

**IN THE CIRCUIT COURT OF THE  
ELEVENTH JUDICIAL CIRCUIT IN AND  
FOR MIAMI-DADE COUNTY, FLORIDA**

**GENERAL JURISDICTION DIVISION**

**CASE NO:**

**MIAMI HOOKAH CO,**  
a Florida corporation,

Plaintiff,

v.

**FLORIDA DEPARTMENT OF  
BUSINESS AND PROFESSIONAL  
REGULATION, DIVISION OF  
ALCOHOL BEVERAGES AND  
TOBACCO,** an agency of the  
State of Florida,

Defendant.

**COMPLAINT**

PLAINTIFF, MIAMI HOOKAH, CO. sues Defendant, FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOL BEVERAGES AND TOBACCO, and avers:

**ALLEGATIONS COMMON TO ALL COUNTS**

**I. Introduction:**

This is an action to prohibit the unconstitutional and illegal collection of excise tax in the State of Florida, in violation of the plain meaning of the Florida Chapter 210, the Florida Constitution and United States Constitution. The

Defendant, Florida Department of Business and Professional Regulation, Division of Alcohol Beverages and Tobacco (the "Division") has collected and refused to provide refunds to distributors for excise tax applied to costs in excess of the "wholesale sales price" of "tobacco products," resulting in unequal taxes charged for in state and out of state manufactured products, and for those distributors that the Division has granted refunds pursuant to the Court's ruling in *Micjo, Inc. v. Florida Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco*, 78 So.3d 124 (Fla. 2<sup>nd</sup> DCA 2009).

## **II. Jurisdiction and Parties:**

1. This is an action for declaratory and injunctive relief within the jurisdiction of this Court.

2. Plaintiff, Miami Hookah Co., ("Miami Hookah") is a duly formed Florida corporation doing business in Miami-Dade County, Florida at 12532 S.W. 120<sup>th</sup> Street, Miami Florida 33186, and is a distributor of hookah tobacco products taxable pursuant to Chapter 120 of the Florida Statutes. In addition, Miami Hookah is licensed and regulated by the Defendant Florida Department of Business and Professional Regulation, Division of Alcohol Beverages and Tobacco (the "Division").

3. Defendant Division is an agency of the State of Florida whose address is 1940 North Monroe Street, Tallahassee, Leon County, Florida. It is an executive branch agency of the State of Florida created pursuant to Florida Statute § 20.165.

4. Under Florida Statute § 72.011, jurisdiction and venue is proper in this Court because, as alleged herein the Division is an agency of the State of Florida, and Miami Hookah is a taxpayer residing and doing business in Miami-Dade County, Florida, that was denied a refund of tax paid under Chapter 210 of the Florida Statutes within 60 days of the filing of this action.

5. The Division is responsible for enforcing Chapter 210 of the Florida Statutes, which addresses the taxation of tobacco products.

6. Florida Statute Section 210.25(13) defines “wholesale sales price” as meaning “the established price for which a manufacturer sells a tobacco product to a distributor, exclusive of any diminution by volume or other discounts.”

7. Florida Statute Section 210.25(11) defines “tobacco products” as “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.”

8. The “wholesale sales price” of the “tobacco product” does not include federal excise tax, duties, shipping costs, and other charges that are not part of the tobacco. See § 210.25(11) (defining “tobacco products”).<sup>1</sup>

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<sup>1</sup> See *Micjo, Inc. v. Florida Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco*, 78 So. 3d 124 (Fla. 2<sup>nd</sup> DCA 2009), a copy of which is attached at *Exhibit “C.”*

9. The Division has inconsistently interpreted and applied Florida Statute Section 210.25(13) to distributors of other tobacco products (“OTP”) resulting in a competitive disadvantage and higher tax payments by some tax payers like Miami Hookah.

10. In an effort to avoid the revocation or suspension of its license, or assessment of penalties or interest based OTP assessed on taxes, duties and other costs of distribution over the amount of the wholesale sales price of the tobacco, Miami Hookah:

(a) From on or about February 2012 to date, has paid OTP to the Division based upon the wholesale sales price of the tobacco and all taxes assessed by other governmental entities.

(b) In or about October and early November, 2013, requested a refund of OTP paid on costs over the wholesale sales price of tobacco from on or about February 6, 2012 to on or about July 5, 2013, as interpreted and applied in *Micjo, Inc. v. Florida Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco*, 78 So.3d 124 (Fla. 2<sup>nd</sup> DCA 2009). The total refund request for that period was \$167,636.45. A copy of the ledger itemizing each invoice for which a refund was requested is attached at *Exhibit “A.”*

11. Based upon information and belief, on or about November 13, 2013, the Division issued a letter denying Miami Hookah’s refund request described in Paragraph 10(b), on the following ground: “Florida law requires the Division to

assess all costs included in the manufacturer's sales price when calculating the OTP tax. As such, your request for a refund is denied." A copy of said denial letter is attached at *Exhibit "B."*

## COUNT I

**CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF REGARDING THE DIVISION'S PROSPECTIVE AND RETROACTIVE APPLICATION OF FLA. CHAP. 210 CONTRARY TO THE RULING IN *MICJO, INC. v. FLA. DEPT. OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO***

12. The Plaintiff alleges and incorporates by reference each and every allegation in Paragraphs 1 through 11 above.

13. All conditions precedent for the bringing of this action have been exhausted and/or waived.

14. An actual controversy has arisen and now exists between the Plaintiff, Miami Hookah, and the Defendant Division as to the interpretation and application of Chapter 120, which prospectively and retroactively interferes with and violates Miami Hookah's rights in violation of Article I, Section 2 of the Florida Constitution and the following provisions of the United States Constitution: Article I, Section 8, Clause 3 (Commerce Clause), Article I, Section 10, clause 2 (Import-Export Clause), and the Fifth and Fourteenth Amendments (Equal Protection Clause).

15. Plaintiff, Miami Hookah, desires a judicial declaration as to the constitutionality of the Division's interpretation of Chapter 210, as provided in its

letter denial attached at *Exhibit "B,"* resulting in the taxation of costs of sale in excess of the "wholesale sales price" of "tobacco," as those terms are defined in Florida Statutes Chapter 210, and contrary to the Second District's ruling in *Micjo, Inc. v. Florida Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco*, 78 So.3d 124 (Fla. 2<sup>nd</sup> DCA 2009), a copy of which is attached at *Exhibit "C."*

16. Plaintiff, Miami Hookah, desires a judicial declaration as to the authority of the Division to expand the definitions in Chapter 120 of the "wholesale sales price" of "tobacco products" to include other costs such as federal taxes and duties, transportation costs, and other costs incurred in the distribution of tobacco products.

17. Plaintiff, Miami Hookah, desires a judicial declaration regarding the lack authority of the Division to refuse to grant Miami Hookah's refund request. See *Exhibits "A" and "B."*

18. A judicial determination is necessary and appropriate at this time under the circumstances in order that Miami Hookah may ascertain its rights and duties under Chapter 120. As set forth in Paragraphs 1 through 11, Miami Hookah is suffering significant financial burdens due to the Division's refusal to refund funds paid on OTP calculated on costs of sale in excess of the wholesale sales price of the tobacco from the manufacturer as those terms are define in Chapter 120. In addition, as set forth above, the Division's interpretation and application of Chapter 120 unjustifiably burdens interstate commerce by

assessing OTP on federal excise tax and other costs of sale to consumers for some distributors like Miami Hookah, but not assessing it as to other distributors. Further, the Division's interpretation of Chapter 120 as set forth in *Exhibit "B"* results in a higher tax for distributors whose goods are transported a longer distance violates.

19. Plaintiff, a corporate entity, is required to retain counsel for the filing and prosecution of this action, and has agreed to pay counsel reasonable attorneys fees, including costs and expenses incurred in this action. Plaintiff is entitled to recover those attorneys fees, costs and litigation expenses from the defendant pursuant to Fla. Stat. Sections 57.105 and 57.111.

#### **PRAYER FOR RELIEF**

WHEREFORE, the Plaintiff, Miami Hookah, prays that this Court enter a judgment against the Defendant granting:

**A.** A declaratory judgment in favor of the Plaintiff finding that the Division has improperly applied OTP to costs in excess of the manufacturer's wholesale sale price of tobacco as those terms are defined in Florida Statute 120, and as interpreted by the Second District Court of Appeal in *Micjo, Inc. v. Florida Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco*, 78 So.3d 124 (Fla. 2<sup>nd</sup> DCA 2009).

**B.** A declaratory judgment in favor of the Plaintiff finding that the Division's actions and interpretation of Fla. Chap. 210, as plead herein, are unconstitutional.

C. An injunction preliminarily and permanently enjoining Defendant from assessing OTP on costs in excess of the manufacturer's wholesale sale price of tobacco, including but not limited to, federal excise tax and duties, transportation costs, storage and insurance.

D. An injunction permanently requiring the Defendant to reimburse Miami Hookah for the amount of the refund request attached at *Exhibit "A"* and all future refund requests for OTP paid on costs in excess of the manufacturer's wholesale sale price of tobacco, as interpreted and applied by the Second District Court of Appeal in *Micjo, Inc. v. Florida Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco*, 78 So.3d 124 (Fla. 2<sup>nd</sup> DCA 2009).

E. An award of attorneys fees and costs for the prosecution of this action pursuant to Fla. Stat. Sections 57.105 and 57.111; and

F. An award of such other relief as the Court shall deem just and proper.

Dated: January 13, 2014.

Respectfully submitted,

  
/s/ Rhonda A. Anderson, Esq.

**RHONDA A. ANDERSON, ESQ.**

Fla. Bar No. 708038

Attorney for Plaintiff

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 13th day of January 2014, I filed the foregoing with the Clerk of Court and have served the following individuals and entities via U.S. Mail, first class postage prepaid, return receipt requested, and via service of process:

Allen Douglas, Director and  
Ben Pridgeon, Bureau Chief, Auditing  
Florida Dept. of Business and  
Professional Regulation, Division of  
Alcohol Beverages and Tobacco  
1940 N. Monroe Street  
Tallahassee, FL 32399-1020  
Telephone: 850-488-3227  
Facsimile: 850-922-5175

Pamela Bondi, Florida Attorney General  
Office of Attorney General  
State of Florida  
The Capitol PL-01  
Tallahassee, FL 32399-1050  
Telephone: 850-414-3300  
Facsimile: 850-488-5865

Katherine Fernandez Rundle, State  
Attorney, Office of the State Attorney,  
11th Circuit of Florida, Miami-Dade  
County  
E.R. Graham Building  
1350 N.W. 12 Avenue  
Miami, FL 33136-2111  
Telephone: 305-547-0100



/s/ Rhonda A. Anderson, Esq.  
**RHONDA A. ANDERSON, ESQ.**

MIAMI HOOKAH  
LICENSE NUMBER 23-01089

DATE	INVOICE #	AMOUNT	SUPPLIER	FED TAX PAID	REFUND
7/5/2013	32646	\$42,870.00	STARBUZZ TOBACCO	\$16,410.02	\$13,948.52
6/3/2013	32350	\$16,446.00	STARBUZZ TOBACCO	\$6,220.24	\$5,287.20
4/22/2013	31967	\$25,063.20	STARBUZZ TOBACCO	\$10,245.98	\$8,709.08
4/3/2013	31757	\$22,474.80	STARBUZZ TOBACCO	\$8,983.96	\$7,636.37
3/4/2013	31308	\$30,280.80	STARBUZZ TOBACCO	\$11,803.82	\$10,033.25
3/18/2013	31524	\$8,364.00	STARBUZZ TOBACCO	\$3,407.86	\$2,896.68
1/25/2013	30738	\$20,683.40	STARBUZZ TOBACCO	\$7,564.65	\$6,429.95
2/18/2013	31075	\$1,290.00	STARBUZZ TOBACCO	\$430.67	\$366.07
1/11/2013	30584	\$26,674.80	STARBUZZ TOBACCO	\$10,421.99	\$8,858.69
12/4/2012	30198	\$12,660.00	STARBUZZ TOBACCO	\$5,122.99	\$4,354.54
10/12/2012	29534	\$49,146.00	STARBUZZ TOBACCO	\$19,596.89	\$16,657.36
10/18/2012	29653	\$17,043.00	STARBUZZ TOBACCO	\$9,249.83	\$7,862.36
10/19/2012	2918	\$1,680.00	STARBUZZ TOBACCO	\$749.00	\$636.65
9/6/2012	29001	\$48,048.00	STARBUZZ TOBACCO	\$18,656.92	\$15,858.38
9/21/2012	29190	\$11,562.00	STARBUZZ TOBACCO	\$6,029.26	\$5,124.87
8/17/2012	2416	\$72.80	STARBUZZ TOBACCO	\$21.86	\$18.58
7/13/2012	28365	\$11,227.20	STARBUZZ TOBACCO	\$3,804.80	\$3,234.08
6/1/2012	27909	\$36,178.80	STARBUZZ TOBACCO	\$14,279.19	\$12,137.31
5/10/2012	27619	\$35,156.40	STARBUZZ TOBACCO	\$14,069.47	\$11,959.05
4/17/2012	27383	\$28,548.00	STARBUZZ TOBACCO	\$12,155.84	\$10,332.46
2/6/2012	26780	\$45,366.00	STARBUZZ TOBACCO	\$17,994.11	\$15,294.99
<b>TOTAL REFUND</b>					<b>\$167,636.45</b>

EXHIBIT "A"

**Ken Lawson**, Secretary

**Rick Scott**, Governor

November 13, 2013

**CERTIFIED MAIL #7006 2760 0002 3500 6497**

Miami Hookah  
242 North Krome Ave  
Florida City, FL 33034

Dear Licensee,

The Division is in receipt of your request for a refund concerning the Florida excise taxes paid on Other Tobacco Products for the period February 2012 through July 2013.

Florida law requires the Division to assess all costs included in the manufacturer's sales price when calculating the OTP tax. As such, your request for a refund is denied.

If you disagree with this denial of refund and would like to contest, you are entitled to initiate an administrative or judicial proceeding within 60 days of the date of this letter, pursuant to section 72.011, F. S.

Sincerely,

Ben Pridgeon  
Bureau Chief, Auditing

**EXHIBIT "B"**



Cited

As of: November 5, 2013 10:42 AM EST

### Micjo, Inc. v. Dep't of Bus. & Prof'l Regulation

Court of Appeal of Florida, Second District  
February 1, 2012, Opinion Filed  
Case No. 2D11-254

**Reporter:** 78 So. 3d 124; 2012 Fla. App. LEXIS 1322; 37 Fla. L. Weekly D 274; 2012 WL 279670

**MICJO, INC.**, a Florida corporation, Appellant, v. **DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO**, Appellee.

**Subsequent History:** Released for Publication February 22, 2012.

**Prior History:** **[\*\*1]** Appeal from the Department of Business and Professional Regulation.

#### Case Summary

#### Procedural Posture

Appellee Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (ABT) (Florida) entered a determination which required appellant store to pay \$ 47,649, plus interest, in Florida excise taxes to ABT. The store appealed.

#### Overview

During the relevant time, the store bought its tobacco from domestic distributors who imported the tobacco from overseas manufacturers. The store paid taxes on the unit price of the tobacco but not on the total invoice price, which included federal excise

tax, shipping costs, and various other charges. The ABT concluded that the store underpaid the Florida Tax on Tobacco Products Other Than Cigarettes or Cigars (OTP) by failing to pay taxes on the total invoice. The appellate court found, however that the established price for purposes of § 210.25, Fla. Stat (2009) was for the sale of the tobacco product. The various other distributor invoice costs for reimbursement of federal tax, shipping, and other charges, were not part of the tobacco. Since the meaning of this statute and the language were clear, ABT's interpretation was rejected and the appellate court relied on the plain meaning of the words used by the legislature. Because wholesale sales price meant the manufacturer's price for the tobacco and because the store paid the Florida OTP tax based on this price, it complied with the statute.

#### Outcome

The determination was reversed.

#### LexisNexis® Headnotes

Tax Law > ... > Alcohol & Tobacco Products > Tobacco Products Taxes > General Overview

**HNI** Florida's Tax on Tobacco Products Other Than Cigarettes or Cigars statute imposes both a surcharge and a tax upon the

EXHIBIT "C"

wholesale sales price of tobacco that is regulated by the statute. § 210.276(1), Fla. Stat.

Tax Law > ... > Alcohol & Tobacco Products > Tobacco Products Taxes > General Overview  
 Tax Law > ... > Alcohol & Tobacco Products > Tobacco Products Taxes > Imposition of Tax

**HN2** See § 210.276(1), Fla. Stat.

Tax Law > ... > Alcohol & Tobacco Products > Tobacco Products Taxes > General Overview  
 Tax Law > ... > Alcohol & Tobacco Products > Tobacco Products Taxes > Imposition of Tax

**HN3** See § 210.30(1), Fla. Stat.

Tax Law > ... > Alcohol & Tobacco Products > Tobacco Products Taxes > General Overview

**HN5** Section 210.25(11), Fla. Stat. defines "tobacco products" under the Florida's Tax on Tobacco Products Other Than Cigarettes or Cigars.

Tax Law > ... > Alcohol & Tobacco Products > Tobacco Products Taxes > General Overview

**HN4** Wholesale sales price is a defined term under Florida's Tax on Tobacco Products Other Than Cigarettes or Cigars statute. It is the established price for which a manufacturer sells a tobacco product to a distributor, exclusive of any diminution by volume or other discounts. § 210.25(13), Fla. Stat.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation  
 Governments > Legislation > Interpretation

**HN6** The administrative construction of a statute by those charged with its enforce-

ment and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation  
 Governments > Legislation > Interpretation

**HN7** A court is not constrained by the administrative construction of a statute when the statute is not ambiguous. Administrative construction of a statute, the legislative history of its enactment and other extraneous matters are properly considered only in the construction of a statute of doubtful meaning.

Tax Law > ... > Alcohol & Tobacco Products > Tobacco Products Taxes > General Overview  
 Tax Law > ... > Alcohol & Tobacco Products > Tobacco Products Taxes > Imposition of Tax

**HN8** The language of § 210.25(13), Fla. Stat. (2009) clearly states that the wholesale sales price is based only on the manufacturer's price of the tobacco product. The phrase "established price for which a manufacturer sells a tobacco product to a distributor" is given its plain meaning by the statute's own definitions. The statute defines a "manufacturer" as someone who manufactures and sells tobacco products. § 210.25(5). Thus, the definition of manufacturer excludes companies that are solely domestic distributors. This is clear from the statute's separate definition for "distributors." Section 210.25(4)(a) defines the applicable definition for "distributor" as any person engaged in the business of selling tobacco products in Florida who brings, or causes to be brought, into Florida from outside the state any tobacco products for sale. This plain language indicates that the

determination of the established price is at the point when the manufacturer sells the tobacco to the domestic distributor.

Tax Law > ... > Alcohol & Tobacco Products > Tobacco Products Taxes > General Overview

Tax Law > ... > Alcohol & Tobacco Products > Tobacco Products Taxes > Imposition of Tax

**HN9** The established price for purposes of § 210.25, *Fla. Stat* (2009) is for the sale of the tobacco product. The various other distributor invoice costs for reimbursement of federal excise tax, shipping costs, and other charges, are not part of the tobacco. *Section 210.25(11)* defines "tobacco products."

Tax Law > ... > Alcohol & Tobacco Products > Tobacco Products Taxes > General Overview

Tax Law > ... > Alcohol & Tobacco Products > Tobacco Products Taxes > Imposition of Tax

**HN10** The plain meaning of wholesale sales price under § 210.25, *Fla. Stat* (2009) is the manufacturer's sales price of the tobacco and not the domestic distributor's invoice price. This interpretation is also consistent with the Florida Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco's own rules for tobacco product invoices. *Fla. Admin. Code Ann. R. 61A-10.054(1)(h)* requires invoices for tobacco products from wholesale dealers to indicate the number of units of each brand of tobacco products, wholesale price per unit, and discount per unit sold to the retailer.

**Counsel:** Harry P. Teichman of Bayshore Law Group, Tampa, for Appellant.

Garnett W. Chisenhall, Chief Appellate Counsel, Tallahassee, for Appellee.

**Judges:** BLACK, Judge. WALLACE, J., and BAUMANN, HERBERT, JR., ASSOCIATE JUDGE, Concur.

**Opinion by:** BLACK

#### Opinion

[\*125] BLACK, Judge.

**Micjo, Inc.**, appeals the final agency action of the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (AB&T), that requires it to pay \$47,649.45, plus interest, in Florida excise taxes to AB&T. In this case of first impression, we are called upon to interpret the phrase "wholesale sales price" as it appears in *section 210.25(13), Florida Statutes* (2009), and as it appears within the context of Florida's "Tax on Tobacco Products Other Than Cigarettes or Cigars" (OTP).<sup>1</sup> Because we conclude that AB&T's interpretation of the statute is contrary to the plain meaning of wholesale sales price and does not include the additional costs that the domestic distributor adds to the manufacturer's unit price of the tobacco, we reverse. As a result, we do not reach **Micjo's** constitutional arguments, and its argument that AB&T failed to challenge a portion of the [**\*\*2**] tax assessment within the relevant statute of limitations is moot.

#### BACKGROUND

**Micjo** owns a store that imports and distributes Middle Eastern-themed products, in-

<sup>1</sup> For ease of reference, we will refer to Florida's "Tax on Tobacco Products Other Than Cigarettes or Cigars" as the "Other Tobacco Products" tax. See §§ 210.25-.75.

cluding hookah tobacco.<sup>2</sup> As a Florida tobacco distributor, **Micjo** is licensed and regulated by AB&T, and the hookah tobacco it distributes is subject to Florida's OTP tax. During the period relevant to this appeal, **Micjo** purchased its hookah tobacco from domestic distributors (commonly referred to as middlemen) who imported the tobacco from overseas manufacturers. **Micjo** paid taxes on the unit price of the tobacco but not on the total invoice price, which included federal excise tax, shipping costs, and various other charges.

In 2009, AB&T audited **Micjo**'s books and records for May 1, 2006, through April 30, 2009. As a result of the audit, AB&T concluded that **Micjo** underpaid the Florida OTP **[\*\*3]** tax by \$47,649.45, plus accrued interest, because it failed to pay taxes on the total invoice price. On March 8, 2010, AB&T informed **Micjo** by letter that it was pursuing legal action against **Micjo**'s tobacco license by filing an administrative complaint. **Micjo** responded by requesting a formal administrative hearing and disputing AB&T's calculation of the tax. **Micjo** also disputed the timeliness of certain of the assessments. The parties agreed on a statement of stipulated facts and agreed "[t]he subject of [the] entire dispute center[ed] on the legal definition of 'wholesale sales price.'" This resulted in an informal hearing pursuant to *section 120.57(2), Florida Statutes* (2010). AB&T held the hearing and issued a recommended order. In the order, the hearing officer concluded, "[T]he [wholesale sales **[\*126]** price] includes delivery charges and the federal excise taxes. It is all components on the invoice that make up the cost to get the product to the purchaser[;] therefore, all components are subject to be taxed."

**Micjo** timely filed exceptions to the recommended order, raising the issues set forth in this appeal. On December 17, 2010, the final order was entered rejecting **Micjo**'s exceptions **[\*\*4]** and adopting AB&T's recommendations in their entirety. As a result, **Micjo** filed this appeal.

### ISSUE

The essence of the dispute is not complicated and involves a pure question of law. The parties disagree as to the taxable components of the wholesale sales price. **Micjo** claims that wholesale sales price refers only to the unit price of the actual tobacco product and does not include domestic distributor add-ons which are not explicitly part of the tobacco. AB&T interprets wholesale sales price to mean the invoice price paid by **Micjo** to the domestic distributors, in its entirety, inclusive of the federal excise tax reimbursements, shipping costs, and other various charges.

### ANALYSIS

**HN1** Florida's OTP statute imposes both a surcharge and a tax upon the wholesale sales price of tobacco that is regulated by the statute. *§ 210.276(1) (HN2 "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."); § 210.30(1) (HN3 "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 **[\*\*5]** the wholesale sales price of such to-*

<sup>2</sup> As pointed out by **Micjo** in its brief, Hookah tobacco is a popular form of tobacco in Middle Eastern countries. It is typically flavored and smoked through a hookah, a large water pipe.

bacco products.”).<sup>3</sup> **HN4** Wholesale sales price is a defined term under the statute. It is “the established price for which a manufacturer sells a tobacco product to a distributor, exclusive of any diminution by volume or other discounts.” § 210.25(13). There are no Florida cases interpreting the definition of wholesale sales price.

AB&T argues that “established price” equals the invoice price. It reasons that the established price consists of the entirety of a domestic distributor’s invoice price, including federal tax, shipping costs, and other charges, because that money is part of the consideration for the purchase of the tobacco. Thus, it suggests that we read into the statute the requirement that the tax base is the total cost of bringing the product to market in Florida.

In support of this position, AB&T reminds us that we owe deference to its interpretation of the statute because it is given the power to administer the statute in question. *Dep’t of Revenue v. First Union Nat’l Bank of Fla.*, 513 So. 2d 114, 119 (Fla. 1987) - [\*\*6] (**HN6** “[T]he administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized.” (citing *Gay v. Canada Dry Bottling Co.*, 59 So. 2d 788, 790 (Fla. 1952))). We recognize that this is the general rule. *Donato v. Am. Tel. & Tel. Co.*, 767 So. 2d 1146, 1153 (Fla. 2000). However, **HN7** we are not constrained by the administrative construction of a statute when the statute is not ambiguous. *Id.* (“Administrative construction of a statute, the legislative history of its enactment and other extraneous matters are properly considered *only in the construc-*

*tion of a statute of doubtful meaning.*” (quoting *Fla. State Racing [\*\*127] Comm’n v. McLaughlin*, 102 So. 2d 574, 576-77 (Fla. 1958))). Since we find the meaning of this statute and the legislature’s language clear, we reject AB&T’s interpretation and rely on the plain meaning of the words used by the legislature. See *id.* at 1154.

**HN8** The statute’s language clearly states that the wholesale sales price is based only on the manufacturer’s price of the tobacco product. The phrase “established price for which [\*\*7] a manufacturer sells a tobacco product to a distributor” is given its plain meaning by the statute’s own definitions. The statute defines a “manufacturer” as someone who “manufactures and sells tobacco products.” § 210.25(5). Thus, the definition of manufacturer excludes companies that are solely domestic distributors. This is clear from the statute’s separate definition for “distributors.” See § 210.25(4)(a) (defining the applicable definition for “distributor” as “[a]ny person engaged in the business of selling tobacco products in this state who brings, or causes to be brought, into this state from outside the state any tobacco products for sale”). This plain language indicates that the determination of the established price is at the point when the manufacturer sells the tobacco to the domestic distributor.

Although AB&T focuses on the term established price, it fails to give that term its plain meaning within the context of the sentence. **HN9** The established price is for the sale of the tobacco product. The various other distributor invoice costs for reimbursement of federal excise tax, shipping costs, and other charges, are not part of the tobacco. See § 210.25(11) (defining “tobacco [\*\*8] products”). Although the do-

<sup>3</sup> The parties do not dispute the fact that hookah tobacco is subject to these sections. See **HN5** § 210.25(11) (defining “tobacco products” under the OTP tax).



mestic distributor adds those charges to the total invoice price, they are not part of the price that the domestic distributor paid the manufacturer for the tobacco, and thus, they are not part of the manufacturer's sales price for the tobacco. Further, items such as shipping costs could vary depending on where the domestic distributor ships the tobacco in Florida, and the total invoice price for the same tobacco would not be an established price. See *Black's Law Dictionary* 586 (8th ed. 2004) (defining "establish" as "to settle, make, or fix firmly").

Based on this reasoning, we conclude **HN10** the plain meaning of wholesale sales price is the manufacturer's sales price of the tobacco and not the domestic distributor's invoice price. This interpretation is also consistent with AB&T's own rules for tobacco product invoices. See *Fla. Admin. Code R. 61A-10.054(1)(h)* (requiring invoices for tobacco products from wholesale dealers to indicate the "number of units of each brand of tobacco products, wholesale price per unit, and discount per unit sold to the retailer").<sup>4</sup>

Because wholesale sales price means the manufacturer's price for the tobacco and because **Micjo** paid the Florida OTP tax based on this price, it complied with the terms of the statute. Although AB&T also cites out-of-state cases and tax commission opinions to support its position, these authorities do not persuade us. **[\*128]** Since we find the language of the Florida Legislature is clear, we are not required to defer to AB&T's interpretation of the statute; thus, if we are not deferring to a Florida agency's interpretation, the nonbinding authority of other states and **[\*\*10]** commissions

is even less persuasive. However, even if they were persuasive, the authorities cited are factually inapposite. See *U.S. Tobacco Sales & Mktg. Co., Inc. v. Wash. Dep't of Revenue*, 96 Wn. App. 932, 982 P.2d 652, 654 (Wash. Ct. App. 1999) (addressing the definition of wholesale sales price—which was identical to Florida's definition—where the manufacturer and the distributor were affiliated companies and concluding that the established price was the invoice price or fair market value, inclusive of various manufacturer's costs); 2005 Wash. Sess. Laws Ch. 180, § 2 (amending *RCW 82.26.010* by taking out the term and definition for wholesale sales price and replacing it with the term "taxable sales price" and a detailed, multiple subsection definition); see also *State of Ill., Dep't of Revenue, Letter No. ST 09-0002-PLR*, 2009 Ill. PLR LEXIS 39, 2009 WL 1163618 (addressing the definition of wholesale sales price in the context of a company selling tobacco to a middleman distributor). Here, AB&T is arguing that the distributor's invoice price, not the manufacturer's invoice price, is the established price. Additionally, the reasoning of the Washington court is not persuasive and does not fully support AB&T's position. See **[\*\*11]** *U.S. Tobacco Sales & Mktg.*, 96 Wn. App. at 940, 982 P.2d 652 (finding other state statutes that clearly defined the manufacturer's selling price as the invoice price were similar to Washington's statute that did not define it as invoice price and concluding that the established price did not "need [to] include the value that is added to the products after the manufacturer sells them").

Because the language of the statute is clear,

<sup>4</sup> Further illustrating the accuracy of this interpretation is **Micjo's** argument concerning Florida's OTP tax **[\*\*9]** on direct imports of hookah tobacco from overseas manufacturers. **Micjo** argues that before 2006, it purchased hookah tobacco directly from the manufacturer; there were no middlemen distributors. It asserts that it directly paid the federal excise tax to the federal government, and it was not required to pay any Florida OTP taxes on the federal tax. Although **Micjo** is now purchasing its tobacco from middlemen distributors, **Micjo** correctly contends that it is illogical for AB&T to require it to pay Florida OTP tax on the federal tax because it is now paying the federal tax to the middlemen distributors in the form of a reimbursement.

we do not reach **Micjo**'s constitutional arguments. Moreover, **Micjo** paid the appropriate amount of taxes; thus, the second issue raised by **Micjo** concerning the statute of limitations for a portion of AB&T's tax assessment is moot. Accordingly, we reverse the agency's final order. *See* § 120.68(7)(d).

Reversed.

WALLACE, J., and BAUMANN, HERBERT, JR., ASSOCIATE JUDGE, Concur.