BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,	
STARBUZZ INTERNATIONAL, INC., and	OTA NO. 19034546
STARBUZZ TOBACCO, INC.,	OTA NO. 19034547
APPELLANT.	

TRANSCRIPT OF VIRTUAL PROCEEDINGS

Cerritos, California

Wednesday, January 27, 2021

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Virtual Proceedings, taken at 12900 Park Plaza Dr., Cerritos, California, 91401, commencing at 1:05 p.m. and concluding at 2:16 p.m. on Wednesday, January 27, 2021, reported by Ernalyn M. Alonzo, Hearing Reporter, in and for the State of California.

APPEARANCES:

Panel Lead:	ALJ NGUYEN DANG
Panel Members:	ALJ SUZANNE BROWN ALJ ANDREW WONG
For the Appellant:	MARDIROS DAKESSIAN
For the Respondent:	STATE OF CALIFORNIA DEPARTMENT OF TAX AND FEE ADMINISTRATION STEPHEN SMITH COURTNEY DANIELS DAMIAN ARMITAGE

I N D E X

E X H I B I T S

(Appellant's Exhibits 1-9 were received at page 8.)

(Department's Exhibits A-I were received at page 8.)

PRESENTATION

CLOSING STATEMENT

Cerritos, California; Wednesday, January 27, 2021

1:05 p.m.

JUDGE DANG: We are opening the record in the consolidated appeals of Starbuzz International, Inc., and Starbuzz Tobacco, Inc., before the Office of Tax Appeals. The case numbers are 19034546 and 19034547, respectively. It is presently 1:05 p.m. on January 27th, 2021.

Consistent with the Governor's Executive Order 25-20 to reduce and minimize the spread and risk of Corona virus infection, and with the agreement of the parties, this hearing is being conducted via Webex video conferencing.

Today's case is being heard and will be decided equally by a panel of three judges. My name is Nguyen Dang, and I'm the lead judge for purposes of conducting this hearing. Also on the panel with me today are Judges Suzanne Brown and Andrew Wong.

Will the parties please state their appearances for the record, beginning with the Appellant.

MR. DAKESSIAN: Good afternoon, Your Honor and Honorable Judges. My name is Mardy Dakessian, and I represent the Appellants in this matter.

JUDGE DANG: Thank you, Mr. Dakessian. Were there other individuals that were appearing with you on

behalf of Appellant?

MR. DAKESSIAN: Not today, Your Honor. We had indicated that more than one of us might be here, but it's just me.

JUDGE DANG: Thank you.

And CDTFA?

MR. DANIELS: Courtney Daniels for CDTFA, along with Steven Smith and Damian Armitage.

JUDGE DANG: Thank you.

The sole issue presented in this case is whether Appellants' shisha distributions, during the claim period, are subject to tobacco products excise tax.

Mr. Dakessian, is that correct?

MR. DAKESSIAN: Yes, Your Honor.

JUDGE DANG: Thank you. And just prior to going on the record, you had indicated that you will not be proceeding with arguments made by Appellants' prior representatives that, essentially, shisha is not a smoking tobacco; is that correct?

MR. DAKESSIAN: Well, yes, Your Honor. We are -- it's a little bit complicated because of the way the statute reads, but we're not going to get into whether a shisha is lighted or heated or any of that. But I think that contextually, as you will see in our presentation, we draw the conclusion that shisha is not smoking tobacco by

virtue of the context of the words of the statute. But we're not getting into technical; is it lighted? Is it heated, things of that nature of the Health and Safety Code? We reserve all rights, but we're not addressing it.

JUDGE DANG: Thank you for that clarification.

CDTFA, does the issue statement appear correct to you as well?

MS. DANIELS: Yes, it does.

JUDGE DANG: Thank you.

MR. SMITH: Mr. Dang, my I ask a point of clarification.

JUDGE DANG: Yes.

MR. SMITH: We were prepared to discuss whether the product is smoked or is a smoking tobacco, apart from the 50 percent test. And now I'm, you know, I'm sitting here wondering whether the Panel would be interested in hearing our arguments in that regard or not. I would hate for us to not make our arguments and then lose on that basis because they reserve the right -- some sort of right with respect to that argument, even though it's not argued at this hearing.

JUDGE DANG: I think -- sorry. This is Judge Dang speaking. I would prefer that since Appellants is not going to be making this argument at this time, that CDTFA not address that issue. But if were to come back

later at some point prior to issuing the decision, if it were to be dispositive, I would allow the parties an opportunity to brief that issue.

MR. SMITH: Okay. Thank you.

JUDGE DANG: Prior to the hearing today, the parties were provided with a copy of the exhibit binder for this appeal. The binder contained Appellants' Exhibits 1 through 9 and Respondent's Exhibits A through I.

Mr. Dakessian, did you have any objections to the exhibit binder into evidence?

MR. DAKESSIAN: No, Your Honor.

JUDGE DANG: Thank you.

And CDTFA, any objections?

MS. DANIELS: No.

JUDGE DANG: Thank you.

The exhibit binder is admitted into evidence.

(Appellant's Exhibits 1-9 were received in evidence by the Administrative Law Judge.)

(Department's Exhibits A-I were received in evidence by the Administrative Law Judge.)

Okay. Mr. Dakessian, if you're ready to present your case, I'll let you know that the panel does have a copy of your presentation. So I appreciate you sending that to us. And if you're ready to begin, you may have

20 minutes.

MR. DAKESSIAN: Thank you, Your Honor.

PRESENTATION

MR. DAKESSIAN: I'm going to share my screen here. Let's see if everyone can see this.

(Wherein a document is shared onscreen.)

So we've already been through the fact that we have a gavel here with Mr. Angeja, just as a sign of respect for the forum that we're in. So let's start with this. We believe this is a simple case, Honorable Judges. There are no fact disputes. There are no evidentiary disputes. There are really no technical tax issues. What this boils down to is a straightforward reading of the operative statute. And the statute in question is 30121(b) of the Revenue & Taxation Code. This statute was operative until April 1 of 2017.

And the reason I make that point now is to note to this panel that this is not an ongoing issue. We are only dealing with periods here before April 1, 2017, and nothing after April 1, 2017, where there really is this cigarette and tobacco products tax law that was expanded greatly, as we'll get into later. But we're talking about a previous period, and so the universe of potential impact is very limited in terms of those in this case.

So we agree with the way, Judge Dang, you presented the issue. It's -- it really comes down to how the 30121(b) are to be interpreted, and more specifically, whether the 50 percent test applies to modify all products on that list or only other articles of product. We take the former view. We believe that there's -- that the 50 percent test references grammatically, syntactically, and contextually everything that is -- that is listed in Section 30121, and CDTFA has another view. They believe that the 50 percent test only modifies other article of products. So that's it.

And I would also note, you know, with due respect to CDTFA, and I understand they are doing their best trying to interpret the statute, but this case is not about health consequences of tobacco use or the policy behind it. This is really an exercise in statutory reading, construction, and interpretation. That's what our task is limited to here to determine what that is. So with that, I want to go through an overview of what we're going to present.

We just discussed the issue, how the 50 percent test is to be applied. And as you can see, on the slides in front of you, that the presentation we have is going to be broken down into three parts. First, the plain language of the statute, which is where we always look to

first. Second, the statutory change in 2017 and its impact on our interpretation and read of the previous version of the statute. And finally, we're going to talk about the -- what I consider to be a bedrock principal of California tax law and jurisprudence, which is that when it comes to taxing statutes, statues of opposing taxes. Any ambiguities or doubts will resolve in favor of the taxpayer. That gives you an overview.

So our first point here is that the plain language controls. I think we can all agree on this. I mean, this is really statutory interpretation 101. There really should be no dispute that we need to look to the meaning of the plain words of the statute, and in their ordinary and common sense. And as you can see here, we have highlighted the relevant statutory language. And it reads, "Tobacco products includes but is not limited to all forms of cigars, smoking tobacco, et cetera, and any other articles or product made of, or containing at least 50 percent tobacco." Okay.

So the first maxim of statutory interpretation that I think is pertinent here, is that words cannot be rendered superfluous. We somehow see it -- we've sometimes seen this expressed in the converse, which is that every -- up the converse but in -- in a different form, which is that every word must be given meaning.

Importance, and significance must be given to each word. You cannot presume that a word is superfluous or extraneous.

And so with that, we focus back on the words of the statute. And the first item I'd like us to take a look at is the word "other". The word other must have meaning. And when I say this, let's read this again. "Tobacco products includes, but is not limited to, all forms of cigars, smoking tobacco, chewing tobacco, snuff, and any other articles or products made of, or containing at least 50 percent tobacco." Any other articles of products, i.e., any other products like the ones before. What else could the word other be referring to?

It is a clear reference. If not a modifier, it is a clear reference to those products before it. And the reason is that these things -- and I know that the definition of smoking tobacco is in dispute. CDTFA mentioned that. But let's look at cigars, chewing tobacco, and snuff. Those items are commonly understood are almost exclusively tobacco. They're predominantly tobacco, and that's why it makes sense that the word other refers back to them; any other products like the ones before it, right.

And here's the problem, ultimately, with the CDTFA's presentation and their argument -- I should say

not presentation -- their argument is that for them, for their interpretation to hold, to pass muster, you have to ignore the presence of the word other, such as the statute would read cigars, smoking tobacco, chewing tobacco, snuff, line of demarcation, and any articles or products made of or containing at least 50 percent tobacco. That's the problem. The problem is they can't get around the word other, and we must give that word meaning.

So the reference back to the items listed. So the next item is that the 50 percent test must have meaning. And I say this because the position that the CDTFA has taken in its briefing is that because shisha can be smoked, it should be shoehorned into the category of smoking tobacco. Now, the problem with this is that you can take just about any type of tobacco product and fit it into a category of being smoked, chewed, or inhaled. And it could defacto, qualify, right. That would sort of be a broader interpretation of the items that are listed here, right.

It's smoked, it's smoking tobacco. It can be chewed, it's chewing tobacco. It could be inhaled, right. So that basically wipes out the 50 percent test. It's a way of circumventing the application of the 50 percent test. That's a real problem with their position. It strips the 50 percent test of any meaning. And the reason

that's important, okay, is that the -- the next point. Let's not forget about this, this little clause here at the end, "but does not include cigarettes." It's almost an afterthought, this clause, right.

But the importance of this is that cigarettes, which are also defined in 30121(a) referring back to 30003 of the Rev & Tax Code. Cigarettes are taxed irrespective of tobacco content. The definition of cigarette means any role -- is any role for smoking made wholly or in part of tobacco. And so what that indicates is that when the legislature -- and this is the previous version of the statute -- when the legislature wants to include a product, regardless of tobacco content, it knows how to do so. It knows how to impose that tax. So based on these points, we think it's quite clear that the 50 percent test applies to all of the listed products. It's clearly referencing them, and it's clearly applying to them.

So the other point we wanted to make with respect to plain language is there's no federal conformity here. There is some mention in the CDTFA's briefing that the federal law or the federal agencies treat shisha tobacco a certain way. Now, I don't know whether that's the case or not, but I say that it doesn't matter. And the reason it doesn't matter is we don't have a strict federal conformity provision, which we have -- we hear about this

most recently in connection with the corporate and franchise income tax or personal income tax law. That's where conformity, I think, is most prominent.

But we also have it in the sales and use tax law. There are several provisions that explicitly reference federal law provisions. We also have it in the cigarette and tobacco tax products law. And so there are at least three provisions in there that we can find that they can explicitly reference and the incorporation of federal law in a federal statute. And the other point is, is that we don't have any strict conformity. At best, any federal interpretation would be persuasive, but that's only if the federal statute is either identical or substantially similar to the state. And that's not the case here.

The federal statute cited by the CDTFA doesn't contain a 50 percent test. It does not have a catch all other articles of products category, and it is measured by weight, not cost. So the federal law is of no use to us here, is the point that we're trying to make. So with that -- with that, let's move onto the second point.

And the second point is that the statutory change in 2017 is really a dispositive of the issue. The statutory change, as you can see, struck the 50 percent test. You can see it here, the bracketed language. You can see the red line. It's gone. Okay. So when the

enactors of the statute intended for products to be taxed, irrespective of tobacco content, we have an example with the cigarettes that I mentioned earlier, but we have an even more pertinent example here. It's to the very statute at issue.

So point number one is that the 50 percent test was eliminated in 2017 through the amendment to the statute. Now, the second point is that in addition to the elimination of the 50 percent test, we have an expansion of all the products that are subject to the tax. So you could see they've dispensed with the 50 percent test and went with the more expansive language that you see here. The consequence was that the statute went from 37 words to 125, more than triple in size, attempting to capture everything. And I don't think there's any dispute that shisha products are now subject to tax under the statute, a product containing native or derived from tobacco or nicotine. It is intended for human consumption.

And by the way, the statutory language also disposes of any discussion as to whether it's smoked or lighted or heated. It includes it all. So this is how you include a product within the ambit of the tax. This is how you do it. You don't do it by implication. You don't do it by innuendo or by attempting to shoehorn products into different categories. This is how you make

it clear it's something that needs to be taxed. So that's the second point.

And the third point is that the statutory change is prospective only. This is undisputed. The CDTFA agrees. So April 1, 2017, this became operative on a prospective basis. It was not a clarification of existing law. It was not allied retroactively. And whenever you have the degree of statutory change that we have here, there is a presumption in the law that a substantial change was intended. There's no evidence to rebut that presumption here. That presumption must stand. The law was changed to include shisha products beginning April 1, 2017. Simple and plain.

And this relates and dovetails into our third point, Honorable Judges, which is that is the imposition of the tax must be clear, and it must be explicit in order for it to withstand muster. And neither of those conditions are present here. This image illustrates, through a baseball analogy, what -- what we're trying to convey here. Which is that in case of any doubt, in case of any ambiguity, those ambiguities or doubts must be resolved in favor of the taxpayer.

Not that we think that this is a close call. I want to make that very clear. This isn't a close play at first. We beat the throw by 10 steps, and the CDTFA's

ball is in the dirt as far as we're concerned. However, if someone views this differently and says that there are two reasonable interpretations here, then we should prevail.

So now let's go and talk a bit about the point that you wanted addressed, Judge Dang, in the prehearing conference and the post conference order having to do with case law that is implementing this principal. And so there are lots of cases that talk about this. We wanted to point out three for the panel to consider.

First, we have a case called American Company versus City of Lakeport. It's a 1934 case, 220 Cal. 548. The pincite is 564. The case had to do with whether a particular statutory provision describing the power of the city council to levy a special tax was limited. This is what our Supreme Court said here in California, quote, "This issue has been briefed and argued several times by able counsel for the parties, and it may be reasonably concluded that the various possible interpretations of these sections have been fully explored. Notwithstanding this thorough consideration of the legislature to provide an unlimited tax. And we have finally come to the conclusion that this doubt must, in accordance with well-settled principles, be resolved against the taxing power and in favor of the taxpayer," close quote.

The second case we have is another California Supreme Court decision, a bit more recent in 1999, and that's Agnew versus State Board of Equalization. At issue in that case was for purposes of the pay first and litigate rule, whether the word "tax" included just tax or included interest. And this was against the Board of Equalization, CDTFA's predecessor agency. And the California Supreme Court came to the conclusion, much as we do here, that since the language is clear, and any ambiguity would have to be resolved in favor of the taxpayer, that the taxpayer should prevail. And the citation is 21 Cal. 4th 310. The pincite is 326 to 327.

And as an illustration of the relevance of this -- the continuing and ongoing relevance of this -- this principle of tax law that ambiguities are resolved in favor of the taxpayer, we want to call the Panel's attention to a case that was just decided this past year, and it's called 731 Market Street versus San Francisco. It's a 2020 case, 50 Cal. App. 5th 937. And at issue there was whether the term "Realty Sold" includes a transfer of tax on an existing leasehold interest with a remaining term of over 35 years. Yes, it's a different issue. Yes, it's a different tax. It was a documentary transfer tax.

But the answer was unclear, and after several

pages of analysis, the Court of Appeal concluded its discussion by saying that, "Further we find that the court's interpretation of the ordinance comports with the well-settled principle of statutory construction." That quote, to the extent there's any doubt whether the transfer is subject to a documentary transfer tax, we construe the ordinance most strongly against the government and in favor of the taxpayer. And strongly against the document and favor of the taxpayer.

We have other cases that we can provide as well. They go back a ways. There's in re Kirschbaum's Estate, which a 1968 case, 268 Cal. App. 2d 155, with the pincite 156. There's Los Angeles County versus Jones (1939) 13 Cal. 2d 554, pincite 561 to 562; Whitmore versus Brown, which is in our briefing, and Pioneer versus Riley, which is also in our briefing. This is a well-settled principle, Honorable Judges.

And so with that, we can move on to the issue of is there an ambiguity. We say no. We say there's no ambiguity, but if there is ambiguity, we should win. And we see here that CDTFA, of course, believes in its position, but it also concedes that an ambiguity exists. And that's because it makes as the center piece of its argument a 1996 memo from the predecessor agency, the State Board of Equalization, in which it is stated the

very issue that we're discussing here is -- is opined on here. But the Board of Equalization's personnel here make the following statement.

The definition in Section 30121 can be interpreted in two ways, depending on whether the clause made of or containing at least 50 percent tobacco is read to qualify all the items listed before it, as we say, or any articles of products as the CDTFA says. We think this is fatal to the CDTFA's argument. Because once there is an admission of any ambiguity based on the cases we just recited, it's dispositive. It's check and mate as we have here in this image.

And so I will conclude with this, three points, just an overview. The plain language is in our favor. The statutory change is in our favor. Any ambiguities must be resolved in favor of the taxpayer. Any one of these would be a basis for granting the instant appeal. The combination of the three, I think, is devastating to CDTFA's position. And for all of the reasons I have discussed, Honorable Judges, we respectfully request the instant appeal.

Thank you.

JUDGE DANG: This is Judge Dang speaking. Thank you, Mr. Dakessian for your presentation.

At this time I'd like to turn it to my

co-panelists for questions, beginning with Judge Wong.

JUDGE WONG: This is Judge Wong. I have a couple of questions for Appellant's counsel. So the 50 percent test, if it applied to all the enumerated items, cigars, smoking tobacco, chewing tobacco, as well as other articles and products, wouldn't that interpretation kind of render cigars, smoking tobacco, et cetera, superfluous. Because why couldn't they just say tobacco products and to find tobacco products as any articles or products made of or containing 50 percent tobacco? Like, why include -- if the 50 percent testing apply to cigars and smoking tobacco, why even enumerate them?

MR. DAKESSIAN: You know, that's a great question, Your Honor. I think what we -- we look at that and we say that we're looking to these items as they are commonly described, right, in their ordinary and common definition. And I don't -- I can't think of any examples of any cigars or chewing tobacco or snuff that would -- that would be below the 50 percent threshold. And I would just go back and say that even -- even if we were to agree with you, it's equally clear that the legislature knows how to make -- how to include a product irrespective of its tobacco content.

And it does that with the cigarettes, and it does that with the new version of the statute. So I don't

think it renders it superfluous at all. I think what it's doing is it's saying that these items are taxable. These items are commonly understood to be almost predominantly tobacco. And any other items that are like it that contain 50 percent or more tobacco are subject to the tax.

That would be my answer to that question, Your Honor.

JUDGE WONG: Thank you. Does it make any difference this was passed by proposition rather than --

MR. DAKESSIAN: I don't think so. I think the case they talk about legislature intent or the intent of the voters the -- whatever enacted statute -- I think that the same principles apply in terms of the ambiguities being resolved in favor of the taxpayer.

JUDGE WONG: And just one last question. And I guess this kind of touches on what Mr. Smith is referencing earlier. Assuming that there was no 50 percent test and -- would shisha qualify as a smoking tobacco in your opinion?

MR. DAKESSIAN: So I -- I thought about that. I've given that a lot of thought. I've seen the arguments in CDTFA's briefing. And I say the answer is no, and here's why. Because I think that smoking tobacco -- as we mentioned in our briefing -- in its ordinary meaning means something different from shisha. And if you come -- and

if you think back to when the statute was first enacted back in 1989, and there are cases that say that we should look not only to the plain language, but to the contemporaneous meaning of the statute, right.

Shisha tobacco was not -- it existed, certainly, but it was not as popular as it has become in recent years. You know, the best that we can tell it started becoming popular in 2000 -- in the early 2000s and forward. And so in its ordinary and common is it tobacco that can be -- is it a tobacco product that can be smoked? Yes. Is it smoking tobacco as it was contemplated? In the ordinary meaning of the term "smoking tobacco", I don't think so. I think smoking tobacco in its ordinary sense refers to pipe tobacco.

I don't -- I don't think they meant they referenced shisha. And the converse of that, Your Honor, is really important. If it doesn't apply to shisha, then what does it apply to? What does the 50 percent test apply to? We're talking about something that's 16 percent tobacco. It's well below the threshold. Why is the 50 percent test there?

JUDGE WONG: This is Judge Wong. Thank you. No further questions at this time.

JUDGE DANG: This is Judge Dang speaking. Judge Brown, did you have any questions for Appellant's

representative?

JUDGE BROWN: I don't have any questions at this time. Thank you.

JUDGE DANG: Okay. Thank you.

CDTFA, if you're ready to begin with your presentation, you have 20 minutes.

MS. DANIELS: I'm sorry. Judge Dang, I cannot hear you at all. It's cut out.

JUDGE DANG: This is Judge Dang. Let me go ahead and repeat myself in case I didn't get through. CDTFA, if you're ready to begin with your presentation, you have 20 minutes.

Is anyone able to hear me? Can I get an indication of people?

JUDGE BROWN: Yes, I can hear you.

MR. SMITH: I can hear you at my end. I'm receiving a text from Ms. Daniels saying that her sound went out. We --we --

MS. DANIELS: It went out. It just came back on.

JUDGE DANG: Okay. Let's --

MS. DANIELS: And now it's out again.

JUDGE DANG: This is Judge Dang.

MR. SMITH: We -- we had problems --

JUDGE DANG: Let's go off the record for a minute while we attempt to resolve these audit issues with

Ms. Daniels.

(There is a pause in the proceedings.)

JUDGE DANG: Let's go back on the record, Ms. Daniels, if you're ready to begin?

MS. DANIELS: Yes. Before we begin, Judge Dang, if we can have a little bit of clarification. Before we began, we were instructed not to address whether the shisha products would be a smoking tobacco. And it seems like Mr. Dakessian had renewed his arguments in the questioning portion of his presentation. And so my question is whether you want us to address this argument at the outset?

JUDGE DANG: This is Judge Dang speaking. I think given the recent exchange, let's go ahead and hear those arguments.

MS. DANIELS: Okay. Thank you.

PRESENTATION

MS. DANIELS: Good afternoon.

The Department's position is that shisha tobacco is a tobacco product as defined in Revenue & Taxation Code Section 3121. Hookah tobacco also sometimes referred to as shisha is a product comprised of tobacco that is mixed with other ingredients such as flavoring, molasses, and glycerin. The hookah using charcoal to heat this tobacco

mixture, and the user inhales that smoke from the heated tobacco mixture.

During the claim period in this appeal, tobacco products was defined by Section 3121 to include but not be limited to, quote, "All forms of cigars, smoking tobacco, chewing tobacco, snuff, and any other article or products made of or containing at least 50 percent tobacco but does not include cigarettes," end quote.

The Department's position is that per the statutes, all forms of smoking tobacco are tobacco products. Therefore, it is the Department's position that hookah tobacco and shisha is a smoking tobacco and is, accordingly, a tobacco product. Appellant has contended that hookah tobacco is not a smoking tobacco because the product is allegedly not smoked. Appellant have tried to characterize the smoke that is admitted from the hookah as a vapor. But this argument is disingenuous.

In Appellant's judicial filings in the case Inhale v. Starbuzz Tobacco Inc., a Ninth Circuit case in 2014, 755 F.3d 1038, Appellant's memorandum of points and authorities clearly state, quota, "A hookah is a smoking device or water pipe that is used to smoke herbs such as tobacco. A hookah is comprised of a jar filled with water where the user forces smoke through the water," end quote. See Exhibit C, page 10.

These statements made by Appellant are consistent with findings made by the California Department of Public Health. The Department of Public Health issued a publication entitled "Hookah Tobacco is Unsafe." See Exhibit 85 in which it describes hookahs as water pipes with long flexible hoses with tips that people put into their mouths to inhale tobacco smoke.

Similarly, in 2017 the Department of Public Health issued a publication entitled "Hookah in Multiunit Housing." That's available at Exhibit 86. In this publication, it states that hookahs are described as producing smoke from the tobacco as well as smoke from the heat source, which is typically charcoal. On January 2nd, 2013, the Department of Public Health issued a document entitled "State Health Officer's Report on Tobacco Use and Its Promotion in California." See Exhibit 87, pages 10 through 11. In this document the Department states that hookah smoking exposes users to secondhand smoke similar to that from cigarettes.

The United States Centers For Disease and Control and Prevention has also issued a fact sheet regarding smoking in tobacco use in particular hookahs, which describes hookah as, quote, "Water pipes that are used to smoke specially made tobacco that comes in different flavors, such as apple, mint, cherry, coconut, chocolate,

licorice, cappuccino, and watermelon," end quote. That's Exhibit A-8. Similarly, the U.S. Food and Drug Administration describes hookah tobacco as, quote, "A type of combustible tobacco that is smoked with a hookah," end quote; Exhibit A-4.

These reputable sources credibly and consistently support the Department's conclusion that hookahs are used for a smoking tobacco product. Appellants also argue that their tobacco mixture should not be considered smoking tobacco because the mixture contains less than 25 percent tobacco, and that Section 3121 requires the product to be made of at least 50 percent tobacco to be included as a tobacco product. Even assuming that Section 3121(b) is susceptible to more than one reasonable interpretation -- which we believe that it is not -- the rules of statutory construction and more than one reasonable interpretation which we believe it is not the rule of statutory construction and extrinsic aid indicate voter intent and support that Section 3121(b) includes all forms of cigars, smoking tobacco, chewing tobacco, and snuff as tobacco products even if containing less than 50 percent tobacco.

As such, we will first look at the plain unambiguous language of the statute. Then we will discuss why the cannons of interpreting that plain language do not support Appellant's interpretation. Next, we will discuss

the historical application and the intention behind the language of the statute. And, finally, we will address why Appellant's interpretation would lead to an absurd result.

So let's look at the actual language of the statute. Section 3121(b) states, quote, "Tobacco products includes, but is not limited to all forms of cigars, smoking tobacco, chewing tobacco, snuff, and any other articles or products made of or containing at least 50 percent tobacco but does not include cigarettes." The plain language of the statute enumerates specific items that are tobacco products, and then provides for an additional category for other tobacco products containing at least 50 percent.

This is clear from the words, quote, "And any other articles or product." Because this language is not ambiguous, our analysis could stop right here. See People v. Valencia (2017) 3 Cal. 5th 347 at 357, holding that if the language is clear and unambiguous there is no need for construction nor is it necessary to resort to indicia of the intent of the voters. However, here because the cannons of statutory language and the intent of the voters support our reading of the statutes, we will continue.

For example, the last antecedent rule of

statutory interpretation requires that prepositional phrases be read to modify the proceeding term or phrase. And that's Harley Shine v. William Sonoma, Inc., (2018) 23 Cal. App. 5th 1070 at 1081. The last antecedent rule would apply here to require the phrase made of or containing at least 50 percent tobacco to only modify any other article or product.

Appellant's interpretation also fails under the statutory rule of Expressio Unius Est Exclusio Alterius, which states that if exemptions or exclusions are specified in a statute, a court may not imply additional exemptions, unless there is a clear legislative intent to the contrary. And that's Lopez v. Sony Electronics, Inc., (2018) 5 Cal. 5th 6727 at pages 635 through 636. Here the statute only explicitly excludes cigarettes as a tobacco product.

Appellant's interpretation would, however, exempt cigars, smoking tobacco, snuff, and other articles or products that are made of tobacco but does not contain at least 50 percent tobacco. So based on Appellant's arguments, items that are clearly enumerated, such as moist snuff, which typically contains 30 to 35 percent tobacco by mass, would be exempted. Appellant's interpretation of the statute is clearly not supported by the statute's text nor the canons of statutory

interpretation.

But it is also not supported by the historical application of the statute. The Department's position has always been that the 50 percent tobacco content requirement modifies the part of that tobacco product's definition that pertains to, quote, "Any other articles or products made of tobacco," end quote. And that the 50 percent test does not apply to the types of tobacco products that are specifically enumerated. If it were to apply to all of the enumerated items, the mere mention of these items would be superfluous.

Our position was explained in the memorandum dated September 27th, 1996, which was annotated so the public would be aware of our interpretation. The annotation states that all forms of cigars, smoking tobacco, chewing tobacco, and snuff are regarded as tobacco products regardless of the amount of tobacco they contain. And other products are regarded as tobacco products if they have at least 50 percent tobacco. The text has always been the Department's position.

In interpreting this section, the analysis and the memo was guided by the manner in which similar language in federal law has been interpreted. Specifically, federal authorities regarded chewing tobacco to be a tobacco product even when a product contained only

2 percent tobacco. The Department's interpretation has never been controversial and was followed industry-wide for decades. Appellants themselves expected this interpretation of the statute throughout the claim period.

Now, in an effort to garner a refund, they are suddenly arguing that the statute is ambiguous. As such, they contend that the statute must be read to require all tobacco products to have at least 50 percent tobacco. This reading is unsupported by law and ignores the intent of the statute and would lead to an absurd result. In interpreting statutory language adopted by voter initiative, the primary task is to determine the intent of the electorate so that we may adopt the construction that best effectuates the purpose of the law.

That is, Committee for Green Foothills v. Santa Clara County of Board of Supervisors (2010) 48 Cal. 4th 32 at 45. See also Robert L. v. Superior Court (2003) 30 Cal. 4th 894 at pages 900 to 901, which states, quote, "Statutory language must be construed in the context of the statute as a whole and the overall statutory scheme in light of the electorate's intent," end quote. Section 3121(b) was adopted in 1988 as a part of Initiative Measure Prop 99, herein after referred to as Prop 99, which is available as Exhibit I.

Section 1 and 2 of Prop 99 provide the findings

and purposes. These sections state that tobacco use, quote, "Is the single most preventable cause of death and disease in California claiming the lives of more than 40,000 people every year," end quote. And resulting in thousands of Californians seeking medical and dental treatment as a result of abuse.

Section 1-C states, quote, "That an increase in the tobacco tax is an appropriate way to decrease tobacco use and mitigate the cost of healthcare treatment and improve existing programs providing for quality healthcare and access to healthcare services for families and children," end quote. This text clearly articulates the intent behind the adoption of the statute to decrease tobacco use by increasing the cost associated with its purchase and to use the increased tax to mitigate health care costs associated with tobacco use.

There is no discussion concerning the percentage of tobacco in certain products or any --

JUDGE DANG: This is Judge Dang speaking.

MS. DANIELS: -- products containing less tobacco are somehow less culpable and contributing to tobacco related diseases.

JUDGE DANG: Ms. Daniels?

MS. DANIELS: Yes.

JUDGE DANG: I apologize. This is Judge Dang.

MS. DANIELS: Yes. Can you hear me?

JUDGE DANG: You were cutting out for a moment there. I see a signal from our stenographer. If you could just repeat maybe the last minute or so of your presentation so that we could have that in the record.

MS. DANIELS: Sure. Is there any way for you to --

JUDGE DANG: Ms. Alonzo, would you be able to provide us with the last --

(The record was read by the stenographer.)

MS. DANIELS: Okay. So I'll just start over with that.

This text clearly articulates the intent behind the adoption of the statute to decrease tobacco use by increasing the cost associated with its purchase and to use the increased tax to mitigate healthcare cost associated with tobacco use. There is no discussion concerning the percentage of tobacco in certain products or any sentiment that products containing less tobacco are somehow less culpable in contributing to tobacco related diseases.

If it was the intent to only submit tax -- sorry. If it was the intent to only tax products with 50 percent or more tobacco content, one would assume that there would at least be some mention of a procedure or standard for

determining whether products contained the requisite amount of tobacco. However, there's no mention within Prop 99 or the statute of such a procedure or any corresponding standard.

In fact, employing Appellant's statutory interpretation would create the absurd result of requiring the Department to test all forms of cigars, smoking tobacco, chewing tobacco, and snuff in order to determine whether they contain at least 50 percent tobacco. Neither Section 3121 nor any corresponding legal authority provides as to what that 50 percent standard actually is. For example, there is no guidance as to whether the 50 percent requirement is determined by weight, by volume, or some other calculation that takes into consideration the monetary value of the product's components.

Moreover, if Appellant's contention were correct, a tobacco's distributor could purchase tobacco for resale, but before reselling that tobacco, they could add flavoring to this tobacco, perhaps a heavy flavoring such as molasses until the flavoring slightly outweighs the tobacco at 51 percent. And suddenly, the tobacco ceases to be a tobacco product at all, even though it is a tobacco that is smoked by consumers. Again, moist snuff typically contains 30 to 35 percent tobacco by mass. Yet, it is an enumerated tobacco product under the statute.

Under Appellant's reading moist snuff would cease to be a tobacco product.

It is a well-settled principle of statutory interpretation that language of a statute should not be given a literal meaning. In doing so would result in absurd consequences that were not intended by the electorate; Stokes v. Baker (2019) 35 Cal. App. 5th 946 at 957, quoting Younger v. Superior Court (1978) 21 Cal. 3d 102 at page 113. Employing Appellant's reading of the statutes would result in just such an absurd result. A requirement that a product be made of at least 50 percent tobacco to be defined as a tobacco product would necessitate the testing and evaluation of all products containing tobacco, either by the manufacturer or by the Department.

It would also require the Department to create and adopt a method for determining the 50 percent standard at this time. And this is years after this statute has been superseded. Appellants are asking the Office of Tax Appeals to sanction state spending towards developing an acceptable means for calculating and overseeing the implementation of a statute that is no longer applicable. This outcome certainly undermines the intent of the statute and would lead to an absurd result.

In conclusion, despite Appellant's contentions,

the facts in the case are simple. Appellants bought and sold tobacco that was smoked by consumers. In other words, they bought and sold smoking tobacco. Appellants may have added flavoring to the smoking tobacco they purchased before they resold it, but this does not change the character of their product. Moreover, Appellant's novel interpretation of Section 3121 should be disregarded because it is in opposite to the plain language of the statute. It contradicts the intention behind that statute, and it would lead to an absurd result.

Appellants suggest that one of the reasons that proponents of Prop 56 expanded the definition of tobacco products with the capture hookah tobacco and other types of smoking tobacco that includes less than 50 percent tobacco. This is simply not correct. As we have demonstrated it's already been understood by everyone and never disputed that the existing statutory definition included all forms of smoking tobacco.

The driving force behind expanding the definition of tobacco products was to capture electronic cigarettes, a fast-growing nicotine product that was not covered by the existing definition for tobacco products. I urge to recognize this argument for what it is, a fruitless attempt at securing a refund that is not grounded in law. For the foregoing reasons, we ask that Appellant's appeal

be denied.

Thank you.

JUDGE DANG: This is Judge Dang. Thank you, Ms. Daniels, for your presentation.

At this time I'd like to turn it over to my co-panelists for any questions, beginning with Judge Wong.

JUDGE WONG: This is Judge Wong. I just have one hypothetical -- excuse me for a second. Sorry. This is Judge Wong again. Assuming that the panel finds -- determines that there is an ambiguity in the statutory language, would, in fact, the tie go to the taxpayer?

MS. DANIELS: Not in this situation because the intent behind the statute is in direct contradiction to what the taxpayer is trying to argue.

MR. SMITH: I would like to add onto that, that I think cases that discuss ambiguity are in situations where a taxpayer didn't pay the tax because they didn't know that they had to pay the tax. In this instance, everyone in the industry has been paying tax on this for 20 years. And the taxpayer themselves paid the tax on this for many years, and then after the fact came up with a theory that it was ambiguous. So those facts, I don't think that the principle that, you know, tie goes to the runner applies.

JUDGE DANG: This is Judge Dang. I see Mr. Dakessian attempting to get my attention. Did you

want to provide a response at this time?

MR. DAKESSIAN: Yes, I would to that last point because, you know, I -- I think we can make a lot of arguments here, you know, and -- and I appreciate opposing counsel. But this notion that -- that we somehow accepted or the industry accepted -- you know, we're in a forum now where people just don't get to make statements like that without any proof, and there is exactly zero proof from CDTFA that either this was accepted industry-wide. And even if it was, we did not accept it.

There's also no proof provided that cases where this bedrock principle of tax law that ambiguities are resolved in favor of the taxpayer is only applied in a deficiency situation or if the taxpayer would -- somehow didn't know. What -- what -- there's no basis for that at all, you know. So I just can't let comments like that stand because there's just -- it's just so wrong. And -- and to just sort of somehow try and impugn us because we're seeking a refund -- I'm not impugning them because they want to assert the tax.

You know, I just -- there's no place for this sort of ad hominem type of conduct, and we saw that in the briefing. I responded to it. I can't sit here and let that continue.

JUDGE WONG: This is Judge Wong. I have no

further questions at this time. Thank you.

MS. DANIELS: Thank you.

JUDGE DANG: Thank you. This is Judge Dang speaking. Judge Brown, did you have any questions for CDTFA?

JUDGE BROWN: No. I don't have any questions.

JUDGE DANG: Thank you.

I do have a few questions for CDTFA. I note that the annotation discusses two possible interpretations of the statute. I know that you sort of backed away from that position, but it does speak to two possible interpretation. That is that this 50 percent qualifier could be applied either serially to all the items in the list or to the last antecedent. It gives reasons for why it should be applied simply to the last antecedent.

I wanted to throw out there a third possible interpretation, and that's whether or not this list could simply be an illustrative list where you have a number of specific items followed by a catch-all provision. So in that -- in that case, if that's a -- if -- I'd like to get CDTFA's position on whether that might be the case. And if not, why?

MS. DANIELS: Well, Judge Dang, I think that what you just said hits the nail on the head. Maybe the -- maybe the 1996 opinion didn't articulate it quite the way

you're saying it, but it's specific that these are things that we know are tobacco products. And then we have this catchall that's for any other products that contain at least 50 percent. But if we make that 50 percent requirement apply to everything, then we've made the enumerated list completely superfluous. I mean, that just doesn't make sense.

JUDGE DANG: Thank you. My understanding is that the catchall provision is one which would provide guidance to the reader to determine other items that have not been specifically enumerated. So in essence a catchall provision is one that gives you the commonality of what these share in that list. In this case that would be that all the items are predominantly consistent of tobacco. And I'm just wondering if that's a position CDTFA has considered and what your response might be.

MS. DANIELS: I can't speak as to whether the enumerated items are all predominantly tobacco. I know that the catchall has been applied in situations of blunt wraps. It's not been applied a lot. But as I'm learning a lot more about tobacco products through my position here, it seems there are a fair amount of enumerated items that might not make that 50 percent requirement. Which is, I believe, is why they were specifically enumerated and then there is the catchall for other products.

JUDGE DANG: Thank you, Ms. Daniels. My next question is I believe you had stated that in your presentation you believe that the specifically enumerated items would be rendered superfluous if we were to determine this list was essentially a list of similar items in a sense that the final phrase -- the final item was not a discrete category.

And I'm wondering, could it be possible that these specific items were enumerated to qualify the general wording, the 50 percent phrase, in terms of these are items that had to be meant for human consumption rather than just any product or any article that might be made of tobacco -- predominantly a tobacco?

MS. DANIELS: I would be just taking a stab at whether that was the intention because I don't have anything that I have read that has clearly articulated that. I mean, certainly it makes sense that we -- the intent of the statute was to help offset some of the health cost that are associated with human consumption and smoking and chewing and use of tobacco. So I mean, you're argument is not without merit.

JUDGE DANG: Well, thank you. Ms. Daniels, I believe you cut out. The last I heard was "without merit," or "not without merit."

MS. DANIELS: That's where I ended, Your Honor.

JUDGE DANG: Okay. Thank you. I guess my concern would be that if we were to treat that last phrase as a discrete category, it might encompass all types of items, even those that were not meant for human consumption; which would, I think, be outside the scope of the intent of the statute, which I believe leads me to another question. You mentioned the purpose -- the intent behind the statute was to combat, I guess, or to reduce tobacco consumption. Would not a 50 percent threshold also achieve that affect if manufacturers were actually reducing the content of their products to below that 50 percent threshold?

MS. DANIELS: I don't believe I'm qualified to answer that. I don't have a medical background in the amount of tobacco that one person needs to ingest or use to cause that -- to cause, you know, that sort of harm. So I don't believe I'm qualified to answer that question, Your Honor.

JUDGE DANG: Thank you. And my final question for you -- and thank you for your patience with these. If the panel were to come to a situation where we truly find this is ambiguous, there's certainly more than one reasonable interpretation going both ways. There's a principle that's been -- a rule of construction that's been put forth by the Appellants, and that is that

ambiguity must be resolved in favor of the taxpayer.

There's another one that's often applied by the courts, and that's Yamaha deference to longstanding agency interpretations. I was unable to find any sort of guidance as to when both of these principles were to apply to a situation like this, which one might be more applicable in this situation. I was wondering if CDTFA had a position on that issue.

MS. DANIELS: Well, I'm going -- sorry. It paused -- can you hear me?

JUDGE DANG: Yes.

MS. DANIELS: Okay. I am not aware of any decision either. So probably also beyond my qualifications as far as making law and deciding whether one statement of law should trump another. In this situation though, we would argue that the statutory construction and the intent and the rule that you should not interpret a statute to create an observed result, all support that you have to follow the Department's reading of the statute.

MR. SMITH: Mr. Dang, if I could just add onto that. I'm also not aware of the situation where a longstanding -- you know, whether a court made a determination about whether the ambiguity can and trumps the longstanding agency determination canon. But I think

that the longstanding agency determination speaks to the ambiguity issue.

That's, you know, the -- that you know -- this -- we had the sanitation, and it was -- it's been out there for 25 years, and to my knowledge this is the first taxpayer to dispute our longstanding interpretation. So the, you know, our understanding of the statute was not ambiguous. It was well-known and followed by everyone.

JUDGE DANG: This is Judge Dang speaking. Thank you for answering my questions. I don't have any further questions at this time.

Mr. Dakessian, you have five minutes for your rebuttal.

MR. DAKESSIAN: Thank you Your Honor.

CLOSING STATEMENT

MR. DAKESSIAN: So I think we confirmed a couple of things. But first we confirmed that the CDTFA wants to get rid of the 50 percent test as it applies to the former version of the statute. I heard Ms. Daniel say that quite clearly that the existence of the 50 percent test does not achieve the general policy objectives of reducing tobacco use.

Although, I agree with the comment that you made, Judge Dang, about even if we were to consider that, which

is inappropriate because the only items of legislative intent that should come to bear here is any evidence of legislative intent as it relates to the text. Just sort of general items and general concerns about tobacco use, that just doesn't come into play. But I do agree that you could make the argument that when that statute was first enacted that it did serve to lower tobacco use from 100 to 50.

But CDTFA is quite clear. They don't like the 50 percent test, and they want to read it out of the statute. The problem is that there's a way to do that, right. There's a way to do that. You have to have different statutory language like you do for cigarettes, which are taxed regardless of tobacco content. Or you have to have a statutory change as the one that took place in 2017.

So with respect to the deference point, Judge Dang, what I -- the way that I look at this is a couple of things. First of all, under Yamaha deference isn't an automatic. Yamaha, which is a California Supreme Court case, stood for the proposition that the Board of Equalization in that case tried to take the position that their annotation was the beginning and the end of the discussion. And Yamaha went through a detailed analysis of the various factors.

There's a professor named Michael Asimow who goes

through the various factors that are to be considered when deciding whether to give deference to the agency. And among those are the thoroughness in the agency's analysis, right, the degree to which the issue was a technical one, okay. If it's an issue like the one we have before us, which is not a technical tax issue, it's a reading of the statute.

Yamaha says that the agency possesses no comparative, quote, "comparative interpretive advantage over the courts," or in this case, over this panel. So no Yamaha deference is really due here because we're talking about a non-technical issue. And this panel can read a statute just as well as the CDTFA, right. And so for the CDTFA to come in and say we're entitled to deference based on the 1996 memo, which by the way they don't like all of it. They don't like the part that says that there are two reasonable interpretations of the statute. They just like the conclusion. So they're kind of trying to have it both ways.

But I consider the whole Yamaha framework a different sort of -- it just goes to the amount of deference that should be given to the agency. I don't think that undercuts. You can -- I don't think any deference is due to the CDTFA at all because they possess a comparative interpretive advantage over the OTA. But

even if there were, that does not take away the fact that there could be more than one reasonable interpretation of the statute. The parties have their views, right, as to the meaning of the statute, but they themselves could be two reasonable that -- Yamaha does not impact is sort of my view. And even if it did, they're entitled to no deference.

The other thing, you know, to your point about the -- I forgot quite how you phrased it. I'm not going to -- I hope I capture the essence of it, which is the list and its examples. And then the catchall, you know, is supposed to kind of refer back to the list. We view it that way as well. And, you know, we didn't bring this up in our presentation, but it's in our briefing, the principle of the Ejusdem generis or Noscitur a sociis, which is basically is Latin for "words are to be construed based on the company that they keep." And so, yes, we agree that those are examples of products that are predominantly tobacco to illustrate what the catchall category applies to.

And I do want to say one thing about the policy points. Oh, let me see. Where should I go next? I think we've covered the other points, historical application. We covered the deference point. Federal law, we covered that in our opening. Okay. I'll just conclude with this,

Your Honor. Okay.

We hear a lot of talk about policy discussions. There was a case, a U.S. Supreme Court case last year called Bostock versus Clayton County, Georgia. And I'm raising this because I don't hear a lot of textual arguments coming from the CDTFA. What I hear is a lot of policy about how tobacco is bad. And that's simply insufficient to carry the day.

This is what our -- U.S. Supreme Court said just last year in the context of policy arguments. This is what they said. With that, Respondents fall back the last line of defense for all failing statutory interpretation arguments. Naked policy arguments. If we were to apply the statute's plain language they complain, any number of undesirable policy consequences would follow. Gone here is any pretense of statutory interpretation. All that's left is a suggestion. We should proceed without the law's guidance to do as we think best. But that's an invitation no court or this Panel should ever take up.

The place to make new legislation or address unwanted consequences of old legislation lies in Congress. When it comes to statutory interpretation, our role is limited to applying the law's demands as faithfully as we can in the cases that come before us. As judges we possess no special expertise or authority to declare for

ourselves whether self-governing people should consider just or wise. And that same judicial humility that requires us to refrain from adding to statutes. It requires us to refrain from intervention. It's Bostock versus Clayton County, Georgia, 140 S. Ct. 1731, pincite 1753. For all these reasons, again, we respectfully request that you grant the instant appeal.

Thank you.

JUDGE DANG: I apologize. I muted myself, apparently. This is Judge Dang speaking. Thank you, Mr. Dakessian, for your concluding remarks there.

At this time I'd like to ask my co-panelists one final time if they have any questions for the parties. Judge Wong?

JUDGE WONG: This is Judge Wong. No questions. Thank you.

JUDGE DANG: And Judge Brown?

JUDGE BROWN: This is Judge Brown. No, I don't have any questions.

JUDGE DANG: Thank you. Once again, I'd like to thank everyone for their presentations today. The record is now closed, and this matter is submitted for decision. The Panel will meet and deliberate upon the arguments and evidence that were presented to us. And we will endeavor to send you our written opinion within 100 days from

today.

Thank you everyone. This hearing is now adjourned.

(Proceedings adjourned at 2:16 p.m.)

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HEARING REPORTER'S CERTIFICATE

I, Ernalyn M. Alonzo, Hearing Reporter in and for the State of California, do hereby certify:

That the foregoing transcript of proceedings was taken before me at the time and place set forth, that the testimony and proceedings were reported stenographically by me and later transcribed by computer-aided transcription under my direction and supervision, that the foregoing is a true record of the testimony and proceedings taken at that time.

I further certify that I am in no way interested in the outcome of said action.

I have hereunto subscribed my name this 22nd day of February, 2021.

_____
ERNALYN M. ALONZO
HEARING REPORTER