IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

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

Appellant,

v.

CASE NO. 1D16-1064
L.T. Nos. : 15-6108RU
15-6148RU

FLORIDA BEE DISTRIBUTION, INC., d/b/a Tobacco Express, PLANET TRADING, INC., and MELBOURNE, L.L.C.,

Appellees.
___________________________________/

THE STATE OF FLORIDA, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION'S MOTION FOR WRITTEN OPINION AND CERTIFICATION OF AN ISSUE OF GREAT PUBLIC IMPORTANCE

Appellant, the Florida Department of Business and Professional Regulation, Division of Alcoholic Beverages & Tobacco (the "Department"), pursuant to Rule 9.330, Fla. R. App. P., respectfully seeks a written opinion and certification of a question of great public importance with respect to this Court's per curiam affirmed decision of October 20, 2016. As shown below, a written opinion would provide a legitimate basis for likely review by the Florida Supreme Court under

Rules 9.030(2)(A)(iv) and (v), Fla. R. App. P.

The question of great public importance to be presented to the Florida Supreme Court is:

> IN DETERMINING TOBACCO TRANSACTION TAXES AND SURCHARGES UNDER SECTION 210.25(13), FLORIDA STATUTES (2015), IS THE "WHOLESALE SALES PRICE" OF THE TOBACCO PRODUCT EQUIVALENT TO THE MANUFACTURER'S INVOICE PRICE TO THE DISTRIBUTOR?

This case presents a clear issue of great importance to the public, the Florida Treasury, and the Health Care Trust Fund administered by the Florida Agency for Health Care Administration ("AHCA"). The Court's PCA decision leaves standing an Administrative Law Judge's erroneous determination that the Department's implementation of section 210.25(13), Florida Statutes (2015)—so as to include in the "wholesale sales price" (upon which tobacco transaction taxes and surcharges are based) all of a manufacturer's costs of sale reflected in its sales invoice for tobacco products, including federal excise taxes and shipping charges incurred by the manufacturer—is an invalid unadopted rule on which the Department cannot rely. In making this determination, the ALJ erred (1) by disregarding the binding precedent established in *Micjo, Inc. v. Department of Business and Professional Regulation*, 78 So. 3d 124 (Fla. 2d DCA 2012), in which the Second District held that section 210.25(13) is clear and unambiguous, and that the manufacturer's invoice price is the wholesale sales price (thus excluding costs added by distributors in resales of tobacco products); and (2) by holding that the Department engaged in unadopted rulemaking in looking to the manufacturer's full invoice price as the wholesale sales price.

The effect of the ALJ's decision to prevent the Department from administering section 210.25(13) on the basis of the manufacturer's full invoice price will be to require the Department to refund taxes to numerous Florida tobacco distributors who paid Florida tobacco transaction taxes and surcharges insofar as the wholesale sales tax included the manufacturer's federal excise tax and shipping costs. These refunds have a potential adverse impact of $50 million each for the three-year refund period, totaling $150 million in total potential refunds.[1]

Of particular significance is that $105 million of this potential three-year

---

[1] *See, e.g.*, Florida House of Representatives, Finance and Tax Committee Meeting Packet, November 5, 2015, at pp. 77 et seq., *located at* http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=2856&Session=2016&DocumentType=Meeting%20Packets&FileName=ftc%2011-5-15.pdf, in which the Department notes that annual average tax receipts from the inclusion of federal excise tax and shipping charges in the wholesale sales price (i.e., the underlying policy determined by the ALJ to be an unadopted rule—also called the "*Micjo*" issue) are $50 million. If all taxpayers who paid taxes on federal excise taxes and manufacturer's shipping charges timely seek refunds, this estimate of annual receipts can be used as a proxy for the State's annual potential refund exposure, which covers the three-year period prior to the recent amendment of section 210.25(13). *See* § 215.26, Fla. Stat.; *Dep't of Revenue v. Nemeth*, 733 So. 2d 970 (Fla. 1999). Accordingly, three years' worth of refunds could total $150 million, which breaks down to $45 million in taxes and $105 million in surcharges.

refund exposure is associated with tobacco transaction surcharges deposited into the Health Care Trust Fund. The surcharges created in section 210.276, Florida Statutes, provide monies to the Health Care Trust Fund to pay for specific public purposes associated with ameliorating the deleterious effects that tobacco use has on human health,[2] including: to support research into tobacco-related cancer, cardiovascular disease, stroke, and pulmonary disease, and also to support efforts to prevent, diagnose, treat, and cure diseases related to tobacco use, § 215.5602, Florida Statutes; for anatomical gift donor registry and educational programs, §§ 320.08047, 322.08, 765.515, 765.5155 & 765.544, Florida Statutes; for assisted living facilities administration, § 429.22, Florida Statutes; for patients with developmental disabilities, § 393.0673, Florida Statutes; for health maintenance organization administration, §§ 641.75 & 641.58, Florida Statutes; for nursing home administration, § 400.23, Florida Statutes; and for alternate placement for nursing home residents, §§ 393.0673, 400.062, 400.063, 400.121 & 400.162, Florida Statutes.

Refunds totaling $105 million would have an extraordinarily negative impact on the public purposes for which the Health Care Trust Fund was established.

For these reasons, this case raises a policy matter of statewide importance

---

2 *See, e.g.*, "Protecting Florida's Health Act," preamble, ch. 09-79, Laws of Fla.

for which discretionary review lies in the Florida Supreme Court under Article III, section 3 of the Florida Constitution, and Rule 9.030(a)(2)(A)(v), Fla. R. App. P. Accordingly, the Department asks that this Court certify this question as being of great public importance.[3]

The Department also seeks a written opinion under Rule 9.030(a)(2)(A)(iv), Fla. R. App. P., as the panel's decision leaves standing an ALJ determination which is contrary to the plain meaning of section 210.25(13), Florida Statutes (2015), and which expressly conflicts with the Second District's opinion in *Micjo*, *supra*, both as to the lack of ambiguity in section 210.25(13), Florida Statutes (2015), and as to the meaning of that statutory provision.

Grounds for Seeking Relief under Rule 9.330

Tobacco transaction taxes and surcharges are set at 25 and 60 percent, respectively, of the wholesale sales price of a tobacco product. §§ 210.276 & 210.30, Fla. Stat. The term "wholesale sales price" is defined by section

---

[3] To illustrate further the significance of this Court's PCA, shortly after it was issued, taxpayers cited it as supplemental authority in a number of other pending matters. *See, e.g.:* Supplement Authority in *DBPR v. Planet Trading, Inc.*, Fla. 5th DCA Case No. 5D15-4128; Request for Judicial Notice filed October 24, 2016, in *DBPR v. RYO Select, L.L.C.*, Fla. 4th DCA Case No. 4D16-1142; and requests for judicial notice filed on October 24, 2016, in: *Brandy's Products, Inc. v. DBPR*, Fla. 19th Cir. Ct. Case No. 2015 CA 764; *Brandy's Products, Inc. v. DBPR*, Fla. 19th Cir. Ct. No. 2014 CA 2046; and *Good Times Pinellas v. DBPR*, Fla. 13th Cir. Ct. No. 2015 CA 6052.

210.25(13), Florida Statutes, to mean "the established price for which a manufacturer sells a tobacco product to a distributor, exclusive of any diminution by volume or other discounts." To ascertain the wholesale sales price, the Department has argued throughout that it looks to the manufacturer's invoice price, as this is the price that must be paid in full, or there will be no sale of the tobacco.

"Tobacco products" is defined in section 210.25(11), Florida Statutes, to list those categories of taxable tobacco products (e.g., loose tobacco suitable for smoking, snuff, snuff flour). Again, as the Department has argued, nothing in section 210.25(13) can be read as the taxpayer suggests, so as to limit the tax base solely to the cost of the tobacco ingredient in each of those products. A plain reading of section 210.25(13) demonstrates that the Legislature intended to impose taxes and surcharges on the transactions for the sale of tobacco products, and not on the tobacco products in isolation from the transactions. That is, Florida taxes the **sales transaction** for the tobacco and **not the tobacco itself**—a critical distinction missed by the ALJ.[4]

Because Florida's statute defines wholesale sales price based on the

---

[4] This distinction between a tax on a tobacco transaction and a tax on tobacco is underscored by the distinctly different approach taken by the federal government, which imposes federal excise taxes on the tobacco itself, according to the weight of the tobacco—a sum that does not vary regardless of how much money is paid for the tobacco.

established price paid to the manufacturer for the tobacco, rather than on the tobacco itself assessed in isolation from its sale, the Department looks to the manufacturer's invoice price as the established price for the sale. Section 210.25(13), Florida Statutes (2015), in defining the wholesale sales price, does not provide for any exemptions or exclusions from the established price paid to the manufacturer. This is consistent with the Department's reading of the Second District's opinion in *Micjo*: *viz.*, that the pertinent statute was unambiguous in requiring the Department to measure the taxes by reference to the manufacturer's price for the tobacco, and to ignore any costs added by distributors in reselling the tobacco (there, federal excise tax and shipping charges for getting the tobacco to the distributors' customers).

The view articulated by the *Micjo* Court on this issue was binding on the ALJ in the proceeding below. *See, e.g., Malu v. Sec. Nat'l Ins. Co.*, 898 So.2d 69, 73, n. 3 (Fla. 2005)("The trial court was bound to follow Hunter [v. Allstate Ins. Co., 498 So.2d 514(Fla. 5th DCA 1986)] since it was the only district court decision that had pronounced a ruling on the issue"); and *Dep't of Fin. Servs. v. McKenzie*, Case No. 06-3862PL, 2007 WL 966756 (Fla. DOAH March 29, 2007) (ALJ bound like other trial courts to follow Florida appellate case law). Nonetheless, the ALJ dismissed the *Micjo* Court's conclusion that the statute was unambiguous and instead concluded just the opposite: that rulemaking was mandatory in light of what the ALJ clearly deemed to be an ambiguous statute.

The ALJ's ruling also expressly conflicts with *Micjo* as to the meaning of "wholesale sales price" in section 210.25(13), Florida Statutes (2015). The ALJ found that the *Micjo* Court had construed "wholesale sales price" to mean "only the charge for the tobacco and not to other charges to bring the tobacco to market." *See*, Final Order, p. 7, ¶ 7 (Record on Appeal at 257). Neither the *Micjo* decision nor section 210.25(13) supports the ALJ's conclusion that "other charges to bring the tobacco to market" are, if incurred and charged by the manufacturer, to be excluded from the wholesale sales price.

Without a written opinion from this Court, the Department is unable to discern the basis for the Court's determination to affirm the ALJ's conclusions that: (1) there is ambiguity in section 210.25(13), Florida Statutes (2015), which serves as a basis for obligatory rulemaking; and (2) that unidentified "other charges to bring the tobacco to market" (presumably, federal excise taxes and shipping costs) are not part of the wholesale sales price. With a written opinion, the Department could better demonstrate that the ALJ's reasoning is in express conflict with the opinion of the Second District in *Micjo*, and be positioned to seek discretionary review of this important issue in the Florida Supreme Court.

In light of the impact this decision is likely to have on refund claims pending in various stages throughout the state (and with the corresponding substantial potential refund impact on the public Treasury and the Health Care Trust Fund[5]), the Department seeks to have this Court pass on this issue of great public importance by explaining its reasoning in a written opinion and by certifying the question presented above so that the Department may seek review in the Florida Supreme Court. In addition, because it appears that this Court has affirmed an ALJ's determination that expressly conflicts with the holdings of the Second District in *Micjo, Inc. v. Department of Business and Professional Regulation*, 78 So.3d 124 (Fla. 2d DCA 2012), the Department seeks a written opinion articulating this Court's reasoning.

Conclusion

For the foregoing reasons, the Department respectfully requests that this Court certify the question set forth above as a matter of great public importance, and that it issue a written opinion.

Respectfully submitted,

PAMELA JO BONDI

---

[5] In 2016 the Florida Legislature amended section 210.25(13) to create a prospective change in the tax base on which the tobacco transaction and surcharges taxes are calculated and the point in the distribution chain at which the wholesale sales price is determined. This means that the impact of rulings such as the one at bar will be limited to refunds for taxes and surcharges paid before the effective date of the new statute, July 1, 2016. That impact, as noted, amounts to exposure of $45 million in tax refunds and $105 million in surcharge refunds.

ATTORNEY GENERAL

<u>/s/ *Blaine H. Winship*</u>
Blaine H. Winship
Special Counsel
Florida Bar No. 356913
William H. Stafford III
Florida Bar No. 70394
Senior Assistant Attorney General
Office of the Attorney General of Florida
The Capitol, Suite PL-01
Tallahassee, Florida 32399-1050
Telephone: (850) 414-3300
Facsimile: (850) 413-7555
blaine.winship@myfloridalegal.com

<u>REQUIRED STATEMENT FOR REQUESTING A WRITTEN OPINION</u>

I express a belief, based upon a reasoned and studied professional judgment, that a written opinion will provide a legitimate basis for Supreme Court review because: (1) the affirmance of the ALJ's Final Judgment conflicts with the Second District's opinion in *Micjo, Inc. v. Department of Business and Professional Regulation*, 78 So. 3d 124 (Fla. 2d DCA 2012), as to whether section 210.25(13), Florida Statutes (2015), is clear and unambiguous, and as to whether all costs of sale of tobacco products reflected in a manufacturer's invoice are included in the "wholesale sales price" under the statute, and a written opinion will provide a basis for likely discretionary review by the Supreme Court under Rule 9.030(a)(2)(A)(iv), Fla. R. App. P.; and (2) there are issues of great public importance raised by this Court's affirmance of the ALJ's determination of unadopted rulemaking by the Department, including the potential exposure of $45 million to the State Treasury and $105 million to the Health Care Trust Fund, and a written opinion will provide a basis for likely discretionary review by the Supreme Court under Rule 9.030(a)(2)(A)(v), Fla. R. App. P.

<u>*/s/ Blaine H. Winship*</u>
Blaine H. Winship
Special Counsel
Florida Bar No. 356913
blaine.winship@myfloridalegal.com

Office of the Attorney General of Florida
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300
(850) 414-9650 fax

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of November, 2016, the above motion was electronically filed with the Florida Courts E-filing Portal, which will send a Notice of Service of Court Documents, in compliance with rule 2.516(b), Fla.R.Jud.Admin, and rule 9.420(c), Fla.R.App.P to the following:

Gerald J. Donnini, II, Esq.
jerrydonnini@floridasalestax.com
Moffa, Sutton & Donnini, P.A.
One Financial Plaza, Suite 2202
100 S.E. Third Avenue
Ft. Lauderdale, FL 33394
(954) 234-2884
(954) 761-1004 fax
jerrydonnini@floridasalestax.com

/s/ *Blaine H. Winship*
Blaine H. Winship
Special Counsel