# FIRST DISTRICT COURT OF APPEAL
# STATE OF FLORIDA

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No. 1D20-822

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GLOBAL HOOKAH DISTRIBUTORS, INC.,

Appellant,

v.

STATE OF FLORIDA, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION,

Appellee.

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On appeal from the Circuit Court for Leon County.
Kevin J. Carroll, Judge.

April 12, 2021

M.K. THOMAS, J.

In 2017, Global Hookah Distributors, Inc. (Global) filed a complaint against the Department of Business and Professional Regulation (Department), seeking reimbursement of tobacco taxes paid from April 2013 through March 2016. The trial court issued summary judgment in the Department's favor, denying Global's claims. Both below and on appeal, Global argues the taxes were

imposed in violation of the Commerce Clause.[1] We disagree because the tax at issue here is not a sales or use tax, but rather an excise tax or surcharge on the distribution of other tobacco products that requires separate considerations when determining the limits of the Commerce Clause.[2] We affirm accordingly.

*I. Facts*

Global is a North Carolina-based corporation engaged in the business of selling tobacco products and related items. In 2007, Global became licensed by the Department as an "out-of-state other tobacco product" distributor, pursuant to section 210.35(2), Florida Statutes (1991). Global sells its products to businesses such as hookah lounges, night clubs, bars, restaurants, and cigar stores, as well as other tobacco distributors. The products are delivered to Global's Florida customers by common carrier. Global has no physical presence in Florida.

During the refund period, Global paid over $1.2 million in taxes. Those taxes, referred to as "Tax on Tobacco Products Other Than Cigarettes or Cigars" (OTP), were paid pursuant to sections 210.276 and 210.30, Florida Statutes. Global filed a complaint seeking a refund of these taxes, arguing that because it is a North Carolina corporation—with its only connection to Florida being that it delivers goods here through a common carrier—it lacked a substantial nexus with the state, which is required under the

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[1] The Commerce Clause authorizes Congress to "regulate Commerce with foreign Nations, and among the several States." Art. I, § 8, cl. 3., U.S. Const.

[2] Global also argues that the United States Supreme Court's recent opinion in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018), is not retroactively applied and does not overrule the Florida Supreme Court's decision in *Department of Revenue v. Share International, Inc.*, 676 So. 2d 1362 (Fla. 1996). Accordingly, Global claims that *Share* is controlling. However, because we find the taxes at issue here are not subject to the sales and use tax physical presence test set forth in *Share*, regardless of the effect of the *Wayfair* decision, these issues are not before us.

Commerce Clause; and thus, Florida could not legally impose the OTP taxes on Global's sale of tobacco in the state.

The trial court disagreed and denied Global's claim. The trial court held that Global was not entitled to a refund because OTP taxes are an excise tax or surcharge, not a sales tax, and thus, the requirement that a company have a physical presence in the state to satisfy the substantial nexus requirement does not apply. Based on the nature of the statute and purpose of the OTP taxes, the trial court concluded that Global's "sale of tobacco products in Florida during the Refund Period rose to the level of a 'substantial nexus' with the State and are therefore subject to the tax collected." Global now appeals that decision.

*II. Analysis*

On appeal, Global argues that the trial court erred in finding that the OTP taxes at issue should be treated differently than a general sales tax, and as such, the Florida Supreme Court's decision in *Share*, 676 So. 2d 1362, governs. The issue before the court in *Share* was whether under the specific facts presented, substantial nexus existed that would permit Florida to tax Share. *Id.* at 1362. Share was a Texas corporation, which sold products primarily through direct mail, had no offices in Florida, nor employees or agents residing in the state. *Id.* at 1362–63. However, three days a year the president and vice president of Share attended a seminar in Florida, and Share's products were available for purchase at the seminar. *Id.* at 1363. In determining that Share was not subject to Florida taxes, the court held that the "slightest presence" of an out-of-state mail order company within the state does not create substantial nexus to that state. *Id.*

Global asserts that because more than a slight physical presence was required to establish substantial nexus in *Share*, the same must be required here. In making its argument, Global urges this Court to find that all taxes are treated the same regardless of whether the tax is categorized as a general sales tax or an excise tax or surcharge. Recognizing there is a question as to the continued application of *Share* in light of *Wayfair*, we find that even if *Share* was not implicitly overruled, it does not apply to the case now before us because not all taxes are treated the same.

We start our analysis with the knowledge that "in all constitutional challenges, the statute comes to this Court clothed with the presumption of correctness and all reasonable doubts about the statute's validity are to be resolved in favor of constitutionality." *Fla. Dep't of Revenue v. Am. Bus. USA Corp.*, 191 So. 3d 906, 911 (2016).

In *Share*, the Florida Supreme Court relied on the United States Supreme Court's decisions in *National Bellas Hess, Inc. v. Illinois Department of Revenue*, 386 U.S. 753 (1967), *overruled by Wayfair*, 138 S. Ct. 2080; and *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992), *overruled by Wayfair*, 138 S. Ct. 2080. In both cases, sales and use taxes were at issue. In *Quill*, the Supreme Court stated in dicta that "[a]lthough we have not, in our review of other types of taxes, articulated the same physical-presence requirement that *Bellas Hess* established for sales and use taxes, that silence does not imply repudiation of the *Bellas Hess* rule." 504 U.S. at 314. In Justice Scalia's concurring opinion in *Quill*, he similarly observed that "[e]ven before *Bellas Hess*, we had held, correctly, I think, that state regulatory jurisdiction could be asserted on the basis of contacts with the State through the United States mail." *Id.* at 333. Based on the foregoing, it appears that the Supreme Court limited its physical-presence rule to sales and use taxes, declining to extend it to regulatory measures.

In *Department of Banking and Finance, State of Florida v. Credicorp, Inc.*, 684 So. 2d 746, 750 (Fla. 1996), the Florida Supreme Court held that statutes governing loan brokers and retail installment sales, which required payment of licensing fees and allowed for imposition of fines, were regulatory in nature. *Id.* at 752. The court noted that the funds were required to be deposited into the Regulatory Trust Fund, and that the fees "ensure that all regulated licensees pay a share of the regulatory costs to protect Florida consumers from improper conduct by the licensees." *Id.* The Court did not apply the physical presence requirement for establishing substantial nexus when determining the statute's constitutionality under the Commerce Clause given its regulatory nature. *Id.* at 751. In light of the taxpayer's activities and their impact on the state, the court found the statute constitutional, holding that the statute was "a regulatory measure

and, because of its evenhanded application to all retail installment sellers, is not violative of the Commerce Clause." *Id.* at 756.

Accordingly, as was the case in *Credicorp*, central to a Commerce Clause analysis here is whether the OTP tax "constitutes (1) a general revenue tax, or (2) a regulatory measure enacted pursuant to this state's police power." 684 So. 2d at 750.

A general revenue tax is a state tax levied against interstate commerce to raise general revenue. *Id.* at 751. In contrast, a regulation "is not essentially economic in purpose and effect." *Id.* Rather, it is a "social regulation designed to protect local interests, and different interests apply than in a general revenue context." *Id.* "As long as a State does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' it retains broad regulatory authority to protect the health and safety of its citizens . . . ." *Id.* (quoting *Maine v. Taylor*, 477 U.S. 131, 151 (1986)).

The OTP taxes at issue here are set forth in sections 210.276 and 210.30, Florida Statutes. Section 210.276 is titled "Surcharge on tobacco products." It provides, "A surcharge is levied upon all tobacco products in this state and upon any person engaged in business as a distributor of tobacco products at the rate of 60 percent of the wholesale sales price." § 210.276(1), Fla. Stat. The statute requires the surcharge to be levied when a distributor "[b]rings or causes to be brought into this state from without the state tobacco products for sale" or when a distributor "[s]hips or transports tobacco products to retailers in this state, to be sold by those retailers." § 210.276(1)(a), (c), Fla. Stat. Under the statute, "[n]o surcharge shall be imposed by this section upon tobacco products not within the taxing power of the state under the Commerce Clause of the United States Constitution." § 210.276(4), Fla. Stat. The revenue produced from the surcharge must be deposited into the Health Care Trust Fund. § 210.276(7), Fla. Stat. Under section 210.30(1), a tax is imposed at the rate of 25% of the wholesale sales price on "all tobacco products in this state and upon any person engaged in business as a distributor thereof." This tax is triggered by the same actions as the surcharge. § 210.30(1)(a), (c), Fla. Stat. Once again, the statute limits its

application to those taxes that are lawful under the Commerce Clause. § 210.30(4), Fla. Stat.

In 2009, when the surcharge became law, it was described as "[a]n act relating to protecting Florida's health through a surcharge on tobacco products." Ch. 2009-79, Laws of Fla. The Legislature noted that health care costs attributable to smoking-related illness in the state have been estimated to exceed $6 billion annually, with direct Medicaid costs estimated to exceed $1.25 billion each year. *Id.* The surcharge was established in an effort to recoup some of the costs of tobacco use. *Id.* The Legislature further determined that the act at issue could be cited as the "Protecting Florida's Health Act." Ch. 2009-79, § 1, Laws of Fla. Additionally, when a person applies for and is granted a license to distribute tobacco products in this state, they agree to be subject to all applicable state law, including the taxes assessed. *See* § 210.35(2), Fla. Stat.

Under this relevant Florida law, there are significant differences between the OTP taxes at issue here, and sales and use taxes. The vast majority of the funds collected via the OTP taxes are not deposited into the General Revenue Fund, but rather must be deposited into the Health Care Trust Fund. §§ 210.276(7), 408.16(2), Fla. Stat. Monies deposited into the Health Care Trust Fund are to be used in the operation of the Agency for Health Care Administration. § 408.16(1)–(2), Fla. Stat. The Legislature made clear when passing the Act that it was not designed with a main purpose of raising general revenue to support governmental operations; rather, it was designed to protect Floridians' health and ensure that wholesalers introducing the product into Florida bear part of the economic burden of tobacco use. Accordingly, we find the OTP tax is a regulatory measure enacted pursuant to this state's police power to protect the health of its citizens.

As we find the OTP tax is a regulatory measure, *Share's* general-tax analysis does not control. Attempts to impose a general tax on commerce are more carefully scrutinized under the Commerce Clause than a regulatory measure enacted pursuant to this State's police power. *See Credicorp*, 684 So. 2d at 750 ("Generally speaking, statutes, that represent the exercise of a state's police power are given less scrutiny under the Commerce

Clause than those statutes enacted to raise revenue for the state."). Instead of the substantial nexus standard set forth in *Share*, a different standard applies when determining the constitutionality of regulatory measures.

> In determining the validity of a regulatory statute challenged under the Commerce Clause, a court must inquire: "(1) whether the challenged statute regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce."

*Id.* at 751 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)).

Global does not address the regulatory measure standard set forth above and does not argue on appeal that even if the trial court was correct that the OTP tax is regulatory in nature, it erred in finding the OTP tax does not violate the Commerce Clause. Instead, Global focuses only on the standard presented in *Share* and whether the OTP tax should be treated as a general sales tax. In finding that *Share* does not apply and the OTP tax is not a sales tax for purposes of Commerce Clause analysis, we have addressed the question presented. Any argument that the OTP tax violates the Commerce Clause under a regulatory measure standard was not asserted and, is therefore, waived; we will not address an issue not before this Court. *See Rosier v. State*, 276 So. 3d 403, 406 (Fla. 1st DCA 2019) (holding this Court may only consider issues raised in the initial brief, and issues not raised in the initial brief are considered waived or abandoned).

## *III. Conclusion*

We affirm the trial court's order finding Global was not entitled to a tax refund. We find that the OTP tax at issue is a regulatory measure and not subject to the physical presence requirement set forth in *Share*.

AFFIRMED.

BILBREY and KELSEY, JJ., concur.

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***Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.***

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