OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Consolidated Appeals of:	)	OTA Case Nos. 19034546. 19034547
	)	CDTFA Case IDs 925929, 925931
STARBUZZ TOBACCO, INC. AND	)	
STARBUZZ INTERNATIONAL, INC.	)	
	)	
	)	

OPINION

Representing the Parties:

For Appellants:	Mardiros H. Dakessian, Attorney Lucian Khan, Attorney Steven Rauser, Attorney
For Respondent:	Courtney Daniels, Tax Counsel III Stephen Smith, Tax Counsel IV Damian Armitage, Hearing Representative
For Office of Tax Appeals:	Corin Saxton, Tax Counsel IV

N. DANG, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 30262, Starbuzz Tobacco, Inc. and Starbuzz International, Inc. (appellants) appeal from decisions issued by the California Department of Tax and Fee Administration (CDTFA)[1] denying appellants' refund claims totaling $2,818,739 for the combined period October 1, 2012, through September 30, 2015 (claim period).[2]

[1] The Cigarette and Tobacco Products Tax Law was formerly administered by the State Board of Equalization (BOE). In 2017, functions of BOE relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to acts or events that occurred before July 1, 2017, "CDTFA" shall refer to BOE, and when this Opinion refers to acts or events that occurred on or after July 1, 2017, "CDTFA" shall refer to CDTFA.

[2] Starbuzz Tobacco, Inc. filed a refund claim for $1,814,429.11 for the period August 1, 2013, through September 30, 2015. Starbuzz International, Inc. filed a refund claim for $1,004,309.89 for the period October 1, 2012, through September 30, 2013.

Office of Tax Appeals Administrative Law Judges Nguyen Dang, Suzanne B. Brown, and Andrew Wong held an oral hearing for this matter on January 27, 2021.[3] At the conclusion of the hearing, we closed the record and submitted this matter for decision.

ISSUE

Whether appellants' shisha distributions for the claim period are subject to the tobacco products excise tax.

FACTUAL FINDINGS

1. During the claim period, appellants reported and paid tax to CDTFA on their shisha distributions.
2. Shisha is a product containing molasses, flavorings, and tobacco.
3. Appellants' shisha contains less than 50 percent tobacco.
4. Shisha is heated and smoked in a hookah, which is a type of water pipe. Hookahs are generally distinguished from conventional water pipes by their use of indirect and continuous heating and multiple hoses and mouthpieces.
5. Appellants filed separate refund claims asserting that their shisha distributions during the claim period are not subject to tax because their shisha contains less than 50 percent tobacco.
6. CDTFA denied appellants' refund claims based on its determination that shisha is a smoking tobacco, and as such, it is subject to tax regardless of its tobacco content.

DISCUSSION

The Cigarette and Tobacco Products Tax Law imposes upon every distributor, a tax upon the distribution of tobacco products in this state, based on the wholesale cost of these products. (R&TC, §§ 30123(b), 30131.2(b).) "'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." (Former R&TC, § 30121(b), added by initiative measure [Prop. 99, § 4, approved Nov. 8, 1988, eff. Jan. 1, 1989] and amended by initiative measure [Prop. 56, § 3.1, approved Nov. 8, 2016, eff. Apr. 1, 2017].)

[3] This hearing was noticed to be held in Sacramento, California. However, to protect the health and safety of the hearing participants during the ongoing coronavirus pandemic, we instead held the hearing via teleconference.

The sole issue upon which the disposition of appellants' refund claims hinges is whether appellants' shisha is a tobacco product within the meaning of former R&TC section 30121(b), which was in effect during the claim period. The parties disagree as to whether the qualifying phrase "made of, or containing at least 50 percent, tobacco" should only apply to the last antecedent "other articles or products," or serially to all the items listed in the statute.

Appellants' position places significant emphasis on the word "other." Appellants argue that an ordinary reading of the statute indicates that the use of the word "other" was intended to reference the commonality possessed by the specifically enumerated items such as cigars, smoking tobacco, chewing tobacco, and snuff; namely, that they are items generally considered to contain at least 50 percent tobacco. Thus, appellants assert that the term "tobacco products" was clearly meant to encompass only those items which are predominately made of tobacco.

This position runs contrary to CDTFA's longstanding interpretation contained in a Cigarette and Tobacco Products Tax Annotation entitled "Tobacco Products—Tobacco Content" (pub. 9/27/96) which states: "The Cigarette and Tobacco Products Tax applies to all forms of cigars, smoking tobacco, chewing tobacco, and snuff, regardless of the amount of tobacco they contain." Thus, under this interpretation, shisha, which CDTFA considers to be a form of smoking tobacco, is subject to tax regardless of tobacco content. In the backup letter to this legal annotation, CDTFA reasoned that:

"The definition [of tobacco products] 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 in the definition only or only 'any other articles or products.' In interpreting this section, we can be guided by the manner in which similar language in federal law has been interpreted.

"The federal definition of tobacco products, at 2[6][4] U.S.C. § 5702(c), is similar to the first portion of our state law definition, and lists cigars, cigarettes, smokeless tobacco, and pipe tobacco. Unlike state law, there is no reference to 'other articles or products'. . . .

"The federal Bureau of Alcohol, Tobacco and Firearms has interpreted the federal tobacco tax to apply to any tobacco products listed in the federal definition, regardless of the amount of tobacco present in the product. . . .

[4] The author mistakenly cites to title 28 (Judiciary and Judicial Procedure) of the United States Code. The proper cite is to title 26, which is the Internal Revenue Code.

"Consistent with the interpretation of federal statutes defining 'tobacco products', we conclude that California's Cigarette and Tobacco Products Tax Law applies to all forms of cigars, smoking tobacco, chewing tobacco, and snuff, regardless of the amount of pure tobacco they contain. In addition, the tax applies to any other articles or products which are made entirely of tobacco or contain at least 50% tobacco, but excluding cigarettes."

CDTFA has partly modified this position on appeal. CDTFA now argues that the language of former R&TC section 30121(b) is clear and unambiguous. However, unlike appellant's interpretation, CDTFA asserts that the word "other" applies only to "articles and products," and thus, the qualifying phrase is meant to enumerate a class of items which are unrelated to the specifically listed items in the statute. This interpretation achieves the same result as found in CDTFA's annotation, in that these specifically listed items would be subject to tax regardless of tobacco content.

CDTFA argues that this interpretation is bolstered by two canons of construction—the last antecedent rule and the maxim *expressio unius est exclusio alterius* (i.e., the negative-implication canon). The former states that "qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote." (*White v. County of Sacramento* (1982) 31 Cal.3d 676, 680 quoting *Board of Port Commrs. v. Williams* (1937) 9 Cal.2d 381, 389.) The maxim *expressio unius est exclusio alterius* is a rule which means "the expression of one thing in a statute ordinarily implies the exclusion of other things." (*In re J.W.* (2002) 29 Cal.4th 200, 209.) CDTFA invokes this rule to suggest that the statutory list of exemptions (i.e., cigarettes) is complete, and that no additional exemptions should be implied or presumed.

CDTFA further asserts that the findings and declarations expressed in the text of the proposed law (i.e., initiative measure Proposition 99) demonstrate the intent of the electorate to tax the specifically listed items regardless of their tobacco content. According to CDTFA, the express purpose of the tobacco excise tax was to provide financial disincentives for individuals purchasing and using tobacco, and that this purpose would be frustrated by imposing a 50 percent tobacco content threshold for taxation on the specifically listed items. CDTFA further contends that if Proposition 99 had intended to impose such a requirement, it would have contained some indication that the electorate considered tobacco products containing less than 50 percent tobacco to be less harmful to human health or the environment, and provided some

standard by which to assess whether an item has met that requirement (e.g., by weight, volume, or value).

CDTFA also contends that the statutory construction specified in its annotation should not, after so many years, be disturbed. CDTFA maintains that its policy of taxing smoking tobacco and the other specifically listed items based on this construction has been in place since the statute was enacted, and that this policy has been accepted and followed industry wide for decades without controversy. CDTFA cites *Sacramento County. v. Hickman* (1967) 66 Cal.2d 841, 851 for the proposition that when "for more than 60 years a statute has been construed in a consistent manner by the administrative agencies charged with its enforcement, and the practice has been consistently acquiesced in by the Legislature and recognized by the courts, its language comes to the Constitution clothed in that special meaning. It is too late to return … to the literal sense of the words used; to strip them of their acquired connotation at this late date would be arbitrarily to deny the experience of all the preceding years."

Finally, CDTFA urges us, should it be necessary, to look beyond the plain meaning of the statute to uphold CDTFA's interpretation. To do otherwise, CDTFA contends, would result in absurd consequences by necessitating the adoption of a system to determine whether tobacco products have met the 50 percent tobacco content requirement years after the statute was amended to abolish this requirement, and that further, it would create an exception whereby tobacco product manufacturers could avoid the tax merely by reducing the tobacco content of their products.

"Our fundamental task in construing a statute is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. We begin by examining the statutory language, giving the words their usual and ordinary meaning. If there is no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the language governs." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272, citations omitted.) However, the plain meaning rule "does not prevent a court from determining whether the literal meaning of the statute comports with its purpose." (*MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1083.) "When the plain meaning of the statute's text does not resolve the interpretive question, we must proceed to the second step of the inquiry. [Citation.] In this second step, the courts may turn to rules or maxims of construction which serve as aids in the sense that they express familiar insights about conventional language usage." (*Ibid.*, quoting

Mejia v. Reed (2003) 31 Cal.4th 657, 663, internal quotations omitted.) Courts also "resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history. In such circumstances, we 'select the construction that comports most closely with the apparent intent of the Legislature, with a view of promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.' These rules apply equally in construing statutes enacted through the initiative process." (*Day v. City of Fontana, supra*, at p. 272, quoting *People v. Coronado* (1995) 12 Cal.4th 145, 151, citations omitted.)

The Statutory Language

We agree with the portion of CDTFA's backup letter concluding that, based on an ordinary reading of the statute, it is unclear whether the qualifying phrase was intended to apply to the specifically listed items. The ambiguity in the statutory language is evident in the lack of uniformity amongst the courts in construing grammatically similar statutes. For example, in analyzing a federal statute, the court in *Dong v. Smithsonian* (D.C. Cir. 1997) 125 F.3d 877 (*Dong*) adopted the approach currently advocated by appellants. Relying on the statute's use of the word "other" before the qualifying phrase, and the fact that the qualifying phrase clearly illustrated a "unifying theme" among the listed items, the court found that Congress must have intended the qualifying phrase to apply to the specifically listed items and that this was the "most logical" reading of the statute. (*Id.* at pp. 879-880.) Conversely, the word "other" has been plainly construed to "add to the things theretofore specifically enumerated, not to take away from or limit what had already been included." (*State v. Hemrich* (1916) 93 Wash. 439, 445-446.)

Our examination of the other modifiers in the statutory definition which might help to resolve this issue, such as the phrases "all forms" and "includes, but is not limited to," indicates that they are also subject to more than one reasonable interpretation. It is unclear whether the phrase "all forms," as applied to the specifically listed items, was intended to convey the idea that these items should be considered tobacco products regardless of their tobacco content. (But see Black's Law Dict. (11th ed. 2019) [defining form to mean "[t]he outer shape, structure, or configuration of something, as distinguished from its substance or matter"].) The phrase "includes, but is not limited to," is similarly ambiguous. On the one hand, this phrase suggests an expansive interpretation, one in which a reading of the words or phrases in a statute is not limited to the immediate context in which they appear. (See, e.g., *U.S. v. Migi* (9th 2003) 329

F.3d 1085, 1088-1089 [declining to apply the contextual rule of *ejusdem generis* because the statute contained the modifier "including, but not limited to"].) Conversely, the phrase "includes" has been interpreted to signal a list of examples illustrating some general principle, which requires a reading of the specifically listed items in conjunction with the qualifying phrase. (*Dong, supra*, at p. 880.)

Canons of Construction

In addition to the last antecedent rule, courts have applied two canons of construction in interpreting statutes containing some list of items followed by a qualifying phrase—the "rule against surplusage" and *reverse* ejusdem generis.[5] The former advises that interpretations which would cause one or more parts of a statute to become redundant should be avoided. (*People v. Rizo* (2000) 22 Cal.4th 681, 687.) As applied in this situation, this canon suggests that it would not have been necessary for the electorate to enumerate the specific items had they merely intended the qualifying phrase to operate as a general rule. Treating the qualifying phrase as a general rule, therefore, would result in redundancy. It follows then, that to give effect to the specifically listed items, the qualifying phrase should not be applied to those items. (See, e.g., *U.S. v. Palmer* (1818) 16 U.S. 610, 628-629.)

The antithesis of the last antecedent rule is the "reverse" variant of the more widely-known contextual rule of *ejusdem generis*. Reverse *ejusdem generis* provides that "when a statute includes a list of terms and a catch-all phrase, the terms in the list are limited to those that are consistent with the catch-all phrase. To put it another way, in a statutory provision that extends to 'A, B, C, and any other Z,' the canon of reverse *ejusdem generis* would advise that only those As, Bs, and Cs that are also Zs are covered. Thus, the phrase 'iguanas, tortoises, rattlesnakes, and other land reptiles' would likely exclude marine iguanas like those found in the Galapagos Islands, and the phrase 'Kansas City, Topeka, Lawrence, Wichita, and other cities in Kansas' would probably not extend to Kansas City, Missouri." (Wexler, *Fun with Reverse Ejusdem Generis* (2020) 105 Minn. L.Rev. 1, 2.) Courts have held that this canon supersedes the last antecedent rule. (See, e.g., *White v. County of Sacramento, supra*, 31 Cal.3d at pp. 680-681

[5] We do not find the negative-implication canon to be applicable here because the issue is not whether additional exemptions should be inferred from the statutory language, but how the qualifying phrase should be applied to the preceding list of items.

[the last antecedent rule is not applicable where "several words are followed by a clause which is applicable as much to the first and other words as to the last"].)

Ultimately, the question we must answer is whether the electorate intended the statutory definition of tobacco products to express some general principle, or whether it was simply meant as a list of unrelated items. In seeking to answer this question, we note that "[n]o single canon of statutory construction is an infallible guide to correct interpretation in all circumstances. . . . A court must be careful lest invocation of a canon cause it to lose sight of its objective to ascertain the Legislature's intent." (*Medical Bd. of California v. Superior Court* (2001) 88 Cal.App.4th 1001, 1013, citations and internal quotations omitted.) We must remember that "[t]hose who write statutes seek to solve human problems. Fidelity to their aims requires us to approach an interpretive problem not as if it were a purely logical game, like a Rubik's Cube, but as an effort to divine the human intent that underlies the statute." (*Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1017.)

With the foregoing principles in mind, we do not find these canons to be dispositive here. From a grammatical standpoint, the canons discussed above appear to be equally applicable. Compounding this difficulty is the fact that these canons reach opposite results, and there are no textual cues indicating which one might best reflect the intent of the voters. Therefore, to resolve this ambiguity we find it necessary to consult extrinsic sources.

Extrinsic Aids

To ascertain voter intent, we turn to the findings and declarations, analyses, and arguments contained in the official ballot pamphlet presented to the voters. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900-901.) We begin with the findings and declarations stated in the text of the proposed law, which states that the "people find and declare as follows:

(a) Tobacco use is the single most preventable cause of death and disease in America.

(b) Tobacco-related diseases create immense suffering and personal loss, and a staggering economic cost which all Californians have to pay.

(c) Tobacco-related diseases are a major burden on state and local governments by requiring them to provide medical care and health services.

(d) Tobacco use causes substantial environmental damage, and property damage and loss of life due to fire.

(e) To reduce the incidence of cancer, heart, and lung disease and to reduce the economic costs of tobacco use in California, it is the intent of the people of California to increase the state tax on cigarettes and tobacco products and do all of the following:

(1) Reduce smoking and other tobacco use among children.

(2) Support medical research into tobacco-related cancer, heart, and lung diseases.

(3) Treat people suffering from tobacco-related diseases.

(4) In recognition of the uncompensated costs of tobacco-related illness, support treatment of patients who cannot afford to pay for services."

(Ballot Pamp., Gen. Elect. (Nov. 8, 1988) Text of Proposed Law, p. 83, Sec. 2.)

The legislative analysis summarizes the tax increases imposed by Proposition 99. It states that the measure would increase the excise tax on cigarettes from 10 cents per pack of 20 cigarettes, to 35 cents. In addition, the measure would "impose a new excise tax on other types of tobacco products, such as cigars, chewing tobacco, pipe tobacco, and snuff." (Ballot Pamp., Gen. Elec. (Nov. 8, 1988) analysis by the legislative analyst, p. 82.)

The argument advanced by the proponents of Proposition 99 focuses primarily on the health risks and costs associated with tobacco use. In particular, it emphasizes that "A YES VOTE ON PROPOSITION 99 will place an additional 25-cent tax on every pack of cigarettes and guarantee strong antismoking programs in our schools. [¶] . . . [¶] NONSMOKING CALIFORNIANS SHOULD NOT HAVE TO PAY HIGHER TAXES AND INSURANCE PREMIUMS BECAUSE SMOKING CAUSES FIRES AND DISEASE." (Ballot Pamp., Gen. Elec. (Nov. 8, 1988) argument in favor of Proposition 99, p. 84.) The argument in rebuttal is best summarized by the following emphasized language: "*Proposition 99 is a 250-percent tax increase and special interest giveaway disguised as a health initiative.* It is not a smoking ban. [¶] Proposition 99 will *encourage crime, discriminate against one group of Californians, penalize some lower-income families and reward its major promoters hundreds of millions of dollars.*" (Ballot Pamp., Gen. Elec. (Nov. 8, 1988) rebuttal to argument in favor of Proposition 99, p. 85.)

It is readily apparent from the above materials that Proposition 99 was enacted to reduce tobacco use and its associated costs to the public through a substantial increase in the cigarette excise tax and a broadening of the tax base to include other tobacco products which were previously not subject to any excise tax. However, this fact fails to illuminate because these

statutory aims are more or less achieved under either interpretation. More specifically, the pertinent question relates to the exact scope of the new excise tax. While CDTFA's interpretation results in the broadest application of this tax, there is nothing in the ballot pamphlet to suggest that this is what the electorate intended.

We also reject the notion that appellants' position would lead to absurd consequences because it would allow tobacco manufacturers to avoid the tax by reducing the tobacco content of their products. "[T]he absurdity exception requires much more than showing that troubling consequences may potentially result if the statute's plain meaning were followed or that a different approach would have been wiser or better. . . . To justify departing from a literal reading of a clearly worded statute, the results produced must be so unreasonable the Legislature could not have intended them." (*Switzer v. Wood* (2019) 35 Cal.App.5th 116, 124, citing *In re D.B.* (2014) 58 Cal.4th 941, 948.) This is not the case here. There is no evidence that tobacco product manufacturers are either willing, or able, to reduce the tobacco content of their products below the 50 percent threshold without substantially compromising the quality or appeal of those products, and, even assuming this was feasible, it would still be in keeping with the statutory purpose of reducing tobacco use.

Reason, Practicality, and Common Sense

Absent any indication in the ballot pamphlet of how the electorate intended the qualifying phrase to apply, we must instead rely on reasonableness considerations. We therefore "cautiously take the third and final step in the interpretive process. [Citation.] In this phase of the process, we apply 'reason, practicality, and common sense to the language at hand.'" (*MacIsaac v. Waste Management Collection & Recycling, Inc.*, *supra,* 134 Cal.App.4th at p. 1084, quoting *Halbert's Lumber Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1239.)

Appellants' position implies that voters were only concerned with the deleterious effects of tobacco use in those items which are predominately made of tobacco. While there is no indication in the ballot pamphlet or otherwise to support this assumption, it is not an impossibility given that public opposition to tobacco use over 30 years ago was likely not as strong as it is today.

Nevertheless, what is clear from the statutory purpose is that the electorate was not concerned with those items containing tobacco, but which have no effect on human health or the environment. These are admittedly rare but would conceivably include items such as artwork

made from tobacco leaves. It makes sense then that the specifically listed items, which are notably all items meant for human consumption, should be read to qualify the phrase "any other articles or products," so that only those items meant for human consumption would be subject to tax. The same logic also applies in reverse—that the qualifying phrase should apply to the specifically listed items to clarify that those items must contain tobacco. For instance, it is highly improbable that the electorate intended, under a literal reading of the phrase "all forms of cigars," for novelty exploding cigars or bubble gum cigars to be subject to tax.

In contrast, imposing the tobacco excise tax based upon two disparate tobacco content standards reflects a puzzling contradiction. CDTFA does not argue for, and we can conceive of no compelling reason for, making such a distinction. There is nothing to suggest that the listed items meaningfully differ from "other articles or products" in their ability to cause harm to human health or the environment, or that would otherwise justify a substantially higher tobacco content threshold for taxation.

We recognize that drafters are not always perfect wordsmiths, and consequently, we should be careful not to place undue significance on what are inherently speculative assumptions regarding word choice or sentence structure. As noted above, we find both interpretations are reasonably supported by the statutory language and adequately serve the statutory purpose. However, based on these practical considerations which suggest a unitary approach to taxing "tobacco products," we find appellants' interpretation to be the more marginally reasonable one.

To be sure, CDTFA's annotation is also entitled to "some consideration." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 15.) The deference we afford to CDTFA's annotation is fundamentally situational and "turns on a legally informed, commonsense assessment of their contextual merit." (*Id.* at p. 14.) The weight given to an annotation in a particular case will therefore depend upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." (*Id.* at pp. 14-15, quoting *Skidmore v. Swift & Co.* (1944) 323 U.S. 134, 140.)

Here, the reasoning expressed in CDTFA's backup letter fails to persuade. There is no basis for concluding that the federal government's interpretation of Internal Revenue Code (IRC) section 5702(c) is relevant to construing former R&TC section 30121(b). The backup letter states, without explanation or support, that "we can be guided by the manner in which *similar*

language in federal law has been interpreted." (Italics added.) We disagree, not with this proposition, but with the assertion that the annotation considered a "similar" federal statute.[6] IRC section 5702(c) states that: "'Tobacco products' means cigars, cigarettes, smokeless tobacco, and pipe tobacco. IRC section 5702(c) contains none of the modifiers or the qualifying phrase at issue here, and it includes cigarettes in its definition of tobacco products. There is nothing in the annotation to support that the federal and state tobacco excise taxes were imposed for similar reasons. This makes IRC section 5702(c) patently different than former R&TC section 30121(b). Therefore, we are skeptical of any reliance upon federal policy or interpretations in construing former R&TC section 30121(b).

Moreover, contrary to CDTFA's assertion, the absence of any evidence as to how the electorate intended the "50 percent" qualifying phrase to be applied is not fatal to appellants' position. Rather, it is the opposite. "In every case involving 'the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen.'" (*Pioneer Express Co. v. Riley* (1930) 208 Cal. 677, 687 (*Pioneer*), citing *Gould v. Gould* (1917) 245 U.S. 151, 153.) We find the lack of any evidence in this regard supports application of this principle here.

We are also not persuaded by the argument that adopting appellants' interpretation would lead to overly burdensome consequences. We note the "50 percent" qualifying language was abolished four years ago by initiative measure Proposition 56 (effective April 1, 2017). Therefore, any disruption at this time to CDTFA or taxpayers who may have acted in reliance upon CDTFA's annotation are minimal, and we give little weight to this consideration.

There is also insufficient evidence to show acquiescence to CDTFA's annotation. Legislative acquiescence is a canon of statutory interpretation based on the idea that "a legislative body is presumed to be aware of prior judicial construction of statutory language, particularly when it undertakes to amend the area of the law judicially construed: If it doesn't change the language judicially construed, there is at least an inference that the legislature agreed with the prior judicial construction." (*Gunther v. Lin* (2006) 144 Cal.App.4th 223, 236,

[6] Federal policies and interpretations are persuasive authority where the federal statute is analogous to the state statute in question. (See, e.g., *J.H. McKnight Ranch, Inc. v. Franchise Tax Bd.* (2003) 110 Cal.App.4th 978, 984.)

disapproved on another ground in *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661.) However, mere legislative inaction following judicial construction is insufficient to demonstrate acquiescence; there must exist "both a well-developed body of law interpreting a statutory provision and numerous amendments to a statute without altering the interpreted provision." (*Scher v. Burke* (2017) 3 Cal.5th 136, 147.)

Former R&TC section 30121(b) has been amended only once since the publication of CDTFA's annotation in 1996. This occurred many years later, in the 2016 general election with the passage of initiative measure Proposition 56, which became operative on April 1, 2017. The prior statutory definition of tobacco products was replaced with the following language: "'Tobacco products' includes, but is not limited to, a product containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to, cigars, little cigars, chewing tobacco, pipe tobacco, or snuff, but does not include cigarettes." (R&TC, § 30121(b).) The statutory amendment did not retain any of the operative language of its predecessor, and therefore, it is not evidence of acquiescence.[7] CDTFA has also failed to identify a "well-developed body of law" consistent with its interpretation of former R&TC section 30121(b). Thus, we are unable to conclude from any legislative inaction that CDTFA's annotation was acquiesced to by the voters.[8]

In summary, we find the statutory definition of "tobacco products" to be ambiguous. Although both the interpretations argued by the parties are reasonable when viewed in light of the statutory language and purpose, based on practical considerations, we find appellants' is slightly more so. Moreover, given that these interpretations stand in relative equipoise, we resolve this ambiguity in favor of appellants. (*Pioneer*, *supra*, 208 Cal. at p. 687; see also *Edison Cal. Stores v. McColgan* (1947) 30 Cal.2d 472, 476; *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 326; *Microsoft Corp. v. Franchise Tax Bd.* (2006) 39 Cal.4th 750, 759.)

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[7] This is in stark contrast to the facts of *Sacramento County v. Hickman*, *supra*, 66 Cal.2d at 850, where acquiescence was found, in part, based on the fact that the language of the predecessor statute was "virtually identical" to the Constitutional provision at issue.

[8] Arguments based on "supposed legislative acquiescence rarely do much to persuade." (*Scher v. Burke*, *supra*, at p. 147.) "The Legislature's failure to act may indicate many things other than approval of a judicial construction of a statute: the sheer pressure of other and more important business, political considerations, or a tendency to trust to the courts to correct their own errors . . . ." (*County of Los Angeles v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 391, 404, quoting *Cleveland v. U.S.* (1946) 329 U.S. 14, 23, [conc. opn. of Rutledge, J.], internal quotation marks omitted.)

Accordingly, we find that "tobacco products," as defined in former R&TC section 30121(b), are only those items which are made of, or contain, at least 50 percent tobacco.

HOLDING

Appellants' shisha distributions for the claim period are not subject to the tobacco products excise tax.

DISPOSITION

CDTFA's actions denying appellants' refund claims are reversed and appellants' refund claims are granted in full.

DocuSigned by:
Nguyen Dang
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Nguyen Dang
Administrative Law Judge

We concur:

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Suzanne B. Brown
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Suzanne B. Brown
Administrative Law Judge

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Administrative Law Judge

Date Issued: 4/28/2021