

1 IN THE OREGON TAX COURT  
2 MAGISTRATE DIVISION  
3 Tobacco Tax

4 GLOBAL HOOKAH DISTRIBUTORS, INC.  
5 State of Oregon,

6 Plaintiff,

7 v.

8 DEPARTMENT OF REVENUE,

9 Defendant.

Case No. 140466N

DEPARTMENT OF REVENUE'S MOTION FOR  
SUMMARY JUDGMENT

10 Pursuant to TCR 47, and on the basis that there is no genuine issue as to any material fact  
11 relevant to the issue that is the subject of this motion and that defendant is entitled to judgment as  
12 a matter of law, defendant respectfully moves the court for an order granting summary judgment  
13 in its favor affirming the imposition of the tobacco tax pursuant to ORS 323.505. This motion is  
14 based upon the following points and authorities.

15 POINTS AND AUTHORITIES

16 This case involves the imposition of the tobacco products tax pursuant to ORS 323.505 on  
17 plaintiff's conceded distribution of tobacco products. The tax imposed upon plaintiff's distribution  
18 was calculated based on 65% of the "wholesale sales price" of the tobacco product as set forth in  
19 ORS 323.505(2). The issue is what costs comprise the "wholesale sales price."

20 Perhaps unique among the states, while that Oregon tobacco tax is imposed upon the  
21 distribution, it "is intended to be a direct tax on the consumer, for which payment upon distribution  
22 is required to achieve convenience and facility in the collection and administration of the tax."  
23 ORS 323.505(1). To avoid rendering this language superfluous, the nature of a "direct tax"  
imposed on the consumer must be considered when determining the costs to include in the .

1 “wholesale sales price.” Even the definition of “wholesale sales price” indicates that a consumer  
2 perspective can be appropriate: “Wholesale sales price means the price paid for untaxed tobacco  
3 products to or on behalf of a seller by a purchaser of the untaxed tobacco products.”  
4 ORS 323.500(16). That “purchaser” can be a consumer. For example, one definition of the term  
5 “distribute” means: “As a consumer, being in possession of untaxed tobacco products in this state.”  
6 ORS 323.500(6)(f). Other definitions of the term “distribute” include bringing, making, storing, or  
7 shipping tobacco product to Oregon for activities other than sales such as for use or consumption.  
8 ORS 323.500(6)(a), (6)(b), (6)(d). And even a distributor can be a consumer. ORS 323.500(7)(e).  
9 From the perspective of imposing a “direct tax” on a consumer, therefore, both direct and indirect  
10 costs of manufacturing as well and packaging and shipping would be included in the sales price.  
11 To receive the tobacco product, all these costs would be paid by the consumer. And these facts also  
12 make clear that the term “wholesale price” is a term of art and does not necessarily mean the sales  
13 price incurred prior to a consumer or retail transaction.

14 Under Oregon law the amount and type of costs incurred that will be encapsulated in the  
15 “wholesale price” may be different depending on when in the sales chain the distribution occurs.  
16 The tax is “imposed upon the distribution” of the product. ORS 323.505(1). That act of distribution  
17 can occur at different levels of trade as reflected in the different definitions of the term “distribute.”  
18 ORS 323.500(6). And for each sales transaction of the same tobacco product up the sales chain a  
19 separate sales invoice must be provided to the subsequent purchaser based on that current sale  
20 price rather than on the original wholesale price if one occurred. ORS 323.538(3). Further, if a  
21 licensed distributor only sells to consumers previously taxed tobacco product such a separate  
22 invoice is not required if the “wholesale sales price” of an “individual sale” to the consumer is for  
23 less than \$50 or for less than 100 cigars. ORS 323.540(3). Therefore, there is no fixed standard of

1 the type of costs included in the wholesale price such as, for example, merely the manufacturer's  
2 costs. All subsequent costs incurred are subsumed into the next sale.

3 The inclusion of all costs, including direct and indirect, is consistent with the statutory  
4 context provided by other Oregon statutes. For example, real and personal property taxes are also  
5 based on a sales price (expected sales price in this case) between a buyer and a seller for the  
6 property. ORS 308.205. The definition of personal property includes items such as merchandise  
7 and stock in trade. ORS 307.020. The method for determining that sales price includes the use of  
8 the cost approach. OAR 150-308.205. For industrial real property the cost approach is specifically  
9 listed as one of the methods. ORS 308.411. The cost approach includes the inclusion of both direct  
10 and indirect (soft) costs. *Betz Evans Associates v. Department of Revenue*, TC 5138, (2014). The  
11 Oregon Tax Court often uses *The Appraisal of Real Estate* as a guide for the list of included  
12 indirect costs:

13 "The Appraisal of Real Estate distinguishes between "direct costs" and  
14 "indirect costs," stating that "indirect costs" include: "Architectural and  
15 engineering fees for plans, plan checks, surveys to establish building lines and  
16 grades, and environmental studies; Appraisal, consulting, accounting, and legal  
17 fees; The cost of carrying the investment in land and contract payments during  
18 construction; [and] All-risk insurance expense and ad valorem taxes during  
19 construction." Id. at 388. "Cost manuals rarely include all indirect costs or an  
20 allowance for entrepreneurial profit, so adjustments must often be made to obtain  
21 an indication of the total cost." Id. at 401. "[A]n estimate of entrepreneurial profit  
22 or entrepreneurial incentive" is "a fundamental component of total cost[.]"

18 *HD Salem or Landlord LLC v. Marion County Assessor*, TC-MC 120136N (2012).

19

20 Therefore, items such as previously paid taxes are included in the sales price. A seller expects a  
21 return of and on all of its costs (direct and indirect) when it sells its property whether it's a house or  
22 a cigar or hookah tobacco.

23 ///

1 For the foregoing reasons, defendant's imposition of the tobacco product tax should be  
2 affirmed.

3 DATED this 15th day of July, 2015.

4 Respectfully submitted,

5 ELLEN F. ROSENBLUM  
6 Attorney General

7 

8 

---

Joseph A. Laronge, #841330  
9 Senior Assistant Attorney General  
10 Of Attorneys for Department of Revenue,  
11 State of Oregon, Defendant

12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

CERTIFICATE OF SERVICE

I certify that on the 15<sup>th</sup> day of July, 2015 I directed the foregoing DEPARTMENT OF REVENUE'S MOTION FOR SUMMARY JUDGMENT to be served upon the party hereto by the method indicated below, and addressed to the following:

JAY RICHARDSON  
Attorney at Law  
5300 Meadows Rd., #200  
Lake Oswego, OR 97035

HAND DELIVER  
 U.S. MAIL  
 OVERNIGHT MAIL  
 FACSIMILE  
 ELECTRONIC MAIL

and prepaying the postage thereon.



Joseph A. Laronge, #841330  
Senior Assistant Attorney General  
Of Attorneys for Defendant