STATE OF FLORIDA
DEPARTMENT OF BUSINSS AND PROFESSIONAL REGULATION

BRANDY'S PRODUCTS, INC.

Petitioner, DOAH CASE NO.: 14-003496

vs.

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

Respondent.

_____/

AMENDED PETITION FOR CHAPTER 120 HEARING

Petitioner, BRANDY'S PRODUCTS, INC. ("Brandy's" or "Petitioner") by and through its undersigned attorney, files this Petition for Chapter 120 Hearing with the State of Florida, Department of Business & Professional Regulation, Division of Alcoholic Beverages & Tobacco, ("Division" or "Respondent") pursuant to Chapter 120, Florida Statutes ("F.S."), to contest the Notice of Decision to the Petitioner, dated May 19, 2014 (the "NOD"). Pursuant to the NOD, the Respondent asserted that Petitioner owes additional Florida other tobacco products tax and surcharge (collectively "OTP Tax") for the period of July 7, 2009 through August 2, 2011 relating to its purchases from National Honey Almond ("NHA").

I. The Parties

1. Petitioner, Brandy's, is a Florida corporation. For purposes of this proceeding, Petitioner's address is that of the undersigned counsel.

2. Petitioner's EIN is 65-0378557 and Petitioner's license number is 6600115.

Filed July 31, 2014 4:11 PM Division of Administrative Hearings

3. The name and address of the Respondent, is 1940 North Monroe Street, Tallahassee, FL 32399.

4. The Petitioner's substantial interests will be adversely affected by the Respondent's determination that the Petitioner owes OTP Tax that is not due under Florida law.

5. The Respondent issued an NOD dated May 19, 2014, which is a final agency action for purposes of court action or administrative proceedings. Further, pursuant to Chapter 72, F.S., the Petitioner contests the legality of the assessment.

II. Background and Procedural History

6. The Petitioner is in the business of operating a distribution company in Florida.

7. As a result of an audit, the Division is attempting to assess $71,868.23 of OTP Tax, penalties, and interest.

8. Pursuant to its letter, dated March 1, 2013, the Division appears to be basing its entire assessment on the Brandy's purchases of items from NHA for the periods of July 2009 through September 2011.

9. On or around March 13, 2013, Brandy's responded to the March 1, 2013 letter and requested an informal conference to discuss the liability at issue.

10. On or around April 4, 2014, the Division issued a "final request" to Brandy's for $70,368.23 and commanded Brandy's payment within 10 days of the letter.

11. It is worth noting that the Division did not advise Brandy's of any of its appeal rights in the "final request."

12. It is also noteworthy that the Division cited Part I, Chapter 210, F.S., which discussed the law regarding "cigarettes."

13. However, the Division appears to have calculated the tax in its audit report based on Part II, Chapter 210, F.S., which governs other tobacco products.

a. For example, the first line of the audit report has an adjustment amount of $2,351.25.

b. From there, the Department calculated an excise tax of $587.81, which is 25% of the amount and $1,410.75, which is 60% of the adjustment.

c. Those tax percentages apply to Part II of Chapter 210, F.S., which governs other tobacco products.

14. While it is unclear exactly what the Division meant by a "final request" Brandy's was concerned in losing its appeal rights, which were not even addressed in the "final request" letter.

15. Therefore, Brandy's responded to the April 4, 2014, letter by filing a protest on or around April 11, 2014, which was within 10 days of the notice.

16. On around May 5, 2014, the Division issued a notice for a Notice of Proposed Assessment Conference to be held on May 13, 2014.

17. The May 13, 2014, conference was held by the Division and was attended by the Division and counsel for Brandy's.

18. On May 19, 2014, the Division summarily dismissed Brandy's objection and sustained the assessment in full by issuing a Notice of Decision and Final Audit Assessment.

19. Apparently due to objections raised by Brandy's counsel during the alleged Notice of Proposed Assessment conference, the Division advised Brandy's of its right to pay **or** appeal the Final Assessment.

III. Statement of Disputed Material Fact

20. Petitioner re-alleges and incorporates herein each allegation set forth in all paragraphs above, as if fully set forth herein. Petitioner disputes each of the Department's factual and legal assertions set forth in the Statement of Liability and in the Notice of Decision.

A. Florida OTP Tax does not apply to the cigar wrapper products at issue because the wraps do not meet the clear definition of a "tobacco product."

21. Specifically, of the total amount allegedly due, the audit report identifies the liability due relates to the Taxpayer's purchases of "blunt wraps" or "cigar wraps" (collectively referred to as a "Wrap").

22. A Wrap is simply a rolling paper.

23. While the wrap contains some tobacco, it is predominantly composed of wood pulp and gums.

24. It is also noteworthy that "cigars" are not subject to OTP Tax in Florida.

25. The Wraps at issue are a component part of a "cigar," and are advertised as cigar wraps, which, as stated above, are not subject to OTP Tax in Florida.

26. Brandy's asserts, that the OTP Tax in the NOD related to the purchases of blunt wraps during the audit period should be eliminated because the blunt wraps are outside of the definition of "tobacco products" in Chapter 210, F.S.

27. Section 210.25, F.S. 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. 201.01(1), or cigars.

28. In order for an item to be subject to OTP Tax, then it must be contained within the four corners of the taxing statute.

29. Here, the Wraps are not 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.

30. In short, the Wraps at issue are not contained in the definition of a "tobacco product."

31. Therefore, the OTP Tax does not apply because the Wraps do not meet the clear definition of a "tobacco product."

32. Even if the Respondent believes that the Wraps can somehow come within the definition, it is long settled law that "tax laws are to be construed strongly in favor of the taxpayer and against the government, and that all ambiguities or doubts are to be resolved in favor of the taxpayer." *Maas Bros., Inc. v. Dickinson,* 195 So. 2d 193, 198 (Fla. 1967).

33. As such, even if the Division can somehow attempt to stretch the definition of a "tobacco product" then the assessment should still be eliminated because an ambiguity should be resolved in the Taxpayer's favor.

34. Therefore, the assessment is invalid.

35. As stated above, the Division appears to have mislabeled its "final request" letters to impose a tax on the Wraps as a "cigarette."

36. As a general rule, Chapter 210, F.S., imposes surtax and excise tax on "cigarettes" brought into Florida.

37. Section 210.25, F.S. defines "cigarette" as:

> [A]ny roll for smoking, except one of which the tobacco is fully naturally fermented, without regard to the kind of tobacco or other substances used in the inner roll or the nature or composition of the material in which the roll is wrapped, which is made wholly or in part of tobacco irrespective of size or shape and whether such tobacco is flavored, adulterated or mixed with any other ingredient.

38. The Wraps at issue are clearly not contained in the definition of a "cigarette."

39. Therefore, the tax and surcharge do not apply.

40. Consequently, even if the Division is attempting to assess the wraps at issue as a "cigarette," the assessment is still invalid.

B. Even if the Wraps are somehow found to be taxable, then a portion of the assessment should be removed because it is time barred by the statute of limitations.

41. In the unusual event that this Court determines that the Wrap is a "tobacco product" then the majority of the tax imposed is barred by the statute of limitations, as it did not arise within the 3 year limit established in section 95.091, F.S.

42. Brandy's hereby states no tax is due for any period prior to April 2011 because such periods are time barred by the statute of limitations.

43. Section 95.091, F.S., states that the Department of Business Regulation may determine and assess the amount of any tax enumerated in section 72.011 "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."

44. Here, the OTP Tax is a tax enumerated in section 72.011, F.S.

45. Being that the Division issued a Notice of Decision and Final audit assessment on May 19, 2014.

46. Brandy's believes this was an assessment because it was called a "Final Assessment" and it gave Brandy's 60 days to challenge such assessment.

47. Therefore, any tax assessed prior to April 2011 is more than 3 years after the date the tax is due.

48. Consequently, any assessment of tax that is for any period prior to April 2011 is invalid because it is time barred by the statute of limitations.

C. To the extent that any of the purchases at issue remain, the assessment should be reduced because *Micjo* operates to exclude federal excise tax and shipping charges from the taxable base of other tobacco products.

49. Based on the foregoing, the Petitioner strongly believes that the Wraps are not subject to the Florida OTP tax.

50. However, in the unforeseen event that the wraps are determined to be other tobacco products and the Court finds that some of the purchases were within the applicable statute of limitations, then *Micjo* should apply to reduce the assessment.

51. *Micjo, Inc. v. Dep't of Bus. & Prof. Reg.*, 78 So. 3d 124 (Fla. 2d DCA 2011), interpreted the meaning of "wholesales sales price."

52. *Micjo* held that charges added to the tobacco product, such as shipping charges and federal excise tax, are not to be included in the "wholesale sales price" subject to the OTP tax.

53. Specifically, *Micjo* stated that the "wholesale sales price" is the "established price for which a manufacturer sells a tobacco product to a distributor." Id. at 127.

54. Section 210.25(5), F.S., defines a manufacturer to mean someone who "manufactures tobacco products."

55. Further, section 210.25(4)(a), F.S., states that a "distributor" is a 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."

56. Micjo ruled that:

> Although AB & T focuses on the term established price, it fails to give that term its plain meaning within the context of the sentence. 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.

Id.

57. Here, the Petitioner paid federal excise tax and shipping costs when it purchased the wraps at issue.

58. Pursuant to *Micjo*, OTP does not apply to those costs.

59. Therefore, if it is determined that Florida OTP applies to the Wraps at issue, the OTP should not apply to the federal excise tax component of the Wraps.

60. Consequently, the assessment should be significantly reduced.

IV. Ultimate Issues of Fact and Law for Determination

61. The ultimate disputed issues of material law and fact for this DOAH are as follows:

a. Whether the Wraps at issue are a "tobacco product" subject to Florida OTP Tax.

b. Whether the Division erred in contacting the statutory authority for the taxation of "cigarettes" on its initial notices.

c. Whether the portion of the audit period is time barred by the statute of limitations.

d. Whether the Division erred in not reducing any remaining tax, penalties, and interest because the Taxpayer's noncompliance was due to reasonable cause and not willful neglect.

V. Demand for Relief

61. The Petitioner demands it is entitled to relief of a full abatement of all tax, penalties, and interest contained on the Notice of Decision and Final Audit Assessment.

62. The Petitioner is not paying any amounts due because it is contesting the Final Assessment in its entirety.

Respectfully submitted this 31st day of July, 2014.

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DEPARTMENT OF BUSINESS & PROFESSIONAL REGULATION
DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO
Power of Attorney / Letter of Authorization
Brandy's Products, Inc.

Tax Type: Other Tobacco Products Tax

The Division of Business and Professional Regulation allows for the Taxpayer to be represented by an attorney by submitting an executed Letter of Authorization.

I hereby acknowledge that this letter shall serve as said authorization, allowing, Joseph C. Moffa, Esq., James H. Sutton Jr., Esq., or Gerald J. Donnini, Esq. of the Law Offices of Moffa & Gainor, & Sutton, P.A. torepresent this company relating to an audit assessment for the periods of 2011 through2014 beforethe DepartmentofBusiness&ProfessionalRegulation,DivisionofAlcoholic Beverages & Tobacco.

This authorization form is hereby binding and shall be in full force and effect for the tax periods of2011 through 2014 or until written notice of termination is issued by me, whichever occurs first.

Brandy's Products, Inc.
603 S. Market Ave.
Fort Pierce, FL. 34982

By: _____
Maryanne Palino, Managing Member

Date: 4/8/14

Florida Department of
Business & Professional Regulation

Division of Alcoholic Beverages and Tobacco
Bureau of Auditing
Ben Pridgeon, Chief
400 West Robinson Street, North Tower, Suite 709
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Ken Lawson, Secretary

Rick Scott, Governor

May 19, 2014

Brandy's Products Inc.
603 South Market Avenue
Fort Pierce, Florida 34982

Re: **Audit- Notice of Decision and Final Audit Assessment**
License Number: 66-00115

Dear Licensee:

On May 13, 2014, the Division of Alcoholic Beverages and Tobacco ("Division") issued a notice in the form of a letter advising ("the Taxpayer") of the Division's proposed tax assessment for the audit period covering the period July 7, 2009 through August 2, 2011. The Taxpayer timely protested the proposed assessment and requested an assessment conference. Pursuant to the taxpayer's request, a conference was scheduled and a Notice of Proposed Assessment Conference was issued on May 5, 2014. The conference was conducted on May 13, 2014.

As a result of the conference, the Division finds that the FINAL AUDIT ASSESSMENT is $71,868.23. Please remit $70,868.23 within 10 days of the date of this letter.

If you wish to request an administrative hearing or judicial proceeding, you must file your request no later than 60 days from the date of this FINAL ASSESSMENT. You must file the petition for an administrative hearing with the Department of Business and Professional Regulation. For judicial proceedings, you must file a complaint with the appropriate Clerk of the Court.

Please refer questions and correspondence to:

Office of the General Counsel
1940 North Monroe Street, Suite 40
Tallahassee, Florida 32399-2202

Sincerely,

Jerry Russo
Senior Tax Audit Administrator