

STATE OF MINNESOTA  
COUNTY OF RAMSEY

TAX COURT  
REGULAR DIVISION

---

Winner Tobacco Wholesale, Inc.,  
Appellant,

**ORDER ON CROSS-MOTIONS  
FOR SUMMARY JUDGMENT**

vs.

Commissioner of Revenue,  
Appellee.

Docket No. 9049-R

Filed: August 6, 2018

---

This matter came before The Honorable Joanne H. Turner, Judge of the Minnesota Tax Court, on cross-motions for summary judgment.

Gerald J. Donnini and Jonathan W. Taylor, Moffa, Sutton & Donnini, P.A., Fort Lauderdale, Florida, represent appellant Winner Tobacco Wholesale, Inc.

Jennifer A. Kitchak, Assistant Minnesota Attorney General, represents appellee Commissioner of Revenue.

Minnesota assesses a tobacco tax on the “wholesale sales price” of tobacco products brought into the state by a distributor such as appellant Winner Tobacco, and (during the period at issue) defined “wholesale sales price” as “the price stated on the price list in effect at the time of sale for which a manufacturer or person sells a tobacco product to a distributor.” Minn. Stat. § 297F.01, subd. 23 (2012). At issue in this dispute is whether (during the period at issue) “wholesale sales price” included the federal excise tax (FET) assessed on tobacco manufacturers. Asserting that during the period at issue “wholesale sales price” did not include federal excise tax on tobacco products, Winner sought a refund of the Minnesota tobacco taxes it paid between May 2012 and December 2013 on the federal excise taxes it claimed were incorporated into the prices

of the tobacco products it purchased during that period. The Commissioner denied Winner Tobacco's refund request and Winner Tobacco appealed to this court. The parties have each moved for summary judgment.

We grant Winner Tobacco's motion in part, deny the Commissioner's motion in part, and order the Commissioner to refund Minnesota tobacco tax paid by Winner Tobacco on federal excise tax separately stated on manufacturer invoices that Winner Tobacco paid during the period at issue. Because Winner Tobacco has not shown that it otherwise paid Minnesota tobacco tax on more than "the price stated on the price list in effect at the time of sale," we deny the balance of Winner Tobacco's motion, grant in part the Commissioner's motion, and affirm her denial of the remainder of the refund claim.

### **ORDER**

1. The motion of appellant Winner Tobacco Wholesale, Inc., for summary judgment is granted in part and denied in part.

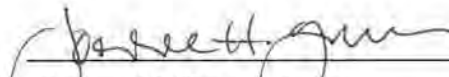
2. The motion of appellee Commissioner of Revenue for summary judgment is granted in part and denied in part.

3. Within 60 days of the date of filing of this order, counsel shall attempt to agree on the amount of Minnesota tobacco tax paid by appellant between May 2012 and December 2013 on federal excise tax specifically stated in the manufacturer invoices filed with the court as exhibits to the Affidavit of Jennifer A. Kitchak. In the event counsel is unable to agree, counsel shall each file his or her calculation with the court for determination. Once counsel has agreed on (or the court has determined) the amount to be refunded, the court will enter judgment accordingly.

IT IS SO ORDERED.

BY THE COURT:



  
\_\_\_\_\_  
Joanne H. Turner, Judge  
MINNESOTA TAX COURT

DATED: August 6, 2018

### MEMORANDUM

In this case, we are asked to determine to what amounts Minnesota's tobacco tax applies. Appellant Winner Tobacco argues that it erred in paying Minnesota tobacco tax on its purchases of tobacco products to the extent the prices of those products incorporated (whether explicitly or not) federal excise taxes. The Commissioner denied Winner Tobacco's request for refund of such taxes and both parties now move for summary judgment. We grant in part Winner Tobacco's motion for summary judgment, and order the Commissioner to refund only the Minnesota tobacco taxes that Winner Tobacco paid on federal excise taxes specifically listed on the invoices Winner Tobacco paid between May 2012 and December 2013.

**Tobacco taxation.** We begin with a brief overview of the federal and Minnesota taxation of tobacco products. The federal government assesses an excise tax on tobacco products (cigars, cigarettes, smokeless tobacco, pipe tobacco, and roll-your-own tobacco) and on certain related products (cigarette papers and cigarette tubes) manufactured in or imported into the United States. 26 U.S.C. § 5701 (2012). The rate of the federal excise tax (FET) depends on the product. For example, the federal excise tax on "small" cigars and cigarettes (those weighing not more than three pounds per thousand) is \$50.33 per thousand, *id.* at (a)(1), (b); the federal excise tax on pipe

tobacco is \$0.028311 per pound, *id.* at (f). The federal excise tax is the liability of the manufacturer or importer, a liability that can be shifted to another entity only if the associated tobacco product is transferred to a bonded warehouse for export. 26 U.S.C. § 5703(a)(1) (2012); 26 U.S.C. § 5704(b) (2012).

Minnesota taxes tobacco products (as defined in Minn. Stat. § 297F.01, subd. 19 (2012)) brought into Minnesota. From May 2012 to June 2013, Minnesota assessed a tobacco tax of 35% and a separate “health impact fee” of 35% (for a total of 70%) on “all tobacco products in this state.” Minn. Stat. § 297F.05, subd. 3 (2012) (tobacco tax); Minn. Stat. § 256.9658, subd. 3 (2012) (health impact fee). Effective July 1, 2013, the “health impact fee” was repealed and the rate of tobacco tax increased to 95%. Act of May 23, 2013, art. 5, §§ 12, 28, 2013 Minn. Laws 2445, 2513 (increase in tobacco tax rate), 2522 (repeal of health impact fee). In all cases, the tax or health impact fee was assessed on the “wholesale sales price” of the tobacco product. Minn. Stat. § 256.9658, subd. 3(b);<sup>1</sup> Minn. Stat. § 297F.05, subd. 3 (2012). Minnesota law defined “wholesale sales price” to mean

the price stated on the price list in effect at the time of sale for which a manufacturer or person sells a tobacco product to a distributor, exclusive of any discount, promotional offer, or other reduction. For purposes of this subdivision, “price list” means the manufacturer’s price at which tobacco products are made available for sale to all distributors on an ongoing basis.

Minn. Stat. § 297F.01, subd. 23 (2012).

---

<sup>1</sup> Minnesota Statutes § 256.9658, subd. 3(b), imposed a fee “upon all tobacco products in this state and upon any person engaged in business as a distributor in an amount equal to the liability for tax under section 297F.05, subdivision 3, or on a consumer of tobacco products equal to the tax under section 297F.05, subdivision 4.”

**Procedural history.** Appellant Winner Tobacco Wholesale, Inc., a Minnesota corporation, distributes tobacco products.<sup>2</sup> Winner Tobacco alleges that between May 2012 and December 2013, it paid Minnesota tobacco tax “on the total invoice price of its tobacco product purchases,” including federal excise tax, when it should have paid Minnesota tobacco tax on only the prices of “the tobacco products” themselves.<sup>3</sup> Between December 2015 and September 2016, Winner Tobacco filed 20 separate requests for refund of Minnesota tobacco taxes on the federal excise taxes it claimed were necessarily included in (although not necessarily stated on) its suppliers’ invoices for tobacco products.<sup>4</sup> In February 2017, the Commissioner denied Winner Tobacco’s refund claims in total.<sup>5</sup>

Winner Tobacco timely appealed to our court, asserting: (1) that Minn. Stat. §§ 256.9658, subd. 2, and 297F.05, subd. 3, “unequivocally and exclusively tax only tobacco products, not ancillary reimbursement charges such as [federal excise tax];” and (2) that “[t]he Commissioner’s refund denial violates the Minnesota Constitution,” specifically, the requirement that taxes be “uniform upon the same class of subjects.”<sup>6</sup>

After discovery, the parties filed simultaneous motions for summary judgment. Winner Tobacco moves for summary judgment “on the ground that the facts are not in dispute and it is

---

<sup>2</sup> Notice Appeal ¶¶ 1, 3 (filed May 2, 2017).

<sup>3</sup> Notice Appeal ¶¶ 4, 5.

<sup>4</sup> Answer Ex. 6 (filed June 28, 2017).

<sup>5</sup> Notice Appeal Attach. 1.

<sup>6</sup> Notice Appeal 2, 4. Article X, Section 1, of the Minnesota Constitution provides, in pertinent part: “Taxes shall be uniform upon the same class of subjects . . . .”

entitled to judgment as a matter of law.”<sup>7</sup> More specifically, Winner Tobacco asserts that federal excise tax “was not part of the taxable base for Minnesota tobacco tax” during the period at issue, and therefore it erred in paying Minnesota tobacco tax on “the total invoice price . . . rather than the price of [just] the tobacco products.”<sup>8</sup> In addition, although Winner Tobacco’s notice of appeal claimed the Commissioner’s actions violated only the Minnesota Constitution, Winner Tobacco’s motion for summary judgment asserts that the Commissioner’s interpretation of “wholesale sales price” violated the Import-Export and the Commerce Clauses of the United States Constitution.<sup>9</sup>

The Commissioner moves for summary judgment on the ground that Winner Tobacco “correctly paid tobacco taxes on the wholesale purchase price of the tobacco products it brought or caused to be brought into the state for sale by retailers.”<sup>10</sup> Alternatively, the Commissioner asks the court “to determine that any [] refunds available in this case are limited to purchases from the three manufacturers for which [Winner Tobacco] has produced some evidence that federal excise tax may have been separately collected in addition to the manufacturer’s list price for the tobacco products.”<sup>11</sup> We heard argument on the parties’ motions on May 30, 2018.

---

<sup>7</sup> Winner Tobacco Wholesale, Inc.’s Notice Mot. Cross-Mot. Summ. J. 1 (filed May 1, 2018).

<sup>8</sup> Mem. Winner Tobacco Wholesale, Inc., Supp. Cross-Mot. Summ. J. 2-3 (filed May 1, 2018).

<sup>9</sup> Mem. Winner Tobacco Wholesale, Inc., Supp. Cross-Mot. Summ. J. 11-14. The Import-Export Clause of the United States Constitution bars the states from “lay[ing] any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it’s inspection Laws.” U.S. Const. Art. I, § 10, cl. 2. The Commerce Clause authorizes Congress “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. Const. Art. I, § 8, cl. 3.

<sup>10</sup> Comm’r’s Notice Mot. Mot. Summ. J. 1 (filed May 2, 2018).

<sup>11</sup> Comm’r’s Notice Mot. Mot. Summ. J. 1-2.

**Legal standard.** Under Minn. R. Civ. P. 56.03, summary judgment is proper when the record “show[s] that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.”<sup>12</sup> Our function in ruling on a motion for summary judgment is first to determine whether there is an issue of fact to be tried. *Anderson v. Twin City Rapid Transit Co.*, 250 Minn. 167, 186, 84 N.W.2d 593, 605 (1957). When, as here, parties file cross-motions for summary judgment, they tacitly agree that there are no genuine issues of material fact. *Am. Family Mut. Ins. Co. v. Thiem*, 503 N.W.2d 789, 790 (Minn. 1993). With no genuine issue of material fact, we determine which party is entitled to judgment as a matter of law.<sup>13</sup>

## ANALYSIS

### 1. Statutory claim

The dispute in this case centers on whether during the period at issue “wholesale sales price” included federal excise tax paid by a distributor to its vendor. “The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the

---

<sup>12</sup> Rule 56, Minn. R. Civ. P., was amended in several respects effective July 1, 2018. Because the parties’ motions were filed and heard before July 1, we apply the version of Rule 56 in effect on the date of hearing.

<sup>13</sup> The record on summary judgment consists of Winner Tobacco’s notice of appeal and exhibits attached thereto; the Commissioner’s Return and Answer and the exhibits attached thereto; the Affidavit of Daniel Hughes and the exhibits attached thereto; the Affidavit of Jennifer Kitchak and the exhibits attached thereto; and the Affidavit of Mark Pederson and the exhibit attached thereto.

At oral argument, Winner Tobacco withdrew the Affidavit of Gerald Donnini (filed May 23, 2018), which was intended to retroactively support the filing of Exhibit C to Winner Tobacco’s opening memorandum. Tr. 12 (May 30, 2018). Exhibit C to Winner Tobacco’s opening memorandum appears to be a calculation of a portion of Winner Tobacco’s refund claim, the amount of which is disputed. Because Mr. Donnini also represents Winner Tobacco in this matter, his appearance here as a substantive witness would violate the Minnesota Rules of Professional Conduct. See Minn. R. Prof. Conduct 3.7 (barring a lawyer from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness unless (with exceptions not applicable here) “the testimony relates to an uncontested issue”).

legislature.” Minn. Stat. § 645.16 (2016). Legislative intent is ascertained “primarily from the language of the statute itself.” *Brayton v. Pawlenty*, 781 N.W.2d 357, 363 (Minn. 2010) (quoting *Gleason v. Geary*, 214 Minn. 499, 516, 8 N.W.2d 808, 816 (1943)). “When the Legislature’s intent is discernible from plain and unambiguous language, statutory construction is neither necessary nor permitted; and courts apply the statute’s plain meaning.” *State v. Jones*, 848 N.W.2d 528, 535 (Minn. 2014) (citing *Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001)).

Words and phrases in statutes are generally to be construed “according to their common and approved usage.” Minn. Stat. § 645.08(1) (2016). But we do not apply the common-law definition of a word if the statute provides its own definition. *State v. Schmid*, 859 N.W.2d 816, 820 (Minn. 2015). In this case, the legislature has provided a definition of “wholesale sales price” applicable to all of chapter 297F. During the period at issue here (May 2012 through December 2013), the definition of “wholesale sales price” read as follows:

“Wholesale sales price” means the price stated on the price list in effect at the time of sale for which a manufacturer or person sells a tobacco product to a distributor, exclusive of any discount, promotional offer, or other reduction. For purposes of this subdivision, “price list” means the manufacturer’s price at which tobacco products are made available for sale to all distributors on an ongoing basis.

Minn. Stat. § 297A.01, subd. 23. In other words, “wholesale sales price” was limited to the price at which the “tobacco product” was sold, excluding additional charges such as shipping and handling. Moreover, “wholesale sales price” was not to be reduced by discounts or promotions. *Id.* (“exclusive of any discount, promotional offer, or other reduction”). Finally, in determining the “wholesale sales price,” we may consider only “the price stated on the price list in effect at the time of sale.” *Id.* With this definition in mind, we turn to the undisputed facts of the case.



In support of their cross-motions, the parties submitted copies of Winner Tobacco's purchase records from May 2012 to December 2013.<sup>14</sup> The Commissioner posits, and Winner Tobacco does not disagree, that of the 28 manufacturers from which Winner Tobacco purchased tobacco or related products during those months, most manufacturers specified (and Winner Tobacco paid state tax on the basis of) only a total invoice price that did not mention federal excise tax. For example, on May 18, 2012, John Middleton, an Altria Company, invoiced Winner Tobacco a total of \$12,227.50 (before discounts) for cigars.<sup>15</sup> The John Middleton invoice listed the particular cigars purchased (for example, "BLK&MLD CGR 30-10/5"), the quantity in cases of each cigar purchased (for example, three cases of BLK&MLD CGR 30-10/5), the price per case of each cigar (\$564.00 per case of BLK&MLD CGR 30-10/5), and the total purchase amount of each cigar (\$2,538.00 of BLK&MLD CGR 30-10/5), without any mention of federal excise tax.<sup>16</sup> Likewise, on May 18, 2012, National Tobacco invoiced Winner Tobacco a total of \$4,153.74 for cases of snuff and other loose tobaccos.<sup>17</sup> The National Tobacco invoice listed the particular

---

<sup>14</sup> Kitchak Aff. Exs. 2 (May 2012 invoices), 3 (June 2012 invoices), 4 (July 2012 invoices), 5 (August 2012 invoices), 6 (September 2012 invoices), 7 (October 2012 invoices), 8 (November 2012 invoices), 9 (December 2012 invoices), 10 (January 2013 invoices), 11 (February 2013 invoices), 12 (March 2013 invoices), 13 (April 2013 invoices), 14 (May 2013 invoices), 15 (June 2013 invoices), 16 (July 2013 invoices), 17 (August 2013 invoices), 18 (September 2013 invoices), 19 (October 2013 invoices), 20 (November 2013 invoices), 21 (December 2013 invoices) (filed May 2, 2018). In lieu of price lists, we assume (without deciding) that the price stated on the manufacturer's invoice was in each case "the price stated on the price list in effect at the time of sale."

<sup>15</sup> Kitchak Aff. Ex. 2, at APP039. Winner Tobacco received a 2.25% discount from John Middleton, apparently for paying the invoice electronically.

<sup>16</sup> Kitchak Aff. Ex. 2, at APP039.

<sup>17</sup> Kitchak Aff. Ex. 2, at APP043. Winner Tobacco received a 2.1% discount from National Tobacco for paying the invoice through Automated Clearing House, a network used for electronic payments and money transfers.

substance purchased (for example, “Stoker’s Peach 16 oz. – case”), the quantity in cases (1), the “unit price” (\$193.44), and the total (\$193.44), without any mention of federal excise tax.<sup>18</sup>

Three manufacturers (Inter-continental Cigar Corporation; Kretek International, Inc.; and Republic Tobacco), however, reported federal excise tax on the products sold, separately from the product prices themselves. For example, on May 3, 2012, Inter-continental Cigar Corporation invoiced Winner Tobacco for \$6,201.27 of tobacco products *plus* \$797.22 of federal excise tax, for a total of \$6,998.40.<sup>19</sup> Similarly, on May 7, 2012, Kretek International, Inc., invoiced Winner Tobacco for \$5,232.00 of tobacco products *plus* \$1,128.00 of federal excise tax, for a total of \$6,360.00.<sup>20</sup> Likewise, on May 2, 2012, Republic Tobacco invoiced Winner Tobacco for \$9,098.77 of tobacco products *plus* \$8,250.82 of federal excise tax, for a total of \$17,349.59 (before discounts).<sup>21</sup>

With respect to those three manufacturers, Winner Tobacco paid Minnesota tobacco tax on *more than* “the price for which a manufacturer sells a tobacco product.”<sup>22</sup> We therefore grant Winner Tobacco’s motion for summary judgment, and deny the Commissioner’s motion for

---

<sup>18</sup> Kitchak Aff. Ex. 2, at APP043.

<sup>19</sup> Kitchak Aff. Ex. 2 at APP024. Winner Tobacco received no discount from Inter-continental for electronic payments.

<sup>20</sup> Kitchak Aff. Ex. 2, at APP025. We note that Kretek International paid “state tax” of \$2,181.76, which is reflected in the total invoice amount.

<sup>21</sup> Kitchak Aff. Ex. 2, at APP047.

<sup>22</sup> Winner Tobacco also filed two affidavits of Roger Gerhard, attesting that the wholesale price of the tobacco products sold by Altadis USA, Inc., and by Commonwealth Brands, Inc., respectively, included federal excise tax. Affidavit of Altadis USA, Inc. (filed May 24, 2018); Affidavit of Commonwealth Brands, Inc. (filed May 24, 2018). Because we consider only “the price for which a manufacturer sells a tobacco product,” we give Mr. Gerhard’s affidavits no weight.

summary judgment, to the extent that the invoices made part of the record show that Winner Tobacco paid Minnesota tobacco tax on amounts in excess of the price of tobacco and related products as stated on the invoice.

Winner Tobacco's arguments in support of a larger refund—a refund of federal excise tax not separate from the price of the tobacco product itself—are contrary to the statutory definition of “wholesale sales price.” We examine, and reject, each in turn.

**a. Economic incidence.** According to Winner Tobacco, “[w]hether FET is separately stated or not is of no consequence” because “[i]t is imposed at a fixed rate per pound based on tobacco type and is calculable on all the invoices from the supplier to Winner.”<sup>23</sup> Winner Tobacco therefore urges us to go further, and order the Commissioner to refund Minnesota tobacco tax on federal excise tax allegedly incorporated into the manufacturer's stated prices. For example, on May 3, 2012, R.S.B. invoiced Winner Tobacco a total of \$76,320 for the purchase of tobacco products.<sup>24</sup> Although federal excise tax is not separately listed on the invoice, Winner Tobacco argues the tax “would have been paid for the tobacco to enter or be manufactured in the United States.”<sup>25</sup> Winner claims it therefore necessarily “reimbursed its supplier for \$28,503.31 of previously paid FET and paid 70% [Minnesota] tobacco tax on the FET reimbursement.”<sup>26</sup>

---

<sup>23</sup> Mem. Winner Tobacco Wholesale, Inc., Supp. Cross-Mot. Summ. J. 4.

<sup>24</sup> Kitchak Aff. Ex. 2, at APP022. Winner Tobacco did not pay Minnesota tobacco tax, and the Commissioner does not seek to collect Minnesota tobacco tax, on such costs as shipping and handling. *See, e.g., id.*

<sup>25</sup> Mem. Winner Tobacco Wholesale, Inc., Supp. Cross-Mot. Summ. J. 4.

<sup>26</sup> Mem. Winner Tobacco Wholesale, Inc., Supp. Cross-Mot. Summ. J. 4.

Winner Tobacco argues that it is entitled to a refund because the *economic incidence* of the federal excise tax necessarily fell upon it.<sup>27</sup> We disagree. The mere fact that tobacco manufacturers must pay a federal excise tax does not, without more, establish that such excise taxes are necessarily passed on to buyers like Winner Tobacco: a seller may, of course, choose to absorb particular costs and cost increases by reducing its profit margin, rather than pass those costs and cost increases on to buyers. Regardless, by defining “wholesale sales price” as “the price stated on the price list in effect at the time of sale,” the Minnesota Legislature has provided a clear and unambiguous basis for taxation that is independent of concerns of economic incidence. If Winner Tobacco has paid Minnesota tobacco tax on “the price stated on the price list in effect at the time of sale,” it has paid only what the law requires—no more—and is not entitled to a refund, *even if* “the price stated on the price list” includes federal excise tax.

In addition, granting Winner Tobacco a refund on tobacco taxes not separately stated on the manufacturer’s invoice would amount to “[an]other reduction” from “the price stated on the price list in effect at the time of sale.” Such a reduction would be directly contrary to the plain language of subdivision 23: “ ‘Wholesale sales price’ means the price stated on the price list in effect at the time of sale . . . *exclusive of any discount, promotional offer, or other reduction.*” Minn. Stat. § 297F.01, subd. 23.

**b. The “tobacco product” itself.** Winner Tobacco further argues that because the plain language of subdivision 23 limits the taxable base to the price of “the tobacco product” itself,

---

<sup>27</sup> Mem. Winner Tobacco Wholesale, Inc., Resp. Comm’r’s Mot. Summ. J. 10-11 (filed May 23, 2018) (“[A] manufacturer or importer would be out of business if they did [not] charge for a reimbursement of FET. Therefore, FET must have been paid and passed along as evidenced by the invoices provided by Winner.”).

it is necessarily exclusive of federal excise tax.<sup>28</sup> Tobacco manufacturers no doubt include in their prices many costs other than “the tobacco product” itself, such as the costs of processing, shipping, and handling. Yet Winner Tobacco has not sought a refund of Minnesota tax paid on those amounts and, plainly, subdivision 23 does not authorize one.

**c. Florida case law.** Winner Tobacco also argues that the issue has been effectively decided for us by courts in other states, particularly Florida. In *Micjo, Inc. v. Department of Business & Professional Regulation*, the Florida Court of Appeals ruled that Florida’s tobacco tax applied to only “the manufacturer’s price of the tobacco product,” excluding “reimbursement of federal excise tax, shipping costs, and other charges.” 78 So. 3d 124, 126-27 (Fla. 2d Dist. Ct. App. 2012). But Florida’s definition of “wholesale sales price”—“the established price for which a manufacturer sells a tobacco product to a distributor, exclusive of any diminution by volume or other discounts”—differs from Minnesota’s. *Id.* at 126. As we have explained, Minnesota law limits the evidence we may consider in determining the “wholesale sales price” to “the price list in effect at the time of sale.” Florida law apparently does not. *Micjo* is not instructive here.

**d. Later amendment of subdivision 23.** Winner Tobacco further argues that its entitlement to a refund is confirmed by the Minnesota Legislature’s 2013 amendment of the definition of “wholesale sales price.” In 2013, the legislature amended Minn. Stat. § 297F.01, subd. 23, to read as follows:

“Wholesale sales price” means the price at which a distributor purchases a tobacco product. Wholesale sales price includes the applicable federal excise tax, freight charges, or packaging costs, regardless of whether they were included in the purchase price.

---

<sup>28</sup> Mem. Winner Tobacco Wholesale, Inc., Supp. Cross-Mot. Summ. J. 7 (“FET was not part of the sale price for the ‘tobacco product’ ”).

Act of May 23, 2013, ch. 143, art. 16, § 4, 2013 Minn. Laws 2445, 2736. Winner argues that because the legislature explicitly included “federal excise tax” in the calculation of “wholesale sales price” *after* 2013, federal excise tax cannot have been included in the calculation of “wholesale sales price” *before* that. Again, we disagree.

The Minnesota Supreme Court considered Minn. Stat. § 297F.01, subd. 23 (as it read in 2003 and until the 2013 amendment), to be unambiguous. *McLane Minn., Inc. v. Comm’r of Revenue*, 773 N.W.2d 289, 297 (Minn. 2009). Indeed, the parties themselves cite *McLane Minnesota* in arguing that the definition of “wholesale sales price” in effect during the period at issue is unambiguous.<sup>29</sup> If a statute is unambiguous, we have no need to resort to legislative history, past or future, to interpret it. *See, e.g., State v. Asfeld*, 662 N.W.2d 534, 541 (Minn. 2003). Moreover, even if the legislature intended to change the treatment of federal excise tax, one could conclude only that before the 2013 amendment, federal excise tax “included in the purchase price” *was* subject to Minnesota tobacco tax and federal excise tax not “included in the purchase price” *was not*. That is precisely the result we reach here.

e. **Ambiguity.** Finally, Winner Tobacco argues that even “the slightest doubt” about the definition of “wholesale sales price” must be resolved in its favor.<sup>30</sup> Winner Tobacco misstates the law on this point. As the Minnesota Supreme Court recently explained, when faced with an ambiguous statute we must first “consider among other matters: the purpose of the law, the circumstances of its enactment, and the mischief the law was meant to remedy.” *Marks v. Comm’r of Revenue*, 875 N.W.2d 321, 328 (Minn. 2016) (quoting *BCBSM, Inc. v. Comm’r of Revenue*, 663

---

<sup>29</sup> Mem. Winner Tobacco Wholesale, Inc., Supp. Cross-Mot. Summ. J. 5 (calling the definition of “wholesale sales price” “clear and unambiguous” and citing *McLane Minnesota*); Mem. Supp. Comm’r’s Mot. Summ. J. 6 (filed May 2, 2018) (citing *McLane Minnesota*).

<sup>30</sup> Mem. Winner Tobacco Wholesale, Inc., Supp. Cross-Mot. Summ. J. 11.

N.W.2d 531, 533 (Minn. 2003)). Only if, after considering these matters, “we are still unable to ascertain legislative intent” are we to resolve the ambiguity in favor of the taxpayer. *Id.* Because the statute at issue here is unambiguous, we do not reach those other considerations, nor do we “apply the principle of construction specific to tax cases.” *Id.*

## 2. Constitutional claim

Winner Tobacco further claims that the Commissioner’s interpretation of “wholesale sales price” violates the Uniformity Clause of Article X, Section 1, of the Minnesota Constitution, which requires that taxes be “uniform upon the same class of subjects.”<sup>31</sup> According to Winner Tobacco’s notice of appeal, under the Commissioner’s interpretation of “wholesale sales price,” “a distributor [purchasing tobacco products from a foreign manufacturer] will pay less Minnesota [tobacco] tax [than it would have paid to purchase the same products from a domestic tobacco manufacturer] because a foreign manufacturer’s invoice will be devoid of [federal excise tax],” and therefore “[t]he Commissioner’s refund denial has a discriminatory effect depending on the

---

<sup>31</sup> Winner Tobacco’s memorandum in support of summary judgment urges us to find that the Commissioner’s interpretation of “wholesale sales price” also violates the Import-Export Clause and the Commerce Clause of the United States Constitution. Mem. Winner Tobacco Wholesale, Inc., Supp. Cross-Mot. Summ. J. 11-14. Because neither of these claims appears in Winner Tobacco’s notice of appeal, the Commissioner was denied the opportunity to conduct discovery on them and our consideration of them would violate the Commissioner’s right to due process. We therefore decline to reach them.

In addition, a challenge to the Uniformity Clause of Article X, section 1, is in effect a claim that the taxpayer has been denied equal protection of the laws. *Westling v. Cty. of Mille Lacs*, 581 N.W.2d 815, 820 (Minn. 1998) (“It is established in Minnesota that the uniformity provision of the state constitution is no more restrictive upon the legislature’s power to tax or classify than is the equal protection clause in the Fourteenth Amendment to the United States Constitution.”). A claim of denial of equal protection requires a showing of intentional or purposeful discrimination, which “is not presumed.” *Draganosky v. Minn. Bd. of Psychology*, 367 N.W.2d 521, 526 n.4 (Minn. 1985) (citing *Snowden v. Hughes*, 321 U.S. 1, 8 (1944)). Winner Tobacco did not allege, much less show, that the Commissioner’s assessment of Minnesota tobacco tax amounted to intentional or purposeful discrimination.

location of the manufacturer.”<sup>32</sup> Winner Tobacco does not allege that the definition of “wholesale sales price” before 2013 was, on its face, unconstitutional. Having determined that the Commissioner’s interpretation of “wholesale sales price” conforms to the law, we necessarily reject Winner Tobacco’s as-applied constitutional challenge.

In summary, we grant in part Winner Tobacco’s motion for summary judgment and deny in part the Commissioner’s motion for summary judgment, ordering the Commissioner to refund Minnesota tobacco tax to the extent separately stated on any invoice for tobacco products paid by Winner Tobacco between May 2012 and December 2013. In all other respects, we deny Winner Tobacco’s motion for summary judgment and grant the Commissioner’s motion for summary judgment.

J.H.T.

---

<sup>32</sup> Notice Appeal ¶¶ 20-21.