STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BRANDY'S PRODUCTS, INC.,

Petitioner,

vs. Case No. 14-3496

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

Respondent.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on January 9, 2015, at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: Gerald J. Donnini, Esquire
Joseph C. Moffa, Esquire
Moffa, Gainor, and Sutton, P.A.
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For Respondent: Elizabeth A. Teegan, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner, a licensed distributor of tobacco products, was required to pay an excise tax and surcharge, which the state levies on specified tobacco products, when it regularly brought into Florida shipments of a tobacco-containing product marketed as a cigar wrapper and known as a "blunt wrap."

PRELIMINARY STATEMENT

At all relevant times, Petitioner Brandy's Products, Inc., was a licensed distributor of tobacco products in the state of Florida, subject to the regulatory authority of Respondent Department of Business and Professional Regulation. Among other responsibilities, Respondent collects the state taxes imposed on cigarettes and other tobacco products.

In 2009, Respondent decided that a type of rolling paper marketed as a cigar wrapper and known popularly as a "blunt wrap" constitutes a taxable "tobacco product" because tobacco is a raw material used in manufacturing the finished good, which consequently contains tobacco. Respondent resolved to start collecting tobacco taxes on blunt wraps brought into the state of Florida from July 1, 2009, forward. Both before and after this effective date, Petitioner purchased blunt wraps for resale and brought them into the state. Unaware of Respondent's stand, which was never officially communicated to distributors,

Petitioner did not remit tobacco taxes on any of these purchases.

In the course of conducting an audit of one of Petitioner's suppliers, Respondent came into possession of records reflecting Petitioner's purchases of blunt wraps, from which it determined that Petitioner owed the state $15,911.60 in excise taxes and $38,187.72 in surcharges for bringing in this purported "tobacco product," together with interest and a penalty. On March 1, 2013, Respondent issued an assessment letter requesting that Petitioner immediately pay $71,868.23.

Petitioner disputed the assessment and tried, but failed, to persuade Respondent to change its mind. On May 19, 2014, Respondent issued a Notice of Decision and Final Audit Assessment, which upheld the original assessment in its entirety. Petitioner timely requested an administrative hearing. On July 24, 2014, Respondent referred Petitioner's Petition for Chapter 120 Hearing to the Division of Administrative Hearings, where an administrative law judge was assigned to conduct the hearing.

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 two employees: Gerald Russo, Senior Tax Audit Administrator; and Nancy Cisek, Senior Tax Specialist, each of whom testified in person.

Additionally, Respondent Exhibits 1 and 2 were admitted into evidence. Petitioner's sole witness was Maryanne Palino, president of the corporation. Petitioner Exhibits 2 through 9 were received as well.

The parties stipulated at hearing that the mathematical calculations Respondent performed as part of the subject audit are correct, meaning that if all of the disputed factual and legal grounds upon which Respondent has relied were decided in Respondent's favor, then the sums Respondent seeks to collect from Petitioner are accurate.

The two-volume final hearing transcript was filed on January 23, 2015. Each party timely filed a Proposed Recommended Order on February 12, 2015, in accordance with the deadline established at the conclusion of the hearing.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2014 Florida Statutes.

FINDINGS OF FACT

1. At all relevant times, Petitioner Brandy's Products, Inc. ("Brandy's"), was a wholesale distributor that supplied more than 2,000 different products to retailers such as gas stations and convenience stores. Among these products were cigarettes, which Brandy's was authorized to sell pursuant to a valid, current permit, and other "tobacco products" besides

cigarettes, in accordance with a separate distributor's license, numbered 66-00115.

2. The state of Florida levies an excise tax and a surcharge upon tobacco products. A distributor becomes liable to pay these impositions, e.g., when it brings such goods into the state, or when it ships or transports tobacco products to retailers in the state. Respondent Department of Business and Professional Regulation ("Department" or "DBPR") is the state agency authorized to administer and enforce the laws relating to the taxation of cigarettes and other tobacco products.

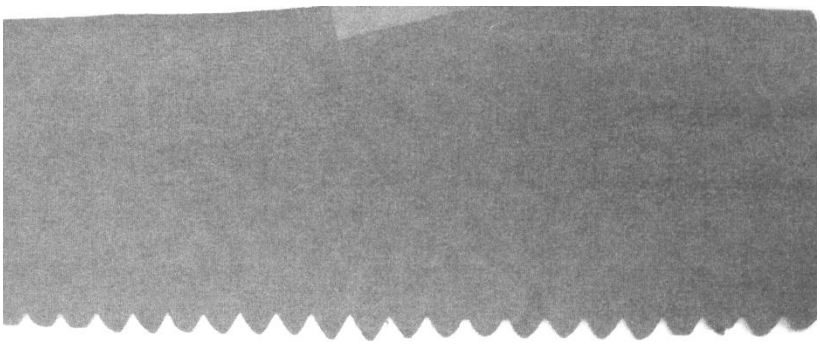
3. The following "tobacco products" are taxable under Florida law:

> 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(11), Fla. Stat. (defining "tobacco products")(emphasis added).

4. At all relevant times, Brandy's sold a product that is marketed as a cigar wrapper (or rolling paper) and known

colloquially as a "blunt wrap." A blunt wrap looks like this[1/] (except for the color, which in reality is a shade of brown):



Tobacco is one of the raw materials used to manufacture the blunt wraps at issue, which consequently contain tobacco as an ingredient. The dispute at the heart of this case is whether blunt wraps fall within the definition of "tobacco products" set forth above, as the Department argues, which would make them taxable, or outside of that definition, as Brandy's maintains, which would place blunt wraps beyond the reach of the taxing statutes.

5. The Department's position hardened in the first half of 2009 after a period of internal discussion triggered by Congress's enactment of legislation which expanded the Internal Revenue Code's definition of "roll-your-own tobacco" to include tobacco-based wrappers for cigarettes or cigars, thereby subjecting blunt wraps purchased after March 31, 2009, to taxation at the federal level.[2/] Although the Florida Legislature had not similarly amended the relevant statutory definition of "tobacco products" (and has not done so as of this

writing), the Department decided that blunt wraps are a form of "loose tobacco suitable for smoking" and thus taxable. The Department declared that July 1, 2009, would be the effective date of its new policy, and it began assessing the excise tax and surcharge on purchases of blunt wraps occurring from that day forward.[3/]

6. The Department did not adopt a rule reflecting its decision to treat blunt wraps as a taxable tobacco product, nor did the agency give any official notice to licensed distributors such as Brandy's that the state would start taxing blunt wraps on July 1, 2009.

7. Brandy's had purchased blunt wraps for sale to customers in Florida for some years before July 1, 2009, but during that time had not, in connection with such transactions, remitted to the state any amounts for the excise tax and surcharge on tobacco products. This was because, until July 1, 2009, the Department had never applied the term "tobacco products" as defined in section 210.25(11), Florida Statutes, pursuant to an understanding that it includes blunt wraps. Brandy's, which was unaware of the Department's expansive reinterpretation of section 210.25(11) in 2009, continued doing business after July 1 of that year just as it had before that date. Consequently, Brandy's did not remit to the Department any amounts for the Florida excise tax and surcharge on tobacco

products based on purchases of blunt wraps during the two-year assessment period at issue, from July 7, 2009, until August 2, 2011.

8. DBPR routinely audits licensed distributors of tobacco products such as Brandy's. At regular, six-month intervals, an auditor conducts an on-site review of the licensee's books and records pertaining to taxable purchases, comparing the documents to the licensee's tax returns. During the assessment period, Brandy's never produced records showing purchases of blunt wraps because Brandy's reasonably believed such purchases remained nontaxable. The auditors never asked to see records relating to blunt wraps, which would have provided Brandy's some notice, at least, of the Department's new policy. The evidence does *not* support a finding that Brandy's knowingly withheld or concealed relevant information from the auditors.

9. Unbeknownst to Brandy's, sometime in 2011 or 2012 the Department obtained records from an out-of-state company called National Honey Almond ("NHA"), a supplier of Brandy's. The NHA records included invoices showing the quantities and purchase prices of blunt wraps that NHA had delivered to Brandy's from July 2009 through September 2011. The state excise tax and surcharge had not been paid on these purchases.

10. Using the NHA invoices, the Department calculated that sums totaling $15,911.60 in excise taxes and $38,187.72 in

surcharges were due from Brandy's on its so-called "untaxed purchases" of blunt wraps from NHA. Together with interest ($12,358.98) and a penalty of $5,409.93, the Department figured that the total liability was $71,868.23. By letter dated March 1, 2013, the Department asked Brandy's to remit payment of this amount within 10 days after receiving the letter. This letter gave Brandy's its first notice that the Department considered blunt wraps to be a taxable tobacco product, but it failed to inform Brandy's that the assessment could be contested.

11. Nevertheless, Brandy's promptly requested an "informal hearing" and tendered a token payment of $1,500 to show good faith. Following that, the Department——without first conducting a hearing——sent Brandy's a letter dated April 4, 2014, in which the Department's "final request" for payment of $70,368.23 was made. Once again, the Department neglected to advise Brandy's of its right to challenge the demand.

12. Brandy's then filed a written protest of the assessment, by letter dated April 11, 2014. This led to an audit assessment conference on May 13, 2014, at which the Department stuck to its guns. On May 19, 2014, the Department issued its "Notice of Decision and Final Audit Assessment," which demanded that Brandy's pay $70,368.23 within 10 days. The Notice informed Brandy's of its right to request a judicial

proceeding or administrative hearing to contest the assessment. Brandy's timely initiated this administrative proceeding.

CONCLUSIONS OF LAW

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

14. Although designated the "respondent," the Department has the initial burden to prove, by a preponderance of the evidence, "that an assessment has been made against the taxpayer and the factual and legal grounds upon which the . . . department made the assessment." § 120.80(14)(b)2., Fla. Stat. If the Department meets its burden, then the taxpayer must establish, also by the greater weight of the evidence, that the assessment is incorrect. See IPC Sports, Inc. v. Dep't of Rev., 829 So. 2d 330, 332 (Fla. 3d DCA 2002).

15. The tax on tobacco products is levied pursuant to section 210.30, Florida Statutes, which provides in relevant part:

> (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.

16. In addition to the excise tax, the state imposes a surcharge on tobacco products, as follows:

> (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.

§ 210.276, Fla. Stat.

17. The term "tobacco products" is defined, for the purposes of the tax and surcharge, in section 210.25(11), which is quoted in paragraph 3 of this Recommended Order. Among the items mentioned in the definition is "loose tobacco suitable for smoking." The Department contends that blunt wraps are a form of loose tobacco suitable for smoking.

18. The legislature did not tax all products containing tobacco. Rather, it "taxed only those specifically enumerated

in the statute." See Fla. S & L Servs., Inc. v. Dep't of Rev., 443 So. 2d 120, 122 (Fla. 1st DCA 1983)(discussing sales tax on telephone services). Statutory definitions such as the one found in section 210.25(11), which determine "what comes within the tax imposition language," circumscribe the extent of the taxing authority. See Dep't of Rev. v. GTE Mobilnet, Inc., 727 So. 2d 1125, 1128 (Fla. 2d DCA 1999). Thus, everything outside the definition of a taxable transaction is nontaxable, not because such things are exempt from the tax, but because the tax does not extend to them.

19. In applying taxing statutes, courts must be careful not to subject to tax anything which has not been clearly so burdened. "Taxes cannot be imposed except in clear and unequivocal language. Taxation by implication is not permitted." Fla. S & L Servs., 443 So. 2d at 122. The "authority to tax must be strictly construed." GTE Mobilnet, 727 So. 2d at 1128. As the Florida Supreme Court explained,

> It is a fundamental rule of construction that tax laws are to be construed strongly in favor of the taxpayer and against the government, and that all ambiguities or doubts are to be resolved in favor of the taxpayer. This salutary principle is found in the reason that the duty to pay taxes, which necessary to the business of the sovereign, is still a duty of pure statutory creation and taxes may be collected only within the clear definite boundaries recited by statute.

Maas Bros., Inc. v. Dickinson, 195 So. 2d 193, 198 (Fla. 1967); see also Mikos v. Ringling Bros.-Barnum & Bailey Combined Shows, 497 So. 2d 630, 632 (Fla. 1986)("The courts are not taxing authorities and cannot rewrite the statute.").

20. The evidence in this case establishes without dispute that tobacco is a raw material used to manufacture blunt wraps. Because blunt wraps are composed in part of tobacco, it would be neither surprising nor confusing, in casual conversation, to refer to them as a tobacco product. Here, however, the term "tobacco products" is specifically and precisely defined for a particular purpose, namely to delimit the scope of a taxing statute. Contrary to the Department's contention, section 210.25(11) clearly does *not* extend to blunt wraps, despite their tobacco content.

21. First, though, the undersigned cannot help but notice that the Department's policy of treating blunt wraps as taxable "tobacco products" appears to be a statement of general applicability that, instead of merely echoing the statute it ostensibly implements, prescribes law by inflating an existing statute with the breath of new meaning. Section 120.57(1)(e)1., Florida Statutes, instructs that "[a]n agency or an administrative law judge may not base agency action that determines the substantial interests of a party on an unadopted rule." The statute further mandates that the "administrative

law judge shall determine whether an agency statement constitutes an unadopted rule." Neither directive is dependent upon the request of a party.[4/] Thus, the undersigned must decide whether the Department's statement regarding the taxability of blunt wraps (see endnote 3) is an unadopted rule.

22. An "unadopted rule" is "an agency statement that meets the definition of the term 'rule,' but that has not been adopted pursuant to the requirements of s. 120.54." § 120.52(20), Fla. Stat. The term "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. The term also includes the amendment or repeal of a rule.

§ 120.52(16), Fla. Stat.

23. To be a rule,

> a statement of general applicability must operate in the manner of a law. Thus, if the statement's effect is to create stability and predictability within its field of operation; if it treats all those with like cases equally; if it requires affected persons to conform their behavior to a common standard; or if it creates or extinguishes rights, privileges, or entitlements, then the statement is a rule."

Fla. Quarter Horse Racing Ass'n, Inc. v. Dep't of Bus. & Prof'l Reg., Case No. 11-5796RU, 2013 Fla. Div. Adm. Hear. LEXIS 558,

37-38 (Fla. DOAH May 6, 2013), aff'd, Fla. Quarter Horse Track Ass'n v. Dep't of Bus. & Prof'l Reg., 133 So. 3d 1118 (Fla. 1st DCA 2014).

24. Moreover, because the definition of the term "rule" expressly includes statements of general applicability that implement or interpret law, an agency's interpretation of a statute that gives the statute a meaning not readily apparent from its literal reading and purports to create rights, require compliance, or otherwise have the direct and consistent effect of law, is a rule, but one which simply reiterates a statutory mandate is not. Id. at 39-40; see also State Bd. of Admin. v. Huberty, 46 So. 3d 1144, 1147 (Fla. 1st DCA 2010); Beverly Enterprises-Florida, Inc. v. Dep't of HRS, 573 So. 2d 19, 22 (Fla. 1st DCA 1990); St. Francis Hosp., Inc. v. Dep't of HRS, 553 So. 2d 1351, 1354 (Fla. 1st DCA 1989).

25. The Department's policy regarding the taxability of blunt wraps is presented as an interpretation of section 210.25(11), Florida Statutes; specifically, the agency statement construes the phrase: "loose tobacco suitable for smoking." Because of this, a distinction must be made between the questions of (a) whether the agency's interpretive statement meets the definition of the term "rule" and (b) whether the agency statement is the correct interpretation of the statute. While it might be tempting to conflate these issues, the merit

of the agency's statutory interpretation is irrelevant to the question of whether the statement is a rule by definition.

26. Thus, although the ALJ might determine that the agency's interpretation is correct, such a conclusion would not remove the statement from the definition of the term "rule." An agency's correct interpretation of an ambiguous statute, in other words, is no less an unadopted rule than a misinterpretation of the statute, if the agency statement meets the definition of the term "rule."

27. And yet, if the agency's interpretation of a controlling statute constitutes an unadopted rule and for that reason cannot be applied to determine the substantial interests of a party, the *statute* remains in control and must be followed. Section 120.57(1)(e) does not prohibit either the ALJ or the agency from determining a party's substantial interests based upon the ALJ's best understanding or interpretation of the governing statute. As a result, the merit of an agency's interpretative statement of general applicability is not irrelevant to the question of how the case should be decided, even if the statement is an unadopted rule which cannot be used to decide a party's substantial interests. An agency statement might still be persuasive, after all, notwithstanding that its use as an authoritative rule of decision is forbidden.

28. When considering whether an agency's interpretive statement constitutes an unadopted rule, the analysis should start with a determination regarding the existence of ambiguity, if any, in the statutory language, which is a question of law. It is well settled that when a statute is clear and unambiguous, the function of the court (or ALJ) is to apply the law, for an unambiguous provision requires no interpretation or construction. See, e.g., Osborne v. Dumoulin, 55 So. 3d 577, 581 (Fla. 2011)("Only when the statutory language is unclear or ambiguous is it necessary to apply principles of statutory construction to discern its meaning."); Verizon Fla. v. Jacobs, 810 So. 2d 906, 908 (Fla. 2002); Shelby Mut. Ins. Co. v. Smith, 556 So. 2d 393, 395 (Fla. 1990). Thus, if the statute is clear and unambiguous as a matter of law and the agency statement merely reiterates the plain statutory mandate, then the statement is not a rule by definition, and the statute should be applied according to its plain meaning, consistent with the agency statement.

29. On the other hand, if the statute is clear and unambiguous and the agency statement modifies, contravenes, enlarges, restricts, or otherwise changes the plain meaning of the statute, then the statement is an unadopted rule, which the ALJ and agency must disregard pursuant to section 120.57(1)(e), and the party's substantial interests must be determined based

upon the plain language of the unambiguous statute. See Campus Commc'ns, Inc. v. Dep't of Rev., 473 So. 2d 1290, 1295 (Fla. 1985)(words of common usage in a statute must be understood and applied not in a technical sense, or as defined in an invalid rule, but according to "their plain and ordinary signification").[5/]

30. The situation is a bit more complicated if the statutory language is ambiguous. "A statute is normally regarded as 'ambiguous' when its language may permit two or more outcomes." Hess v. Walton, 898 So. 2d 1046, 1049 (Fla. 2d DCA 2005). When the statute is ambiguous, "a court may turn to the rules of statutory interpretation and construction." Anderson v. State, 87 So. 3d 774, 777 (Fla. 2012). If the statute is ambiguous and the agency statement interpreting the statute is an unadopted rule, then the ALJ must disregard the unadopted rule qua rule and follow the statute, notwithstanding its ambiguity.

31. This is because, to repeat for emphasis, section 120.57(1)(e) prohibits application of an unadopted rule *as a rule* but does not compel the ALJ and the agency to ignore a controlling *statute*, even an ambiguous one. To follow an ambiguous statute, however, the ALJ must construe the ambiguous statute, and in doing so should treat the agency's interpretation, not as authoritative or binding, i.e., *as a*

rule, but as an advocate's argument that might be persuasive depending on its cogency. To be sure, a determination that an agency's interpretive statement constitutes a rule by definition has adverse consequences for the agency, but among them is not the foregone conclusion that the agency's statutory interpretation is *wrong*.

32. In the end, the ALJ must recommend that the party's substantial interests be determined according to the ALJ's best interpretation of the ambiguous statute, which might or might not accord with the agency's interpretation. Applying the ALJ's interpretation of the law to determine a party's substantial interests in a particular case would not run afoul of section 120.57(1)(e), even if the ALJ's best interpretation happened to agree with the agency's interpretation, but the agency would be vulnerable to a challenge under section 120.56(4) unless and until its statement were either abandoned or adopted as a rule.[6/]

33. Turning to the statement under consideration, the undersigned need not resort to a rule of strict or literal construction to conclude that section 210.25(11) does not describe blunt wraps. The statutory language is unambiguous and requires no interpretation, but even if it were amenable to construction, the most expansive, *reasonable* reading of "loose tobacco suitable for smoking" still would not encompass these items. This is because a blunt wrap is a distinct, cohesive,

uniform product, which upon inspection is readily seen to have been cut to a specific, predetermined shape. No tobacco, as such, is visible when examining a blunt wrap, much less "loose" tobacco or any other "loose" ingredients for that matter. In short, a blunt wrap is no more loose tobacco than a piece of writing paper is loose wood.[7/]

34. DBPR's interpretation of section 210.25(11) as including blunt wraps within the specialized definition of "tobacco products" is erroneous and unreasonably enlarges the taxing authority in contravention of the plain language of the statute. See Campus Commc'ns, Inc. v. Dep't of Rev., 473 So. 2d 1290, 1291 n.1 (Fla. 1985)("The power to tax lies with the legislative branch. . . . An agency may not impose a tax, by rule or in any other manner."). Correctly understood, giving the words used in section 210.25(11) their plain and ordinary signification, the definition in dispute does not include blunt wraps within its reach.[8/] Blunt wraps are not taxable as "tobacco products."[9/]

35. The Department's statement concerning blunt wraps, apart from being incorrect, also gives the statute a meaning not readily apparent from a literal reading, imposing legally binding tax obligations upon all licensed distributors who purchase blunt wraps and subjecting those who do not remit such taxes to enforcement action. The conclusion that this statement

meets the definition of the term "rule" is practically self-evident. That the policy has its own effective date separate from that of the enabling statute[10/] is 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. Neither the administrative law judge nor the Department may determine the substantial interests of Brandy's based upon this unadopted rule. § 120.57(1)(e)1., Fla. Stat.

36. Brandy's asserts that the disputed assessment is largely time barred pursuant to section 95.091(3)(a)1.b., which provides that DBPR "may determine and assess the amount of any tax, penalty, or interest due" under the taxing statutes it has the authority to administer "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." Contending that DBPR's issuance of the Notice of Decision and Final Audit Assessment on May 19, 2014, constituted the clock-stopping event, Brandy's reasons that the assessable period started, at the earliest, on May 19, 2011, with the result that transactions occurring before that date must be reckoned too old to be taxed. If Brandy's is correct, the two-year assessment period at issue

should be truncated to the few months between May 19, 2011, and August 2, 2011.

37. The Department responds that, pursuant to section 95.091(3)(a)5., it was authorized to make an assessment against Brandy's "[a]t any time" because "the taxpayer failed to make any required payment of the tax" and failed to "disclose[] in writing the tax liability to the department before the department contact[ed] the taxpayer." Inasmuch as the central dispute in this case is whether Brandy's is "required" to pay the subject tobacco taxes on transactions involving blunt wraps, however, the Department's argument begs the question (by assuming that Brandy's failed to make a required tax payment), significantly undermining its persuasive force. Beyond that, DBPR's position suggests, problematically, that practically any dispute over a tax assessment would fall under subparagraph 5's potentially limitless limitation period, since most assessments presumably arise from the Department's allegation that a taxpayer has failed to make a required payment of the tax it seeks to collect.

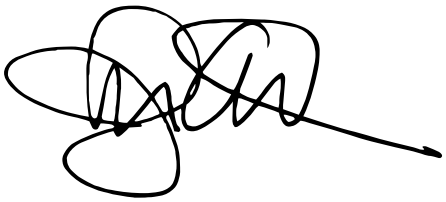
38. Even if the statute of limitations were applied exactly as Brandy's believes it should be, though, the question of whether blunt wraps are taxable as "tobacco products" would persist because a small portion of the assessment period is within the three years preceding the Notice of Decision and

Final Audit Assessment. Having decided the unavoidable issue, and concluded that the transactions at issue are nontaxable, the undersigned will sidestep the issues presented by the parties' statute-of-limitations arguments, for there is no need to determine whether the limitation period had run on some of these transactions, given that no taxes are due on any of them.[11/]

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Business and Professional Regulation enter a final order setting aside the assessment against Brandy's for the excise taxes and surcharges on tobacco products that the Department alleged were due, together with interest and a penalty, on purchases of blunt wraps that Brandy's had made between July 7, 2009, and August 2, 2011.

DONE AND ENTERED this 24th day of February, 2015, in Tallahassee, Leon County, Florida.



JOHN G. VAN LANINGHAM
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of February, 2015.

ENDNOTES

[1/] The photograph reproduced in the text has been sized to scale. Cutting out this picture therefore would yield a rough approximation of the product under discussion, though the genuine article actually has a somewhat soft and damp texture when fresh, becoming brittle over time as it dries out.

[2/] See Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. No. 111-3, 123 Stat. 110 (2009).

[3/] The Department's statement of policy is that all rolling papers made from, or containing *any* trace of, tobacco are "tobacco products" subject to the state excise tax and surcharge as of July 1, 2009.

[4/] Agency action may be based upon an unadopted rule under an extremely narrow exception to the otherwise blanket proscription set forth in subparagraph 1 of the statute. See § 120.57(1)(e)2., Fla. Stat. Reliance upon this exception requires the agency to establish, among other things, that recent legislation has directed the agency to adopt a rule, and

that the agency, despite moving quickly and in good faith to do so, has not had enough time to complete the process. The Department clearly could not make such a showing with regard to the statement under review, for the policy has been in effect for nearly six years and is not the subject of ongoing rulemaking.

[5/] Unadopted rules, as a class, are a subset of the category comprising all invalid exercises of delegated legislative authority. That is, all unadopted rule are necessarily invalid rules, see § 120.52(8)(a), Fla. Stat., but not all invalid rules are unadopted rules, see § 120.52(8)(b)-(f), Fla. Stat.

[6/] The ALJ's interpretation of an ambiguous statute is not, strictly speaking, a statement of *general applicability* because it affects at most only the parties to the proceeding before the ALJ; therefore, the ALJ's statement regarding the meaning of the statute is not an unadopted rule. The agency's settled interpretation of an ambiguous statute which it administers, in contrast, *is* generally applicable, at least where the ambiguity is patent and does not arise from the uncertain application of a facially unambiguous statute to a peculiar or unforeseen factual situation. Such an agency statement is required to be adopted as a rule pursuant to section 120.54(1)(a).

[7/] It is doubtful, moreover, that a blunt wrap, on its own, is "suitable for smoking." There is insufficient persuasive evidence to support a finding one way or the other, however, which means that the Department failed, in this separate instance, to carry its burden of establishing all of the factual grounds supporting the assessment. Yet 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.

[8/] DBPR cites Cadwalader v. Zeh, 151 U.S. 171 (U.S. 1894), in support of an argument that the term "loose tobacco" is a "widely understood" term of art in the "industry," which accordingly must be given its commercial meaning, rather than its plain meaning. In Zeh, the Court observed:

> It has long been a settled rule of interpretation of the statutes imposing duties on imports, that if words used therein to designate particular kinds or classes of goods have a well known signification in our trade and commerce,

> different from their ordinary meaning among the people, the commercial meaning is to prevail, unless Congress has clearly manifested a contrary intention; and that it is only when no commercial meaning is called for or proved, that the common meaning of the words is to be adopted.

Id. at 176. The venerable rule of commercial designation retains its vitality as a guide for interpreting tariff laws. See, e.g., Cent. Prods. Co. v. U.S., 20 Ct. Int'l Trade 862 (Ct. Int'l Trade 1996). The taxes in question here are not imposts or duties, however, which under the Import-Export Clause are revenue sources to which the federal government has exclusive rights. See Art. I, § 10, cl. 2, U.S. Const. Thus, the commercial-designation doctrine is inapplicable. But even if the tariff-term rule were apposite, which it is not, the existence of a commercial designation is a question of fact, with the burden falling on the proponent of the specialized usage to "demonstrate that such tariff term has a meaning which is general (extending over the entire country), definite (certain of understanding), and uniform (the same everywhere in the country)." Id. at 864. The Department did not make such a showing with regard to the term "loose tobacco," and thus it failed to establish a factual basis for abandoning the common meaning of the statutory language.

[9/] The Department argues that its interpretation of section 210.25(11) is entitled to deference since the Department is charged with administering this statute. True enough: "Judicial deference is, of course, owed an agency's interpretation of a statute the agency is charged with administering." Fla. Elec. Comm'n v. Davis, 44 So. 3d 1211, 1215 (Fla. 1st DCA 2010); Fla. Hosp. (Adventist Health) v. Ag. for Health Care Admin., 823 So. 2d 844, 847 (Fla. 1st DCA 2002)(The court is "required to be highly deferential to the agency's interpretation of" a statute the agency is empowered to enforce.). But the Department's argument assumes that the prudential doctrine of *judicial* deference constrains ALJs——a common misunderstanding which confuses the role of the ALJ with that of the court.

Unlike the judiciary, ALJs are participants in the decision-making processes that lead to administrative interpretations of statutes and rules——the very administrative interpretations to which courts defer. (Indeed, deference is sometimes owed to the *ALJ*'s interpretation. Davis, 44 So. 3d at

1215.) The ALJ's duty is to provide the parties an independent and impartial analysis of the law with a view towards helping the agency make the correct decision. In fulfilling this duty, the ALJ should not defer to the agency's interpretation of a statute or rule, as a court would; rather, the ALJ should make independent legal conclusions based upon his or her best interpretation of the controlling law, with the agency's legal interpretations being considered as the positions of a party litigant, entitled to no more or less weight than those of the private party.

The ALJ's independence in this regard in no way diminishes the primary authority of the agency to formulate the administrative interpretation of a statute it is charged with enforcing because the "agency is not required to defer to the administrative law judge on issues of law" over which it has substantive jurisdiction. State Contr'g & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). Instead, the agency may reject such legal conclusions if it "state[s] with particularity [the] reasons for rejecting or modifying such conclusion[s]" and finds, in each instance, "that its substituted conclusion of law . . . is as or more reasonable than that which was rejected or modified." § 120.57(1)(l), Fla. Stat. So, while a court, which has the last word in disputes over the meaning of a statute, can bind the agency to an unwelcome interpretation of a statute within the agency's substantive jurisdiction, an ALJ cannot; the agency, not the ALJ, is ultimately in control of the *administrative* interpretation of a statute it enforces, allowing the ALJ to speak freely while examining the dispute from a disinterested perspective. The undersigned therefore rejects the Department's contention that its interpretation of section 210.25(11) is entitled to deference by the ALJ; it is not.

That said, the agency is required to defer to the ALJ's "determination regarding an unadopted rule under" section 120.57(1)(e)1., which "shall not be rejected . . . unless the agency first determines from a review of the complete record, and states with particularity in the order, that such determination is clearly erroneous or does not comply with essential requirements of law." § 120.57(1)(e)3., Fla. Stat. Thus, if the ALJ finds that the agency's interpretation of a statute is a rule by definition and, further, reaches a different conclusion about the meaning of the statute, then, in that situation, the agency cannot reject the ALJ's interpretation of the statute under section 120.57(1)(l) without first rejecting the ALJ's determination regarding the unadopted

rule, pursuant to section 120.57(1)(e)3. Even so, the agency's inability to base agency action on an unadopted rule in a given proceeding due to an ALJ's determination under section 120.57(1)(e) would not necessarily preclude the agency from applying its preferred interpretation in other cases (as a final order under section 120.56(4) would), or from adopting its interpretation as a rule, which would be the prudent response. See § 120.54(1)(a), Fla. Stat.

[10/] The statutory definition of "tobacco products" was enacted nearly 30 years ago, taking effect on July 1, 1985 (exactly 24 years before the unadopted rule became effective). Ch. 85-141, §§ 1, 5, at 1023-29, Laws of Fla.

[11/] Should resolution of statute-of-limitations dispute become necessary at some future point in this proceeding, it will be seen that the parties' respective positions regarding the statute of limitations are based upon undisputed historical facts and hence can be decided as a matter of law.

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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.