

**STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO**

FILED	
Department of Business and Professional Regulation Deputy Agency Clerk	
CLERK	Brandon Nichols
Date	9/21/2017
File #	2017-07497

IN RE:

PETITION FOR DECLARATORY STATEMENT
BEFORE DIVISION OF ALCOHOLIC
BEVERAGES AND TOBACCO, on behalf of
Logic Technology Development, LLC,

DABT Case No. 2017-024640

DS 2017-029

Petitioner
_____/

FINAL ORDER ON PETITION FOR DECLARATORY STATEMENT

The Department of Business & Professional Regulation, Division of Alcoholic Beverages & Tobacco ("Division"), pursuant to Rule 28-105.003, Florida Administrative Code ("F.A.C."), files this Final Order on Logic Technology Development, LLC's Petition for Declaratory Statement, filed on May 18, 2017.

1. The Department assigned this Petition case number DS 2017-024640. The Petition was noticed on May 24, 2017, in issue 43/101 of the Florida Administrative Register.

ISSUE PRESENTED

2. Petitioner seeks a response from the Division regarding whether its VapeLeaf system or any of its components are "tobacco products" as defined by s. 210.25(12), Florida Statutes.

FINDINGS OF FACT¹

3. The Division is charged with the permitting, enforcement, and administration of chapter 210, Florida Statutes, entitled Tax on Tobacco Products.

¹ The Division accepts as true the facts alleged in Petitioner's Petition. See Fla. Admin. Code R. 28-105.003 (providing that "[t]he agency may rely on the statements of fact set out in the petition without taking any position with regard to the validity of the facts.").

4. Petitioner sells a variety of electronic nicotine delivery systems online and through wholesalers and retailers in Florida and the United States.

5. One of Petitioner's products is called "Logic VapeLeaf" (hereinafter "VapeLeaf"). The VapeLeaf system is not currently sold in Florida.

6. VapeLeaf is an electronic device made for tobacco consumption which utilizes a vapor system combining vapor heat and granulated tobacco.

7. The VapeLeaf electronic device is comprised of three components: a tobacco capsule, a cartridge, and a rechargeable battery. These three components are designed exclusively for use with one another. The tobacco capsules and cartridge are sold together while the rechargeable battery and charger are sold separately.

8. Each of the five packaged tobacco capsules contain tobacco granules composed of various tobacco leaf grades, which are shredded, mixed, grinded, extruded and sieved to form the granule particles. Flavoring is subsequently added to the tobacco granules which are then used to fill the tobacco capsules. Product packaging labels the tobacco capsules as "pipe tobacco."

9. The tobacco capsules containing the tobacco granules are made of hard plastic. Product safety information provided by the manufacturer warns users to not disassemble the capsule and to not fill the capsule with any other substance.

10. Each tobacco capsule's duration of efficacy is 50 inhalations. The cartridge is to be discarded after 250 inhalations.

11. Approximately 0.01 mg of nicotine is delivered per inhalation.

12. The cartridge contains liquid that heats, via the rechargeable battery, to create a vapor synchronized for use with the tobacco capsules. The cartridge heats the tobacco granules to

approximately 86 degrees Fahrenheit. No combustion occurs at any time during the use of the product, and no smoke or ash byproduct is generated during use.

13. In order to utilize the VapeLeaf product, the consumer must insert one tobacco capsule into the cartridge and screw the cartridge onto the VapeLeaf rechargeable battery. The battery will power on when the consumer inhales from the tobacco capsule tip and power off again when the consumer stops inhaling.

14. Nicotine is delivered when the lithium-ion battery heats the liquid inside the cartridge to create a vapor; the heated vapor then passes through the tobacco capsule filled with the tobacco granules to create a tobacco vapor.

15. The product packaging for a refill pack of one cartridge and five tobacco capsules specifically states “No ash, no smoke smell.”

16. Product safety information warns users not to bite the tobacco capsule. The system is not intended for use as chewing tobacco.

17. Petitioner’s provided patent information for the product uses the following titles for its components: “Non-combusting flavor inhaler and control method”; “Non-combusting flavor inhaler and package”; “Non-combusting flavor inhaler”; and “Cartridge and non-combusting flavor inhaler.”

18. Petitioner included two exhibits with its Petition, Exhibits A and B. Exhibit A is the VapeLeaf kit which includes the rechargeable battery and the USB charger used to connect the battery to a charging device. Exhibit B is sold separately, but includes the package containing the VapeLeaf cartridge and the five limited-use tobacco capsules. Petitioner’s Exhibit A and B are attached hereto and incorporated herein by reference.

JURISDICTION

19. Pursuant to s. 120.565, Florida Statutes,

Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

20. In *Chiles v. Dep't of State*, 711 So. 2d 151, 154–55 (Fla. 1st DCA 1998), the Court explained,

The purpose of a declaratory statement is to address the applicability of a statutory provision or an order or rule of the agency in particular circumstances. A party who obtains a statement of the agency's position may avoid costly administrative litigation by selecting the proper course of action in advance. Moreover, the reasoning employed by the agency in support of a declaratory statement may offer useful guidance to others who are likely to interact with the agency in similar circumstances. Another party can expect the agency to apply the rationale for its declaratory statement consistently, or to explain why a different application is required.

21. The Division finds that Petitioner has presented a particular set of circumstances, is substantially affected by the Department's application of the statute, and can likely avoid costly administrative litigation by selecting the proper course of action in advance. Accordingly, the Division finds jurisdiction to issue a Declaratory Statement pursuant to section 120.565, Florida Statutes.

CONCLUSIONS OF LAW

22. "Legislative intent guides statutory analysis, and to discern that intent we must look first to the language of the statute and its plain meaning." *Fla. Dep't of Children & Family Servs. v. P.E.*, 14 So. 3d 228, 234 (Fla. 2009). Correspondingly, "legislative intent is determined primarily from the text" of the statute. *Cont'l Cas. Co. v. Ryan, Inc. E.*, 974 So. 2d 368, 374 (Fla. 2008). If the language of the statute is clear and unambiguous, then it is unnecessary to look

beyond the plain meaning of the statutory text. *Saunders v. Saunders*, 796 So. 2d 1253, 1254 (Fla. 1st DCA 2001).

23. Section 210.25(12), Florida Statutes, indicates,

“Tobacco products” means 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. 210.01(1), or cigars. .

24. In *Brandy’s Products v. Dep’t of Bus. & Prof’ Regulation, Div. of Alcoholic Beverages & Tobacco*, 188 So. 3d 130, 132 (Fla. 1st DCA 2016), the Court found that,

The statutory phrase in [s. 210.25(12), Florida Statutes] “loose tobacco suitable for smoking” is clear and unambiguous . . . the phrase loose tobacco is not an industry-specific term of art, so we refer to the dictionary definition of “loose” to ascertain the meaning of the phrase. The dictionary defines “loose” to mean “not rigidly fastened or securely attached,” “not brought together in a bundle, container, or binding,” “not dense, or compact in structure or arrangement,” and “not solid.” Accordingly, tobacco that is densely bound together to make a solid, uniform, cohesive product like the blunt wraps at issue in this case is not “loose tobacco” for purposes of s. 210.25(11), Florida Statutes (internal citation omitted).

25. Petitioner’s VapeLeaf product is used for tobacco consumption. The package which includes the tobacco capsules indicates that the product is pipe tobacco.

26. The tobacco capsules contain “shredded, mixed, grinded, extruded and sieved” tobacco “to obtain the desired granule particles.”

27. A particle is defined as “a minute quantity or fragment;” “a relatively small or the smallest discrete portion or amount of something.”²

² Merriam-Webster Online Dictionary, www.merriam-webster.com/dictionary/particle (last visited August 8, 2017).

28. Particles are small quantities, fragments or portions of something, and, therefore, “not dense, or compact in structure or arrangement,” and “not solid.”

29. Section 210.25(12), Florida Statutes, does not indicate that loose tobacco does not also encompass or contemplate just a component of a product.

30. Though, in theory, the tobacco granules could be removed from the capsule, it is not clear that the product, as presented, qualifies as “loose tobacco *suitable for smoking*.” (emphasis added).

31. “Statutes imposing taxes and penalties must be strictly construed against the taxing authority and any ambiguity in the provision of a tax statute must be resolved in the taxpayer's favor.” *Verizon Bus. Purchasing, LLC v. State*, 164 So. 3d 806, 809 (Fla. 1st DCA 2015) (internal citations omitted).

32. There is no indication that the product, as presented, is created, packaged, or marketed in a manner as to evade or avoid tobacco taxation.

33. Accordingly, the tobacco capsule component of the VapeLeaf system is not “tobacco products” as defined by section 210.25(12), Florida Statutes.

DONE and ORDERED in Tallahassee, Florida this 20th day of September, 2017.




Thomas R. Philpot, Director
Division of Alcoholic Beverages & Tobacco

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review Proceedings are governed by rules 9.110 and 9.190, Florida Rules of Appellate Procedure. Such proceedings are commenced upon the filing of a Notice of Appeal with the Department of Business and Professional Regulation, Attention: Ronda L. Bryan, Agency Clerk, 2601 Blair Stone Road, Tallahassee, Florida 32399, and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the Florida District Court of Appeal where the party resides. The Notice of Appeal must be filed within thirty days of rendition of the Declaratory Statement.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to Logic Technology Development, LLC., c/o Bryan M. Haynes, Troutman Sanders, LLP, at 1001 Haxall Point, Richmond, Virginia 23219, and via electronic mail at bryan.haynes@troutmansanders.com on this 21st day of September, 2017.

A handwritten signature in black ink that reads "Brandon M. Nibbel". The signature is written in a cursive, slightly slanted style. Above the signature, there is a faint, circular stamp that appears to contain the number "30".

Agency Clerk's Office

Exhibit A



VAPELEAF™

**TOBACCO
VAPOR SYSTEM**

EXCLUSIVELY FOR USE
WITH LOGIC VAPELEAF™
TOBACCO CAPS

**WARNING: This
product contains
nicotine. Nicotine
is an addictive
chemical.**

EXHIBIT

A

tabbies

1X CARTRIDGE
5X TOBACCO CAPS
MENTHOL GREEN

logic.



VAPELEAF™
PIPE TOBACCO

EXCLUSIVELY FOR
USE WITH LOGIC VAPELEAF™
Exhibit B TOBACCO
VAPOR SYSTEM

**WARNING: This
product contains
nicotine. Nicotine
is an addictive
chemical.**

Best Before:

Jan 2018
K236XV045

EXHIBIT

tabbies®

B

PETITION FOR DECLARATORY STATEMENT BEFORE THE
FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION



IN THE MATTER OF:

Logic Technology Development, LLC,
Petitioner.

Case No.: **DS 2017-029**

PETITION FOR DECLARATORY STATEMENT

Petitioner Logic Technology Development, LLC, ("Logic") hereby requests, under Fla. Stat. § 120.565 and Fla. Admin. Code Ann. r. 28-105, et seq., a Declaratory Statement from the Florida Department of Business and Professional Regulation ("the DBPR"), answering whether Logic's VapeLeaf system or any of its components are "tobacco products" as defined in Fla. Stat. § 210.25(12).

FACTUAL BACKGROUND

A. Logic

1. Logic distributes electronic nicotine delivery systems, and it sells its products both online and through wholesalers and retailers in Florida and across the United States.
2. Logic has a warehouse located at 2004 Northwest 25th Avenue, Pompano Beach, Florida 33069 ("Pompano Warehouse").

B. VapeLeaf

3. Among Logic's products is "Logic VapeLeaf™ ("VapeLeaf").
4. VapeLeaf is an electronic device for tobacco consumption. (VapeLeaf Tobacco Vapor System User Guide 3 (hereinafter "User Guide"), found in Ex. A.)
5. VapeLeaf is an innovative tobacco vapor system, combining vapor technology and granulated tobacco.

6. The system consists of three components: a “tobacco cap,” a cartridge, and a rechargeable battery.
7. The tobacco cap contains tobacco granules.
8. The cartridge contains liquid which is heated to create vapor, synchronized for use with 5 tobacco caps. The tobacco caps and cartridges are sold together.
9. The rechargeable battery and charger are packaged and sold separately.
10. These components are exclusively for use with one another.
11. The separate components are combined together to form a system that provides tobacco vapor for inhalation.
12. In order to use the product, the consumer inserts one tobacco cap into the cartridge and screws the cartridge onto the VapeLeaf rechargeable battery.
13. The battery will switch on when the consumer inhales from the tobacco cap tip and switch off when the consumer stops inhaling.
14. The lithium-ion battery heats liquid in the cartridge to create vapor. The vapor then passes through the tobacco cap filled with tobacco granules to create a tobacco vapor.
15. Traditional means of tobacco consumption differ from VapeLeaf in operation and in use. Most “electronic cigarette” devices also differ from VapeLeaf in operation and in use.

C. Intended Warehousing

16. Logic plans for VapeLeaf to be stored at the Pompano Warehouse.
17. From the Pompano Warehouse, VapeLeaf will be sent to distributors and retailers throughout the United States, including Florida.

D. Doubtful Tax and Surcharge Application

18. Florida imposes a tax and a surcharge on “tobacco products.” Fla. Stat. §§ 210.30(1), .276(1).
19. The tax is imposed at a rate of twenty-five percent of the cost of the “tobacco product,” id. § 210.30(1), and the surcharge is imposed at sixty percent of the wholesale sales price, id. § 210.276(1).
20. The DBPR’s Division of Alcoholic Beverages and Tobacco administers the tax and the surcharge. Id. § 210.75.
21. If Florida’s “tobacco products” tax and surcharge were imposed on VapeLeaf, the levy would have a financial impact on Logic.
22. There are, however, substantial questions and doubts whether the “tobacco products” tax and surcharge apply to VapeLeaf or any of its components.

NEED FOR DECLARATORY STATEMENT

“A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions . . . over which the agency has authority.” Fla. Admin. Code Ann. r. 28-105.001. “Any substantially affected person may seek a declaratory statement regarding an agency’s opinion as to the applicability of a statutory provision . . . as it applies to the petitioner’s particular set of circumstances.” Fla. Stat. § 120.565(1). “Thus, the purpose of a declaratory statement is to answer the petitioner’s questions about how the statutes or rules apply to his own circumstances so that he may select a proper course of action.” Carr v. Old Port Cove Prop. Owners Ass’n, 8 So. 3d 403, 404 (Fla. 4th Dist. Ct. App. 2009).

Logic petitions for a Declaratory Statement addressing whether VapeLeaf or any of its components are statutorily-defined “tobacco products.” That definition corresponds to the “tobacco products” tax and surcharge. The potential tax-and-surcharge liability—at rates, respectively, of twenty-five percent of cost and sixty percent of wholesale sales price—would affect Logic, which plans to warehouse and distribute VapeLeaf from its Pompano Warehouse. It is therefore necessary to determine whether VapeLeaf or any of its components are “tobacco products,” so Logic may plan accordingly.

QUESTION PRESENTED

In view of Logic’s particular circumstances and doubts over statutory application, Logic presents this question:

Is VapeLeaf or any of its components a “tobacco product” as defined in Fla. Stat. § 210.25(12)?

STANDARD OF REVIEW

On a petition for declaratory statement, “[t]he agency may rely on the statements of fact set out in the petition without taking any position with regard to the validity of the facts.” Fla. Admin. Code Ann. r. 28-105.003. In addressing questions of law, the agency is bound to apply “the plain and unequivocal language being interpreted.” See Thrivent Fin. for Lutherans v. Dep’t of Fin. Servs., 145 So. 3d 178, 181 (Fla. 1st Dist. Ct. App. 2014) (quoting Eager v. Fla. Keys Aqueduct Auth., 580 So. 2d 771, 772 (Fla. 3d Dist. Ct. App. 1991)).

DISCUSSION

For the following reasons, Logic does not believe that VapeLeaf or any of its components are “tobacco products” and, therefore, doubts the application of the corresponding excise tax and surcharge.

A. Tax Statutes Must Be Applied According to their Clear and Certain Terms or Else in the Taxpayer's Favor.

It is fundamental that “[n]o tax shall be levied except in pursuance of law.” Fla. Const. art. VII, § 1(a). Thus, “[t]he power to tax lies with the legislative branch. . . . An agency may not impose a tax, by rule or in any other manner.” Campus Comm’c’ns, Inc. v. Dep’t of Revenue, 473 So. 2d 1290, 1291 n.1 (Fla. 1985).

Further, “tax statutes are to be construed narrowly, not broadly. This is because ‘the duty to pay taxes, while necessary to the business of the sovereign, is still a duty of pure statutory creation and taxes may be collected only within the clear definite boundaries recited by the statute.’” Brandy’s Prods. v. Dep’t of Bus. & Prof’l Regulation, 188 So. 3d 130, 132–33 (Fla. 1st Dist. Ct. App. 2016) (other citations omitted) (quoting Maas Bros., Inc. v. Dickinson, 195 So. 2d 193, 198 (Fla. 1967)). Indeed, “[t]he Courts of Florida have repeatedly held that unless a tax is imposed in clear and certain terms, it will be held not to have imposed the tax.” Lake Garfield Nurseries Co. v. White, 149 So. 2d 576, 578 (Fla. 2d Dist. Ct. App. 1963).

“If the language of the statute is unambiguous and conveys a clear and definite meaning, the court must apply that meaning even if it conflicts with the interpretation of the statute adopted by the administrative agency charged with enforcing the statute.” Brandy’s Prods., 188 So. 3d at 132. “[I]f,” instead, “the text does not reveal with certainty the intent of the Legislature and it is susceptible of two meanings, that meaning most favorable to the taxpayer should be adopted. This is all the more true if one meaning results in imposing the tax and the other relieves it.” Walgreen Drug Stores Co. v. Lee, 28 So. 2d 535, 536 (Fla. 1946).

B. “Tobacco Products” are Narrowly Defined.

The “Tax on Tobacco Products,” encompassing both the tax and the surcharge, appears as Chapter 210 in Title XIV of Florida’s Statutes. There, “[t]he legislature did not tax all

products containing tobacco. Rather, it ‘taxed only those specifically enumerated in the statute.’” Brandy’s Prods., Inc. v. Dep’t of Bus. & Prof’l Regulation, No. 14-3496, 2015 Fla. Div. Adm. Hear. LEXIS 69, at *13 (Feb. 24, 2015) (ALJ recommendation) (quoting Fla. S & L Servs., Inc. v. Dep’t of Revenue, 443 So. 2d 120, 122 (Fla. 1st Dist. Ct. App. 1983)).¹ “[E]verything outside the definition of a taxable transaction is nontaxable, not because such things are exempt from the tax, but because the tax does not extend to them.” Id.

For purposes of both the tax and the surcharge on “tobacco products,”

“[t]obacco products” means 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. 210.01(1), or cigars.

Fla. Stat. § 210.25(12) (emphasis added).

C. Neither VapeLeaf nor Any of its Components are “Tobacco Products.”

Simply put, nothing enumerated as a “tobacco product” describes VapeLeaf or any of its components. Very clearly, neither VapeLeaf nor any of its components fit the definition as “snuff,^[2] snuff flour,^[3] cavendish,^[4] plug^[5] and twist^[6] tobacco; fine cuts^[7] and other chewing

¹ To be clear on the authoritative value of this statement of law, the DBPR rejected it in ruling that the cigar wraps at issue in the case were subject to the “tobacco products” tax and surcharge. See Brandy’s Prods., Inc. v. Dep’t of Bus. & Prof’l Regulation, No. 14-3496, 2015 Fla. Div. Adm. Hear. LEXIS 233, at *8–10 (June 10, 2015) (DBPR order). However, the First District Court of Appeal, in reasoning consonant with the ALJ’s on this issue, reversed the DBPR’s decision. See Brandy’s Prods., 188 So. 3d 132–33.

² “[A] preparation of pulverized tobacco to be chewed, placed against the gums, or inhaled through the nostrils.” Snuff, Webster’s Third New International Dictionary of the English Language 2159 (unabr. 2002) (hereinafter Webster’s Unabridged”).

³ “Dried tobacco-leaves prepared for conversion into snuff.” 4 Snuff-flour, Zell’s Popular Encyclopedia 144 (1882).

⁴ “[L]eaf tobacco softened, sweetened, and pressed into plugs or cakes.” Cavendish, Webster’s Unabridged, supra, at 357.

tobaccos;^[8] shorts;^[9] refuse scraps;^[10]” or as “clippings, cuttings, and sweepings of tobacco,^[11] and other kinds and forms of tobacco prepared in such manner as to be suitable for chewing.” VapeLeaf is not intended to be chewed, nor is it suitable for chewing. If any, the portion of this definition with, perhaps, the closest *conceivable* application is “loose tobacco suitable for smoking.” However, this category plainly does not encompass VapeLeaf or any of its components.

1. Neither VapeLeaf nor Any of its Components are “Loose Tobacco.”

“The statutory phrase ‘loose tobacco suitable for smoking’ is clear and unambiguous,” Brandy’s Prods., 188 So. 3d at 132. In Brandy’s Products, the First District Court of Appeal had the occasion to address the applicability of this phrase to “cigar wraps — or, as they are colloquially known, ‘blunt wraps.’” See id. at 131. The wraps at issue were “made of tobacco, wood pulp, and other materials, and . . . similar to rolling papers in that they [were] designed to be used as the outer wrapper of homemade cigars.” Id. Asserting that the wraps fit the definition of “tobacco products,” the DBPR emphasized “that tobacco is one of the raw materials used to manufacture blunt wraps” and characterized as “wrong” the “conclu[sion] that

⁵ “A flat cake of pressed or twisted tobacco” or “[a] piece of chewing tobacco.” Plug, American Heritage Dictionary 1355 (5th ed. 2011); see also Plug, Webster’s Unabridged, supra, at 1743 (“[A] flat compressed cake of tobacco.”); Plug Tobacco, Webster’s Unabridged, supra, at 1743 (“[T]obacco in the form of plugs.”); cf. infra note 8.

⁶ “[T]obacco leaves twisted into a thick compact roll.” Twist, Webster’s Unabridged, supra, at 2473; cf. supra note 5.

⁷ “[T]obacco cut into small shreds for chewing or smoking.” Fine Cut, Webster’s Unabridged, supra, at 852.

⁸ “[T]obacco, usu[ally] in the form of a plug, that contains a large percentage of flavoring material.” Chewing Tobacco, Webster’s Unabridged, supra, at 386.

⁹ Cf. Shorts, American Heritage Dictionary, supra, at 1621 (“Clippings or trimmings that remain as byproducts in various manufacturing processes, often used to make an inferior variety of the product.”); cf. also infra note 10.

¹⁰ “[A] by-product of the handling of tobacco consisting of loose tangled pieces of leaves, floor sweepings, but no stems” or “coarsely broken or cut tobacco used for chewing and smoking.” Scraps, Webster’s Unabridged, supra, at 2039.

¹¹ Cf. supra note 10.

a product taxable as loose tobacco would become exempt from taxation merely by combining it with other material to make a loose cigar wrapper.” See Brandy’s Prods., Inc., 2015 Fla. Div. Adm. Hear. LEXIS 233, at *11–12. The First District Court of Appeal disagreed and reversed.

Giving “loose tobacco suitable for smoking” its “plain and ordinary signification, the definition . . . d[id] not include blunt wraps within its reach.” Brandy’s Prods., 188 So. 3d at 132 (omission in original). The Court elaborated as follows:

The phrase “loose tobacco” is not an industry-specific term of art, so we refer to the dictionary definition of “loose” to ascertain the meaning of the phrase. The dictionary defines “loose” to mean “not rigidly fastened or securely attached,” “not brought together in a bundle, container, or binding,” “not dense, close, or compact in structure or arrangement,” and “not solid.” Accordingly, tobacco that is densely bound together to make a solid, uniform, cohesive product like the blunt wraps at issue in this case is not “loose tobacco” for purposes of section 210.25(11).¹²

Brandy’s Prods., 188 So. 3d at 132 (other citation omitted) (quoting *Loose*, Merriam-Webster Online Dictionary, available at www.merriam-webster.com/dictionary/loose (visited Mar. 14, 2016)).

The Court also rejected the DBPR’s argument for a broad construction of the statutory definition. First, the Court recalled the “well-settled” rule “that tax statutes are to be construed narrowly, not broadly.” Id. Second, the Court observed that the DBPR’s “argument effectively read[d] the word ‘loose’ out of the statute and replace[d] it with the word ‘all.’” Id. at 133. On that point, the Court reminded the DBPR that, whatever the DBPR’s policy objective, “*only the Legislature* has the authority to amend the definition of ‘tobacco products’ . . . to accomplish that end.” Id. (emphasis added).

¹² Reflecting the present numbering, “[s]ubsection (11) was renumbered as (12) in 2016.” Grabba-Leaf, LLC v. Dep’t of Bus. & Professional Regulation, No. 16-3160RU, 2016 Fla. Div. Adm. Hear. LEXIS 442, at *5 n.4 (Aug. 26, 2016) (ALJ order).

The reasoning in Brandy's Products controls the determination here.¹³ The VapeLeaf tobacco cap confines the tobacco granules close together. Simply put, the granules are not loose. Rather, they are “brought together in a . . . container.” See id. (quoting *Loose*, Merriam-Webster Online Dictionary, supra). The tobacco cap being the only component of VapeLeaf with any tobacco in it, there is no other basis for treating the VapeLeaf system as a “tobacco product.” Accordingly, neither VapeLeaf nor any of its components are subject to the “tobacco products” tax or surcharge.

2. Neither VapeLeaf nor Any of Its Components are “Suitable for Smoking.”

If the answer on the “loose tobacco” question were not enough, it is also clear that neither VapeLeaf nor any of its components are “suitable for smoking.”¹⁴

To smoke means “[t]o draw in and exhale smoke from a cigarette, cigar, or pipe.” *Smoke*, American Heritage Dictionary 1654 (5th ed. 2011). That smoke is “[t]he vaporous system made up of small particles of carbonaceous matter in the air, resulting mainly from the *burning* of organic material, such as wood or coal.” Id. (emphasis added). Confirming this plain reading, the Florida Legislature has provided that

- “[s]moking’ means inhaling, exhaling, burning, carrying, or possessing any *lighted* tobacco product, including cigarettes, cigars, pipe tobacco, and any other *lighted* tobacco product,” Fla. Stat. Ann. § 386.203(10) (emphasis added) (defining for purposes of public health/indoor air), and that

¹³ “In the absence of inter-district conflict or contrary precedent from [the Supreme Court of Florida], it is absolutely clear that the decision of a district court of appeal is binding precedent throughout Florida.” Sys. Components Corp. v. Fla. DOT, 14 So. 3d 967, 973 n.4 (Fla. 2009).

¹⁴ There is some disagreement whether “suitable for smoking” means “suitable for smoking by itself” or, simply, suitable for smoking in the sense that the product has qualities appropriate for smoking (seemingly, as a very general matter). Cf. Grabba-Leaf, LLC, 2016 Fla. Div. Adm. Hear. LEXIS 442, at *11–13 (synthesizing the former interpretation from Creager Mercantile Co., Inc. v. Colorado Department of Revenue, No. 13CA1580, 2015 Colo. App. LEXIS 190, at *4–7 (Feb. 12, 2015), and Brandy's Products, Inc., 2015 Fla. Div. Adm. Hear. LEXIS 69, but deciding on the latter interpretation), on appeal at No. 4D16-4166 (Fla. 4th Dist. Ct. App.). Under either definition, however, neither the VapeLeaf nor any of its components are suitable for smoking. A tobacco cap cannot be smoked on its own—much less at all. Nor, for that matter, can one smoke the VapeLeaf system or any other component.

- “[s]moking’ means *burning* or *igniting* a substance and inhaling the smoke. Smoking *does not include the use of a vaporizer*,” *id.* § 381.986(1)(i) (emphasis added) (defining for purposes of compassionate use of low-THC and medical cannabis).

In short, there is no smoke where there is no fire.

Using the VapeLeaf system does not fit the definition of “smoking.” VapeLeaf is used without any “burning” or “igniting,” and it is never “lighted.” Rather, heated vapor passes over tobacco granules to provide a vapor of tobacco taste, which the user inhales. As neither VapeLeaf nor any of its components involve smoking, they are not “suitable for smoking.” Accordingly, neither VapeLeaf nor any of its components are “tobacco products” subject to the corresponding tax and surcharge.

CONCLUSION

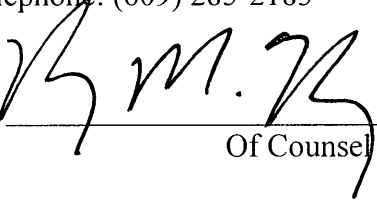
Given Logic’s planned warehousing and distribution of VapeLeaf in Florida and the doubtful application of the “tobacco products” tax and surcharge, Logic is entitled to a Declaratory Statement answering its Question Presented. To that end, the DBPR should conclude that neither VapeLeaf nor any of its components fit the definition of “tobacco products” and, therefore, that they are not subject to the corresponding tax and surcharge.

Respectfully submitted, this the 17th day of May, 2017.

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May 17, 2017

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BY OVERNIGHT MAIL

MAY 18 2017

Department of Business and Professional Regulation
Office of the General Counsel - Stop Code N21
2601 Blair Stone Road
Tallahassee, Florida 32399-2202

OGC-ABT

Re: Petition for Declaratory Statement
In the Matter of: Logic Technology Development, LLC

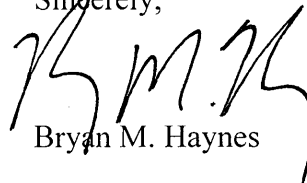
Dear Sir or Madam:

For filing with the Department, please find enclosed Logic Technology Development, LLC's Petition for Declaratory Statement and Exhibits.

Please note that the matters raised in the Petition are time-sensitive, and we would appreciate the Department's expedited review of the Petition.

Please do not hesitate to contact me if there are any questions about this submission.

Sincerely,



Bryan M. Haynes