IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

BRANDY'S PRODUCTS, INC.,

Appellant,

CASE NO. 1D15-3101
L.T. Case No. 14-3496

vs.

STATE OF FLORIDA,
DEPARTMENT OF BUSINESS &
PROFESSIONAL REGULATION

Appellee.

_____/

APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

The Appellant, Brandy's Products, Inc., is referred to as "Brandy's" or "Appellant."

The Appellee, Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco is referred to as "Department," "Division," or "Appellee."

Brandy's was the Petitioner during the proceeding below and the Division was the Respondent.

References to the three volume Record on Appeal will be referenced by (ROA, Volume #, at page #). References to the two volume Transcript of Proceedings will be referenced by (ROA, TR, at page #).

STATEMENT OF THE CASE AND FACTS

I. Background of Florida Tobacco Taxing Scheme

While most people are unaware of state wholesale tax on tobacco, it should come as no surprise that tobacco is subject to heavy taxes. In its simplest form, the first person to manufacture or import a "tobacco product," as defined by federal law, into the United States must pay federal tax on the item. 26 U.S.C. § 5701. At the federal level, the tax is imposed on the weight of the product and varies depending

on the type of product that is manufactured or imported.[1] *Id.* Then, when the "tobacco product," as defined by Florida law in section 210.25, Florida Statutes ("Fla. Stat."), is imported into or manufactured in Florida, state tax applies. § 210.276, Fla. Stat. Rather than taxing the items based on weight, Florida chose to tax the products based on sales price. *Id.*

Some of the nuances of Florida's wholesale taxing scheme on tobacco are also noteworthy. Florida law, specifically Chapter 210, Fla. Stat., splits tobacco products into two categories: Part I – Tax on Cigarettes and Part II – Tax on Tobacco Products Other than Cigarettes or Cigars.

For purposes of this case, only Part II, Chapter 210, Fla. Stat., need be considered. Pursuant to Part II, Chapter 210, Fla. Stat., Florida imposes a 60% surcharge and a 25% excise tax on "tobacco products other than cigarettes or cigars." § 210.276, Fla. Stat.; § 210.30, Fla. Stat. For purposes of this case, "tobacco products other than cigarettes or cigars" will be referred to as "other tobacco products" or "OTP." *See* Part II, Chapter 210, Fla. Stat. Further, for simplicity, the surcharge and excise tax will be collectively referred to as "OTP Tax."

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1. For example, pursuant to 26 U.S.C. 5701, the federal government applies an excise tax at the following rates: 1) Pipe Tobacco $2.8311/pound, 2) Roll Your Own Tobacco ("RYO") $24.78/pound, 3) Snuff $1.51/pound, 4) Chew $0.5033/pound.

Unlike Florida, OTP, as defined by federal law, is taxed at the federal level based on weight and product type when it is manufactured or imported into the United States. 26 U.S.C. § 5701. Then, when the OTP, as defined by Florida law, is manufactured or imported into Florida, it is taxed at a rate of 85% of the "wholesale sales price." § 210.276, Fla. Stat.; § 210.30, Fla. Stat.

II. Brandy's Business

The Appellant, Brandy's, is a small wholesale business with about eight employees and two owners. ROA, TR, at page 199. At all times relevant to the case, Brandy's was a wholesale distributor that supplied more than 2,000 different items to retailers such as gas stations and convenience stores. *Id.* at 200-01. Included in those products were OTP and cigarettes; the distribution of each required a Florida distributor's license. *Id.* at 233.

At issue is a particular product that Brandy's sells called a cigar wrapper, commonly known as a blunt wrap (a "Wrap"). *Id.* at 201. A Wrap, which is used to roll your own cigarettes, is akin to a rolling paper and is comprised of paper and tobacco. *Id.* at 89, 99-102; ROA, Volume I, at pages 198-203. A sample Wrap was entered into evidence during the formal administrative hearing. ROA, TR, at page 99-102. In addition, a picture of the Wrap can be found in the record. ROA, Volume I, at page 198. A wrap was determined to be "a distinct, cohesive, uniform product, which upon inspection is readily seen to have been cut to a specific, predetermined

shape." ROA, Volume I, at pages 128-29. The ALJ factually determined the Wraps are not "loose" tobacco. *Id.* In the words of the ALJ:

> 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.

ROA, Volume I, at page 129.

Brandy's purchased the Wraps for some years prior to 2009, but never remitted any tax, because, as explained below, it was never assessed on the Wraps despite regular audits. ROA, TR, at pages 234-36.

As a licensed distributor, Brandy's is subject to and is routinely audited by the Department. ROA, TR, at page 52-53, 203. In fact, the Department audits each distributor at regular six-month intervals. *Id.* During the previous audits, Brandy's never produced records and the Department never requested to see records of the Wraps purchases at issue. ROA, TR, at page 205.

III. Procedural Background

In July 2009, the **Federal** Alcohol and Tobacco Trade Bureau ("TTB") made an announcement that would impact Florida tobacco distributors from that point forward.[2] Specifically, the federal definition of "roll-your-own tobacco" was

2. In 2009, the Children's Health Insurance Reauthorization Act of 2009, Pub. L. No. 111-3, 123 Stat. 110 (2009), amended the definition of 26 U.S.C. § 5702(o) of "roll-your-own-tobacco" to mean "any tobacco, which because of its appearance, type, packaging, or labeling, is suitable for use and likely to be

amended to include Wraps. Without any statutory change or administrative rule announcement, the Department unilaterally decided to follow suit and begin taxing Wraps as well.

Conversely, under Florida law, sections 210.276[3] and 210.30,[4] Florida Statutes ("Fla. Stat."), impose an OTP Tax on the purchase of "tobacco products" other than cigarettes and cigars. Section 210.25(11), Fla. Stat., 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 but "tobacco products" does not include cigarettes, as defined by s. 210.01(1), or cigars.

During its regular audits, the Department reviewed or should have reviewed all Brandy's sales and purchases, which included Wraps, and did not assess tax on the Wraps. ROA, TR, at pages 204-06. Based solely on records supplied from National Honey Almond ("NHA"), Brandy's Wraps supplier, and without

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offered to, or purchased by, consumers as tobacco for making cigarettes or cigars, or for use of wrappers thereof." (Amendment underlined for emphasis.)

3. 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.
4. 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.

conducting an audit, the Department issued a "bill" to Brandy's on or around March 1, 2013. ROA, Volume III, at page 354. 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. *Id.*

Brandy's opted to go the protest route within the Department. ROA, Volume III, at page 393. Specifically, Brandy's protested the assessment, had a conference with the Department, and the Department summarily dismissed Brandy's intra agency appeal. ROA, Volume III, at pages 347, 366-76, and 350. On or around May 19, 2014, the end result of the appeals process was issued and called the "Notice of Decision and Final Audit Assessment." ROA, Volume I, at page 1. Brandy's contested the Notice of Decision by filing a 120 Petition, Request for Administrative Hearing. ROA, Volume I, at pages 2-10.

On January 9, 2015, a Final Hearing was conducted via video conference in Tallahassee and Lauderdale Lakes, Florida. ROA, TR, at pages 1-2. Subsequent to the Final Hearing, the ALJ issued a Recommended Order on February 24, 2015. ROA, Volume 1, at pages 110-38. In the Recommended Order, the ALJ made a factual determination that the Wraps were not loose tobacco. *Id.* at 128-29. Consequently, from a legal perspective, ALJ Van Laningham determined that the assessment should be set aside because the tobacco was not "loose tobacco suitable for smoking." *Id.* The ALJ also determined that the Department illegally affected

Brandy's substantial interests based on an unadopted rule. *Id.* Although the ALJ appeared to agree with Brandy's on the statute of limitations issue, the ALJ decided to sidestep the issue because it was determined that the items at issue were not taxable. *Id.* at 130-31.

On March 11, 2015, the Department filed eight numbered exceptions to the ALJ's Recommended Order. ROA, Volume I, at pages 139-51. The Department responded by issuing a Final Order on June 11, 2015. ROA, Volume I, at pages 152-63. In the Final Order, the Department determined that the assessment was due in full because the Wraps are "loose tobacco suitable for smoking." *Id.* at 161. Further the Department determined that none of the assessment was time barred by the statute of limitations. *Id.* at 160. The Final Order overturned the Administrative Law Judge's ("ALJ") Recommended Order and ruled that the items at issue are a taxable other tobacco product ("OTP") because they are "loose tobacco suitable for smoking." *Id.* at 152-63. As such, the Final Order held that Brandy's be required to pay $71,868.23. *Id.* at 161. Brandy's, the Petitioner below, appeals the Final Order rendered by the Department, the Respondent below, on June 11, 2015. ROA, Volume I, at page 164.

SUMMARY OF ARGUMENT

This is a case in which the Department egregiously turned a blind eye to Florida tax law and inexplicably ignored administrative law jurisprudence by unilaterally deciding to tax an item not subject to OTP Tax. The Department essentially thumbs its nose at the judicial process by ignoring the ALJ's factual finding that Wraps are not "loose tobacco" and doing precisely what this DCA and others have prohibited for years. *Lantz v. Smith*, 106 So. 3d 518, 521 (Fla 1st DCA 2013)("An agency abuses its discretion when it improperly reject the ALJ's findings of fact."). By trying to camouflage these facts as "conclusions of law" the Department attempted to manipulate the subjectively unpleasant and disagreeable facts in order to support its predetermined conclusion. More egregious, the Department does so without even bothering to determine that the key findings of fact are not supported by competent substantial evidence. *Viering v. Fla. Comm'n on Human Relations*, 109 So.3d 296, 298 (Fla. 1st DCA 2013). In this case, the Department violated what this Court has characterized as a "cardinal test of administrative law," by failing to "honor the [ALJ's] findings of fact." *Amerisure Mut. Ins. Co. v. Dep't of Fin. Servcs.*, 156 So. 3d 520, 528 (Fla 1st DCA 2015).

Simply put, the ALJ listened to testimony, inspected an example of the Wrap itself, and found as a fact that the Wrap sold by Brandy's was not the requisite "loose tobacco."

It could not have been clearer when the ALJ stated:

> 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.

ROA, Volume 1, at page 129.

Unlike the broad federal definition, on which the Department relies, in order for the Wrap to be taxable under Florida law, it must be "loose tobacco suitable for smoking." Rather than correctly choosing "to honor the [ALJ's] findings of fact," it is clear the Department predetermined the Wraps to be taxable. From there, the Department circumvented the ALJ's factual findings and Florida law to reach that illogical conclusion.

The improper overturning of a finding of fact by the Department should be the beginning and the end of this Court's analysis. However, in the unlikely event that it is not, the applicable law supports Brandy's position that the Wraps are not taxable. The Wraps unequivocally fail to satisfy the statute's requirement of being "loose" tobacco and "suitable for smoking." At the very least, if it is ambiguous as to whether the Wraps are contained within the statutory definition, Brandy's should prevail because taxing statutes are to be construed in favor of the taxpayer and against the government. *Maas Bros., Inc. v. Dickinson*, 195 So. 2d 193, 198 (Fla. 1967). In support of this position are the amendments made to both federal and other state laws to explicitly include Wraps within their OTP tax regime while Florida

made no such change. Additionally, Colorado, a state with an OTP law very similar to Florida's, also determined that Wraps are not taxable. Consequently, from a pure statutory analysis, the Wraps are not taxable, because they are outside of the reach of the taxing statute.

Already deep in its commitment to violating Florida law and paying no attention to fundamental taxing principles, the Department proceeded to decide Brandy's fate based on an unadopted rule. It also went a step further by creatively determining it was the only agency able to extend the applicable statute of limitations from three to five years.

The Department took several liberties and completely disregarded the ALJ's factual and legal reasoning in its greed for OTP Tax. Cumulatively, these arguments show not only the validity of Brandy's position but also the gross abuse of authority by the Department. For the reasons set forth below, the Department's Final Order should be reversed.

I. The Department's final order should be reversed because the department abused its discretion by disregarding the ALJ's findings of fact which were supported by competent, substantial evidence.

STANDARD OF REVIEW:

Section 120. 57(1)(l), F.S., states that "[t]he agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not

based upon competent, substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements." Findings of fact must be supported by competent substantial evidence in the record on appeal. *Verleni v. Dep't of Health*, 853 So. 2d 481, 483 (Fla. 1st DCA 2003). Conclusions of law are subject to de novo review by the court. *Steward v. Dep't of Children & Families*, 865 So. 2d 528, 530 (Fla. 1st DCA 2003).

ARGUMENT:

The major flaw in the Department's Final Order is that it ignored the factual findings of the ALJ. It is settled law that an agency must accept the ALJ's finding of fact unless it is unsupported by substantial competent evidence. *See* § 120.57(1)(l), Fla. Stat.; *Verleni v. Dep't of Health,* 853 So. 2d 481, 483-84 (Fla 1st DCA 2003). Similarly, an agency cannot make alternate findings of fact to support its desired conclusion. *See Lantz v. Smith*, 106 So. 3d 518, 521 (Fla 1st DCA 2013)(quoting *Resnick v. Flagler Cty. Sch. Bd.*, 46 So. 3d 1110, 1112-13 (Fla. 5th DCA 2010), "In a fact-driven case such as this, where an employee's conduct is at issue, great weight is given to the findings of the [ALJ], who has the opportunity to hear the witnesses' testimony and evaluate their credibility."). Further, an agency may not circumvent this standard by labeling a finding of fact as a legal conclusion. *Stokes v. Bd. of Prof'l Eng'rs*, 952 So. 2d 1224, 1224 (Fla. 1st DCA 2007); *See Harry's Rest. & Lounge, Inc. v. Dep't of Bus. & Prof'l Reg.*, 456 So. 2d 1286, 1288

(Fla. 1st DCA 1984)(explaining that labeling a finding of fact as a conclusion of law is not dispositive.). An agency that improperly rejects the ALJ's findings of fact has abused its discretion. *Resnick*, 46 So. 3d at 1113

In this case, the Department is attempting to erroneously ignore the ALJ's findings of fact by substituting its own facts to reach a desired conclusion. In order to reach the Department's "obvious" conclusion that the Wraps are "loose tobacco suitable for smoking," it would have had to factually conclude that the Wraps were 1) loose tobacco and 2) suitable for smoking. The Department found neither of those as facts in the case.

During the administrative proceeding the opposite facts were determined by the ALJ, the trier of fact. ROA, TR, at pages 19-20. Brandy's presented substantial competent evidence and the ALJ determined that the Wraps are not "loose" tobacco. *Id.* at pages 99-104. Namely, Brandy's presented as evidence the Wrap, the product at issue, and testimony from a witness that it was not "loose tobacco." *Id.* at 202-227. On the other side, the Department presented testimony that the Wraps are loose because the tobacco leaf is separated into parts. *Id.* at 49-50. It is clearly the ALJ's role to evaluate the evidence, draw factual inferences, consider credibility, and reach a determination on the facts of the dispute. § 120.68(7)(b) and 120.68(10), Fla. Stat.; *Reily Enters. LLC v. Dep't of Envtl. Prot.*, 990 So. 2d 1248, 1251 (Fla 4th DCA

2008); *Wenz v. Bd. of Tr. of Brevard Cmty. Coll.*, 439 So. 2d 264, 264 (Fla. 5th DCA 1983).

At the conclusion of the ALJ's evaluation of the evidence, drawing of factual inferences and considering credibility, it determined that the Wraps were not "loose tobacco." ROA, Volume I, at pages 128-29. The ALJ stated that the Wrap "is no more loose tobacco than a piece of writing paper is loose wood." *Id.* at 129. The ALJ also explained his factual findings as follows:

> [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.

Id. at 128-29.

It is clear from a factual perspective that the ALJ determined the Wraps are not the "loose" tobacco required to subject an item to OTP Tax. *Id.*

It is noteworthy that the ALJ never reached the factual finding as to whether it was also "suitable for smoking." *Id.* at 134, n.7. From a factual perspective, the Wraps were not "loose tobacco" and likely were not "suitable for smoking." Based on its factual determination, the ALJ reached the legal conclusion that the Wraps are not "loose tobacco suitable for smoking." ROA, Volume I, at pages 128-29.

Despite the ALJ's factual and legal conclusions, the Department ignored the ALJ's findings of fact and summarily reached its legal conclusion that the Wraps were "loose tobacco suitable for smoking." *Id.* at 158-59. The Department just

decided that because the Wraps contain tobacco so they must be "loose tobacco suitable for smoking." *Id.* It flies in the face of logic that the Department reached its desired result that Wraps are "loose tobacco suitable for smoking" without factually determining that the Wraps are "loose tobacco" or that they were "suitable for smoking." The only logical inference is that the Department was determined to tax the non-taxable Wraps and filled in the reasoning later.

Pursuant to administrative law jurisprudence, the Department could not conclude the Wraps were "loose" tobacco because the ALJ relied on competent, substantial evidence to factually determine it was not "loose" tobacco. ROA, Volume I, at pages 114-15, 128-29; *See* ROA, TR, at page 98-100. Even if the Department came up with its own version of the facts to support this conclusion, it could not use alternate facts to support its desired conclusion. Therefore, the Department's conclusion that the Wraps are "loose tobacco suitable for smoking" runs afoul to the factual determination made by the ALJ, which was supported by competent, substantial evidence and constitutes reversible error in the Final Order.

The instant case is strikingly similar to a case involving factual determinations made in an administrative case involving a restaurant holding a special beverage license. *See Harry's Rest. & Lounge, Inc. v. Dep't of Bus. & Prof'l Reg.*, 456 So. 2d 1286 (Fla 1st DCA 1984). In *Harry's*, the Division sought to discipline the business for not operating primarily as a restaurant and failing to serve bona fide

meals in conjunction with its beverage license. *Id.* at 1287. During an administrative hearing, each side presented evidence and despite finding that less than 51% of the sales were derived from non-alcoholic sales, the hearing officer determined the restaurant was operating primarily as a restaurant and it was serving bona fide meals. *Id.* at 1287-88. The Department issued a Final Order that ran contrary to the recommended order with respect to two significant points contained in the "conclusions of law" section. *Id.* at 1288. In the Final Order, the Department determined that the restaurant 1) failed to operate primarily as a restaurant and 2) was not serving bona fide meals. *Id.*

The restaurant appealed and successfully argued that both determinations were findings of fact and supported by the record. *Harry's Rest. & Lounge, Inc.*, 456 So. 2d at 1288. As such, the Department could not overturn a finding of fact that was based on competent substantial evidence. *Id.* The Court stated:

> Although labeled a "Conclusion of Law" the Division's finding that appellant failed to operate primarily as a bona fide restaurant is, in reality, a finding of fact. As such, it is an improper rejection of the hearing officer's finding of fact since the officer's finding is supported by the record. § 120.57(1)(b) 9, Florida Statutes.

Id.

Several cases have applied a similar analysis and stand for the proposition that an agency cannot overturn a finding a fact which is supported by competent substantial evidence. *See, e.g., Lantz v. Smith*, 106 So. 3d 518, 521 (Fla 1st DCA 2013);

Resnick v. Flagler Cty. Sch. Bd., 46 So. 3d 1110, 1112-13 (Fla. 5th DCA 2010); *Verleni v. Dep't of Health*, 853 So. 2d 48 (Fla 1st DCA 2003).

Brandy's is facing a similar situation in that the Department is attempting to assess OTP Tax on Wraps. Like *Harry's*, during the administrative hearing both sides presented evidence to allow the ALJ to factually determine whether the Wraps are "loose tobacco." Nearly identical to *Harry's*, the ALJ in the administrative proceeding reviewed the evidence, heard testimony, and drew inferences, that allowed it to determine that the Wraps were not "loose tobacco" and likely not "suitable for smoking."

Just like in *Harry's*, where the hearing officer factually ascertained that the business was operating primarily as a restaurant and serving bona fide meals, the ALJ in this case factually determined the Wraps are not "loose" tobacco and were not likely "suitable for smoking." In both *Harry's* and the case at bar, the fact finder supported its findings of fact from competent substantial evidence. Therefore, exactly like in *Harry's*, in which the Department, under the guise of a "Conclusion of Law," was prevented from amending the hearing officer's findings of fact that a restaurant was operating primarily as a restaurant and serving bona fide meals, the Department should not be allowed to overturn the ALJ's finding of fact that the Wraps are not "loose" tobacco because it is supported by competent substantial

evidence. Therefore, the Department has abused its discretion in overturning findings of fact, which should result in a reversal of its Final Order.

It is inarguable that an agency cannot reject or modify factual findings that are based on competent substantial evidence without abusing its discretion. The ALJ determined factually that the Wraps are not "loose" tobacco in this case. The Department impermissibly overturned or modified this factual finding to support its position that the Wraps are "loose tobacco suitable for smoking." This clear abuse of discretion should not be allowed and should be reversed by this Court.

II. The Department's final order should be reversed because the wraps do not meet the statutory definition of a taxable tobacco product under section 210.25, Florida Statutes.

STANDARD OF REVIEW:

A conclusion of law is subject to de novo review. *See Steward v. Dep't of Children & Families*, 865 So. 2d 528, 530 (Fla 1st DCA 2003). The standard of review for an issue of law of the Department's Final Order in this case is whether the Department erroneously interpreted the law and, if so, whether a correct interpretation compels a particular action. *Fla. Hosp. v. Agency for Health Care Admin.*, 823 So. 2d 844, 847 (Fla. 1st DCA 2002). The Court may set aside agency action when it finds that the agency action constitutes an abuse of discretion. *Metro. Dade Cty. v. Dep't of Envtl. Prot.*, 714 So. 2d 512, 515 (Fla. 3d DCA 1998).

ARGUMENT:

A. ***The Wraps at issue are not taxable because they are not encompassed by the clear and unambiguous language of section 210.25, Florida Statutes.***

The plain language of section 210.25, Fla. Stat., requires that this Court overturn the Final Order of the Appellee in favor of Brandy's. There is no support for the Department's position other than its desire to tax this particular product. In the end, this case is nothing more than a case of statutory interpretation and the Wraps at issue simply do not fit the taxing statute.

As it has been stated above, section 210.30, Fla. Stat., states 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.

Likewise, section 210.276, Fla. Stat., states in relevant part:

> (1) A surcharge is levied upon all tobacco products in this state and upon any person engaged in business as a distributor of tobacco products at the rate of 60 percent of the wholesale sales price. The surcharge shall be levied at the time the distributor:
>
> > (a) Brings or causes to be brought into this state from without the state tobacco products for sale;
> >
> > (b) Makes, manufactures, or fabricates tobacco products in this state for sale in this state; or
> >
> > (c) Ships or transports tobacco products to retailers in this state, to be sold by those retailers. A surcharge may not be levied on tobacco products shipped or transported outside this state for sale or use outside this state.

It is clear that Florida OTP Tax applies to the "wholesale sales price" of a "tobacco product." Section 210.25, Fla. Stat., defines a "tobacco product" to mean:

> **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.

(Emphasis added).

Here, the Wraps at issue do not fit the statutory definition of a "tobacco product."[5] The Wraps at issue are not "loose tobacco," nor are they "suitable for smoking." Therefore the Wraps cannot be "loose tobacco suitable for smoking."

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5. During the administrative hearing and written in its Final Order, the Department's position is that the Wraps meet the definition of "loose tobacco suitable for smoking." Therefore, this is the sole focus of the definition.

It is axiomatic 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)).

The phrase "loose tobacco suitable for smoking," is not defined by the statute so its plan and ordinary meaning should be used. "Loose" is ordinarily understood to mean something "not bound together" or "untied." *See Merriam-Webster Dictionary, Loose* (2015), available at http://www.merriam-webster.com/dictionary/loose; ROA, TR, at pages 221-27. "Suitable" means "fit an appropriate for an intended purpose" or "adapted for a use or purpose." *Merriam-Webster Dictionary, Suitable* (2015), available at http://www.merriam-webster.com/dictionary/suitable; *See also* ROA, TR, at pages 221-27. Putting the phrase in context with the instant case, the statute was drafted to tax loose tobacco products, such as pipe tobacco. Pipe tobacco constitutes the inner part being rolled and then smoked, the unbound tobacco that is fit or adapted for the purpose of smoking.[6] It is clear the statute envisions a product similar to the inner part of a cigarette.

6. The ordinary meaning of "loose" was also the meaning understood by both Brandy's and Brandy's customers, as developed during the administrative hearing. ROA, TR, at pages 211-12.

1. The Wraps are a bound piece of tobacco and paper, and, therefore, are not "loose tobacco" as required for a taxable "tobacco product" under Florida law.

Being that it was determined that the Wraps were a bound, cohesive, and connected piece of tobacco and paper the Wraps are not "loose" tobacco. The ALJ also agreed with Brandy's and stated:

> [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.

ROA, Volume 1, at pages 128-29.

Therefore, the Wraps are not subject to OTP Tax because they are not the "loose tobacco" envisioned by the statute.

During the administrative hearing, the Department advanced the position that the Wraps are loose tobacco because they are made from tobacco, which is made by "separating the tobacco leaf into parts;" therefore a Wrap is "loose" tobacco. ROA, TR, at page 49. In its Final Order, the Department changed its position that the Wraps are taxable because they contain tobacco. ROA, Volume I, at pages 152-63. However, if the Legislature wanted to tax anything made from tobacco, it could have done so. Instead, it chose to tax certain items that contained tobacco, but it did not chose to include the Wraps within that definition. Consequently, the Department's theory during the administrative proceeding and in its Final Order are misguided and should be reversed.

2. The Department never established a prima facie case that the Wraps are "suitable for smoking" as required for a taxable "tobacco product," and therefore, never established that the Wraps are taxable under Florida law.

In a tax assessment case the Department has to first show, by the preponderance of the evidence, "the factual and legal grounds upon which the . . . department made the assessment" against a particular taxpayer. § 120.84(14)(b)2., Fla Stat. If the Department establishes its *prima facie* case, the taxpayer must then prove, by the preponderance of the evidence, that the assessment is wrong. *IPC Sports, Inc. v. Dep't of Rev.*, 829 So. 2d 330, 332 (Fla. 3d DCA 2002).

In the administrative hearing below, the Department never established that the Wraps were "suitable for smoking." The Department did not meet its burden to show the factual grounds upon which the assessment was made against Brandy's. As a result, Brandy's only offered testimony to show the assessment was wrong. ROA, TR, at pages 211-12. Therefore, the Final Order should be reversed because the Department never met its initial burden to show the Wraps were "suitable for smoking," and without that factual ground, the assessment cannot stand.

Even if the Department made its *prima facie* case and established the Wraps were "suitable for smoking," Brandy's could easily show the Wraps are not "suitable" or adapted to or intended for smoking on their own. *See Id.* The Wraps,

standing alone, are not suitable for smoking because they must be filled with tobacco or other flammable substances in order to be smoked. *Id.*

It is noteworthy that the ALJ, in its Recommended Order, agreed with both of these assertions. Pursuant to the ALJ's Recommended Order:

> 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.

ROA, Volume 1, at page 25.

Therefore, the ALJ's interpretation is consistent with Brandy's in that the Wraps are not "suitable for smoking."

On the flip side of the coin, the Department "unpredictably" stated in its Final Order that the Wraps are "obviously suitable for smoking." ROA, Volume I, at page 159. It is unlikely that the conclusion is so "obvious" that neither Brandy's nor the ALJ thought the Wraps were in fact suitable for smoking. In fact, it was so "obvious" the Department did not even bother to offer any evidence to show the Wraps are suitable for smoking. Further, the Department thought it was so obvious, it never bothered to include in its *prima facie* case as to whether the Wraps are suitable for smoking. Even if they did, as noted by the ALJ and common sense, the Wraps are not "suitable for smoking," because they have to be filled with another substance if one wants to smoke them. Therefore, the Department's Final Order is

erroneous and should be reversed, because just as the Wraps are not "loose tobacco," the Wraps are also not "suitable for smoking."

Based on the foregoing, a Wrap is not "loose tobacco," because it is a bound, cohesive, connected rolling paper. Likewise, the Wraps are not "suitable for smoking" because they must be filled with tobacco in order to be smoked. Since the Wraps are not "loose tobacco suitable for smoking," they clearly fall outside the taxing statute and are not taxable. As a result, the Department's Final Order should be reversed.

B. *Even if this Court determined that the statute is not clear, the Wraps are not taxable because taxing statutes are to be narrowly construed and any ambiguity is to be resolved in the taxpayer's favor.*

While Brandy's believes the Wraps are clearly outside of the definition of a "tobacco product," it is still in a favorable position if the statute is not clear or ambiguous.

It is well settled law and a fundamental rule of statutory construction that tax laws must be construed strongly in the taxpayer's favor and against the government, and any ambiguities or doubts must be resolved in favor of the taxpayer. *Maas Bros., Inc. v. Dickinson*, 195 So. 2d 193, 198 (Fla. 1967); *See also Mikos v. Ringling Bros. – Barnum & Bailey Combined Shows, Inc.*, 497 So. 2d 630, 632 (Fla. 1986)("The courts are not taxing authorities and cannot rewrite the statute."); *Dep't of Rev. v. GTE Mobilnet, Inc.*, 727 So. 2d 1125, 1128 (Fla. 2d DCA 1999)("[T]he authority to

tax must be strictly construed."). Neither courts nor agencies can subject tax to anything, unless it is clearly burdened, because "[t]axes cannot be imposed except in clear and unequivocal language." *Fla. S & L Servs. v. Dep't of Rev.*, 443 So. 2d 120, 122 (Fla. 1st DCA 1983). Further, "[t]axing by implication is not permitted." *Id.*

Here, the Department appears to be ignoring these concepts of taxing policy in its Final Order. The Department is enlarging the taxing statute in its own favor, making all reasonable inferences to support its position, rewriting the statute, imposing tax on an item that is not clearly and unequivocally burdened by the taxing statute, and taxing Brandy's by implication. The taxing statute does not apply to the Wraps at issue because when reading everything in the proper light, the light most favorable to Brandy's, the statute does not support a finding that the Wraps are the "loose tobacco" demanded by the statute. While the Wraps have tobacco in them, they do not meet the precise definition of section 210.25, Fla. Stat., the taxing statute.

As the ALJ correctly stated:

> The evidence in this case established 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), F.S., clearly does *not* extend to blunt wraps, despite their tobacco content.

ROA, Volume 1, at page 122.

In the instant case, Brandy's position is that the statute at issue is clear, unambiguous, and requires no interpretation. The Wraps are not "loose tobacco suitable for smoking;" therefore, are not taxable. If the Legislature wanted to tax anything with tobacco in it, like the Department suggests, the Legislature could have broadly defined a "tobacco product" to be just that. Instead, the Legislature chose to use the words "loose tobacco suitable for smoking." Therefore, the Wraps are not taxable, because if the language of section 210.25, Fla. Stat., is unclear, it should be read to favor the taxpayer since taxing statutes are to be construed against the government and in favor of the Taxpayer.

C. *There is significant persuasive authority from other taxing jurisdictions to support Brandy's positon that the Wraps are not taxable.*

It has been established above that the applicable statutory language does not encompass Wraps. Alternatively, if the statute is unclear, then the Wraps are not taxable because it can be reasonably inferred that the Wraps are not captured by the taxing statute and all reasonable inferences and doubts should go in Brandy's favor. In addition, and to further cement that the Wraps are not taxable, there is significant authority from other jurisdictions to support the finding that the Wraps are not subject to OTP Tax.

1. Federal Law Changes

Also raised previously, the federal government faced a similar conundrum dealing with the taxability of Wraps. Under federal law, "roll-your-own-tobacco" is a subset of a taxable "tobacco product." 26 U.S.C. § 5702. Likely due to its understanding that the Wraps did not fit within the current federal definition of tobacco product, the federal government amended its law to expand the definition of "roll-you-own-tobacco" to mean "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.*; *See* (26 U.S.C. § 5702(o))(amended by Pub. L. No. 111-3 (Feb. 3, 2009)).

If it wanted to, Florida could have done any number of things to tax the Wraps. Florida could have made the same change to its definition of a "tobacco product," but chose not to do so. Florida could have chosen to tax anything with tobacco in it, but it did not. 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. However, as it presently stands, the statutory framework does not apply to the Wraps at issue.

It was made clear during the administrative hearing, that the Department's sudden shift in position coincided with the change to the federal law. However, the Department failed to get the Florida law amended. Based on the evidence and

testimony presented during the final hearing, the Wraps do not fit within the above referenced definition because the Wraps are sheets of bound tobacco. Therefore, the Wraps in this case are not taxable.

2. Cases from Other States

Recently and most significantly, is the previously discussed case out of Colorado, in which a Colorado appellate court interpreted whether its taxing statute encompassed Wraps. *Creager Mercantile, Inc. v. Co. Dep't of Rev.*, Case No. 13CA-1580 (Co. Ct. App. 2015). Specifically, a Colorado tobacco wholesaler challenged whether a Wrap was taxable under Colorado law. *Id.* In *Creager*, the Colorado DOR issued a notice in 2006 that it would begin imposing its wholesale tobacco tax on Wraps.[7] *Id.* From a factual perspective, the Court in *Creager* determined that the Wraps are a wrapping for roll-your-own cigarettes, not suitable for smoking, unless filled with a flammable material, and are more like a rolling paper than the tobacco that fills it. *Id.* at 5-6. From a legal perspective, Colorado has a broader definition than that of Florida.

7. Even though the Wraps were determined to be taxable, Colorado at least gave its taxpayer some notice that it would begin treating the items as taxable. Conversely, the Department did not issue any formal notice to its taxpayers. Rather, it just collected information from the Florida distributor's supplier and sent out bills for tax due. ROA, TR, at page 69, 147.

Colorado defined a "tobacco product" as:

> cigars, cheroots, stogies, periques, granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco, snuff, snuff flour, cavendish, plug and twist tobacco, fine-cut 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 or for smoking in a pipe or otherwise, or for both chewing and smoking, but does not include cigarettes which are taxed separately . . . .

Id. at 4.

In *Creager*, the parties disagreed on whether the Wraps were "prepared in such a manner as to be suitable for . . . smoking in a pipe or otherwise." *Id.* at 4-5. The Court looked at Colorado's similar statutory scheme and determined the Wraps were not taxable because statutory construction demands that ambiguous statutes be resolved in favor of the taxpayers. *Creager*, at 7. In addition, the Court ruled that unlike the other tobacco products, which can be consumed alone, Wraps are only suitable for consuming together with other products. *Id.* at 9. As a result the Court found in favor of the taxpayer because the Wraps were clearly not "suitable for smoking." *Id.*

In the instant case, a similar reading of a narrower statute should apply. Factually, just as in *Creager*, which dealt with Wraps that are similar to a rolling paper comprised partially of tobacco, the instant case centers around an identical product that is a rolling paper that has tobacco as an ingredient. With an analogous statute and an extremely similar product, just as the Court in *Creager* determined that the Wraps were not clearly included in the taxing statute because they were not

"suitable for smoking," this Court should also find that the Wraps are not "suitable for smoking" and are not taxable.

Therefore, *Creager* serves as additional support that the Department stands by itself on this issue. The position advanced by Brandy's and agreed with by the ALJ should be supported by this Court. As a result, the Department's Final Order should be reversed.

3. Statutes from Other States Dealing with Wraps

Florida could have done several things if it wanted to capture Wraps within its taxing jurisdiction. It could have amended its laws to mirror the federal legislation to specifically tax Wraps, but it did not. Florida could have done what many other states have done and taxed items that have some or are predominantly made of tobacco, but it chose not to do that either. Instead, the Department woke up one day and decided to just start taxing Wraps, without any Legislative authority.

Unlike the Department, many other states properly started taxing Wraps by creating a taxing statute that clearly encompassed Wraps. For example, several other states have dealt with the issue by broadly defining a "tobacco product" to mean anything partially or predominantly made from tobacco. *See e.g.*, Del. Code § 5301(defining a "tobacco product" to mean "all products . . . made primarily from tobacco for individual consumption" in Delaware); Haw. Rev. Stat. § 245-1, (defining a "tobacco product" to mean "tobacco in any form ... that is prepared or

intended for consumption" in Hawaii); Iowa Code § 63-2551 (defining "tobacco product" to include "any other articles or products made of tobacco except cigarettes" in Iowa); N.J. Stat. § 54:40B-2 (defining a "tobacco product to mean "any product containing any tobacco for personal consumption" in New Jersey). Other states like Indiana, Maryland, Minnesota, Montana, New Mexico, North Carolina, South Dakota, Utah, and Washington have similar statutes. *See* Ind. Code § 6-7-2-7(a)(1) (2015); MD. Code § 16.5-101 (2015); Minn. Stat. § 297F.01 (2015); Mont. Code § 16-11-402 (2015); N.M. Stat. § 7-12A-2 (2015); N.C. Gen. Stat. § 105-113.4 (2015); S.D. Codified Laws § 10-50-1 (2015); Utah Code § 59-14-102; Wash. Rev. Code § 82.26.010 (2015). It is obvious that if a state wants to tax the Wraps, it could easily do so.

Other states have followed the federal government's lead in taxing Wraps. For example, Alabama places a special rate on the distribution of a "Cigar Wrap." Ala. Code § 40-25-2.1. In Alabama, a Cigar Wrap means "[a]n individual tobacco wrapper that is made wholly or in part from tobacco, including reconstituted tobacco, whether in the form of tobacco leaf, sheet, or tube, if the wrap is designed to be offered to or purchased by a consumer." *Id.* It is apparent that Alabama followed the federal government's lead in order to tax Wraps.

It is inarguable that if a state wishes to tax a particular item then it can do so. However, the proper way to tax a product is through the legislative process, not on

the independent whim of a taxing agency. Conversely, the Department decided it was above the legislature in this case; and rather than administering the taxing laws, it decided to make its own law. Even worse, the Department did not even announce their new law to anyone.

It is also noteworthy that the Department attempted to tax the Wraps in the right way through a legislative amendment. This past year, in Senate Bill 7074, the Department tried to get section 210.25, Fla. Stat., amended to "include wraps." The Legislature clearly addressed its intent of the statute by not enacting the proposed amendment to include wraps. This all but crystalized Florida's legislative intent to tax "loose tobacco suitable for smoking" and not to tax Wraps. Therefore, despite the Department's burning desire to collect OTP Tax on Wraps, the Wraps fall outside of the present state of the law.

III. The Department's final order should be reversed because the Department impermissibly determined the substantial interest of a party by employing an unadopted rule.

STANDARD OF REVIEW:

An agency's conclusion of law is subject to de novo review. *See Steward v. Dep't of Children & Families*, 865 So. 2d 528, 530 (Fla 1st DCA 2003). The standard of review on an issue of law of the Department's Final Order in this case is whether the Department erroneously interpreted the law and, if so, whether a correct interpretation compels a particular action. *Fla. Hosp. v. Agency for Health Care*

Admin., 823 So. 2d 844, 847 (Fla. 1st DCA 2002). The Court may set aside agency action when it finds that the agency action constitutes an abuse of discretion. *Metro. Dade Cty. v. Dep't of Envtl. Prot.*, 714 So. 2d 512, 515 (Fla. 3d DCA 1998).

ARGUMENT:

In the instant case, the Department clearly made a statement that was tantamount to rule. Despite no change in the taxing statute, section 210.25, Fla. Stat., the Department started treating the law very differently in 2009. Specifically in 2009, which coincided with the change in federal law, the Department began treating Wraps as a "tobacco product" subject to OTP Tax. The Department's policy erroneously interpreted and unreasonably enlarged its taxing authority and began taxing under its own perceived authority without any legislative action. Just as fatal, the change in policy was not mirrored to any formally adopted rule by the Department, yet it was applied to all licensed distributors who purchased Wraps in Florida. Clearly, the Department illegally taxed Brandy's under the auspices of an unadopted rule.

Section 120.57(1)(e)1., Fla. Stat., pronounces that "[a]n agency or administrative law judge may not base agency action that determines the substantial interests of a party on an unadopted rule." Pursuant to section 120.52(20), Fla. Stat., "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." Further, section 120.52(16), Fla. Stat., defines a rule to mean:

> 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.

See also Campus Commc'ns, Inc. v. Dep't of Rev., 473 So. 2d 1290, 1291 n.1 (Fla. 1985)(stating "The power to tax lies within the legislative branch . . . An Agency may not impose a tax, by rule or in any other manner."). As explained in *Fla. Quarter Horse Racing Ass'n v. Dep't of Bus. & Prof'l Reg.*, 133 So. 3d 1118, 1119-20 (Fla. 1st DCA 2014), a rule is:

> a statement of general applicability having the force and effect of law. Florida administrative law does not allow an agency to establish such a policy stealthily by the issuance of expedient licenses; this is equally true whether the policy is highly controversial or widely praised. To be legal and enforceable, a policy which operates as law must be formally adopted in public, through the transparent process of the rulemaking procedure set forth in section 120.54.

An unadopted "rule" is, by definition, an invalid rule. *See* § 120.52(8)(b)–(f), Fla. Stat. A "statement" is defined by reference to the term "Rule," which is also defined in section 120.52(16), Fla. Stat.

The view that the Department's action constituted an unadopted rule was also echoed by the ALJ. In the words of the ALJ:

> 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 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.

ROA, Volume 1, at pages 129-30.

The disinterested and impartial ALJ further evidences that the Department's actions were improperly based on an unadopted rule. Since the Department's position is an agency action that determines the substantial interests of a party on an unadopted rule, the Final Order should be reversed.

Shockingly, the Department disagreed with the ALJ on yet another point. In its Final Order, the Department simply concluded that Wraps are "obviously" "loose tobacco suitable for smoking." Thus, the Department is merely interpreting the statute. However, the Department impermissibly places upon the statute an interpretation that is not readily apparent from a literal reading. *Contra St. Francis Hosp., Inc. v. Dep't of Health & Rehab. Servs.*, 553 So.2d 1351, 1354 (Fla. 1st DCA 1989)(explaining that "an agency interpretation of a statute which simply reiterates

the legislature's statutory mandate and does not place upon the statute an interpretation that is not readily apparent from its literal reading, nor in and of itself purport to create certain rights . . . is not an unadopted rule."). This Court has also said, "[i]n determining whether the tax assessment procedure . . . is an illicit rule we must consider its effect, rather than DOR's characterization of the procedure as a mere direct application of section 212.031(1)." *Dep't of Rev. v. Vanjaria Enters., Inc.*, 675 So.2d 252 (Fla. 5th DCA 1996)(quoting *Dep't of Admin. v. Harvey,* 356 So. 2d 323, 325 (Fla. 1st DCA 1977)). An agency statement that requires compliance, creates certain rights while adversely affecting others, or otherwise has the direct and consistent effect of law is a rule.

Here, the agency is not merely interpreting a law, it is making a law. While it believes the Wraps are "clearly" within the scope of the taxing statute, several taxpayers, an ALJ, and at least one case disagree that the Wraps are taxable. The Department is "clearly" enlarging and stretching the statute, which it is charged to enforce. In short, the Department has instated a general policy, a rule, without formally adopting it.

It is clear in this case that the Department is incorrectly basing its action that determines the substantial interests of a party on an unadopted rule, beyond interpreting a statute. Consequently, the Final Order should be reversed.

IV. In the unlikely event the wraps are taxable, the final order should be reversed to the extent the applicable statute of limitations applies.

STANDARD OF REVIEW:

A conclusion of law is subject to de novo review. *See Steward v. Dep't of Children & Families*, 865 So. 2d 528, 530 (Fla 1st DCA 2003). The standard of review on an issue of law of the Department's Final Order in this case is whether the Department erroneously interpreted the law and, if so, whether a correct interpretation compels a particular action. *Fla. Hosp. v. Agency for Health Care Admin.*, 823 So. 2d 844, 847 (Fla. 1st DCA 2002). The Court may set aside agency action when it finds that the agency action constitutes an abuse of discretion. *Metro. Dade Cty. v. Dep't of Envtl. Prot.*, 714 So. 2d 512, 515 (Fla. 3d DCA 1998).

ARGUMENT:

Although the Wraps are outside of the grasp of the taxing statute, if the Wraps are somehow determined to be taxable, the statute of limitations applies to reduce the assessment.

Even more egregious than its creative reading of the "tobacco products" definition is the agency's utter disregard for the statute of limitations. The concept of a statute of limitations is to provide a set point in time that a taxing authority can assess a taxpayer for the past. *Allie v. Ionata*, 503 So. 2d 1237, 1240 (Fla. 1987). It would be unfair and unworkable to require a taxpayer to maintain records

indefinitely to defend against an eventual assessment for stale periods. In the case at hand, the Department is attempting to disregard the statute of limitations by assessing for periods in excess of the last three years.

Section 95.091, Fla. Stat., states that the Department of Business Regulation may determine and assess the amount of any tax enumerated in section 72.011, Fla. Stat., "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." Here, the OTP Tax (governed by section 210.25, Fla. Stat.) is a tax enumerated in section 72.011, Fla. Stat. The Division issued a Notice of Decision and Final audit assessment on May 19, 2014. *See Verizon Bus. Purchasing, LLC v. Dep't of Rev.*, 164 So. 3d 806, 812 (Fla. 1st DCA 2015)(ruling that a "proposed" assessment is not an assessment for statute of limitation purposes). Therefore, by application of section 95.091, Fla. Stat., any tax assessed prior to the 3 year statute of limitations is barred.

Allowing the Department to go beyond three years would be completely unfair and stand contrary to Florida law and any notion of due process. Brandy's has regularly filed returns and is audited by the Department approximately every six months. The Department had access to Brandy's records and could have reviewed and asserted tax liability on its Wraps purchases at any time. Instead, the Department decided one day that the Wraps were taxable, gathered documentation from the Wraps supplier, and sent a bill for periods that were more than three years stale. To

allow this would not only be unfair but it would place an undue burden on taxpayers and render the Department's audits meaningless from a finality perspective. Even if the Wraps are deemed taxable, then any tax, interest, and penalty assessed outside of the 3 year time period should be removed.

Hardly surprising at this point, the Department interpreted the applicable statute of limitations to impose the maximum tax liability to Brandy's rather than applying the law. Equally unsurprising, without explaining its logic, the Department summarily concluded in its Final Order that the statute of limitations is five years.

The neutral and impartial ALJ also agreed with Brandy's interpretation of section 95.091, Fla. Stat., during the administrative hearing. The ALJ correctly struck down the Department's interpretation that the applicable statute of limitations was five years because Brandy's failed to make a required payment of tax (on Wraps) despite having timely filed and paid on returns for other OTP items. Consistent with Brandy's understanding of section 95.091, Fla. Stat., the ALJ reasoned that virtually any tax assessment would be subject to a five year statute of limitations period if the Department was correct, because any tax assessment is a required payment of tax in the Department's world. Ultimately, the ALJ, having determined that the Wraps were not taxable, did not factually decide the open periods pursuant to section 95.091, Fla. Stat.

Without discussing the issue *ad nauseum*, it is illogical to think that the Legislature enacted section 95.091, Fla. Stat., to allow a three year statute of limitations for the Department to assess OTP Tax, while simultaneously allowing the Department to assess tax for a five year period because an audit assessment constitutes a required payment of tax. It is clear that to the extent the Wraps are taxable, the assessment should be significantly reduced to three years back from the Final Assessment, which is the applicable statute of limitations. Therefore, the Final Order should be reversed.

CONCLUSION

Based on the foregoing discussion it is clear that the Department is attempting to flex its administrative muscle and extract as much tax as possible from distributors like Brandy's. Wraps are not "loose tobacco" nor "suitable for smoking." Regardless, taxing laws are to be construed against the government and in favor of the Taxpayer. Most egregiously, the Department's Final Order unjustifiably and impermissibly reached its desired legal conclusion by overturning the ALJ's findings of fact. The Department went on in this case, to tax an item clearly outside of the taxing statute and based its determination on an unadopted rule. In the alternative, the applicable statute of limitations is a one-sided argument in that the Department has three years, not five, to determine an assess tax. If the Department's Final Order is affirmed, then one can only guess what items the Department will seek to tax next.

Based on the foregoing reasons, the Final Order should be reversed.

Dated: October 13, 2015

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished via e-mail on October 13, 2015 to Elizabeth Teegen, Esquire, by email to:

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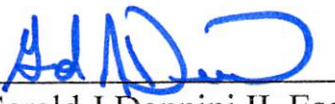

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I CERTIFY that the foregoing Initial Brief complies with the font requirements of Rule 9.210, Florida Rules of Appellate Procedure.

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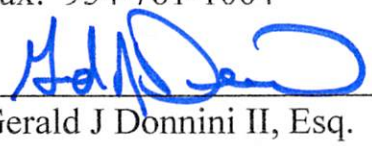

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