

BOARD OF TAX APPEALS
STATE OF LOUISIANA

MCLANE/SOUTHERN, INC.

Petitioner

versus

B.T.A. DOCKET NO. 13590C

SECRETARY OF DEPARTMENT
OF REVENUE, STATE OF LOUISIANA

Respondent

JUDGMENT WITH WRITTEN REASONS

This matter came before the Board for hearing on cross Motions for Summary Judgment on March 19, 2025, with Chairman Francis J. "Jay" Lobrano presiding, and Vice-Chair Lisa Woodruff-White (Ret.) present.

Appearing before the Board were: Robert S. Angelico and Cheryl Kornick, attorneys for McLane/Southern, Inc. ("Taxpayer"); and Aaron Long and Antonio Ferachi, attorneys for the Department of Revenue ("LDR"). At the conclusion of the hearing, the Board took the matter under advisement. Thereafter, additional briefs were submitted, which were also considered by the Board in accordance with an Order issued by this Board on April 1, 2025.

In accordance with the attached Written Reasons for Judgment, the Board now rules as follows:

IT IS ORDERED, ADJUDGED, AND DECREED that the Motion for Summary Judgment filed by the LDR is denied.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Cross-Motion for Summary Judgment filed by the Taxpayer is granted.

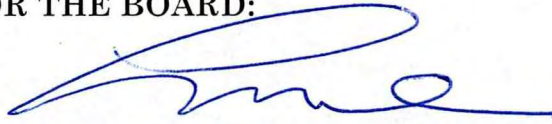
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the term "smoking tobacco" as used in La. R.S. 47:842(16), does not include the wraps and wrappers at issue, which are not "prepared in such manner as to be suitable for smoking in pipe or cigarette."

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Notice of Assessment issued by LDR for Louisiana Tobacco Excise Taxes, Interest and Penalties for the tax periods January 1, 2019 through April 30, 2022 is vacated. LDR shall refund to the Taxpayer the tax, penalties, and interest paid under protest pursuant to the Notice of Assessment plus interest as provided by law.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Motion to Strike the Affidavit of Clifford P. Block and the Taxpayer's Statement of Uncontested Facts Paragraphs 4,5,6,7,8,9,10,11,12, and 13 is denied.

JUDGMENT RENDERED AND SIGNED AT BATON ROUGE,
LOUISIANA, THIS 29th DAY OF MAY, 2025.

FOR THE BOARD:



JUDGE LISA WOODRUFF-WHITE (RET.)
VICE-CHAIR, BOARD OF TAX APPEALS
STATE OF LOUISIANA

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Appearing before the Board were: Robert S. Angelico and Cheryl Kornick, attorneys for McLane/Southern, Inc. ("Taxpayer"); and Aaron Long and Antonio Ferachi, attorneys for the Department of Revenue ("LDR"). At the conclusion of the hearing, the Board took the matter under advisement. On March 20, 2025, LDR filed a Motion for Leave to File Post-Hearing Memorandum to Correct Statements Made at Hearing on Motion for Summary Judgment with Incorporated Memorandum and a Post-Hearing Memorandum/Correction. On March 21, 2025, Taxpayer filed an Opposition to Motion for Leave to File Post-Hearing Memorandum. Thereafter, also on March 21, 2025, LDR filed Department's Reply to Petitioner's Opposition to Motion for Leave to File Post-Hearing Memorandum/Correction. The Board issued an Order on April 1, 2025, granting the LDR's Motion for Leave, allowing the filing of the supplemental pleadings by LDR. In the Order, the Board granted Taxpayer 10 days from notice of the Order for Taxpayer to file a reply to the post-trial memorandums of the LDR, as requested in Taxpayer's opposition. On April 7, 2025, Taxpayer filed a Reply to the Post-Hearing Memorandum.

The Board now issues these Written Reasons for Judgment on the motions for summary judgment and related matters.

Facts:

The pertinent facts are undisputed and simple. Taxpayer is a Louisiana bonded and permitted wholesale tobacco dealer. Taxpayer supplies, distributes, and sells tobacco products to Louisiana customers through its grocery logistics system. The products at issue in this matter are wraps or wrappers (“Wraps”). It is undisputed that the Wraps are comprised of 67% to 100% tobacco and contain nicotine. Taxpayer purchases the Wraps wholesale from manufacturers. When the Wraps are ultimately sold to consumers, they are sold separately from tobacco content or other substance that would be rolled up and smoked.

The Wraps are advertised and labeled as paper for wrapping around the substance into a blunt for smoking. When smoked both the contents and the wrap are burned and consumed. Nevertheless, there is no evidence in the summary judgment record to suggest that the Wraps are, or are intended to be, consumed inside another wrapper. Furthermore, LDR does not contend that the Wraps can be smoked on their own without internal contents.

On February 18, 2020, Taxpayer filed their Tobacco Excise Tax Return for the January 2020 Tax Period. On that return, Taxpayer reported the Wraps as “other” tobacco products and remitted tax according to the rate applicable to such “non-smoking” tobacco products. Prior to filing that return, Taxpayer had reported and remitted tax on the Wraps as if they were “smoking” tobacco. As a result of treating the Wraps as “other” non-smoking tobacco products, Taxpayer paid a reduced rate of tax.

LDR subsequently audited Taxpayer’s Tobacco Excise Tax Returns for the Tax Periods of January 1, 2019 through April 30, 2022 (the “Audit Period”). LDR determined that the Wraps were “smoking” tobacco, which is taxed at a higher rate than “other” tobacco products. Taxpayer filed a protest. After the protest hearing, the LDR issued an Assessment for Tobacco Excise Tax for the Audit Periods, assessing Tobacco Excise Tax in the amount of \$34,491.48, interest in the amount of \$4,579.31,

and no penalties, for a total assessed amount of \$39,070.79 (“Assessment”). The additional tax due per the Assessment reflects the difference between treating the Wraps as “smoking” tobacco over the tax already paid under the rate applicable to “other” non-smoking tobacco. Taxpayer timely paid the Assessment under protest and filed their Petition with this Board.

Issue Presented:

Whether the tobacco Wraps constitute “smoking tobacco” as defined in La. R.S. 47:842(16).

Discussion:

A. Motions for Summary Judgment

As a preliminary matter, this case is before the Board on Cross Motions for Summary Judgment filed by LDR and Taxpayer. A motion for summary judgment is a procedural device used when there is no genuine issue of material fact for all or part of the relief prayed for by a litigant. *Hester v. Walker*, 20-01278 (La. 5/13/21), 320 So. 3d 362; *Roach v. Moffatt*, 55,415 (La. App. 2 Cir. 1/10/24), 379 So. 3d 268; *Rodessa Oil & Land Co. v. Perkins*, 47-378 (La. App. 2 Cir. 8/8/12), 104 So. 3d 52; *In re Clement*, 45,454 (La. App. 2 Cir. 8/11/10), 46 So. 3d 804. The motion for summary judgment shall be granted if the motions, memorandum, and supporting documents show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(A)(3); *Minifield v. Gardner*, 54,686 (La. App. 2 Cir. 8/10/22), 345 So. 3d 495. Further, despite the legislative mandate that summary judgments are now favored, factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion and all doubt must be resolved in the opponent’s favor. *Rodessa, supra*; *Shelter Ins. Co. v. Broan-Nutone, LLC*, 39,625 (La. App. 2 Cir. 5/11/05), 902 So. 2d 1146, *writ denied*, 05-1483 (La. 12/16/05), 917 So. 2d 1112.

A material fact is one that potentially ensures or precludes recovery, affects a party's ultimate success, or determines the outcome of the dispute. *Rodessa, supra*. A genuine issue is one about which reasonable persons could disagree. *Id.* If only one conclusion could be reached by reasonable persons, then there is no triable issue and summary judgment is proper. *Id.*; *Hines v. Garrett*, 04-0806 (La. 6/25/04), 876 So. 2d 764. In determining whether a factual issue is genuine for purposes of summary judgment, a court should not consider the merits, make credibility determinations, evaluate testimony, or weigh evidence. *Crescent City Property Redevelopment Assoc., LLC v. Muniz*, 21-00371 (La. 6/1/21), 347 So. 3d 682; *Suire v. Lafayette City-Parish Consol. Gov't*, 04-1459 (La. 4/12/05), 907 So. 2d 37. Summary judgment is seldom appropriate for determinations based on subjective facts, such as motive, intent, good faith, knowledge and malice. *Smith v. Our Lady of the Lake Hospital, Inc.*, 93-2512 (La. 7/5/1994) 639 So. 2d 730; *Robins v. Coles*, 23-1343 (La. App. 1st Cir. 8/26/24) 395 So. 3d 345.

The Motions for Summary Judgment in the case before the Board both raise the issue of how the Wraps are defined under the Tobacco Excise Tax. The primary issue is narrowly focused on the definition of "smoking tobacco" and "smokeless tobacco" in La. R.S. 47:841 (16) and (17), and more specifically, whether the Wraps constitute "smoking tobacco" as defined in La. R.S. 47:842 (16). The distinction is important because La. R.S. 47:841 imposes a different tax rate based on the type of tobacco product at issue. The Board finds that this issue is appropriately resolved on summary judgment by application of the clear statutory language in La. R.S. 47:842 (16).

1. Motion to Strike:

Before addressing the summary judgments, the Board will opine on the Motion to Strike filed by LDR on February 26, 2026. The Motion to Strike seeks to strike in full or in part, the Affidavit of Clifford P. Block, attached in support of Taxpayer's Motion for Summary Judgment, and Taxpayer's Statement of Uncontested Facts

Paragraphs 4,5,6,7,8,9,10,11,12, and 13. LDR asserts that Mr. Block is an attorney whose familiarity with the subject matter is based on second-hand research and not personal knowledge. With respect to the aforementioned paragraphs from Taxpayer's fact statement, LDR claims that these are inadmissible legal conclusions.

a. Affidavit of Clifford P. Block

Mr. Block is an attorney and the Vice President of Special Operation of McLane Company, Inc. ("MCI"), Taxpayer's parent entity. LDR maintains neither Taxpayer nor MCI are, or have claimed to be, manufacturers of the Wraps. As such, LDR objects to Mr. Block's statements relating to the manufacturing, the intended purpose, and the possible uses for the Wraps.

La. C.C.P art. 967(A) states in relevant part that, "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Personal knowledge means something the witness actually saw or heard, as distinguished from what he learned from some other person or source. *State, Dept. of Transp. and Development v. Cecil*, 42,433, p. 4 (La. App. 2 Cir.2007), 966 So.2d 131, 134, citing *Barnes v. Sun Oil Co.*, 362 So.2d 761 (La. 1978); *Jones v. Foster*, 41,619, p. 4 (La. App. 2 Cir. 12/13/06), 945 So.2d 262, 265. The purpose of the requirement of "personal knowledge" is to limit the affidavit to facts which the affiant saw, heard, or perceived with his own senses. *Atkinson v. Allstate Ins. Co.*, 361 So.2d 32, 33 (La. App. 3 Cir. 1978) citing *Hidalgo v. General Fire Casualty Company*, 254 So.2d 493 (La. App. 3 Cir.1971).

Mr. Block, though not a manufacturer, is an officer of the wholesaler that purchased the Wraps from the manufacturer. In his affidavit, he states that he frequently consults on matters that include cigarettes, other tobacco products and nicotine delivery products, their characteristics, marketing, utilization and associated regulatory components. His affidavit therefore demonstrates that he is

familiar with the composition of the Wraps and the purposes for which they are marketed and sold to distributors and consumers.

b. Taxpayer's Statement of Uncontested Facts

Based on the pleadings filed, evidence submitted and oral arguments, there is no actual dispute as to the material composition of the Wraps. LDR's statement of facts asserts that the Wraps contain nicotine and are either 67% tobacco or marketed as 100% tobacco. LDR further introduced exhibits in support of its Motion for Summary Judgment showing packaging of the Wraps, which are undisputedly representative of the items at issue. LDR's Exhibits show packaging for "Al Capone" Wraps that identify the product as "100% Tobacco Leaf Wrap." LDR also introduced the Affidavit of Tony Morrison, which was not objected to, and represents that the "Zig Zag" Wraps are made using homogenized tobacco leaf (HTL) which is comprised of approximately 67% tobacco material. As such, it is a matter of undisputed fact that the Wraps are comprised primarily made of tobacco and contain nicotine.

For the reasons stated, the Motion to Strike the Affidavit of Clifford P. Block and Taxpayer's Statement of Uncontested Facts Paragraphs 4,5,6,7,8,9,10,11,12, and 13 is denied.

2. Definition of Wraps Under Tobacco Excise Tax, La. R.S. 47:841

Relevant to the determination of this matter are the definition of terms found in La. R.S. 47:842. These are the definitions of "smokeless tobacco" and "smoking tobacco" as follows:

(15) "Smokeless tobacco" means all smokeless tobacco including but not limited to fine cut, long cut, packed in pouches, snuff, snuff flower, chewing tobacco, cavendish, plugs, twists, shorts, refuse and other scraps, clippings and sweepings of tobacco, and other forms of loose tobacco, articles and products made of tobacco, or a tobacco substitute.

(16) "Smoking tobacco" includes granulated, plug cut, crimp cut, ready rubbed and any other kind and form of tobacco prepared in such manner as to be suitable for smoking in pipe or cigarette.

LDR argues that the definition for “smoking tobacco” provides that the tobacco be suitable for smoking “in” a cigarette, not “within” a cigarette. LDR asserts the wrapper of a cigarette forms parts of the cigarette and the cigarette filler by itself does not constitute a cigarette. Focusing on how the cigarette is consumed, LDR argues that the tobacco contained “in” the completed rolled cigarette, includes the tobacco contained in every component of the cigarette, including the tobacco filled wrapper. LDR further notes that the amount of combustible tobacco and nicotine contribute to the total consumption of tobacco when the cigarette is consumed when smoked, noting that the Wraps “at issue are 100% tobacco or at least 67% tobacco.” LDR seeks a summary judgment determining that the Wraps constitute “smoking tobacco” taxed at the 33% rate applicable to “smoking tobacco.”

Taxpayer asserts La. R.S. 47:842(16) limits “smoking tobacco” to tobacco that is “prepared in such manner as to be suitable for smoking in pipe or cigarette” and that the language is a clear and obvious reference to the “combustible filler material” or “combustible tobacco product” used as the filler material in pipes and cigarettes. Further, Taxpayer argues that the term “smoking tobacco” as used in La. R.S. 47:842 (16), does not include the wrap or wrappers that contain tobacco but are not capable of being “smoked” as that term is defined and generally understood. Alternatively, Taxpayer asserts that the usage of the term “smoked” in context and applied to Wraps is “unconstitutionally vague that at most, if enforceable at all, should be strictly construed against the taxing jurisdiction and liberally construed in favor of the Taxpayer.”

Taxpayer does not dispute that the Wraps can burn or that the Wraps contain tobacco. Taxpayer notes the Wraps are intended to be “wrapped around combustible filler material (tobacco), and they are burned when the combustible filler material (tobacco) is smoked.” Taxpayer argues, however, that the burning of the Wraps does not comport with being “prepared in such manner as to be suitable for smoking in pipe or cigarette.”

It is also important to note that the statements in the Affidavits supporting the Motions for Summary Judgment, one from Taxpayer and one from LDR, support the assertion of Taxpayer that the Wraps are not complete smoking articles because they lack the combustible filler material.

LDR attached Exhibit 4 to their Motion for Summary Judgment which is the Affidavit of John Morrison. In the Affidavit Mr. Morrison states, he is a Research Chemist with Turning Point Brands, Inc. (TPB) the parent company of National Tobacco Company, L.P. (NTC). He further states, he is "familiar and well acquainted with the Zig-Zag® Wraps- Melon and Cherry ("Zig-Zag Wraps")" and identifies an image of the Wraps in an Exhibit to his Affidavit. In his statement of what he would testify to at trial, Mr. Morrison includes a statement on page 2, numbered paragraph 8 that:

Zig-Zag Wraps are intended to be used for fanning or wrapping legal consumable smoking articles but are not complete smoking articles by themselves as they lack a combustible filler material needed to form a finished smoking article.

The Affidavit also states that the "Zig-Zag Wraps are made using homogenized tobacco leaf (HTL) which is comprised of approximately 67% tobacco material" and that Zig-Zag Wraps are regulated by the Food and Drug Administration because the wraps contain tobacco and nicotine. The presence of nicotine in the Zig-Zag Wraps, derived solely from tobacco fibers, is also noted by Mr. Morrison because "nicotine is naturally occurring within tobacco."

Taxpayer attached to its Cross Motion for Summary Judgment the Affidavit of Clifford P. Block, identified as Exhibit A and previously addressed herein states in numbered paragraph 11 the Wraps "are not meant for use in the absence of smoking tobacco or other products suitable for smoking, nor do they have any practical use in isolation from smoking tobacco or other products suitable for smoking." Further, in numbered paragraph 12, Mr. Block states the Wraps "are designed to be filled with a combustible filler mater, specifically smoking tobacco or other products suitable for

smoking.” The consistency in the statements in the Affidavits is beneficial and persuasive to the Board as it relates to the use of the Wraps and application of La. R.S. 47:842 (16). Further, the Board rejects the argument of LDR that because the Wraps are combustible and the nicotine and tobacco in the Wraps is consumed when the final smoking product is consumed, the Wraps should be treated as “combustible filler material” or “combustible tobacco product” for purposes of La. R.S. 47:842 (16).

There is no ambiguity in the language of La. R.S. 47:842 (16) as it relates to the issue before the Board. More particularly, the Board does not find ambiguity in the phrase defining smoking tobacco to include “granulated, plug cut, crimp cut, ready rubbed and any other kind and form of tobacco prepared in such manner as to be suitable for smoking in pipe or cigarette.” However, it is well settled that if the language of a taxing statute is ambiguous, said ambiguity must be construed in favor of the taxpayer.

The fundamental question in all cases of statutory interpretation is legislative intent. *Black v. St. Tammany Parish Hospital*, 2008–2670 (La.11/6/09), 25 So.3d 711. The principal rule is the “text of a statute is considered the best evidence of legislative intent or will.” *State v. Williams*, 2000–1725 (La.11/28/01), 800 So.2d 790, 800. If the language of the law is clear, unambiguous and its application does not lead to absurd consequences, then the law must be applied as written. *Barfield v. Bolotte*, 2015-0847, p. 6 (La. App. 1 Cir. 12/23/15), 185 So.3d 781, 785, *writ denied*, 2016-0307 (La. 5/13/16), 191 So.3d 1058.

If a taxing statute is ambiguous, *i.e.*, susceptible of more than one reasonable interpretation, then that ambiguity is to be strictly construed against the taxing authority and in favor of the taxpayer. *Goudchaux/Maison Blanche, Inc. v. Broussard*, 590 So.2d 1159, 1161 (La.1991).

The Board finds the language of La. R.S. 47:842 (16) to be clear in defining “smoking tobacco” as a kind or form of tobacco “prepared in such manner as to be suitable for smoking in pipe or cigarette.” In applying the clear language of La. R.S.

47:842 (16), it is the position of the Board that “smoking tobacco” is the combustible filler material and not the Wraps, regardless of the amount of tobacco or nicotine in the Wraps and regardless of the burning or consumption of the Wrap along with the combustible filler material in the final smoking article or cigarette.

B. Validity of Notice of Assessment

Taxpayer seeks the Notice of Assessment be cancelled and vacated. The Board finds that the Notice of Assessment was based on classification of the Wraps as “smoking tobacco” resulting in the application of a 33% tobacco excise tax on these products, which the Board finds to be incorrect. As the Notice of Assessment is in error based on the findings and ruling of this Board, the Notice of Assessment is vacated.

Conclusion:

In the case before the Board, after consideration of the cross Motions for Summary Judgment and the Exhibits and evidence presented, the Board finds there is no genuine issue of material fact, and Taxpayer is entitled to summary judgment as a matter of law for the reasons outlined herein. The term “smoking tobacco” as used in La. R.S. 47:842 (16), does not include the Wraps and wrappers at issue, which are not “prepared in such manner as to be suitable for smoking in pipe or cigarette.” As such, the Cross-Motion for Summary Judgment filed by Taxpayer is granted and the Motion for Summary Judgment filed by the LDR is denied. The Notice of Assessment issued by LDR for Louisiana Tobacco Excise Taxes, Interest and Penalties for the tax periods January 1, 2019 through April 30, 2022, is vacated. Taxpayer paid the sums due pursuant to the Notice of Assessment under protest. Accordingly, the Board’s Judgment orders LDR to refund to Taxpayer the tax, penalties, and interest paid under protest pursuant to the Notice of Assessment plus interest as provided for by law.

Lastly, the Motion to Strike the Affidavit of Clifford P. Block and Taxpayer’s Statement of Uncontested Facts Paragraphs 4,5,6,7,8,9,10,11,12, and 13 is denied.

Judgment is issued herein by the Board in accordance with these reasons.

BATON ROUGE, LOUISIANA, THIS 29th DAY OF MAY 2025.

FOR THE BOARD:



JUDGE LISA WOODRUFF-WHITE (RET.)
VICE-CHAIR, BOARD OF TAX APPEALS
STATE OF LOUISIANA