IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CASE NO. 1D15-3101
L.T. NO. DOAH 14-3496

BRANDY'S PRODUCTS, INC.,

Appellant,

v.

STATE OF FLORIDA,
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION,

Appellee.

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Appeal from the Division of Administrative Hearings

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# AMENDED ANSWER BRIEF OF APPELLEE

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## TABLE OF CONTENTS[1]



[1] The Answer Brief filed by appellee on December 2, 2015, was amended to conform with the court's order of December 9, 2015, as follows: the Table of Contents was modified to set forth the arguments on appeal, and all references to the Florida Statutes were modified to conform with the format required by rule 9.800, Florida Rules of Appellate Procedure.

## TABLE OF CITATIONS

### Cases



### Statutes

**Rules**



**Regulations**

## GLOSSARY OF BRIEF REFERENCES

The following abbreviations/references will be used in this brief:

| ABBREVIATION/ REFERENCE | DESCRIPTION OF ABBREVIATION/REFERENCE |
|---|---|
| Appellant or Brandy's Products | Appellant, Brandy's Products, Inc. |
| Appellee, DBPR, or the department | Appellee, State of Florida, Department of Business and Professional Regulation |
| OTP | Other Tobacco Products, an informal shorthand used to describe those tobacco products, other than cigarettes and cigars, which are subject to taxation in sections 210.230 and 210.276, Florida Statutes |
| OTP taxes and surcharges | Taxes and surcharges levied under sections 210.276 and 210.30, Fla. Stat. |
| R # at # | Record on Appeal, followed by Roman numeral volume and page number |
| T # at # | Transcripts, followed by Roman numeral volume and page number |

## STATEMENT OF THE CASE AND FACTS

Although the Statement of the Case and Facts in the Initial Brief is lengthy, it contains a number of assertions regarding material facts that are simply unsupported by the record.[2] Accordingly, the Department of Business and Professional Regulation submits this Statement of the Case and Facts.

This is an appeal of a final order entered by the Department of Business and Professional Regulation (department) upholding an assessment of tobacco excise taxes and surcharges against appellant as the distributor of a product called "blunt wraps." A blunt wrap is a small sheet of material used by a smoker as the outer wrapper of a homemade cigar (R I at pp. 114-115), and the blunt wraps at issue in this matter are made from tobacco and contain tobacco as a constituent part. (R I at pp. 114 - 115, 122) They are rolled into a cylindrical shape around other tobacco or marijuana and then smoked. (R I at p. 155, fn. 1)

Between July 7, 2009 and August 2, 2011 (the audit period), appellant purchased the blunt wraps from an out of state wholesaler and brought them into Florida for resale to retailers, who in turn offered them for retail sale to the public. (R I at p. 111) No tobacco excise taxes or surcharges were reported or paid by appellant on these purchases. (R I at p. 112) The final assessment is based on the department's analysis that the blunt wrap is a "tobacco product" subject to taxation

[2] For clarity and ease of reading, examples of these unsupported assertions are provided in footnotes 6 and 8, herein.

under chapter 210, Florida Statutes, and that the tobacco excise taxes were payable by appellant at the time the blunt wraps were shipped into Florida.

The final assessment against appellant included taxes, surcharges, penalties and interest in the (uncontested) amount of $71,868.23 for purchases of blunt wraps for resale during the audit period. (R III at pp. 347-392 "Audit File"). No penalties or interest have accrued since the date of the department's initial demand letter to appellant, dated March 1, 2013. (R III at p. 354, 355)

## Introduction: Florida's Taxation of Tobacco Products and the 2009 Protecting Florida's Health Act

Since the central issue in this appeal is whether a particular tobacco product is subject to taxation, a brief overview of Florida's taxation of tobacco products is helpful. At all times material to this case, Florida has imposed tobacco excise taxes and surcharges on "tobacco products" which are not otherwise classified as cigarettes or cigars[3] in part II, chapter 210, Florida Statutes.[4] The phrase "tobacco products" is statutorily defined to include classes of both smoked (i.e., combusted and inhaled) tobacco products and smokeless (i.e., non-combusted) tobacco products. § 210.25(11), Fla. Stat. The taxes and surcharges are levied at the time

[3] Cigarettes are taxed in a separate part of chapter 210, Florida Statutes, which is not otherwise applicable in this matter, and cigars are exempt from taxation altogether. The blunt wraps at issue were taxed as "other tobacco products," informally called "OTP," under part II of chapter 210.

[4] *See*, §§ 210.230 and 210.276, Fla. Stat.

a distributor purchases and brings into Florida the tobacco products for resale. The excise taxes and surcharges are imposed at the rates of 25% and 60%, respectively, of the price paid by the distributor (the wholesale sales price). Tobacco excise taxes and surcharges paid by the distributor are added to the price the distributor charges to his customers, and passed on in that manner to the ultimate consumer of a tobacco product.

Florida has levied an excise tax on the purchase of tobacco products for many decades, but the 60% surcharge is of more recent origin, becoming effective on July 1, 2009, with the passage of the "Protecting Florida's Health Act" (Health Act). See, ch. 09-79, ss. 7 and 11, at pp. 11, 12 and 15, Laws of Fla. (codified at § 210.276, Fla. Stat.).

The 2009 Florida Legislature made clear its reasoning for imposing such a substantial additional cost directly on the users of tobacco products: the high costs of treating tobacco-related illnesses in Florida necessitated the imposition of an additional 60% surcharge to pay for those costs. [5] See, generally, ch. 09-79,

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[5] The preamble to chapter 2009-79, Laws of Florida, reads:

WHEREAS, the United States Surgeon General has found that smoking causes lung cancer, heart disease, and emphysema, and
WHEREAS, the United States Surgeon General has found that smoking by pregnant women may result in fetal injury, premature birth, and low birth weight, and
WHEREAS, the United States Surgeon General has found that tobacco smoke increases the risk of lung cancer and heart disease, even in nonsmokers,

preamble and ss. 7 and 8, at pp. 3, 11, 12 and 13, Laws of Fla. By levying this surcharge, the legislature intended to give "tax relief" to non-users by recouping the extraordinary costs paid by all Floridians (via Medicaid) for treating tobacco-related illnesses directly from the pockets of those Floridians who smoke or use other tobacco products. Ch. 09-79, preamble, at p.3, Laws of Fla. The Health Act levied the surcharge on new purchases of other tobacco products as well as all existing inventory of tobacco products in the possession of every Florida manufacturer, distributer and retailer on the effective date of the Health Act. *See, generally*, ch. 09-79, preamble and s. 8, at pp. 3, 12 and 13, Laws of Fla.

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and WHEREAS, the United States Surgeon General has found that smokeless tobacco may cause gum disease, tooth loss, and mouth cancer, and
WHEREAS, the United States Surgeon General has found that exposure to secondhand smoke causes respiratory symptoms in children and slows their lung growth, and causes sudden infant death syndrome (SIDS), acute respiratory infections, ear problems, and more frequent and severe asthma attacks in children, and
WHEREAS, health care costs attributable to smoking-related illness in Florida have been estimated to exceed $6 billion annually, and
WHEREAS, the direct Medicaid costs attributable to tobacco-related illness in Florida have been estimated to exceed $1.25 billion each year, and
WHEREAS, the Legislature finds that the cost of tobacco usage should be recouped from those persons who engage in the use of tobacco products through a surcharge upon the retail purchase of cigarettes and other tobacco products, and
WHEREAS, the Legislature finds that the imposition of such a surcharge will provide tax relief to Florida residents and businesses that heretofore have been subject to exactions to pay for the Medicaid costs attributable to the use of tobacco products . . . .

Blunt Wraps

In 2009, the department, as the entity charged with administering the tobacco tax statutes, finalized its analysis that a product seen in recent years on the market and identified as a "blunt wrap" was taxable as an "other tobacco product" [6]

[6] As noted above, there are assertions regarding material facts in the Initial Brief that are not supported by the record. One example is appellant's assertion that the consumer product at the center of this case, the blunt wrap, "is comprised of paper and tobacco." (Initial Brief at p. 3) Although appellant provides citations to the record, they simply do not support the contention regarding any material in the blunt wrap other than tobacco. Although the department does not contend that the percentage of tobacco in a blunt wrap is dispositive of the issue of taxability, and appellant does not contest that the product is made of tobacco, it is nonetheless important for the findings regarding the content of the product at issue in this matter to be accurately recited. Along these lines, there were findings regarding tobacco as an ingredient in the products sold by appellant (R I at pp. 114 - 115, 122), and there was testimony regarding: the "paperlike" feeling and look of the blunt wrap (T I at 102, 103); that "some" blunt wraps on the market have paper in them (T I at 103); and that some blunt wraps on the market look like natural tobacco leaves (T 1 at 103). Significantly, however, there was no finding or other record evidence to support appellant's assertion that the specific blunt wrap sold by appellant contained paper (or anything other than tobacco) as a constituent material. In fact, there are no ingredients listed on the outside of the package containing the blunt wrap sold by appellant, but the packaging is replete with the Surgeon General's warnings about the hazards of tobacco use. (R II, at pp. 200 - 203 photos of outer packaging).

As a second example, appellant contends without any citation that the department's determination to issue assessments on the sale of blunt wraps starting in 2009 was based on an amendment to federal laws taxing tobacco products. (Initial Brief at pp. 4 and 5) This contention is not consistent with the findings in the recommended order. The ALJ did find that the department began internal discussions about the taxability of the product after the federal change occurred, but he did not find (and it is not the case) that the department's determination to tax blunt wraps is based on federal law. (R I at pp. 115 - 116)

under section 210.25(11), Florida Statutes, (R I at p. 111), and specifically as a product within the classification of "loose tobacco suitable for smoking." (R I at pp. 158 - 159) After making this determination, the department began issuing assessments of tobacco taxes and surcharges on the purchase of blunt wraps in July 2009. [7] (R I at p. 116)

The Assessment at Issue

The department conducts regular audits of distributors of other tobacco products (OTP audits) twice a year. (R I at p.117) During the department's OTP audits of appellant between July 7, 2009 and August 2, 2011, appellant did not produce records of material purchases of blunt wraps to the department's auditors because appellant did not believe the blunt wraps were a taxable product,[8] (R I at pp. 116, 117), nor did the department's auditors specifically request records of blunt wraps purchases (R I at p. 117). The department's auditors were not aware

[7] Although the department began assessing taxpayers for their purchases of blunt wraps in July 2009, the Recommended Order found that appellant first received notice of the taxability of blunt wraps nearly 4 years later, at the time of its receipt of the department's first demand letter, on March 1, 2013. (R I at p. 118) The relevance of this finding is unclear.

[8] As the final example of an unsupported assertion in the Initial Brief, appellant contends that during its regular audits of appellant the department "reviewed or should have reviewed all of Brandy's sales and purchases, which included wraps . . . ." (Initial Brief at p. 5). This contention is nonsense, and utterly inconsistent with the explicit finding that appellant purposefully did not produce records of its purchases of blunt wraps for the department's auditors (because appellant did not think the blunt wraps were taxable). (R I at p. 117).

during these regular OTP audits that appellant had shipped blunt wraps into Florida during the audit periods. (R I at pp. 116, 117)

In a later audit beginning in 2011 or 2012 of an out-of-state supplier's (National Honey Almond) shipments into Florida, the department determined for the first time that blunt wraps had been shipped to a number of Florida distributors, including appellant, during the time period at issue. (R I at p. 117). After verifying that the taxes and surcharges had not been paid, on March 1, 2013, the department issued a demand letter to appellant requesting payment in the amount of $71,868.23 (inclusive of taxes, surcharges, penalties and interest through the date of the letter). (R III at pp. 354, 355) Appellant remitted an initial "good faith" payment of $1,500.00, reducing the outstanding amount to $70,363.23, along with a request for an informal hearing with the department. (R I at p. 118)

Appellant's request for an informal hearing was not acted upon by the department. A conference between the parties was conducted at appellant's request after a second demand letter styled a "final request" for payment was issued to appellant nearly a year later on April 4, 2014. (R I at p. 118; R III at p. 353) The conference, held on May 13, 2014, offered appellant the opportunity to protest the tax assessment directly with the department. (R III at p. 351)

The matter was not resolved at the audit assessment conference, and the department issued its Notice of Decision and Final Audit Assessment on May 19,

2014. Appellant timely filed a petition under chapter 120, Florida Statutes, and a final hearing was conducted on January 9, 2015. By Recommended Order on February 24, 2015, the Administrative Law Judge recommended that the assessment be set aside in its entirety, concluding that the department's determination to assess blunt wraps was without statutory support and constituted an unadopted rule. (R I at pp. 110 -138) On June 11, 2015, the department issued its Final Order, upholding the assessment in its entirety and rejecting the conclusions regarding an unadopted rule as clearly erroneous. (R I at pp. 152 - 163). This appeal ensued.

## SUMMARY OF THE ARGUMENT

The department is charged with administration of the laws regulating the taxation of cigarettes and other tobacco products distributed in the State of Florida. In addition to collecting taxes on these products, the department is also charged with enforcing collection of the surcharge created by the 2009 "Protecting Florida's Health Act." In implementing its statutory responsibilities, the department must determine the applicability of these statutes to the numerous non-cigar/non-cigarette "other" tobacco products on the market. In light of the authority and responsibility that has been conferred on the department to implement and administer these statutory provisions, wide discretion should be afforded by this court in evaluating the department's determinations. Provided the

department's implementation of these statutes is within the range of possible and reasonable interpretations, such determinations are not clearly erroneous and should be affirmed.

Section 210.25(11), Florida Statutes, delineates the classes of "other" tobacco products which are subject to taxation.[9] In general, in interpreting the plain meaning of the words in this statutory provision, the court should consider the statute's place within the overall statutory scheme associated with the regulation and taxation of tobacco. In light of the uniquely harmful nature of tobacco, and the legislature's clear intent to ameliorate through taxation the health costs associated with tobacco's use, the department does not read the statute to provide an exclusive laundry list of discrete consumer products, but rather understands it to apply to broad classes of tobacco products delimited by the manner in which the processed tobacco is prepared for ingestion; i.e., classes of intended use. This construction is clearly within the grant of authority given to the

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[9] Section 210.25(11), Florida Statutes, provides:

> 'Tobacco products' means 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.

department and is reasonable. An unnecessarily narrow reading of this provision is simply inconsistent with the policy articulated by the legislature.

With respect to application of the statute to the blunt wrap sold by appellant, the department concluded that the blunt wrap is included within the statutory class of products described by the phrase "loose tobacco suitable for smoking." This unambiguous phrase is understood by the department to connote any tobacco product that is processed, to be suitable for smoking, by use of the parts of the tobacco leaves after they have been cured and de-stemmed. The department's understanding of the statutory phrase was supported at hearing by unrebutted testimony from the department's witness.

The blunt wrap is "loose tobacco suitable for smoking" because it is comprised of tobacco and is manufactured in a manner to be used by a smoker as the outer wrapper of a homemade tobacco or marijuana cigar. The product is manufactured from the cured and de-stemmed parts of the tobacco leaf, and is intended to be combusted and inhaled along with any fill ingredient (such as tobacco or marijuana). Unlike other products listed in section 210.25(11), Florida Statutes, loose tobacco suitable for smoking is not manufactured for ingestion by any manner other than inhalation such as chewing or sniffing.

Although the Administrative Law Judge concluded that the term "loose" was unambiguous, he erroneously concluded that it was the only operative term in the

phrase “loose tobacco suitable for smoking.” He also erred in concluding that a dictionary definition of the word “loose” would suffice to establish the meaning of the whole phrase “loose tobacco suitable for smoking.” As set forth in the Final Order, all of the words in the phrase “loose tobacco suitable for smoking” must be read together. Giving great weight only to the word “loose” renders the balance of the phrase insignificant and nearly superfluous.

The ALJ also erred in concluded that a blunt wrap cannot be “loose tobacco suitable for smoking” because the product, by itself, is not suitable for smoking. There is simply nothing in the statute to limit “loose tobacco suitable for smoking” only to those items that are combustible on their own. Many pipe tobacco products on the market are not readily combustible out of the package, and must be further manipulated (by rubbing the tobacco apart and packing it in a pipe) before the tobacco can be combusted and ingested.

In fact, following the ALJ’s too- restrictive interpretation of the phrase “loose tobacco suitable for smoking” would result in a conclusion that the legislature did not intend to tax many of those same pipe tobacco products which are clearly intended to be ingested through inhalation, but which are sold in a compressed cake- or brick-like form, rather than “loose.” A conclusion that any form of pipe tobacco is not taxable because it is not “loose,” is utterly inconsistent

with the language of the statute, the clear policy underpinning the regulatory scheme and the department's long administration of these taxing statutes.

The error in the ALJ's conclusion that section 210.25(11), Florida Statutes, provides an exclusive list of taxable consumer products also led to his erroneous conclusion that the department's application of the statutory language to the product sold by appellant was an unadopted rule. In interpreting the statute to apply to the product sold by appellant, the department was simply applying the plain language of the statute to the facts associated with the particular product purchased by appellant.[10] Similarly, although appellant argues that the department improperly overturned findings of fact in the recommended order when it concluded that blunt wraps are taxable as loose tobacco suitable for smoking, the department's application of the statute to appellant's product led to a legal conclusion that the product is taxable. This was simply an application of the statute to the facts associated with the product purchased by appellant, and did not require the department to overturn any of the findings in the recommended order.

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[10] As a separate matter, the ALJ's determination regarding an unadopted rule was not raised by appellant at any point in the proceeding, and was not tried by consent. In fact, it was raised sua sponte for the first time in the ALJ's recommended order. The department was simply not given an opportunity to be heard on the issue before issuance of the recommended order. This denial of due process itself is a departure from the essential requirements of law.

As a final point, appellant argues that a statute of limitations applies to bar any assessment of taxes and surcharges on purchases earlier than the three-year period immediately preceding the department's first demand letter (March 1, 2013). As noted in the recommended and final orders, this is purely a matter of law, and requires interpretation of the time limits set forth in section 95.091(3)(a)(5), Florida Statutes. Given that the applicable statute relates to the department's taxing authority, the department's conclusion that the five year statute of limitations applies in this situation is reasonable.

## STANDARD OF REVIEW

An agency may not reject an ALJ's findings of fact "without first finding, after a review of the entire record, that the ALJ's factual findings were not supported by competent, substantial evidence." Amerisure Mut. Ins. Co. v. Florida Dep't of Fin. Servs., Div. of Workers' Comp., 156 So. 3d 520, 527 (Fla. Dist. Ct. App. 2015), reh'g denied (Feb. 20, 2015), reh'g denied (Feb. 20, 2015), , reh'g denied (Feb. 20, 2015). And the standard of review as to questions of statutory interpretation is de novo. Amerisure Mut. Ins. Co., 156 So. 3d, 529.

## ARGUMENT

### I. THE DEPARTMENT DID NOT ABUSE ITS DISCRETION IN THE FINAL ORDER BECAUSE THERE WERE NO REJECTED FINDINGS OF FACT

Appellant contends at length that the department's final order disregarded findings of fact that were made by the ALJ and are supported by competent, substantial evidence. A cursory look at the Recommended Order (R I at pp. 110 - 138), the department's exceptions to the findings in the Recommended Order (R I at pp. 139 - 151) and the Final Order (R I at 152 - 163) reveal: 1) there were a total of twelve findings of fact in the Recommended Order; 2) the department filed exceptions to four of the twelve findings, and 3) all four exceptions filed by the department were in fact denied in the Final Order. In other words, contrary to appellant's labored arguments, the Final Order simply did not overturn ANY of the Administrative Law Judge's findings of fact. Nor did the Final Order improperly categorize any of the ALJ's findings as a conclusion of law. See.e.g., Amerisure Mut. Ins. Co., 156 So. 3d, 528, (an agency may not avoid its obligation to honor the ALJ's findings of fact by categorizing a contrary finding as a conclusion of law).

Accordingly, the record simply does not support appellant's contention that the department abused its discretion by improperly overturning any findings of fact when none of the recommended findings were rejected by the department.

The Final Order did overturn a number of the ALJ's Conclusions of Law where those conclusions were based on an erroneous interpretation of the law. To the extent appellant's arguments in this part of the brief seem to be based on the

department's rejection of a recommended conclusion of law, the department will attempt to address the arguments.

Appellant argues that the ALJ made a factual determination that the blunt wraps sold by appellant were not "loose" tobacco. Presumably, appellant is referring to the ALJ's recommended conclusion of law number 33. In this paragraph, the ALJ concluded that the unambiguous language "loose tobacco suitable for smoking" cannot apply to a product that 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.

(R I at pp. 128 - 129)

Appellant seems to be arguing that because the ALJ "concluded" that the product is for example, cohesive and displays no "loose" ingredients, that the department's rejection of this conclusion was an improper overturning of a factual finding. Appellant seems to further assume that the department's rejection of the ALJ's analysis in conclusion 33 is based on a rejection of the findings as to the cohesive nature of the product. Appellant fundamentally misunderstands the determination made by the agency with regard to this particular conclusion.

In its Final Order, the department concluded that the ALJ's interpretation of the statutory phrase "loose tobacco suitable for smoking" was erroneous,

regardless of any other determinations made with respect to the nature of the product. The department took no issue with the ALJ's determinations that the product is cohesive and displays no "loose" ingredients. The department simply disagrees that those determinations are dispositive of whether the product constitutes "loose tobacco suitable for smoking" under the statutory scheme the department is charged with administering.

A more detailed analysis of the department's interpretation of the statutory phrase "loose tobacco suitable for smoking" is set forth below, in response to appellant's second argument. To conclude as to this point, the department asserts that there was no improper rejection of any of the ALJ's findings of fact. The department's decision to overturn the ALJ's conclusion as to the interpretation of the statute was proper.

## STANDARD OF REVIEW

The standard of review as to questions of statutory interpretation is de novo. Amerisure Mut. Ins. Co., 156 So. 3d, 529.

## ARGUMENT

### II. THE DEPARTMENT'S APPLICATION OF THE CLEAR LANGUAGE OF THE STATUTE TO TAX BLUNT WRAPS WAS PROPER

#### A. The blunt wraps sold by appellant are taxable tobacco products within the ambit of section 210.25(11), Florida Statutes

This section addressed the arguments in appellant's section II.A. and II.A.1,

together.

As noted above, sections 210.276 and 210.230, Florida Statutes, impose tobacco excise taxes and surcharges on all "tobacco products" brought into the state for distribution. Although the taxes and surcharges can be imposed at different points in the supply chain of tobacco products, for purposes of the purchases at issue here, there is no dispute that appellant is the proper taxpayer to be assessed the taxes and surcharges under sections 210.30(1)(a), 210.276(1)(a), Florida Statutes, respectively.

As set forth throughout this brief, the department assessed taxes and surcharges on appellant's purchases of blunt wraps during the period July 7, 2009 and August 2, 2011, after concluding that the blunt wraps were a taxable product under section 210.25(11), Florida Statutes. Specifically, the department concluded that the blunt wraps fall within the classification of products described as "loose tobacco suitable for smoking."

Appellant argues that the department's conclusion of law, and its interpretation of section 210.25(11), Florida Statutes, to include appellant's blunt wraps within the ambit of "loose tobacco suitable for smoking" is error. More to the point, appellant takes the same approach as the ALJ did in concluding at the outset that the only operative word needing interpretation in this provision is the single word "loose." The department contends that this approach is inconsistent

with the language of that provision, inconsistent with a harmonious reading of the entire statutory scheme and inconsistent with legislative policy.

The 25% excise tax levied in section 210.230, Florida Statutes, has been in effect for many decades. In contrast, the surcharge imposed by section 210.276, Florida Statutes, was first created in 2009, specifically as a mechanism to ensure that the cost of treating tobacco-related illnesses in Florida would be recouped directly from those who use tobacco products. See, generally, ch. 09-79, preamble, at p. 3, Laws of Fla. The proceeds from collection of the surcharge are deposited into the Health Care Trust Fund with the Agency for Health Care Administration. § 210.276(7), Fla. Stat. It is against this backdrop that the department's interpretation of its statutes must be understood.

The statutory provision in dispute in this matter is section 210.25(11), Florida Statutes, which provides a definition for the phrase "tobacco products," as used in sections 210.30, 210.276, Florida Statutes:

> 'Tobacco products' means 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.

Legislative intent is the polestar that guides a court's statutory construction analysis. State, Dep't of Revenue v. Lockheed Martin Corp., 905 So. 2d 1017, 1020 (Fla. Dist. Ct. App. 2005). When a statute is clear, a court may not look behind the statute's plain language or resort to rules of statutory construction to determine the legislative intent. Id. (citing State v. Burris, 875 So. 2d 408 (Fla. 2004), in which the Florida Supreme Court noted that legislative intent must be determined primarily from the language of a statute). A court should apply a "common-sense approach" to statutory interpretation in order to give effect to legislative intent. See, e.g., Bautista v. State, 863 So. 2d 1180, 1180 (Fla. 2003). A statutory phrase should also be viewed not only in its internal context within the section, but in harmony with interlocking statutes. Sw. Florida Water Mgmt. Dist. v. Charlotte Cnty., 774 So. 2d 903 (Fla. Dist. Ct. App. 2001).

Where the legislature has not defined the words used in a statute, the language should be given its plain and ordinary meaning. Florida Birth-Related Neurological Injury Comp. Ass'n v. Florida Div. of Admin. Hearings, 686 So. 2d 1349, 1354 (Fla. 1997). If there is no statutory definition of a word, the judiciary has the responsibility to give the word its ordinary and commonly accepted meaning as it is used in the particular statutory context. Hancock Adver., Inc. v. Dep't of Transp., 549 So. 2d 1086 (Fla. Dist. Ct. App. 1989)(where the Third District had to construe the word "on" in association with the placement of a

billboard “on” a particular road) Moreover, with a very basic word, resort to a dictionary definition is not always helpful or determinative. Hancock at footnote 4.[11] In such a case, the significance of the particular milieu in which the legislature employs a given word or expression must be reviewed to determine the word's meaning. Id. It is proper for the court to consider the "practical construction" which has in fact been adopted by the industry Id. at 1089. As a final point, any uncertainty as to the legislative intent should be resolved by an interpretation that best accords with the public benefit Devin v. City of Hollywood, 351 So. 2d 1022 (Fla. Dist. Ct. App. 1976)

Section 210.25(11), Florida Statutes, classifies "tobacco products" by the manner in which the processed tobacco is prepared for ingestion; i.e., the category of intended use. That is, contrary to the conclusion of the ALJ, the statute does not

[11] At final hearing in this matter, there was testimony by appellant regarding the dictionary definition of the word “loose.” (T II, at pp. 227 et seq.) Among the definitions reviewed by appellant were free from anything that binds or restrains," such as loose cats, and "not put up in a package or other container" such as loose mushrooms. Appellant then produced a picture, for demonstrative purposes, of the outside packaging of several tobacco products sold at retail, as examples of "loose" tobacco. (T II at p. 209) The absurdity of resorting to these particular dictionary definitions is illustrated perfectly by appellant's demonstrative exhibit: ALL of the items in the exhibit are "put up in a package or other container." By appellant's admission, "loose" tobacco is sold in packages. Therefore, NONE of the products are "loose" tobacco products. In other words, using the dictionary to determine the meaning of the word “loose” leads to the absurd result that the only tobacco product that can be taxed as loose tobacco suitable for smoking is tobacco that is purchased by the consumer from a bulk tobacco bins and bagged by the consumer himself.

provide an exclusive list of specific consumer products. Rather, the phrase “loose tobacco suitable for smoking” is clearly intended to identify a class of products to be smoked (as opposed to say, “snuff” or “snuff flour,” which are classes of products that are intended to be nasally inhaled). The blunt wrap is “loose tobacco suitable for smoking” because it is comprised of tobacco and is manufactured in a manner to be used by a smoker as the outer wrapper of a homemade tobacco or marijuana cigar. The product is manufactured from the cured and de-stemmed parts of the tobacco leaf, and is intended to be combusted and inhaled along with any fill ingredient (such as tobacco or marijuana). Unlike other products listed in section 210.25(11), Florida Statute, loose tobacco suitable for smoking is not manufactured for ingestion by any manner other than inhalation such as chewing or sniffing.

The recommended order did not limit itself to a determination that the specific consumer product presented at hearing (a specific blunt wrap sold by this distributor) was not loose tobacco suitable for smoking. It concluded that "loose" is the only word in the statute with material meaning, thus concluding that there is only one specific kind of product that IS subject to taxation as "loose tobacco suitable for smoking." To follow the logic of the ALJ, the department’s taxation of any tobacco product other than the one product that fits within the ALJ's carefully circumscribed description is invalid.

The phrase "loose tobacco suitable for smoking" describes an array of consumer products that bear no resemblance to one another as they are packaged and sold to the consumer. A cursory review of any website selling tobacco products amply illustrates the extraordinary variety of tobacco products smoked by consumers. For example, there are a very large number of products on the market for smoking in a regular, old-fashioned pipe. Pipe tobacco is available in a form that looks like shredded lettuce, or in a compressed form that looks like a brick, or in a rope-like form that can be sliced like salami. Similarly, hookah tobacco is smoked, but it bears no resemblance to other pipe tobacco because it is intended to remain moist as it is smoked in a water pipe. The one thing all of these items do have in common, though, is they are all comprised of loose tobacco (after it has been cured and de-stemmed), and manufactured in a manner to be suitable for smoking.

In other words, a cured tobacco leaf which will end up being smoked can be processed in such a variety of ways that the final products bear no resemblance to one another. To conclude that only one specific finished product is "loose tobacco suitable for smoking" seems to thwart the entire intent to pass the health and economic costs of tobacco-related illnesses onto all of the users of the products. The manufacturer of the blunt wraps sold by appellant clearly markets this product as a tobacco product. It would be extraordinarily myopic not to impose the

surcharge intended to pay for the costs of tobacco-related illness on a product that labels itself as hazardous to health because it is made of tobacco.

Accordingly, the department's application of section 210.25(11), Florida Statutes, in determining that the blunt wraps sold by appellant are "loose tobacco suitable for smoking" is consistent with the plain meaning of the statute, supported by the unrebutted testimony of the department's witness at hearing, and consistent with the policy articulated in Florida's Health Act.

II.A.2. The department met its burden of proof with respect to the basis for the assessment.

Appellant is correct that the burden of proof is on the department to establish the prima facie validity of its tax assessment under section 120.84(14)(b)2, Florida Statutes. Appellant argues that the department failed to establish that the blunt wraps are suitable for smoking, and therefore did not meet its burden.

This is a curious argument, and flows directly from the ALJ's erroneous contention that "suitable for smoking" under section 210.25(11), Florida Statutes, really means "suitable for smoking by itself." (R I at p. 134, fn. 7) No such statutory limitation exists regarding the class of products within the ambit of "loose tobacco suitable for smoking." In other words, there is nothing in the statute to suggest that only products that can be combusted and inhaled from the package by themselves can be considered "suitable for smoking." As with the analysis above, the department's interpretation is that this statutory language means any product

comprised of tobacco leaves after they have been cured and de-stemmed and manufactured for the purpose of being inhaled is "loose tobacco suitable for smoking." The analysis suggested by appellant is inconsistent with the plain language of the statute and clear legislative intent.

II.B. The department's determination to tax blunt wraps is consistent with the plain language of section 210.25(11), Florida Statutes.

Appellant argues that the statute must be strictly construed against the department because the purpose of the statute is to impose a tax. In light of the department's analysis above as to the clear meaning of the language "loose tobacco suitable for smoking," there is no ambiguity in the statute that must be construed in favor of the taxpayer.

II.C. Case law from other jurisdictions is not persuasive in the interpretation of section 210.25(11), Florida Statutes.

Appellant argues at length that statutory and decisional law from other jurisdictions is persuasive to an interpretation of the Florida statutes relevant to this matter. As argued above, the department's interpretation of the statutes it is charged with administering is entitled to deference. The department applied the clear language the statute to find this product taxable, and did not rely on any provision of federal law to support its determination. Argument regarding how other state legislatures have handled the taxability of tobacco products is not persuasive in this context. As a final note, the lower appellate decision in the

Colorado case relied on most heavily by appellant, Creager Mercantile, Inc. v. Co. Dept of Revenue, is not final, and should not be relied on as persuasive for any proposition. Certiorari review of that decision is currently pending in the Colorado Supreme Court. Colorado Dept of Revenue v. Creager Mercantile, Colorado S.Ct. case no. 2015 SC 226.

III. The department's interpretation of section 210.25(11), Florida Statutes, does not constitute an unadopted rule.

As an initial matter, this issue was raised sua sponte by the ALJ for the first time in his recommended order. The issue was not raised by appellant in the lower tribunal, there was no evidence or argument on the issue put forth by either parties, and it was not tried by consent. Nor did the ALJ raise the issue before closing the record. Appellant did not challenge any existing DPBR rule by filing a rule challenge proceeding under section 120.56, Florida Statutes. Nor did petitioner allege a failure under section 120.54, Florida Statutes, by DBPR to engage in rulemaking regarding an agency statement that qualifies as a rule. Accordingly, there was no evidence or argument presented at hearing regarding a purported unadopted rule. The ALJ's conclusions in this regard were articulated for the first time in the recommended order.

This constitutes a basic denial of due process. The due process clause of the Federal and Florida Constitutions applies in administrative hearings. Brookwood Extended Care Ctr. of Homestead, LLP v. Agency for Healthcare Admin., 870 So.

2d 834 (Fla. Dist. Ct. App. 2003). Due process requires that parties to a proceeding be given adequate notice and an opportunity to be heard on the issue. Bresch v. Henderson, 761 So. 2d 449 (Fla. Dist. Ct. App. 2000). Although the concept of due process in an administrative proceeding is less stringent than in a judicial proceeding, it nonetheless applies. Under the circumstances, the ALJ's decision to address this issue for the first time in the recommended order departs from the essential requirements of law. Moreoever, the determination of an unadopted rule is a very fact-intensive determination, and neither the ALJ nor a reviewing court has a sufficient record on which to base such a determination.

Aside from the due process concerns, the department asserts that its application of the plain language of section 210.25(11), Florida Statutes, to tax the blunt wraps sold by appellant does not constitute an unadopted rule, and the ALJ's determination is clearly erroneous. 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, or require compliance, or to otherwise have the direct and consistent effect of the law, is not an unpromulgated rule, and actions based upon such an interpretation are permissible without requiring an agency to go through rulemaking.

Amerisure Mut. Ins. Co., 156 So. 3d at 532, citing St. Francis Hosp., Inc. v. Dept. of Health & Rehab. Svcs.,

St. Francis Hosp., Inc. v. Dep't of Health & Rehabilitative Servs., 553 So. 2d 1351 (Fla. Dist. Ct. App. 1989).

As set forth in detail in the sections above, in this case, the department concluded that the product at issue was within the statutory description of "loose tobacco suitable for smoking." That is, the blunt wrap is a product of "loose tobacco" as that phrase is understood and defined by the industry, and because it is manufactured in a manner to be suitable for smoking, it fits squarely within the statutory definition of tobacco product. The direct application of the statute to the facts associated with the product sold by appellant does not constitute an unadopted rule.

IV. The department's determination regarding the applicable statute of limitations was proper.

While Petitioner argues that section 95.091(3)(a)1b., Florida Statutes, limits the department's authority to administer taxes to within three years of the date the taxes became due, because appellant failed to make a required payment of the tax and did not disclose the tax liability in writing to the department before the department contacted the taxpayer, the present case falls under section 95.091(3)(a)5, Florida Statutes, which provides as follows:

> At any time after the taxpayer failed to make any required payment of the tax, failed to file a required return, or filed a fraudulent return, except that for taxes due on or after July 1, 1999, the limitation prescribed in subparagraph 1. applies if the taxpayer disclosed in writing the tax liability to the department before the department contacts the taxpayer

Therefore, the audit period in this case is not limited to three years from the date the taxes became due, but rather spans the entire period of April 2009 – August 2011.

Moreover, rule 61A-10.052(1), Florida Administrative Code, requires a Tobacco Products Wholesale Dealer, such as Brandy's, to "keep complete and accurate records and make full and complete reports reflecting the detail of all transactions on the appropriate and applicable forms furnished by the division." Although the ALJ found insufficient evidence to support a conclusion that appellant "knowingly" withheld information regarding the blunt wrap purchases during regular audits by the department (R I at 116), in the same paragraph the ALJ found that appellant in fact, never did produce the records. (R I at p. 116). This seems inconsistent with the clear requirement that a taxpayer make available accurate records for the department's review at audit.

In the end, the ALJ concluded that the issue of the applicable statute of limitations is purely a matter of law. (R I at 137, fn. 11). In its Final Order, the department properly concluded that because the applicable statute relates to the department's taxing authority, the department's conclusion that the five year statute of limitations applies in this situation is reasonable.

## CONCLUSION

Based on the foregoing, the Department of Business and Professional Regulation respectfully requests that this court affirm the Final Order issued by the department in this matter.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Answer Brief of Appellee has been electronically served as follows on this 15th day of December, 2015:

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## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the font requirements of Fla. R. App. P. 9.210(a), this 15th day of December, 2015.

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