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IN THE OREGON TAX COURT
MAGISTRATE DIVISION

Tobacco Tax

GLOBAL HOOKAH DISTRIBUTORS, INC.,)	
)	
Plaintiff,)	TC-MD 140466N
)	
v.)	PLAINTIFF'S MOTION
)	FOR SUMMARY JUDGMENT
DEPARTMENT OF REVENUE, State Of)	
Oregon,)	Oral Argument Requested
)	
Defendant.)	
)	

UTCRC 5.050

Plaintiff, Global Hookah Distributors, Inc., estimates that oral argument on this matter will take one hour. Official court reporting services are not requested.

MOTION

Pursuant to TCR 47, Plaintiff moves the court for an order granting summary judgment in favor of Plaintiff on its Complaint in this case. There are no genuine issues as to any material facts and Plaintiff is entitled to judgment as a matter of law. Plaintiff further moves the court for an order granting attorney's fees to Plaintiff under ORS 20.105

CERTIFICATION

Pursuant to TCR 17 C(1), Plaintiff's attorney hereby certifies that that the following certifications are based on its reasonable knowledge, information and belief, formed after making reasonable inquiry under the circumstances.

1 Pursuant to TCR 17 C(2), Plaintiff's attorney certifies that this Motion for Summary
2 Judgment is not being presented for any improper purpose

3 Pursuant to TCR 17 C(3), Plaintiff's attorney certifies that the claims, defenses and
4 other legal positions taken in the Motion are warranted by existing law.

5 Pursuant to TCR 17 C(4), Plaintiff's attorney certifies that the allegations and other
6 factual assertions in the Motion are supported by evidence.

7 Pursuant to TCR 17 C(5), Plaintiff's attorney certifies that any denials of factual
8 assertion are supported by evidence.

9 In support of this Motion, Plaintiff relies on the pleadings filed herein, the Declaration
10 of Brennan Appel, President of Global Hookah Distributors, Inc., and Plaintiff's Memorandum
11 of Law in Support of Summary Judgment.

12
13 DATED this 14th day of July, 2015.

14
15 BUCKLEY LAW P.C.

16 
17 Of Attorneys for Plaintiff
18 Jay Richardson, OSB#: 823814
503/620-8900
jar@buckley-law.com

1 IN THE OREGON TAX COURT

2 MAGISTRATIVE DIVISION

3 Tobacco Tax

4 Global Hookah Distributors, Inc.,)
5)
6 Plaintiff,) TC-MD 140466N
7)
8 v.) **DECLARATION IN SUPPORT OF**
9) **MOTION FOR SUMMARY JUDGMENT**
10 Department of Revenue, State of Oregon)
11)
12)
13 Defendant.)
14)

11 I, Brennan Appel, declare and state:

- 12 1. I make this declaration based upon personal knowledge and I am otherwise competent
- 13 to testify to the matters stated in this declaration. I make this declaration in support of
- 14 Plaintiff's Motion for Summary Judgment.
- 15 2. I am now, and was at all times during the tax quarters at issue in this case, the president
- 16 of Global Hookah Distributors, Inc., the plaintiff in the captioned lawsuit.
- 17 3. As stated by Barbara V. Stoener, Conference Officer, in her October 16, 2014 letter to
- 18 the Plaintiff, neither I nor the Plaintiff have any legal right to control any of the entities
- 19 that sell my company's tobacco and tobacco products, including shisha.
- 20 4. Plaintiff paid Oregon excise tax under the quarters at issue based upon the wholesale
- 21 sales price of the tobacco products (purchased by Plaintiff).
- 22 5. I have never asked for any entity to lower the stated price of shisha and raise the stated
- 23 cost of other invoiced charges such as shipping, warehousing, etc. charges (such
- 24 charges are referred to as "Overhead Costs" in the Plaintiff's Motion for Summary
- 25 Judgment) No such entity has, to my knowledge, purposefully or accidentally made
- 26 such invoice adjustments.


1 6. The Overhead Costs included in Plaintiff's invoices from its wholesalers reflect arms-
2 length charges over which my company cannot control, other than to cease acquiring
3 tobacco products from such companies. Moreover, such charges can vary over time,
4 increasing or decreasing based upon factors facing the companies that the Plaintiff
5 purchases product from, none of which either I or the Plaintiff can control.

6 7. Despite Ms. Stoener's assertions, the Overhead Costs are logical. Overhead Charges
7 paid by the Plaintiff represent the then market-based prices for charges such as
8 shipping. Any assertion that such charges are not "logical" can only be made by
9 someone that is not familiar with global commerce in general, the shisha/hookah
10 business in particular.

11 8. Finally, despite Ms. Stoener's assertions that Plaintiff has no incentive to report the
12 costs of shisha correctly, nothing could be further from the truth. Oregon is a good
13 market for Plaintiff and the Plaintiff values its Oregon Tobacco Distributor's license.
14 Each form 530, *Oregon Quarterly Tax Return for Tobacco Distributors*, that Plaintiff
15 files contains the following declaration at the end: "I declare under the penalties for
16 false swearing [ORS 305.990(4)] that I have examined this document and to the best of
17 my knowledge it is true, correct, and complete." Accordingly, all forms 530 filed by
18 Plaintiff are true, correct and complete. Moreover, neither I nor anyone associated with
19 the Plaintiff has ever "cooked our books," or requested a seller to "cook our invoices"
20 which otherwise could easily create criminal liability.

21 I HEREBY DECLARE THAT THE ABOVE STATEMENTS ARE TRUE TO THE BEST
22 OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND THAT THEY
23 ARE MADE FOR USE AS EVIDENCE IN COURT AND ARE SUBJECT TO PENALTY
24 FOR PERJURY.

25 DATED this 8 day of July, 2015.
26 BA


Brennan Appel

Mecklenburg City, N.C.
7-8-15
My Commission Expires June 30, 2019

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IN THE OREGON TAX COURT

MAGISTRATE DIVISION

Tobacco Tax

GLOBAL HOOKAH DISTRIBUTORS, INC.,)	
)	
Plaintiff,)	TC-MD 140466N
)	
v.)	MEMORANDUM OF LAW
)	IN SUPPORT OF PLAINTIFF'S
DEPARTMENT OF REVENUE, State of)	MOTION FOR SUMMARY JUDGMENT
Oregon,)	
)	ORAL ARGUMENT REQUESTED
Defendant.)	

INTRODUCTION

This case is about Oregon’s 65% excise tax on other tobacco products under ORS 323.505(1), (2)(c) (“OTP Tax”). OTP Tax is imposed on loose flavored tobacco sold in Oregon because it is a “tobacco product” under ORS 323.500(14). Plaintiff’s loose flavored tobacco will be referred to in this Memorandum as “OTP.”

Since its registration as a foreign business corporation in Oregon, Plaintiff paid OTP Tax on wholesale sales price of OTP sold in Oregon. Plaintiff has consistently followed this interpretation of Oregon law since it began filing quarterly excise tax returns in 2007. Despite Magistrate Robinson’s holding in *Global Distributor & Wholesaler, Inc. v. Department of Revenue*, TC-MD 1 01182C (March 13, 2012), Defendant asserts that the taxable wholesale sales price of OTP includes the cost of the OTP and other costs incurred by Plaintiff in the purchase of OTP. According to Defendant, Plaintiff’s wholesale sales price includes federal

1 tax and shipping; custom fees, duties, transportation, palletizing, warehousing, customer
2 service, advertisement, documentation and “other charges” found in Plaintiff’s invoices from
3 its wholesalers. Collectively, these other costs taxed by Defendant are referred to herein as
4 “Overhead Costs.” Because Plaintiff did not calculate OTP Tax on its Overhead Costs for the
5 quarterly periods 2008-12 & 2009-06 through 2012-12, Defendant recalculated Plaintiff’s OTP
6 Tax and issued Notices of Deficiency against Plaintiff (“Notices”).

7 **ISSUE IN THIS CASE**

8 The issue in this case is simple: are Overhead Costs incurred by Plaintiff in its purchase
9 of OTP included in Plaintiff’s “wholesale sales price” under ORS 323.500(16) and ORS
10 323.505(2)(a)? Plaintiff believes that Overhead Costs are not included; Defendant contends
11 that they are.

12 **FACTS**

13 The following facts are not in dispute:

- 14 a) Plaintiff is a North Carolina business corporation registered as a foreign
15 business corporation in the state of Oregon (Reg. No. 477476-96). Plaintiff’s business
16 operations are conducted primarily out of Florida.
- 17 b) Plaintiff is a Licensed “Other Tobacco Product Distributor,” carrying Oregon
18 license 1186. Accordingly, Plaintiff is a distributor as defined in ORS 323.500.
- 19 c) On September 17, 2013, Defendant issued its proposed Auditor’s Reports for the
20 periods 2008-12 & 2009-06 through 2012-12.
- 21 d) Defendant issued its Notices on October 25, 2013.
- 22 e) Plaintiff appealed the Notices in a letter dated November 20, 2013.
- 23 f) An in-person conference was held on April 23, 2014.
- 24 g) On October 16, 2014, Defendant issued its Conference Decision Letter
25 upholding the Notices.

1 h) The invoices examined by Defendant are the correct OTP invoices for the
2 periods in question.

3 i) Defendant's math calculations in its Auditor's Report are correct.

4 The following facts are based upon the Declaration of Brennan Appel made in support
5 of Plaintiff's Motion for Summary Judgment:

6 j) Plaintiff correctly calculated the tax on its quarterly tax returns based upon the
7 cost of the OTP itself (without Overhead Charges).

8 k) The Overhead Costs are based upon arms-length activity between unrelated
9 entities and reflect legitimate business conditions facing both Plaintiff and Plaintiff's sellers.

10 APPLICABLE AUTHORITY

11 1. ORS 323.505(1), (2) which states:

12 (1) A tax is hereby imposed upon the distribution of all tobacco products in this
13 state. The tax imposed by this section is intended to be a direct tax on the
14 consumer, for which payment upon distribution is required to achieve
15 convenience and facility in the collection and administration of the tax. The tax
16 shall be imposed on a distributor at the time the distributor distributes tobacco
17 products.

18 (2) The tax imposed under this section shall be imposed at the rate of:

19 (a) Sixty-five percent of the wholesale sales price of cigars, but not to
20 exceed 50 cents per cigar;

21 (b) One dollar and seventy-eight cents per ounce based on the net weight
22 determined by the manufacturer, in the case of moist snuff, except that the
23 minimum tax under this paragraph is \$2.14 per retail container; or

24 (c) Sixty-five percent of the *wholesale sales price of all tobacco products* that
25 are not cigars or moist snuff. (emphasis added)

26 2. ORS 323.500(14) which states:

1 (14) "Tobacco products" means cigars, cheroots, stogies, periques, granulated,
2 plug cut, crimp cut, ready rubbed and other smoking tobacco, snuff, snuff flour,
3 moist snuff, cavendish, plug and twist tobacco, fine-cut and other chewing
4 tobaccos, shorts, refuse scraps, clippings, cuttings and sweepings of tobacco and
5 *other kinds and forms of tobacco, prepared in such manner as to be suitable for*
6 *chewing or smoking in a pipe or otherwise*, or both for chewing and smoking,
7 but shall not include cigarettes as defined in ORS 323.010. (emphasis added)

8 3. ORS 323.500(15) which states:

9 (15) "Untaxed tobacco products" means tobacco products for which the tax
10 required under ORS 323.500 to 323.645 has not been paid.

11 4. ORS 323.500(16) which states:

12 (16) "Wholesale sales price" means the price paid for untaxed tobacco products
13 to or on behalf of a seller by a purchaser of the untaxed tobacco products.

14 ARGUMENT

15 TCR 47C provides that a court shall enter judgment for the moving party if the pleadings,
16 depositions, affidavits, declarations and admissions on file show that there is no genuine issue
17 as to any material fact and that the moving party is entitled to a judgment as a matter of law.
18 Based on the facts admitted and established in the materials submitted by Plaintiff, there are no
19 genuine issues as to any material fact, and Plaintiff is entitled to judgment as a matter of law.
20 Therefore, the Court should grant Plaintiff's Motion for Summary Judgment.

21 1. There are no Genuine Issues of Material Fact.

22 A. Plain Meaning of Oregon Statutes

23 The Oregon statutes at issue here (ORS 323.500(14)-(16) and 323.505(1), (2)) are not
24 ambiguous. The plain meaning of these statutes is that the wholesale sales price of Plaintiff's
25 OTP includes only the wholesale sales price of the OTP itself and not any Overhead Costs.
26 Magistrate Robinson, deciding that *Global Distributor's* shipping, marketing and exclusivity

1 costs were not part of its wholesale sales price stated: “No reference [in ORS 323.500(13)]¹ is
2 made to packaging; packaging alone does not affect the suitability of the tobacco to be chewed
3 or smoked in a pipe.” Similarly, in this case, no reference in ORS 323.500(13) is made to
4 Overhead Costs and therefore they are not part of Plaintiff’s “tobacco products.” None of
5 Plaintiff’s Overhead Costs affect the suitability of its OTP sold in Oregon.

6 The plain meaning of ORS 323.500(16)² is equally clear: the definition of wholesale sales
7 price refers only to the price of the OTP itself. Magistrate Robinson easily found that ORS
8 323.500(16) excludes “methods of shipping, marketing, or packaging” in the *Global*
9 *Distributor* case. *Id.* at 9. Although the Overhead Costs at issue in *Global Distributor* were
10 narrower than those in this case, it is important to note that one of the Overhead Costs included
11 by Defendant in Plaintiff’s wholesale sales price is Plaintiff’s shipping costs. Plaintiff’s
12 Overhead Costs including shipping are not included in the wholesale sales price of its OTP.

13 Any attempt by Defendant to argue *Global Distributor* is limited solely to packaging,
14 promotional and advertising costs and not Plaintiff’s Overhead Costs is disingenuous. The
15 issue is the inclusion of **any** Overhead Costs, not any particular type of Overhead costs.
16 Second, it should be noted that several of Plaintiff’s Overhead Costs taxed by Defendant
17 (shipping, palletizing, warehousing, customer service, advertisement) are similar in nature to
18 the packaging, exclusivity and promotion fees that were at issue in *Global Distributor*.

19 **B. Legislative History**

20 Plaintiff is unable to find any legislative history expanding the definition of wholesale
21 sales price to include costs beyond that of the OTP itself. Following the time-honored statutory
22 interpretation principal to “not insert what has been omitted.” Magistrate Robinson correctly
23 concluded that “the legislature did not intend to impose a tax on items other than tobacco. . .”
24

25 ¹ This statute was renumbered after the *Global Distributor* case to ORS 323.500(14).

26 ² This statute is numbered ORS 323.500(15) in the *Global Distributor* case.

1 Similarly, magistrate Robinson noted that “the legislature intended to impose a tax only on the
2 [hookah] tobacco itself, not any extraneous packaging or exclusivity fees.” *Id.* At 9. The
3 legislative history of the statutes at issue does not support Defendant’s position.

4 **C. Contextual Analysis**

5 Hookah is but one type of tobacco taxed by Oregon. Like hookah, a wholesaler of
6 cigars and cigarettes can incur expenses similar or identical to Overhead Costs. Yet, Oregon
7 law (ORS 323.505(2)(a) and 323.010(1) imposes excise tax on cigars and cigarettes on a per-
8 unit basis. As Magistrate Robinson noted in *Global Distributor*, Overhead Costs are not part of
9 the taxable cost of cigars and cigarettes. *Id.* at 10. There is no evidence to support any notion
10 that the Oregon legislature intended to tax Overhead Costs incurred in selling loose tobacco and
11 not in selling cigars and cigarettes.

12 **D. Reasonableness Analysis**

13 Defendant’s interpretation of the statutes at issue would produce unreasonable results.
14 In *Global Distributor*, Magistrate Robinson offered an illustrative hypothetical. If a customer
15 wanted their tobacco shipped in a gold container, was it reasonable to assume that the Oregon
16 legislature intended to tax the cost of the gold container? According to Magistrate Robinson,
17 such an interpretation would be “unreasonable and onerous, and against any principle of equity.
18 . . .” In this case, Defendant included Plaintiff’s shipping costs (among others) in its calculation
19 of Plaintiff’s wholesale sales price of its OTP. Following Magistrate Robinson’s gold package
20 analogy, if a customer of Plaintiff wants \$50.00 of hookah delivered immediately, and was
21 willing to pay a \$75 overnight shipping charge, it is reasonable to assume that the legislature
22 wanted to impose excise tax on \$125.00? The answer is of course no, as this tax would also be
23 unreasonable, onerous and against any principle of equity.

24 **E. Other Case Law**

25 Plaintiff’s position in this case, and Magistrate Robinson’s decision in *Global*
26 *Distributor*, is consistent with the law in Florida, the state from which Plaintiff operates its

1 business. In *Micjo, Inc. v. Department of Business and Professional Regulation*, No. 2D11-254
2 (February 1, 2012) the Florida District Court of Appeal had no trouble holding that Florida’s
3 excise tax on the “wholesale sales price” of hookah does reach “distributor add-ons” such as
4 excise tax, shipping costs, and other charges “[that] are not part of the tobacco.” *Id.* At 6. The
5 fact that Florida imposes its excise tax on distributors (like Micjo) at a different point than does
6 Oregon is irrelevant when the “plain language” indicates that “various other invoice costs for
7 reimbursement of federal excise tax, shipping costs, and other charges, are not part of the
8 tobacco.” It should be pointed out that *Micjo* was followed in a subsequent case in the Florida
9 Thirteenth Judicial Circuit (*Good Times Pinellas, L.L.C v. State of Florida, Department of*
10 *Business & Professional Regulation*, Case No. 2014-CA-1672 (June ___, 2015)(federal excise
11 tax included in Florida’s calculation of other tobacco products excise tax violated plain
12 meaning of “wholesale sales price.”)

13 **6. Oregon’s Constitution**

14 Article IX, Section 3, of Oregon’s Constitution provides that “[n]o tax shall be levied
15 except in accordance with law.” Because Defendant has levied a tax on Plaintiff under a
16 misapplication of ORS 323.500 and 323.505, the levy is not in accordance with law and is
17 violation of Oregon’s Constitution.

18 **ATTORNEY FEES**

19 Granting Plaintiff’s motion for summary judgment, and denying Defendant’s motion for
20 summary judgment, will not end this matter for Plaintiff. Plaintiff has incurred significant
21 attorney fees protesting Defendant’s Notices. Plaintiff has asked for attorney fees in its
22 complaint and asks this Court to grant them as part of Plaintiff’s motion for summary
23 judgment. Plaintiff’s reason for its attorney fee request is simple: Defendant pursued its Notices
24 after the decision in *Global Distributor* was issued. Indeed, the auditor in the *Global*
25 *Distributor* case is the same auditor in this case (Fred Nichols). Defendant made no attempt to
26 settle this case and instead took a hardline and irrational approach to its position (even going so

1 far as to cite “Black’s Law Dictionary’s definition of “product” at the April 23, 2014 in person
2 conference). In Ms. Barbara Stoener’s October 16, 2014 Conference Decision Letter, she stated
3 without support that Defendant did not agree with Magistrate Robinson’s interpretation of the
4 statutes at issue in *Global Distributor*. Defendant’s game of cat-and-mouse left Plaintiff unable
5 to fully assess Defendant’s strategy and caused Defendant to incur attorney fees in pursuit of
6 the appropriate strategy as a result of Defendant’s silence. Ms. Stoener also stated in that letter
7 that “[Plaintiff] does not have an incentive to provide an accurate accounting. Based upon an
8 examination of the records, the breakdown of cost in the instant case does not appear logical.”
9 These curious statements by Ms. Stoener appear to be a veiled attempt to place the Plaintiff’s
10 records in the same apparently shoddy condition as those that were examined in *Global*
11 *Distributor*. Nevertheless, the auditor, Mr. Fred Nichols, issued his audit reports using the
12 Overhead Costs in Plaintiff’s invoices without adjustment. This contradiction was completely
13 unreasonable. Defendant’s administration of the tobacco excise tax laws left Plaintiff
14 wondering if the Defendant was, in the vernacular, trying to have its cake and tax it too. As
15 such, there is no objectively reasonable basis for the claim to excise taxes made by the
16 Defendant. Plaintiff should be awarded reasonable attorney fees under ORS 20.105.

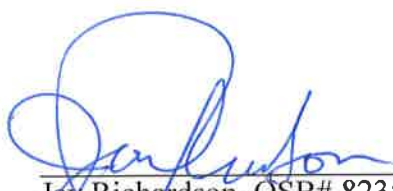
17 **CONCLUSION**

18 Plaintiff correctly calculated and paid excise tax under ORS 323.505(1), (2)(a). It
19 calculated that tax based upon its wholesale sales price of the OTP and not on any Overhead
20 Costs. Oregon law does not impose an excise tax on any extraneous Overhead Costs related to
21 the sale of Plaintiff’s OTP. There is no legislative history to support Defendant’s position or
22 that the Oregon legislature intended to tax OTP differently than cigars and cigarettes.
23 Defendant has effectively converted the term “wholesales sales price” into “invoice price”
24 which produces unjustified tax revenue to Defendant. There is no dispute as to the validity of
25 the statutes at issue, and there are no genuine issues of material fact regarding the price that
26 Plaintiff paid for its OTP and the other invoiced costs that Defendant seeks to add to Plaintiff’s

1 wholes sales price of its OTP. Therefore, Plaintiff respectfully requests that the Court grant its
2 Motion for Summary Judgment and grant Plaintiff an award of costs and attorney fees.

3 DATED this 10th day of July, 2015.

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5 BUCKLEY LAW P.C.

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8 By: 
9 Jay Richardson, OSB# 82351
Of Attorneys for Plaintiff

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IN THE OREGON TAX COURT
MAGISTRATE DIVISION

Tobacco Tax

GLOBAL HOOKAH DISTRIBUTORS, INC.,)
)
 Plaintiff,) TC-MD 140466N
)
 v.) **ORDER GRANTING**
) **SUMMARY JUDGMENT**
 DEPARTMENT OF REVENUE, State of)
 Oregon,)
)
 Defendant.)

This matter is before the court on Plaintiff's Motion for Summary Judgment (the "motion") made at _____ on July _____, 2015. Defendant agreed with Plaintiff's motion and the court granted the Motion. Tax Court Rule (TCR) 36 to 46 shall apply. Now, therefore,

IT IS ORDERED that Plaintiff's motion is granted. TCR 36 to 46 shall apply.

IT IS FURTHER ORDERED that Plaintiff recover its reasonable attorneys fees under ORS 20.105. Plaintiff's counsel may submit an Affidavit pursuant to ORCP 68.

DATED this ___ day of _____, 2015.

Magistrate

This interim order may not be appealed. Any claim of error in regard to this order should be raised in an appeal of the Magistrate's final written decision when all issues have been resolved. ORS 305.501