S."), and if so, then 2) whether a portion of the assessment is time barred by the statute of limitations pursuant to section 95.091, F.S.

PRELIMINARY STATEMENT

Based solely on records supplied from National Honey Almond ("NHA") and without conducting an audit, the Respondent, Florida Department of Business & Professional Regulation, Division of Alcoholic Beverages and Tobacco (the "Department") issued a letter to Brandy's Products, Inc. ("Brandy's") on or around March 1, 2013. In the letter, the Department asserted that NHA's purchases were not reported, and, therefore Brandy's owed $71,868.23, of Other Tobacco Product ("OTP") Tax, penalty, and interest. The letter went on to allow 10 days to pay the bill, but did not address any appeal rights for Brandy's. Brandy's filed a letter on March 13, 2013, requesting an informal conference to discuss the perplexing assessment. It is unclear whether such informal conference was ever granted.

On or around April 4, 2014, the Department issued a "final request" letter for $70,368.23, which apparently was reduced by a $1,500 good-faith payment made by Brandy's. The final request letter again did not inform Brandy's of what, if any, appeal rights it had. The final request letter gave Brandy's two options: pay the assessment or be referred to the enforcement department.

On or around April 11, 2014, still unsure how to proceed and without any guidance from the Department's correspondence or through its rules, Brandy's, through its Power of Attorney,

filed an informal protest within the allotted 10 day period. Despite calling the conference a Notice of Proposed Assessment conference, the conference was actually conducted pursuant to a protest of the "Final Request." A conference was conducted on May 13, 2014 and the Department summarily dismissed the protest and sustained the assessment in full by issuing its "Notice of Decision and Final Audit Assessment" on or around May 19, 2014. Brandy's timely contested the Notice of Decision by filing this action.

The final hearing was held on January 9, 2015, as scheduled, with both parties present and represented by counsel. Respondent presented its prima facie case through testimony of Gerald Russo, a senior tax auditor administrator who works for the Department and Nancy Cisek, a senior tax specialist who works for the Department. In addition, the Department offered 3 Exhibits, numbered 1 through 3 (hereinafter "RE, Exhibit #"), which were received. Petitioner called one witness during its case-in-chief: Maryanne Palino, who is Brandy's President. In addition, Petitioner had 6 exhibits admitted, which were labeled Petitioner's Exhibits 3, 5, 6, 7, 8, and 9 (hereinafter "PE, Exhibit #").

The two volume final hearing transcript was filed on January 23, 2015 (cited hereinafter as ("TR, page"). The Respondent requested, and the Petitioner agreed, to have 20 days in which to file Proposed Recommended Orders. The parties timely submitted proposed findings of fact and conclusions of law, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

THE PARTIES

1. Petitioner, Brandy's, is a Florida corporation having its home office and principal place of business in Fort Pierce, Florida. (TR, 200).

2. Respondent, Department, an agency of the State of Florida, is authorized to administer the state's wholesale tobacco tax laws under Part II, Chapter 210, F.S. § 210.75, F.S.

BRANDY'S BUSINESS

3. Brandy's is a wholesaler distributor to gas stations and convenience stores. (TR, 200).

4. Operating at a warehouse location, Brandy's is a small business with about 8 employees and 2 owners. (TR, 199-200).

5. Over the last 20 years, Brandy's has been selling some 2,000 different items including candy, gum, cigars, beef jerky, tobacco, cigarettes, rolling papers, automotive items, other non-grocery items found in a convenience store, and of course, Blunt Wraps. (TR, 200-01).

6. From a wholesale tobacco tax perspective[1] ("OTP Tax"), Brandy's sells various items it considers to be tobacco products, including Bacco, Black O, Signal, Native, and Red River, to name a few. (TR, 209, PE 4).

7. Brandy's did not and does not consider the Blunt Wraps to be loose tobacco suitable for smoking because the Blunt Wraps are not loose, or unbound, tobacco. (TR, 202-227).

[1] Technically, Florida OTP Tax has two components, which are known as a 60% surcharge and a 25% excise tax, pursuant to section 210.276, F.S., and section 210.30, F.S., respectively. In short OTP Tax applies at a steep rate of 85%.

THE BLUNT WRAPS

8. At the center of the dispute is whether the Blunt Wraps are contained within Florida's definition of a tobacco product. (TR, 15).

9. Evidence was presented to show the Blunt Wraps were more akin to a rolling paper in that it looks and feels like one. (PE 3, TR 89, 99, 102, 208-209).

10. Although there was no evidence offered to determine the exact composition of the Blunt Wraps at issue, they appeared extremely similar in composition to the other brands of the same product. (TR, 163-65).

11. Other evidence showed that the Blunt Wraps are a sheet of rolling paper that consists of about 40% tobacco with the balance of the ingredients of wood pulp (paper) and war gum. (TR 209, PE 6, at 110).

12. The product at issue itself was also introduced as evidence. The packaging of the Blunt Wraps contained a statement that the Blunt Wraps were made predominantly of tobacco with non-tobacco ingredients added. (PE 3).

13. The Blunt Wraps are not intended to be smoked by itself, rather the Blunt Wraps are used to roll and smoke other products, such as loose tobacco. (TR, 211).

AUDIT AND PROTEST

14. Since its existence, Brandy's has regularly been audited by the Department about every six months and Brandy's always made its records and facility available for the Department to conduct regular audits. (TR, 203-06, PE 7).

15. Just as it has customarily been the case, Brandy's has been audited over the past few years without material issue. (PE 7).

16. During its regular audits, the Department reviewed or should have reviewed all Brandy's sales and purchases, which included the Blunt Wraps, and did not assess tax on the Blunt Wraps. (TR 204-06, PE 7).

17. Based solely on records supplied from NHA and without conducting an audit, the Department issued a "bill" to Brandy's on or around March 1, 2013. (TR 136-37, 171, 205, RE 1).

18. In the letter, the Department asserted that NHA's purchases weren't reported, and, therefore Brandy's owed $71,868.23, of OTP Tax, penalty, and interest. (RE 1).

19. The letter went out on or around March 1, 2013 to allow 10 days to pay the letter, but did not address any appeal rights for Brandy's. *Id.*

20. Unsure how to proceed and because the letter did not explain any appeal rights, Brandy's paid $1,500 on advice from its accountant. The $1,500 payment was an effort to show good-faith to get the issue resolved. Brandy's also filed a letter on March 13, 2013, requesting an informal conference to discuss the perplexing assessment. It is unclear whether such informal conference was ever granted. *Id.* (TR, 152-56).

21. On April 4, 2014, the Department issued a "final request" letter for $70,368.23, which apparently was reduced by the $1,500 good-faith payment made by Brandy's and the letter gave Brandy's two options: pay the assessment or be referred to the enforcement department. (TR, 158, RE 1).

22. On April 11, 2014, still unsure how to proceed and without any guidance from the Department's correspondence or through its rules, Brandy's, through its Power of Attorney, filed an informal protest within the allotted 10 day period. *Id.* (RE 1).

23. Despite calling the conference a Notice of Proposed Assessment conference, the conference was actually conducted pursuant to a protest of the "Final Request."[2] *Id.*

24. A conference was conducted on May 13, 2014 and the Department summarily dismissed the protest and sustained the assessment in full by issuing its "Notice of Decision and Final Audit Assessment" on or around May 19, 2014. Brandy's contested the Notice of Decision by filing this action. *Id.*

PRESUMPTIONS AND BURDENS OF PROOF

25. Although designated the "Respondent," the Department has the initial burden to prove, by preponderance of the evidence, not only "that an assessment has been made against the taxpayer [but also] the factual and legal grounds upon which the . . . department made the assessment." § 120.80 (14) (b)2., F.S.

26. Further, it is settled law that taxing statutes are narrowly construed against the government, and all ambiguities or doubts must be resolved in the taxpayers favor. *Maas Bros., Inc. v. Dickinson*, 195 So. 2d 193, 198 (Fla. 1967).

THE DEPARTMENT'S THEORY OF THE CASE

27. The Department's position is consistently inconsistent.

28. In April 2009, the Federal Government amended its definition of a tobacco product to include Blunt Wraps. (PE 6, at 82-83, PE 9, at 211).

[2] It is worth noting that on several other cases, the Department issues a document labeled "Notice of Proposed Assessment," which provides the taxpayer a breakdown of its proposed liability and enumerated appeal rights. It is unclear why a formal Notice of Proposed Assessment was never issued in this case. It does show, however, the Department has a history of making up its own rules which often vary from service center to service center.

29. Numerous admissions were offered as evidence to show the Department changed its position based on the change in federal law. (PE 6 at 86, 88-90, 95-96, 117, 119-121, 124-25).

30. In addition, testimony was offered that the Department "followed the federal government." (TR, 46)

31. Numerous admissions were also offered that the Department taxed the Blunt Wraps because they have tobacco in them. (PE 6 at 78-81, 86-91,97-98).

32. Similar to the federal law change, testimony was offered to show the Department taxed Blunt Wraps because they contained tobacco. In fact, the Department even believes that something with 1% tobacco in it would be covered in Florida's definition of a tobacco product. (TR, 103, 165).

33. Aware of the statutory ambiguity, the Department even suggested statutory changes to the tobacco products definition. (PE 6, at 75, 92-94).

34. During the final hearing, the Department took the position for the first time that the Blunt Wraps are "loose tobacco" because the product begins as a tobacco leaf. (TR, 49-51).

35. Irrespective of the reason, the Department took the position that the Blunt Wraps were taxable in mid-2009. There was no change in Florida law, both from a statutory or case law perspective that dealt with the taxability of Blunt Wraps around that time. (TR 29-31, 135-36).

36. The Department also deemed the penalty and interest associated to the tax in this case to be appropriate because "[i]t's an automatic calculation." (TR, 164).

37. If the item is somehow taxable, then the Department also creatively interpreted section 95.091 to allow 5 years to audit.[3]

CONCLUSIONS OF LAW

JURISDICTION

38. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to sections 72.011(1)(a), F.S., 120.569, 120.57(1), and 120.80(14)(b), F.S.

Do Blunt Wraps meet the definition of a "tobacco product" under section 210.25, Florida Statutes ("F.S.")?

39. Sections 210.276[4] and 210.30,[5] Florida Statutes, impose surcharges and taxes (collectively "OTP Tax"), respectively, on the purchase of "tobacco products" other than cigarettes and cigars.

40. The taxes and surcharges are imposed on a distributor, like Petitioner, who brings the tobacco products into the State of Florida for sale.

41. Section 210.25(11), Florida Statutes, defines "tobacco products" as follows:

> 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 . . . .

42. Therefore, the threshold question is whether the Blunt Wraps are loose tobacco

[3] Section 95.091(3)(a), F.S., clearly allows the Department 3 years from the date a return is filed to determine an assess tax. Allowing the Department's nonsensical reading would treat any amount due under audit to be subject to a 5 year statute of limitations. This clearly cannot be the Legislative intent.

[4] 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.

[5] 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.

suitable for smoking because in order for the Blunt Wraps to be taxable, they must fit within the above definition. If, on the other hand, the answer is "yes," then the Court will have to determine whether a portion of the assessment is barred by the statute of limitations.

43. There are no cases in Florida that speak on the issue, thus, this is a case of first impression.

44. It is axiomatic law that if a word is not defined in a statute, then the statutory language is given its plain and ordinary meaning. *State v. Burris*, 875 So. 2d 408, 411 (Fla. 2004) (citing *Green v. State*, 604 So. 2d 471 (Fla. 1992)).

45. Here, "loose tobacco suitable for smoking," is not defined by the statute so its plain and ordinary meaning should be used.

46. The word "loose" is ordinarily understood to mean something "not bound together" or "untied." *See* PE 5, at 72, TR 221-227.

47. The ordinary definition of "loose" is certainly not the one imagined by the Department meaning "separating the tobacco leaf into parts." (TR, 49).

48. Putting the phrase into the tobacco industry context, the statute was drafted to tax loose tobacco products, such as pipe tobacco or shag tobacco, which is the inner part of being rolled and then smoked, the unbound tobacco.

49. Put another way, the statute envisions a product similar to the inner part of a cigarette.

50. Further, Brandy's and Brandy's customers all understood "loose" to mean unbound or cut tobacco. (TR, 209-212).

51. Conversely, the Blunt Wraps at issue are clearly not the "loose tobacco"

envisioned or captured by the statute.

52. The federal government faced a similar conundrum dealing with the taxability of Blunt Wraps.

53. Similar to Florida, the federal government imposes an excise tax on various tobacco products. (26 U.S.C. 5701).

54. Under federal law, a "tobacco product" is subject to federal excise tax. (26 U.S.C. 5702).

55. Included in the federal "tobacco product" definition is a provision for "roll-your-own-tobacco." *Id.*

56. Understanding that the Blunt Wraps did not fit within the current federal definition of tobacco product, the federal government amended its law to expand the definition of "roll-your-own-tobacco." *See* (26 U.S.C. 5702(o)) (amended by Pub. L. No. 111-3 (Feb. 3, 2009)).

57. The amendment changed the definition to state that "roll-your-own-tobacco" means "any tobacco which, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes or cigars, or for use as wrappers thereof." *Id.* (emphasis added to show amendment). With the update, the current law clearly applies to the Blunt Wraps at issue.

58. Florida could have made the same change to its definition of a "tobacco product," but chose not to do so.

59. If the Legislature wanted or wants this item to be taxable in the future, then it

simply could amend the statute, just as the federal government did.[6]

60. However, as it presently stands, the current statutory framework does not apply to the Blunt Wraps at issue.

61. Based on the evidence and the testimony presented during the final hearing, the Blunt Wraps do not fit within the above referenced definition because the Blunt Wraps are sheets of bound tobacco.

62. Therefore, the Blunt Wraps are not taxable.

63. The position advanced by the Department that the Blunt Wraps are taxable because they meet the federal definition is irrelevant. The federal law definition of a tobacco product does not determine whether Florida OTP Tax applies to a particular item.

64. In addition, the Department's theory that the Blunt Wraps have tobacco in them makes them taxable. Florida's statutory framework is not nearly that broad and states that it has to be "loose tobacco" to be taxable, not just contain tobacco.

65. As stated above, the Blunt Wraps are simply not loose tobacco. Therefore, the Department's arguments fail.

66. At best, the testimony and evidence presented at the final hearing showed whether the Blunt Wraps are "loose tobacco" is ambiguous.

67. In fact, the agency charged with the responsibility of administering the tax, was confused as to whether the Blunt Wraps are taxable.

[6] It is also noteworthy that other states have amended their statutes to capture the Blunt Wraps as well. For example, in Alabama, the statute specifically includes "cigar wrappers," Ala. Code § 40-25-21 (2015). Likewise, Alaska and Rhode Island have similar provisions to specifically encompass a Blunt Wrap. *See* Alaska Stat. § 43.50.390; R.I. Gen. Laws § 44-20-13.2. Florida chose not to legislate such an amendment.

68. At first, the Department took the position that the 2009 federal amendment gave it reason to tax the Blunt Wraps. (PE 6, at 82-83, PE 9, at 211).

69. Voluminous evidence and testimony were offered to show the Department changed its position based on the change in federal law. (PE 6 at 86, 88-90, 95-96, 117, 119-121, 124-25).

70. Voluminous evidence and testimony were also offered that the Department taxed the Blunt Wraps because they have tobacco in them. (PE 6 at 78-81, 87-91, 97-98).

71. Aware of the statutory ambiguity, the Department even suggested statutory changes to the tobacco products definition. (PE 6, at 75, 92-94).

72. However, the Department provided no evidence that the state changed the definition of a "tobacco product" to include tobacco used as "wrappers," as the federal government did.

73. Consequently, pursuant to *Maas Bros, Inc.*, any ambiguity should be resolved in Brandy's favor.

74. As a result, whether the Wraps are "loose tobacco" is ambiguous at best; therefore it must be concluded that whether the Blunt Wraps are subject to OTP Tax favors Brandy's.

Does the Statute of Limitations Limit the Assessment to Three Years?

75. Even if this court were to recommend that Wraps are taxable tobacco, the Department is attempting to disregard the statute of limitations by assessing for periods longer than three years ago.

76. Section 95.091, F.S., states that the Department of Business Regulation may determine and assess the amount of any tax enumerated in section 72.011 "within 3 years after the date the tax is due, any return with respect to the tax is due, or such return is filed, whichever occurs later."

77. By allowing the Department to go back beyond three years, taxpayers would be required to keep records forever, which is an unworkable solution for the Department's failure to assess certain items on audit.

78. As stated in *Major League Baseball v. Morsani*, 790 So. 2d 1071, at 1075-76 (Fla. 2001), one of the primary purposes of the statute of limitations "is to protect defendants from unfair surprise and stale claims."

79. In *Morsani*, the court went on to quote:

> As a statute of [limitations], they afford parties needed protection against the necessity of defending claims which, because of their antiquity, would place the defendant at a grave disadvantage. In such cases how resolutely unfair it would be to award one who has willfully or carelessly slept on his legal rights an opportunity to enforce an unfresh claim against a party who is left to shield himself from liability with nothing more than tattered or faded memories, misplaced or discarded records, and missing or deceased witnesses. Indeed, in such circumstances, the quest for truth might elude even the wisest court."

Id. at 1076 (quoting *Nardone v. Reynolds*, 333 So. 2d 25, 36 (Fla. 1976).

80. In addition, it is settled law that statutes should be construed to accomplish the purpose for which it was enacted rather than strictly construed to make the Legislative power meaningless. *Hanson v. State*, 56 So. 2d 129, 131 (Fla. 1952).

81. Here, the OTP Tax (governed by section 210.25, F.S.) is a tax enumerated in section 72.011, F.S.

82. The Division issued a Notice of Decision and Final audit assessment on May 19, 2014, allowing the Department to assess tax no earlier than May 19, 2011.

83. Therefore, by application of section 95.091, F.S., any tax assessed prior to the 3 year statute of limitations is barred.

84. Further allowing the Department to assess beyond the three year period would place Brandy's at a grave disadvantage against the Department that impermissibly slept on its rights.

85. Allowing the Department to go beyond three years would be completely unfair and stand contrary to Florida law and any notion of due process.

86. Construing the statute in the light advanced by the Department would render the application of section 95.091, F.S., meaningless.

87. Brandy's regularly filed returns and was audited by the Department approximately every six months.

88. The Department had access to Brandy's records and could have reviewed and assessed its Blunt Wraps purchases at any time.

89. Instead, one day the Department decided that the Blunt Wraps were taxable, so the Department gathered documentation from the Blunt Wraps distributor and sent a bill.

90. To allow this would not only be unfair, but it would also place an undue burden on taxpayers and render the Department's audits meaningless from a finality perspective.

91. Therefore, even if the Blunt Wraps are deemed taxable, then any tax, interest, and penalty assessed outside of the 3 year time period should be removed.

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, withdraw the assessment relating to Blunt Wraps that were purchased by Brandy's.

DONE AND ENTERED this _____ Day of _____, 2015 in Tallahassee, Leon County, Florida.

John G. Van Laningham
Administrative Law Judge
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