

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR OSCEOLA COUNTY, FLORIDA

MCLANE SUNEAST, INC.,

Plaintiff,

v.

CASE NO.: 14-CA-000372

FLORIDA DEPARTMENT OF
BUSINESS AND PROFESSIONAL
REGULATION,
DIVISION OF ALCOHOLIC
BEVERAGES AND TOBACCO,
an agency of the State of Florida;
KEN LAWSON, Secretary; and
WILLIAM SPICOLA, Director,

Defendants.

AMENDED COMPLAINT

Plaintiff, McLane Suneast, Inc. (“McLane” or “Plaintiff”), through its attorneys, Holland & Knight LLP and Morrison & Foerster LLP, brings this suit against Defendants, Florida Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (the “Department”), an agency of the State of Florida; Ken Lawson, as secretary of the Department; and William Spicola, as director of the Division of Alcoholic Beverages and Tobacco (collectively, “Defendants”) for damages, a refund of certain taxes and surcharges paid to the Department by Plaintiff, and declaratory judgment.

Plaintiff alleges as follows:

PARTIES

1. McLane Suneast, Inc. is a corporation organized and existing under the laws of the State of Texas. The principal place of business within the State of Florida for McLane Suneast, Inc. is located in Kissimmee, Florida. McLane Southeast, Inc. regularly maintains its books and records in the ordinary course of business at this location.

2. The Department is an administrative agency existing and operating under the statutes of the State of Florida. The Department's principal office is located at 1940 North Monroe Street, Tallahassee, Florida 32399. Ken Lawson is the secretary of the Department, and William Spicola is the director of the Division of Alcoholic Beverages and Tobacco. The Department is generally responsible, and the Division of Alcoholic Beverages and Tobacco is specifically responsible, for the administration and collection of the taxes and surcharges imposed under Chapter 210, Florida Statutes, that are described further below.

BASIS OF THE ACTION

3. Pursuant to the Commerce Clause of the U.S. Constitution, Plaintiff brings this action against Defendants for damages suffered by Plaintiff as a result of Defendants' unconstitutional imposition and collection of certain cigarette and other tobacco product taxes and surcharges.

4. Pursuant to section 215.26 and section 72.011(1), Florida Statutes, Plaintiff brings this action against Defendants for the refund of certain cigarette and other tobacco product taxes and surcharges paid by Plaintiff from July 1, 2009, through June

30, 2013 (the "Period at Issue"), which were unconstitutionally and/or unlawfully collected by Defendants.

5. Pursuant to section 86.011, Florida Statutes, Plaintiff further prays for declaratory judgment that certain cigarette and other tobacco product taxes and surcharges are invalid and unconstitutional under the Commerce Clause and the Due Process Clause of the U.S. Constitution, and the Due Process Clause, Equal Rights Clause, and section 1, article VII of the Florida Constitution; and, pursuant to section 86.061, Florida Statutes, as part of its declaratory judgment action, prays for supplemental relief in the form of damages, plus interest, attorneys' fees, and costs.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this claim for refund pursuant to section 72.011(4), Florida Statutes.

7. This Court has jurisdiction over this declaratory judgment action pursuant to section 86.011, Florida Statutes.

8. Venue is proper in this Court pursuant to section 72.011(4)(a), Florida Statutes.

PROCEDURAL POSTURE

9. This complaint is timely filed.

10. All conditions precedent, including any required statutory notice, have been either satisfied or excused.

11. On July 18, 2012, November 8, 2012, February 5, 2013, May 6, 2013, and August 8, 2013, Plaintiff filed claims for refund, applicable to the Period at Issue, and, on August 8, 2013, and October 17, 2013, Plaintiff further amended those claims for the Period at Issue.

12. On November 19, 2013, Plaintiff attended the Refund Request Conference administered by the Department. Plaintiff provided the Department with a written presentation of its claims and arguments.

13. On December 6, 2013, the Department denied all of Plaintiff's claims. The Department's denial is attached hereto as **Exhibit A**.

GENERAL ALLEGATIONS

14. Plaintiff adopts paragraphs 1 through 13, as if set forth fully herein.

15. Section 210.02(1), Florida Statutes, imposes an excise or privilege tax on "the sale, receipt, purchase, possession, consumption, handling, distribution, and use of cigarettes" in Florida (the "Cigarette Tax"). Fla. Stat. § 210.02(1).

16. Section 210.30(1), Florida Statutes, imposes an excise or privilege tax on "all tobacco products [other than cigarettes and cigars] in this state and upon any person engaged in business as a distributor . . . of such tobacco products" in Florida (the "Tobacco Tax"). Fla. Stat. § 210.30(1).

17. Neither the Cigarette Tax nor the Tobacco Tax is imposed on cigars. Fla. Stat. §§ 210.01(1), 210.25(11).

18. In March 2009, the Florida State Senate's Policy and Steering Committee on Ways and Means introduced Senate Bill No. 1840, Chapter 2009-79, Laws of Florida (the "Bill").

19. The Bill took effect on July 1, 2009. Bill § 11.

20. The Bill imposed a surcharge, in addition to all other taxes, on the "sale, receipt, purchase, possession, consumption, handling, distribution, and use" of cigarettes in Florida (the "Cigarette Surcharge"). Bill § 3 (codified at Fla. Stat. § 210.011).

21. The Bill also imposed a surcharge, in addition to all other taxes, on “all tobacco products [other than cigarettes and cigars] in this state” (the “Tobacco Surcharge”). Bill § 7 (codified at Fla. Stat. § 210.276(1)).

22. Neither the Cigarette Surcharge nor the Tobacco Surcharge is imposed on cigars. Fla. Stat. §§ 210.01(1), 210.25(11).

23. McLane is a licensed distributor of cigarettes and other tobacco products in Florida.

24. McLane is legally required to pay, and is ultimately responsible for, the Cigarette Tax and the Tobacco Tax (collectively the “Taxes”) and the Cigarette Surcharge and the Tobacco Surcharge (collectively the “Surcharges”). Fla. Stat. §§ 210.02(6), 210.011(6), 210.30(1), 210.276(1).

25. McLane did not collect the Taxes and/or the Surcharges from its customers through a separate line-item on McLane’s invoices to its customers.

26. McLane was unable to collect all of the Taxes and Surcharges from its customers in every circumstance.

27. McLane did not pass along all of the economic burden of the Taxes and/or the Surcharges to its customers.

28. McLane itself absorbed a portion of the economic burden of the Taxes and Surcharges.

29. McLane has suffered damages by being required to pay the unconstitutional Taxes and Surcharges. These damages include but are not limited to the amount of the Taxes and Surcharges themselves, as well as the lost sales and profits resulting from the imposition of the Taxes and Surcharges.

COUNT I – VIOLATION OF CONSTITUTIONALLY PROTECTED RIGHTS
(Against Defendants for Violation of the Commerce Clause of the U.S. Constitution)

30. Plaintiff adopts paragraphs 1 through 29, as if set forth fully herein.

31. Cigars are excluded from the Taxes and Surcharges. Fla. Stat. §§ 210.01(1), 210.25(11).

32. Tobacco, such as all cigarettes, smoking tobacco, snuff, fine-cut chewing tobacco, cut and granulated tobacco, Cavendish, and plug or twist tobacco—but not cigars—is subject to the Taxes and Surcharges in Florida.

33. Florida is the only state that taxes non-cigarette tobacco products but does not tax cigars.

34. The vast majority of cigars sold in the United States are either manufactured in or imported through Florida.

35. The majority of the cigarette industry and of the tobacco product (not including cigars) industry are not Florida local industries.

36. Cigars and cigarettes and other tobacco products are competitive products.

37. The intent and effect of the Taxes and Surcharges is to favor the local manufacturers, importers, and distributors of cigars and other products containing tobacco over out-of-state manufacturers, importers, and distributors of cigarettes and other tobacco products.

38. “A finding that state legislation constitutes ‘economic protectionism’ may be made on the basis of either discriminatory purpose . . . or discriminatory effect.” *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (emphasis added) (citation omitted).

39. The Taxes and Surcharges constitute economic protectionism on the basis of both discriminatory purpose *and* discriminatory effect.

40. Promoting in-state products is not a legitimate purpose and runs counter to the Commerce Clause. *See, e.g., Div. of Alcoholic Beverages and Tobacco v. McKesson Corp.*, 524 So. 2d 1000 (Fla. 1988), *rev'd on other grounds and remanded*, 496 U.S. 18 (1990).

41. The Florida Legislature excluded cigars from the Taxes to protect Florida's local cigar industry.

42. The governor signed the legislation excluding cigars from the Taxes to protect Florida's local cigar industry.

43. The original version of the Bill included cigars in the tax base for the Tobacco Surcharge.

44. In May 2009, the Bill was amended to remove cigars from the Tobacco Surcharge base.

45. In removing cigars from the Tobacco Surcharge base, the Florida Legislature intended to protect and promote Florida's local cigar industry.

46. In signing the final version of the Bill excluding cigars from the Tobacco Surcharge base, the governor intended to protect and promote Florida's local cigar industry.

47. Documents provided to or produced by the Legislature or prepared in connection with the Bill confirm the intent to protect and promote Florida's local cigar industry.

48. When the effect of a statute “is to favor in-state economic interests over out-of-state interests, [the courts] have generally struck down the statute without further inquiry.” *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986).

49. Courts need not know how unequal the effect of a tax is before concluding that it unconstitutionally discriminates against interstate commerce. *See, e.g., Bacchus*, 468 U.S. at 269.

50. The Taxes and Surcharges place a discriminatory burden on interstate commerce clearly excessive in relation to any permissible local benefit.

51. The Taxes and Surcharges discriminate against interstate commerce in violation of the Commerce Clause of the U.S. Constitution. U.S. Const. art. I, § 8, cl. 3.

52. WHEREFORE, Plaintiff requests that this Court (a) grant Plaintiff damages resulting from the Legislature’s passage and Defendants’ imposition of the unconstitutional Taxes and Surcharges, plus interest, attorneys’ fees, and costs, each in an amount to be determined; (b) grant Plaintiff any such other relief as the Court deems just and proper; and (c) enjoin Defendants from further collection of the unconstitutional Taxes and Surcharges.

COUNT II – TAX REFUND

(Against Defendants for Violation of the Commerce Clause of the U.S. Constitution)

53. Plaintiff adopts paragraphs 1 through 52, as if set forth fully herein.

54. Pursuant to section 72.011(1), Florida Statutes, Plaintiff contests the legality of the Defendants’ denial of Plaintiff’s claims for refund of the Taxes and Surcharges for the Period at Issue.

55. McLane paid the Taxes and Surcharges for the Period at Issue.

56. The Taxes and Surcharges violate the Commerce Clause of the U.S. Constitution.

57. WHEREFORE, Plaintiff requests that this Court (a) grant Plaintiff a refund of the Taxes and Surcharges that it remitted for the Period at Issue, plus statutory interest, in an amount to be determined; and (b) grant Plaintiff any such other relief as the Court deems just and proper.

COUNT III – DECLARATORY JUDGMENT

(Against Defendants for Violation of the U.S. Constitution and the Florida Constitution)

58. Plaintiff adopts paragraphs 1 through 57, as if set forth fully herein.

59. Pursuant to section 86.011, Florida Statutes, Plaintiff requests declaratory judgment that the Taxes and Surcharges are unconstitutional, and, pursuant to section 86.061, Florida Statutes, as part of its declaratory judgment action, Plaintiff further prays for supplemental relief in the form of damages, plus interest, attorneys' fees, and costs.

60. The Taxes and Surcharges are invalid and unconstitutional under the Commerce Clause and the Due Process Clause of the U.S. Constitution and the Due Process Clause, the Equal Rights Clause, and section 1, article VII of the Florida Constitution. U.S. Const. art. I, § 8, cl. 3; U.S. Const. amend. XIV, § 1; Fl. Const. art. I, §§ 2, 9; Fl. Const. art. VII, § 1.

61. Defendants have enforced and administered, and continue to enforce and administer, the Taxes and Surcharges.

62. Plaintiff's rights are affected by Defendants' collection of the Taxes and Surcharges.

63. There exists a present, actual, and justifiable controversy between Plaintiff and Defendants, requiring a declaration of rights, not merely the giving of legal advice.

64. Plaintiff prays for a determination as to the question of the constitutionality or validity of the Taxes and Surcharges.

65. WHEREFORE, Plaintiff requests that this Court (a) declare chapter 210, Florida Statutes—including section 210.01(1), Florida Statutes; section 210.011, Florida Statutes; section 210.02, Florida Statutes; section 210.25(11), Florida Statutes; section 210.276, Florida Statutes; and section 210.30, Florida Statutes—invalid and unconstitutional under the Commerce Clause and/or the Due Process Clause of the U.S. Constitution and/or the Due Process Clause, the Equal Rights Clause, and/or section 1, article VII of the Florida Constitution; (b) grant Plaintiff supplemental relief in the form of damages, plus interest, attorneys' fees, and costs, each in an amount to be determined; and (c) grant Plaintiff any such other relief as the Court deems just and proper.

COUNT IV – TAX REFUND
(Against Defendants for Invalid Double Taxation of
Cigarettes and Other Tobacco Products)

66. Plaintiff adopts paragraphs 1 through 65, as if set forth fully herein.

67. The Bill imposed the Surcharges on “existing inventory on July 1, 2009.”
Bill § 8.

68. The Bill does not define the term “inventory.”

69. Pursuant to the Bill, McLane took an inventory of cigarettes (both stamped and unstamped) and other tobacco products in their possession (“Floor Stock”) as of July 1, 2009, certified that inventory, and paid the Surcharges on that inventory. Bill § 8.

70. Section 210.04(2), Florida Statutes, provides that “[t]he cigarette tax imposed shall be collected only once upon the same package or container of such cigarettes.” Fla. Stat. § 210.04(2).

71. Section 210.30(3), Florida Statutes, provides that “[a]ny tobacco product with respect to which a tax has once been imposed under this part shall not again be subject to tax under this part.” Fla. Stat. § 210.30(3).

72. McLane had paid the Taxes on its Floor Stock before the Surcharges were due.

73. The imposition of the Surcharges on the Floor Stock constitutes an unlawful second collection of a tax on the Floor Stock.

74. WHEREFORE, Plaintiff requests that this Court (a) grant Plaintiff a refund of the Surcharges it remitted for the Floor Stock during the Period at Issue, plus statutory interest, in an amount to be determined; and (b) grant Plaintiff any such other relief as the Court deems just and proper.

COUNT V – TAX REFUND

(Against Defendants for Imposing Surcharges Invalid as Fees)

75. Plaintiff adopts paragraphs 1 through 74, as if set forth fully herein.

76. The Florida Legislature expressly intended for the Surcharges not to constitute taxes.

77. Based on that legislative intent, the Surcharges are fees.

78. Fees are distinguished from taxes in that fees are charged in exchange for a particular governmental service that benefits the party paying the fee or to reasonably compensate the government for services related to the activity upon which the fee is assessed.

79. The Bill does not contemplate that McLane or any other distributor will receive any special or particular benefit as a result of paying the Surcharges, and the revenue raised by the Surcharges has no connection to governmental services related to

the activity upon which the fee was assessed. Instead, the Bill was designed to raise vast amounts of revenue for the state.

80. The Surcharges do not meet the tests applicable to fees.

81. The Surcharges are invalid fees and unenforceable impositions.

82. WHEREFORE, Plaintiff requests that this Court (a) grant Plaintiff a refund of the Surcharges it remitted during the Period at Issue, plus statutory interest, in an amount to be determined; and (b) grant Plaintiff any such other relief as the Court deems just and proper.

COUNT VI – TAX REFUND

(Against Defendants for Unlawful Application of the Collection Allowance)

83. Plaintiff adopts paragraphs 1 through 82, as if set forth fully herein.

84. The Department determined that stamps unaffixed to cigarettes (“Unaffixed Stamps”) were subject to the Cigarette Surcharge.

85. The Department required that all wholesale dealers in possession of Unaffixed Stamps take and certify an inventory of their Unaffixed Stamps and remit the Cigarette Surcharge on the Unaffixed Stamps.

86. The Bill permits wholesale dealers to “deduct 5 percent of the amount of the surcharge *due* and *certified* and *remitted* to the [Department]” (the “Collection Allowance”). Bill § 8(2) (emphasis added).

87. The Cigarette Surcharge on the Unaffixed Stamps was due and certified and remitted to the Department by Plaintiff, as mandated by the Department.

88. The Department refused to apply the Collection Allowance to the Cigarette Surcharge on Unaffixed Stamps that was *due* and *certified* and *remitted* by Plaintiff, contrary to such Collection Allowance being specifically allowed by the Bill.

89. WHEREFORE, Plaintiff requests that this Court (a) grant Plaintiff a refund equivalent to the Collection Allowance allowed by the Bill on the Cigarette Surcharge that was due and certified and remitted by Plaintiff on Unaffixed Stamps, plus statutory interest, in an amount to be determined; and (b) grant Plaintiff any such other relief as the Court deems just and proper.

COUNT VII – TAX REFUND

(Against Defendants for Violation of the Florida Constitution)

90. Plaintiff adopts paragraphs 1 through 89, as if set forth fully herein.

91. The Taxes and Surcharges, and the manner in which the Defendants administered them, violate the equal rights and due process requirements of the Constitution of the State of Florida and the prohibition on ad valorem taxes of section 1, article VII of the Florida Constitution. Fl. Const. art. I, §§ 2, 9; Fl. Const. art. VII, § 1.

92. WHEREFORE, Plaintiff requests that this Court (a) grant Plaintiff a refund of the Taxes and Surcharges that it remitted for the Period at Issue, plus statutory interest, in an amount to be determined; and (b) grant Plaintiff any such other relief as the Court deems just and proper.

WHEREFORE, Plaintiff requests that this Court:

- A. Award Plaintiff damages, plus interest and costs;
 - B. As appropriate for each Count herein, grant Plaintiff a refund of all or part of the Taxes and Surcharges that it paid during the Period at Issue, plus statutory interest, in an amount to be determined;
 - C. Declare that the Taxes and Surcharges are invalid and/or unconstitutional and grant Plaintiff supplemental relief in the form of damages, plus interest and costs;
- and

D. Grant Plaintiff attorneys' fees, costs, and any such other relief as the Court deems just and proper.

Respectfully submitted this 20th day of September, 2014.

HOLLAND & KNIGHT LLP

/s/ Kevin W. Cox

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for Plaintiff, MCLANE SUNEAST, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Complaint was served this 20th day of September, 2014, by electronic service to J. Clifton Cox, Office of the Attorney General, Revenue Litigation Bureau, primary email: Clifton.Cox@myfloridalegal.com; secondary email: Monica.Padgett-Cash@myfloridalegal.com; and secondary email: Jon.Annette@myfloridalegal.com.

/s/ Kevin W. Cox _____
Attorney

EXHIBIT A

Ken Lawson, Secretary

Rick Scott, Governor

December 6, 2013

CERTIFIED MAIL #7006 2760 0002 3500 6831

Jim Ervin, Esq.
Holland & Knight, LLP
315 South Calhoun Street, Suite 600
Tallahassee, FL 32301

**RE: FINAL REFUND DENIAL (CONSOLIDATED)
MCLANE SUNEAST, INC. and MCLANE COMPANY, INC., d/b/a MCLANE DOTHAN
JULY 1, 2009 - JUNE 30, 2013**

Mr. Ervin,

On November 19, 2013, the Division of Alcoholic Beverages and Tobacco ("Division") held a refund request conference with McLane Suneast, Inc. and McLane Company, Inc., d/b/a McLane Dothan, ("Taxpayer"). The conference pertained to the Taxpayer's five refund requests for the period of July 1, 2009 through June 30, 2013.

Having fully considered the matter, a consolidated final denial for the five requests is entered.

If you disagree with this final 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,



Benjamin Pridgeon
Bureau Chief, Auditing

RECEIVED

DEC 09 2013

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