No. 24-0052

In the Supreme Court of Texas

GLENN HEGAR, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS; THE OFFICE OF THE COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS; AND KEN PAXTON, ATTORNEY GENERAL OF THE STATE OF TEXAS,
Petitioners,

v.

RJR VAPOR CO., LLC,
Respondent.

On Petition for Review
from the Third Court of Appeals, Austin

PETITION FOR REVIEW

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Statement of the Case

Nature of the Case:	Plaintiff RJR Vapor initiated this tax-protest suit against Glenn Hegar, the Texas Comptroller of Public Accounts; his office; and the Attorney General (collectively, "the Comptroller"), seeking, among other things, a refund of taxes paid on RJR Vapor's oral nicotine products, which are known as VELO products. CR.2344-88; *see* Tex. Tax Code §§ 112.051-.060. RJR Vapor also sought an injunction and a declaratory judgment that VELO products are not taxable "tobacco products" under Texas's Cigars and Tobacco Products Tax. CR.39, 2387.
Trial Court:	250th Judicial District Court, Travis County The Honorable Amy Clark Meachum
Disposition in the Trial Court:	The trial court granted partial summary judgment for RJR Vapor. CR.2225. After a bench trial, the trial court rendered final judgment for RJR Vapor, requiring the Comptroller to remit a tax refund and declaring the statutory phrase "made of tobacco or a tobacco substitute" unconstitutional. CR.3990; *see* Tex. Tax Code § 155.001(15)(E). It denied RJR Vapor's request for a permanent injunction. CR.3990.
Parties in the Court of Appeals:	RJR Vapor was the appellant and cross-appellee. The Comptroller was the appellee and cross-appellant.
Disposition in the Court of Appeals:	The court of appeals affirmed in part and vacated in part. *RJR Vapor Co. v. Hegar*, 681 S.W.3d 867, 871 (Tex. App.—Austin 2023, pet. filed) (per Triana, J., joined by Baker and Kelly, JJ.) It dismissed RJR Vapor's claims for declaratory and injunctive relief for want of jurisdiction. *Id.* at 871, 885.

Statement of Jurisdiction

The Court has jurisdiction under Texas Government Code section 22.001(a).

Issues Presented

Texas imposes a tax on "tobacco products other than cigars." Tex. Tax Code § 155.0211(a). As relevant here, "tobacco product" means "an article or product that is made of tobacco or a tobacco substitute and that is not a cigarette or an e-cigarette." *Id.* § 155.001(15)(E). RJR Vapor sells "VELO products"—pouches and lozenges that contain nicotine isolate. Nicotine isolate is produced by chemically processing tobacco.

The issues presented are:

1. Whether VELO products are "tobacco products."
2. If VELO products are "tobacco products," whether the contested definition of "tobacco products" is constitutional (unbriefed issue).

Introduction

Texas taxes "tobacco products," including "product[s] that [are] made of tobacco or a tobacco substitute." The court of appeals wrongly concluded that products like RJR Vapor's—which are made of nicotine produced by chemically processing tobacco—are not "made of tobacco or a tobacco substitute."

That decision has sweeping effect. The Legislature has used the Tax Code's definition of "tobacco products" to prohibit and regulate many kinds of behavior. For example, "tobacco products" cannot be sold to minors. But under the court of appeals' decision, minors can buy products laden with nicotine because those products are supposedly not "made of tobacco or a tobacco substitute." The court of appeals' decision has a similar effect on other Texas statutes and thus puts public health at risk. The Court should grant the petition for review, reverse the court of appeals' judgment, and render judgment for the Comptroller.

Statement of Facts

The court of appeals correctly stated the nature of the case. *See supra* p. vi.

I. Statutory Background

The Cigars and Tobacco Products Tax (the "Tax"), Tex. Tax Code §§ 155.001-.2415, becomes "due and payable when a permit holder receives cigars" or "tobacco products other than cigars[] for the purpose of making a first sale in this state," *id.* §§ 155.021(a) (cigars), 155.0211(a) (tobacco products other than cigars); *see also id.* § 155.041 (requiring a permit). "'Tobacco product' means:"

(A) a cigar;

(B) smoking tobacco, including granulated, plug-cut, crimp-cut, ready-rubbed, and any form of tobacco suitable for smoking in a pipe or as a cigarette;

(C) chewing tobacco, including Cavendish, Twist, plug, scrap, and any kind of tobacco suitable for chewing;

(D) snuff or other preparations of pulverized tobacco; or

(E) an article or product that is made of tobacco or a tobacco substitute and that is not a cigarette or an e-cigarette as defined by Section 161.081, Health and Safety Code.

Id. § 155.001(15); *see also id.* § 154.001(2) (defining "cigarette"); Tex. Health & Safety Code § 161.081(1) (adopting Tax Code section 154.001(2)'s definition of "cigarette").

The Legislature uses this definition for several purposes beyond just levying this Tax. It has incorporated the definition into other statutes that prohibit the sale of "tobacco products" to minors, Tex. Health & Safety Code §§ 161.081(5), 161.082; *see also id.* § 161.087(a), (a-1), (d) (proscribing distributing to minors a "coupon or other item" to "receive" tobacco products); proscribe minors from possessing, purchasing, or consuming tobacco products, *id.* §§ 161.251(2), 161.252(a); and prohibit the possession or provision of a "tobacco product" by or to "a person confined in a correctional facility," Tex. Penal Code § 38.11(a), (a)(5), (f)-(h). The "tobacco products" definition also applies in other contexts, such as regulating vending machines containing tobacco products, Tex. Health & Safety Code § 161.086(a)(2) (proscribing the installation of such machines); forbidding the offering of "tobacco products for sale in a manner that permits a customer direct access to [them]," *id.* § 161.086(a)(1); regulating the placement of signs advertising "tobacco

products," *id.* §§ 161.121(5), 161.122(a), (f); and requiring annual reporting of tobacco products distributed in Texas, *id.* §§ 161.351(3), 161.352.

II. Factual Background

RJR Vapor sells "oral nicotine products," CR.321, including nicotine pouches and lozenges sold under the brand name "VELO" ("VELO products"). VELO pouches and lozenges contain nicotine isolate, CR.549; *see also* CR.307-09 (describing the pouches and lozenges), which is made by grinding tobacco in water and extracting the nicotine with an organic solvent through a multi-step chemical process, CR.310-11, 550.

RJR Vapor asked the Comptroller for a general information letter discussing whether RJR Vapor's VELO products "qualify as [] tobacco product[s]" for the Tax's purposes. CR.322, 2517-18; *see* 34 Tex. Admin. Code § 3.1(a)(1), (b) (general information letters). The Comptroller issued a letter explaining that VELO products "meet[] the definition of [] tobacco product[s]" because they "contain[] nicotine that was previously extracted from a tobacco leaf." CR.2390-91. RJR Vapor explained its belief that VELO products are not "made of tobacco or a tobacco substitute," CR.339, but the Comptroller declined to reverse the position he took in the letter and indicated that RJR Vapor should remit the tax on its VELO products, CR.340. RJR Vapor paid the Tax for the period running June 1, 2020, to December 31, 2021, submitting protest letters with each payment. CR.2407-3702.

III. Procedural Background

Shortly after it had begun paying the Tax, RJR Vapor filed a tax-protest suit against the Comptroller. CR.2344-88 (live petition); *see* Tex. Tax Code §§ 112.051-.060. Among other things, it sought a "declaratory judgment[] under the common law and/or the UDJA" that VELO products "are not 'tobacco products' as defined by Tex. Tax Code § 155.001(15)" and thus "are not subject to" the Tax, CR.39 (original petition), as well as a refund of the Tax in an amount to which the parties stipulated, CR.2387 (live petition), 3793 (stipulation). RJR Vapor also requested a declaratory judgment that section 155.001(15) violated the federal Constitution's Due Process and Equal Protection Clauses and the Texas Constitution's Due Course and Equal and Uniform Clauses. CR.2387; *see* U.S. Const. amend. XIV; Tex. Const. art. I, § 19; Tex. Const. art. VIII, § 1. And it asked the trial court for permanent "injunctive relief prohibiting the Comptroller from collecting or assessing" the Tax "with respect to activities and transactions involving" oral nicotine products. CR.2384-87.

The parties filed cross-motions for partial summary judgment on whether VELO products are "tobacco products" as the Tax defines them. CR.281-477, 478-778. After a hearing, the trial court granted RJR Vapor's motion and denied the Comptroller's, ruling that VELO pouches and VELO lozenges are not "tobacco products" under section 155.001(15). CR.2225.

Following a bench trial, the trial court rendered final judgment for RJR Vapor and ordered the Comptroller to remit a tax refund of $16,071.68. CR.3989-90. It likewise declared section 155.001(15)(E)'s phrase "made of tobacco or a tobacco

substitute" unconstitutional for two reasons: In the trial court's view, the phrase (1) "is both overbroad and vague, . . . inconsistent with the constitutional guarantees of due process," and (2) "violates taxpayers' right to equal and uniform taxation." CR.3990. The trial court denied RJR Vapor's request for a permanent injunction. CR.3990. The parties cross-appealed. CR.3993-94 (the Comptroller's notice of appeal); 2.SCR.96-97 (RJR Vapor's notice of appeal).

The court of appeals affirmed the trial court's partial summary judgment but vacated its ruling on RJR Vapor's constitutional claims. *RJR Vapor*, 681 S.W.3d at 871, 885. It agreed with the trial court that VELO products are not "made of tobacco or a tobacco substitute." *Id.* at 871, 885. Reasoning that "the definition of 'tobacco' that is most consistent with the statutory scheme is the leaves of cultivated tobacco plants that are prepared for use in smoking or chewing or as snuff," the court of appeals determined that nicotine isolate did not "qualify as 'tobacco'" because "no tobacco leaves or other parts of the tobacco plant remain as part of the nicotine isolate by the end of the manufacturing process." *Id.* at 877. It therefore concluded that VELO products are not "made of tobacco." *Id.* at 879. Nor, according to the court of appeals, are they "made of . . . a tobacco substitute," *id.* at 882, "because nicotine isolate does not have the same qualities as tobacco leaves," *id.* at 881. The court therefore determined that VELO products are not subject to the Tax. *Id.* at 882. It also dismissed RJR Vapor's declaratory and injunctive claims for lack of jurisdiction. *Id.* at 871.

Summary of the Argument

I. VELO products are "made of tobacco" because they are made of chemically processed tobacco—nicotine isolate. Statutory text and context demonstrate that the statute applies to chemically processed tobacco. And although the court of appeals held that nicotine isolate was made *from* tobacco, not made *of* tobacco, RJR Vapor's own expert witness demonstrated that *made from* and *made of* can be used interchangeably. VELO products are therefore subject to the Tax.

II. Alternatively, VELO products are "made of . . . a tobacco substitute" because nicotine isolate provides a way to consume nicotine without using tobacco. The court of appeals concluded that nicotine isolate did not qualify as a "tobacco substitute" because it did not "have the same qualities as tobacco leaves." But nicotine isolate and tobacco leaves share at least one important quality: nicotine content. Moreover, using RJR Vapor's proposed industry definitions of the phrase *tobacco substitute* would render the statute surplusage.

III. This case warrants review because the court of appeals' construction of the statute affects multiple prohibitions and regulations that the Legislature has placed on use or sale of "tobacco products." For example, the court of appeals' decision effectively permits VELO products and the like legally to be sold to minors, who could also legally possess, purchase, and consume them. And the decision would have a similar effect in the context of many other Texas statutes.

Standard of Review

The Court reviews summary judgments de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). Where, as here, "both parties move for

partial summary judgment on the same issues and the trial court grants one motion and denies the other," the Court considers both sides' summary-judgment evidence, "determines all questions presented," and "renders the judgment the trial court should have rendered." *Id.* A taxpayer bears the burden of proving that it is entitled to a tax refund. *Hegar v. Health Care Serv. Corp.*, 652 S.W.3d 39, 43 (Tex. 2022).

ARGUMENT

I. VELO Products Are "[M]ade of [T]obacco."

VELO products are not cigars, smoking tobacco, chewing tobacco, or snuff. *See* Tex. Tax Code § 155.001(15)(A)-(D). Accordingly, they are subject to the Tax only if they qualify as "article[s] or product[s] that [are] made of tobacco or a tobacco substitute." *Id.* § 155.001(15)(E).

VELO products are "made of tobacco" because they are made of nicotine isolate, which is produced by chemically processing tobacco. *See* CR.310-11, 550. The nicotine isolate in VELO products comes solely from the tobacco plant. CR.549. For that reason, whether nicotine can be extracted from other plant life is irrelevant for purposes of determining whether VELO products are subject to the Tax. *See RJR Vapor*, 681 S.W.3d at 876 (noting RJR Vapor's argument that nicotine isolate "could theoretically be manufactured from any plant in the nightshade family," to which tobacco belongs). Because VELO products are "made of" chemically processed tobacco, they are subject to the Tax. Tex. Tax Code § 155.001(15)(E).

Statutory text and context show that "tobacco products" may contain chemically processed tobacco. A "tobacco product" is, among other things, a "product

that is made of tobacco or a tobacco substitute." *Id.* A *product* is something "made by industry or art." *Product*, Webster's New Twentieth Century Dictionary (2d ed. 1960); *see also Product*, Webster's New International Dictionary (2d ed. 1948); CR.357 ("Texas has defined 'tobacco products' to include 'any other articles or products made of tobacco or any substitute therefor' since 1959 for the purposes of the" Tax. (emphasis omitted) (quoting Act of July 30, 1959, 56th Leg., 3d C.S., ch. 1, art. 8.01, 1959 Tex. Gen. Laws 187, 235)), 402-03 (the 1959 statute). The statute therefore contemplates that a "product . . . made of tobacco" will have undergone some sort of processing. *See Product*, Black's Law Dictionary (7th ed. 1999) ("the result of fabrication or processing"). *Product* can also mean a "substance resulting from a chemical change," *Product*, Webster's New Twentieth Century Dictionary, *supra*—like the chemical change that occurs in tobacco to create nicotine isolate, *see* CR.310-11, 550. So, under the statutory text, a "tobacco product" may be "made of" chemically processed tobacco like nicotine isolate.

Context points in the same direction. Section 155.001 expressly distinguishes between raw tobacco and processed tobacco—that is, "tobacco products." *Compare* Tex. Tax Code § 155.001(13-a), *with id.* § 155.001(15). "'Raw tobacco' means any part of the tobacco plant, including the tobacco leaf or stem, that is harvested from the ground and is not a tobacco product as the term is defined in this chapter." *Id.* § 155.001(13-a). A "tobacco product," therefore, cannot consist merely of "part of the tobacco plant, including the tobacco leaf or stem." *Id.*; *see In re CenterPoint Energy Hous. Elec., LLC*, 629 S.W.3d 149, 159 (Tex. 2021) (orig. proceeding) (explaining that courts "must give effect to all words of a statute and not treat any language

as surplusage"); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 174 (2012). Rather, context confirms that a "tobacco product" refers to processed tobacco, not mere tobacco leaves. *Compare* Tex. Tax Code § 155.001(13-a), *with id.* § 155.001(15).

And both physically and chemically processed tobacco can qualify as "tobacco products." When words "are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar." Scalia & Garner, *supra*, at 195 (describing the *noscitur a sociis* canon); *e.g.*, *In re Millwork*, 631 S.W.3d 706, 712-13 (Tex. 2021) (per curiam). That is, "words grouped in a list," as the different types of "tobacco products" are, Tex. Tax Code § 155.001(15), "should be given related meanings," Scalia & Garner, *supra*, at 195. "The common quality suggested by a listing should be its most general quality—the least common denominator, so to speak—relevant to the context." *Id.* at 196. But courts should not use this tool of construction to "restrict" a term to just "one of its many possible applications." *Id.*

As the court of appeals recognized, the statute anticipates that physically processed tobacco—processed by, for example, chopping tobacco leaves—counts as a "tobacco product." *RJR Vapor*, 681 S.W.3d at 877; s*ee* Tex. Tax Code § 155.001(15)(A)-(D). But it also contemplates that chemically processed tobacco can, too. Snuff is a taxable "tobacco product," Tex. Tax Code § 155.001(15)(D), and part of the process of making snuff requires fermenting tobacco, CR.570; Nat'l Cancer Inst. & Ctrs. for Disease Control & Prevention, *Smokeless Tobacco and Public Health: A Global Perspective*, App'x B Global Smokeless Tobacco Product Factsheets

B-15, B-37 (2014), https://cancercontrol.cancer.gov/sites/default/files/2020-06/smokelesstobaccoandpublichealth.pdf. Fermentation is a chemical process—a "process" of "chemical change," *Fermentation*, Webster's Third New International Dictionary (2002), "by which molecules . . . are broken down anaerobically," *Fermentation*, Britannica, https://www.britannica.com/science/fermentation (last visited Mar. 14, 2024); *see also Fermentation*, New Oxford American Dictionary (3d ed. 2010) ("the chemical breakdown of a substance by bacteria, yeasts, or other microorganisms"). Because tobacco goes through chemical processing to become snuff, context indicates that tobacco that has undergone some chemical processing can qualify as a taxable "tobacco product." *See* Tex. Tax Code § 155.001(15)(D), (E).

The court of appeals' understanding of what counts as a "tobacco product" contravenes both text and context. After defining "tobacco" as "the leaves of cultivated tobacco plants that are prepared for use in smoking or chewing or as snuff," it concluded that "the nicotine isolate in the VELO products does not qualify as 'tobacco'" because "no tobacco leaves or other parts of the tobacco plant remain as part of the nicotine isolate by the end of the manufacturing process." *RJR Vapor*, 681 S.W.3d at 877. That approach wrongly assumes that a "product . . . is made of tobacco or a tobacco substitute" if it is physically processed but not if it is chemically processed. *See id.* at 877-78. *But see supra* pp. 9-10.

The court of appeals offered one more reason to disagree that VELO products are "made of tobacco." It stated that the products are made *from* tobacco, not made *of* tobacco, and therefore do not fall within the "tobacco products" definition. *Id.* at 878. It explained, "'We use *made of* when we talk about the basic material or qualities

of something. . . . ' And '[w]e often use *made from* when we talk about how something is manufactured.'" *Id.* (quoting *Made from, made of, made out of, made with*, Cambridge Dictionary, https://dictionary.cambridge.org/us/grammar/british-grammar/made-from-made-of-made-out-of-made-with (last visited Mar. 14, 2024)). "[W]hen an object is 'made of' a substance, that substance stays fundamentally the same when the object is made," but "when an object is 'made from' a substance, that substance is changed, typically through some sort of chemical or mechanical process, to make the object." *Id.*

But in fact, the two terms can be, and often are, used interchangeably. RJR Vapor's own expert witness stated that he would "absolutely say" both "that cigars are made *of* tobacco" and that cigars are "made *from* tobacco." CR.564 (emphasis added). He also said that "chewing tobacco is made from tobacco." CR.565. But chewing tobacco is comprised of "cut pieces of tobacco," CR.565, and is manufactured merely by "chopping the tobacco," CR.566. Under the court of appeals' definition, chewing tobacco would be "made *of* tobacco" because it *is* tobacco—not "made *from* tobacco." Because RJR Vapor itself has demonstrated how these two phrases can be used interchangeably, the *made of*/*made from* distinction does not do the work the court of appeals thought.

VELO products are made of tobacco because they are made of chemically processed tobacco—nicotine isolate. They are thus subject to the Tax.

II. VELO Products Are "[M]ade of . . . a [T]obacco [S]ubstitute."

At the very least, VELO products are "made of . . . a tobacco substitute." Tex. Tax Code § 155.001(15)(E). A "substitute" is something "used in place of another."

Substitute, Webster's New Twentieth Century Dictionary, *supra*; *accord Substitute*, Webster's New International Dictionary, *supra*; *Substitute*, Black's Law Dictionary (4th ed. 1957). Even if the Court concludes that nicotine isolate is neither tobacco nor made of tobacco, it is a substitute for tobacco because it provides a way to consume nicotine without using tobacco. Because VELO products are made of nicotine isolate, they are "made of . . . a tobacco substitute." Tex. Tax Code § 155.001(15)(E).

The court of appeals agreed that "a 'tobacco substitute' must be something that takes the place or function of 'tobacco.'" *RJR Vapor*, 681 S.W.3d at 879. But it nonetheless determined that nicotine isolate did not count as a "tobacco substitute." *Id.* at 880-81. In the court of appeals' view, because "[t]he process of making nicotine isolate removes all parts of the tobacco leaf, leaving only the concentrated chemical compound of nicotine," *id.* at 880, and "nicotine isolate does not have the same qualities as tobacco leaves," *id.* at 881, nicotine isolate could not be a tobacco substitute.

But nicotine isolate *does* share with tobacco leaves at least one material quality: nicotine content. *See* Scalia & Garner, *supra*, at 196. All the other statutorily enumerated tobacco products contain nicotine. *See* Tex. Tax Code § 155.001(15)(A)-(D). A person who wants nicotine can get it through the traditional tobacco products listed in subparts (A) through (D) or through a substitute for tobacco like a product containing nicotine isolate. In that way, nicotine isolate "takes the place or function of 'tobacco.'" *RJR Vapor*, 681 S.W.3d at 879.

The court of appeals rejected the Comptroller's argument that nicotine isolate is a tobacco substitute. In its view, that argument "require[d] [the court] to assume that nicotine is the *only* reason consumers use tobacco products." *Id.* at 880. "The number and variety of tobacco products on the market disproves that assumption. If consumers cared only about obtaining nicotine, then the source would not matter." *Id.*

That is illogical and flouts standard statutory-interpretation principles. Under those principles, the phrase "product that is made of . . . a tobacco substitute" must have a meaning similar to that of the other statutorily enumerated tobacco products, not of all the tobacco products in the world. *See* Scalia & Garner, *supra*, at 195. After all, it is only those "words grouped in a list," not all the other possible iterations of tobacco products, with which the phrase "product that is made of . . . a tobacco substitute" must share a similar meaning. *See id.* And the tobacco products listed in subparts (A) through (D) of section 155.001(15) all contain nicotine. *See* Tex. Tax Code § 155.001(15)(A)-(D). It therefore makes sense to conclude that nicotine isolate is a tobacco substitute because it also contains nicotine and thus provides an alternative way for users to consume something that all the enumerated "tobacco products" have in common: nicotine. *See id.* § 155.001(15)(A)-(E); Scalia & Garner, *supra*, at 195-96.

The consumer's reason for choosing a product containing nicotine does not change this. The court of appeals stated that "something more goes into a consumer's choice of product than the desire for the concentrated chemical it contains," analogizing to caffeine, which "consumers seek out in many different

forms." *RJR Vapor*, 681 S.W.3d at 880 n.12. That may be true, but it is beside the point. The consumer's reason for selecting a product with nicotine does not alter the fact that the product contains nicotine. And it is the latter quality, not the former, that matters here. *See* Scalia & Garner, *supra*, at 195; *supra* p. 13.

The court of appeals also declined to adopt the common-sense meaning of "tobacco substitute" because it viewed that phrase as a term of art. *RJR Vapor*, 681 S.W.3d at 881; *see* Tex. Gov't Code § 311.011(b) ("Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly."). RJR Vapor argued below that "tobacco substitute" has two potential industry-specific meanings. Br. for Cross-Appellee at 16-24, *RJR Vapor Co. v. Hegar*, No. 03-22-00188-CV (Tex. App.—Austin Oct. 24, 2022). *First*, it could mean reconstituted tobacco sheets. *Id.* at 16-19. Those are manufactured by "taking the small pieces of tobacco, extracting the water-soluble materials, making a paper sheet of the non-soluble materials, then reapplying the water soluble materials to the sheet. [The sheet] is then cut into an appropriate size and incorporated into cigarettes at varying, but typically low, levels." CR.313. *Second*, "tobacco substitute" could mean other "materials that could possibly replace tobacco leaves within cigarettes." Br. for Cross-Appellee, *supra*, at 19. Per RJR Vapor, such substances are "relatively free of nicotine" and "mimic[] tobacco leaves within a cigarette for smoking." *Id.* at 22 (emphasis omitted), 27; *see* CR.373. Before the court of appeals, RJR Vapor argued that "'tobacco substitute' should be defined as 'cigarette filler.'" Br. for Cross-Appellee, *supra*, at 24.

But that definition does not make sense in context. RJR Vapor presented evidence that reconstituted tobacco sheets are usually used in cigarettes. CR.313. But products "made of" that "tobacco substitute"—cigarettes—are exempted from the Tax. Tex. Tax Code § 155.001(15)(E). Thus, if a "product that is made of . . . a tobacco substitute" just means cigarettes, section 155.001(15)(E) cancels itself out. *See id.*; *see also id.* § 154.001(2), (2)(A) (defining "[c]igarette" as a "roll for smoking" that is "made of tobacco or tobacco mixed with another ingredient and wrapped or covered with a material other than tobacco").

The same is true if, as RJR Vapor argued below, "tobacco substitute" just means cigarette filler—a material "relatively free of nicotine," Br. for Cross-Appellee, *supra*, at 22 (emphasis omitted), that "can be mixed in wide proportions with cured tobacco" and "has strength, feel[,] and mass integrity characteristic of conventionally cured tobacco," CR.374. That kind of material can be "mixed with" tobacco to make cigarettes. Tex. Tax Code § 154.001(2)(A); CR.373-74. But because cigarettes are not subject to the Tax, Tex. Tax Code § 155.001(15)(E), adopting this proposed industry definition would render the phrase "made of . . . a tobacco substitute" surplusage, *but see CenterPoint*, 629 S.W.3d at 159.

In short, nicotine isolate is a tobacco substitute because it allows consumers to obtain nicotine in an alternative form to tobacco. VELO products are thus "made of . . . a tobacco substitute." Tex. Tax Code § 155.001(15)(E).

III. This Case Merits Review.

The importance of the "tobacco products" definition extends well beyond this case. The Legislature uses that definition to restrict the sale of "tobacco products"

to minors. Tex. Health & Safety Code §§ 161.081, 161.081(5), 161.082. While RJR Vapor insists that VELO products are not sold to minors, CR.309, 321, the court of appeals' decision effectively permits VELO products legally to be sold to minors, who could also legally possess or purchase—not to mention consume—those and similar products, Tex. Health & Safety Code §§ 161.251(2), 161.252(a). The court of appeals' construction of section 155.001(15)(E) would also allow individuals "confined in a correctional facility" to possess VELO products and other similarly nicotine-laden products. *See* Tex. Penal Code § 38.11(a), (f). And it would have a wide-ranging effect on other statutes regulating the sale, consumption, and advertisement of "tobacco products." *See supra* pp. 2-3.

PRAYER

The Court should grant the petition for review, reverse the court of appeals' judgment affirming the trial court's partial summary judgment in favor of RJR Vapor, and render judgment for the Comptroller.

Respectfully submitted.

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/s/ Sara B. Baumgardner
Sara B. Baumgardner

No. 24-0052

In the Supreme Court of Texas

GLENN HEGAR, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS; THE OFFICE OF THE COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS; AND KEN PAXTON, ATTORNEY GENERAL OF THE STATE OF TEXAS,

Petitioners,

v.

RJR VAPOR CO., LLC,

Respondent.

On Petition for Review
from the Third Court of Appeals, Austin

PETITIONER'S APPENDIX

Tab

TAB A:
TRIAL COURT'S ORDER GRANTING PARTIAL SUMMARY JUDGMENT

Cause No. D-1-GN-20-004023

RJR Vapor Co., LLC, Plaintiff,	§	In the District Court of
v.	§	
Glenn Hegar, Comptroller of Public Accounts of the State of Texas; the Office of the Comptroller of Public Accounts of the State of Texas; and Ken Paxton, Attorney General of the State of Texas, Defendants	§	Travis County, Texas
	§	250th Judicial District

Order on Motions for Partial Summary Judgment

On June 14, 2021, the motions for partial summary judgment of Plaintiff, RJR Vapor Co., LLC, and Defendants, Glenn Hegar, Comptroller of Public Accounts of the State of Texas, and Ken Paxton, Attorney General of the State of Texas, were heard by this Court. All parties appeared and announced ready.

The Court, having considered the pleadings, motions, summary judgment evidence, arguments of counsel, and applicable law, **GRANTS** Plaintiff's Motion for Partial Summary Judgment and **DENIES** Defendants' Motion for Partial Summary Judgment. The Court rules that VELO pouches and VELO lozenges are not "tobacco products" under Tex. Tax Code § 155.001(15).

This Order is not intended to be a final order, because it does not resolve all aspects of the claims raised by Plaintiff, including the refund amount due to Plaintiff, Plaintiff's constitutional claims, or Plaintiff's request for injunctive relief.

Signed this 14th day of July, 2021.

Judge Presiding

APPROVED AS TO FORM AND SUBSTANCE:

Doug Sigel
Counsel for Plaintiff

APPROVED AS TO FORM:

Thales Smith
Counsel for Defendants

TAB B:
TRIAL COURT'S CORRECTED FINAL JUDGMENT

Cause No. D-1-GN-20-004023

RJR Vapor Co., LLC, Plaintiff,	§	In the District Court of
v.	§	
Glenn Hegar, Comptroller of Public Accounts of the State of Texas; the Office of the Comptroller of Public Accounts of the State of Texas; and Ken Paxton, Attorney General of the State of Texas, Defendants.	§	Travis County, Texas
	§	250th Judicial District

Corrected[1] Final Judgment

On January 31 and February 1, 2022, the above-referenced suit came before this Court for a bench trial. Plaintiff, RJR Vapor Co., LLC, and Defendants, Glenn Hegar, Comptroller of Public Accounts of the State of Texas, and Ken Paxton, Attorney General of the State of Texas, appeared through counsel and announced ready for trial.

This Court incorporates the October 4, 2021 Order of the Honorable Amy Clark Meachum, wherein she denied Defendants' Second Amended Second Plea to the Jurisdiction and held that this Court has jurisdiction to consider and award the relief requested by Plaintiff.

This Court further incorporates the July 14, 2021 Order by the Honorable Jan Soifer, wherein she granted Plaintiff's Motion for Partial Summary Judgment and held:

> The Court, having considered the pleadings, motions, summary judgment evidence, arguments of counsel, and applicable law, GRANTS Plaintiff's Motion for Partial Summary Judgment and

[1] The Court issued a Final Judgment in this matter on March 11, 2022. Pursuant to Tex. R. Civ. P. 316, Defendants filed a Motion to Correct the Judgment on March 31, 2022. Plaintiff does not oppose Defendants' Motion. Therefore, the Court grants Defendants' Motion and issues this Corrected Final Judgment, which does not differ substantively from the Court's March 11, 2022 Final Judgment.

DENIES Defendants' Motion for Partial Summary Judgment. The Court rules that VELO pouches and VELO lozenges are not "tobacco products" under Tax Code § 155.001(15).

After considering the evidence presented, pleadings, briefing, and arguments of counsel, this Court grants Plaintiff the following relief:

Based on Judge Soifer's July 14, 2021 Order holding that VELO pouches and lozenges are not "tobacco products," this Court holds that the Comptroller unlawfully demanded that Vapor LLC remit the Texas Cigars and Tobacco Products Tax. Accordingly, Defendants are ordered to issue one or more refunds warrants to Plaintiff (Taxpayer Identification No. 3-20650-7887-8) in the amount of $16,071.68 in Texas Cigars and Tobacco Products Tax. Defendants are also to pay statutory interest on that amount provided by Chapter 112 of the Tax Code.

Further, the language "made of tobacco or a tobacco substitute" within Tex. Tax Code § 155.001(15)(E) is unconstitutional for two reasons.

First, the language "made of tobacco or a tobacco substitute" within Tex. Tax Code § 155.001(15)(E) is unconstitutional—facially and as applied—under the due process clauses of the state and federal constitutions. The language "made of tobacco or a tobacco substitute" is not reasonably clear and invites discriminatory and arbitrary government enforcement. As a result, this language is both overbroad and vague, which renders Tex. Tax Code § 155.001(15)(E) inconsistent with the constitutional guarantees of due process.

Second, the language "made of tobacco or a tobacco substitute" within Tex. Tax Code § 155.001(15)(E) is unconstitutional as applied, because it violates taxpayers' right to equal and uniform taxation under the law. Under Defendants' interpretation of the language "made of tobacco or a tobacco substitute," Defendants have applied the Cigars and Tobacco Products Tax to some—but not all—products within the class of tobacco-free oral nicotine products. There is no rational basis to distinguish some tobacco-free oral nicotine products, such as nicotine replacement therapies, from other tobacco-free oral nicotine products.

Furthermore, the Court DENIES Plaintiff's request for a permanent injunction.

All relief requested by the parties and not specifically granted herein is denied. This judgment finally disposes of all parties and all claims and is a final, appealable

judgment.

Signed this 4th day of April, 2022.

Honorable Amy Clark Meachum
Judge Presiding

APPROVED AS TO FORM:

Doug Sigel
Counsel for Plaintiff

Thales Smith
Thales Smith
Counsel for Defendants

DISTRICT COURT OF TRAVIS COUNTY TEXAS

TAB C:
TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

CAUSE NO. D-1-GN-20-004023

RJR VAPOR CO., LLC, Plaintiff,	§	IN THE DISTRICT COURT
v.	§	
GLENN HEGAR, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS; THE OFFICE OF THE COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS; AND KEN PAXTON, ATTORNEY GENERAL OF THE STATE OF TEXAS, Defendants.	§	OF TRAVIS COUNTY, TEXAS
	§	250TH JUDICIAL DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court issues the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. All Findings of Fact that would be more appropriately classified as Conclusions of Law are hereby adopted as such.

2. The parties in this case ask this Court to resolve a statutory dispute regarding whether oral nicotine products (specifically VELO pouches and VELO lozenges) are subject to a "tobacco products" tax under Texas law, Tex. Tax Code § 155.001(15) (the "Tobacco Products Tax").

3. While this matter has been resolved by state legislatures in other states, the Comptroller has not sought—and does not appear to be seeking—legislative clarification in the State of Texas. Plaintiff RJR Vapor Co. LLC ("Vapor LLC"), therefore, seeks relief to resolve this statutory dispute by a declaratory judgment action. Vapor LLC asks this Court to determine

whether VELO pouches and lozenges are subject to the Tobacco Products Tax.

4. Vapor LLC maintains VELO pouches and VELO lozenges are tobacco free products and classify them as Oral Nicotine Products.

5. On December 10, 2018, Vapor LLC submitted a request for a General Information Letter from the Comptroller asking the Comptroller to confirm that VELO pouches and lozenges are *not* "tobacco products" subject to the Tobacco Products Tax.

6. On January 11, 2019, Defendant, the Comptroller of Public Accounts of the State of Texas ("the Comptroller"), sent Vapor LLC a General Information Letter.

7. In the January 11, 2019, General Information Letter, the Comptroller asserted that VELO pouches and lozenges are "tobacco products" and demanded that Vapor LLC remit the Tobacco Products Tax whenever Vapor LLC received VELO pouches and lozenges for the purpose of making a first sale in Texas. Texas law imposes the Tobacco Products Tax "when a permit holder receives tobacco products other than cigars, for the purpose of making a first sale in this state." Tex. Tax Code § 155.0211(a) (emphasis added).

8. Thus, in a response to Vapor LLC's request that the Comptroller determine VELO pouches and lozenges were *not* "tobacco products," the Comptroller instead did the opposite and demanded that Vapor LLC remit the Tobacco Products Tax. The Comptroller determined that VELO pouches and lozenges are "tobacco products" under Tex. Tax Code § 155.001(15).

9. The Comptroller concluded in the Letter that Oral Nicotine Products sold by Vapor LLC are "tobacco product[s]" as defined by Tex. Tax Code § 155.001(15), because "[t]he product contains nicotine, which is an extract of the tobacco leaf; therefore, it meets the definition of a tobacco product."

10. Tex. Tax Code § 155.001(15) defines "tobacco product" as follows:

"Tobacco product" means:
(A) a cigar;

(B) smoking tobacco, including granulated, plug-cut, crimp-cut, ready-rubbed, and any form of tobacco suitable for smoking in a pipe or as a cigarette;
(C) chewing tobacco, including Cavendish, Twist, plug, scrap, and any kind of tobacco suitable for chewing;
(D) snuff or other preparations of pulverized tobacco; or
(E) an article or product that is made of tobacco or a tobacco substitute and that is not a cigarette or an e-cigarette as defined by Section 161.081, Health and Safety Code.

11. During the course of this litigation, the Comptroller has clarified that, as interpreted by the Comptroller, Oral Nicotine Products are "tobacco products" under Tex. Tax Code § 155.001(15)(E), because they use nicotine as an ingredient.

12. The Comptroller has, at various times throughout this litigation, argued that nicotine is "tobacco" and a "tobacco substitute."

13. The Comptroller has not yet published a rule or policy explaining how it defines, interprets, or applies the language "made of tobacco or a tobacco substitute" within Tex. Tax Code § 155.001(15)(E). The Comptroller has also not sought legislative clarification.

14. Instead of seeking legislative relief or relying published rule or policy, the Comptroller has interpreted the statutory language "made of tobacco or a tobacco substitute" within Tex. Tax Code § 155.001(15)(E)" on an *ad hoc* basis.

15. In each instance where the Comptroller advised taxpayers that Oral Nicotine Products are "made of tobacco or a tobacco substitute," the reason provided by the Comptroller was that these products use nicotine as an ingredient.

16. The Comptroller has not assessed or collected Tobacco Products Tax on all products using nicotine as an ingredient.

17. Vapor LLC remitted the Tobacco Products Tax, under protest, on July 24, 2020. Tex. Tax Code §§ 155.001–.2415.

18. Vapor LLC then filed suit on August 4, 2020, to recover its payment of Tobacco Products Tax paid under protest.

19. In accordance with an Agreed Scheduling Order, the parties filed Cross-Motions for Partial Summary Judgment on May 24, 2021, to resolve the sole issue of whether VELO pouches and lozenges are "tobacco products" as defined by Tex. Tax Code § 155.001(15).

20. The parties had a summary judgment hearing on the Travis County District Court Central Docket before The Honorable Judge Jan Soifer. In her July 14, 2021, Order, she ruled that that VELO pouches and VELO lozenges are not "tobacco products" under Texas Tax Code § 155.001(15).

21. Judge Soifer made clear in her Order that the certain matters remained for final trial: the amount of the refund due Vapor LLC, as well as Vapor LLC's constitutional claims and claims for injunctive relief.

22. The parties have stipulated that, Vapor LLC has remitted $16,071.68 in Tobacco Products Tax under protest for the periods June 1, 2020, through December 31, 2021.

CONCLUSIONS OF LAW

1. All Conclusions of Law that would be more appropriately classified as Findings of Fact are hereby adopted as such.

2. The parties have stipulated that, pursuant to Judge Soifer's July 14, 2021, Order, Vapor LLC is entitled to a refund of $16,071.68 in Tobacco Products Tax paid under protest for the period June 1, 2020, through December 31, 2021.

3. Therefore, the Court awards Vapor LLC a refund of $16,071.68, plus statutory interest.

4. The July 14, 2021, Order found that that VELO pouches and VELO lozenges are not "tobacco products" under Texas Tax Code § 155.001(15).

5. The language "made of tobacco or a tobacco substitute" within Tex. Tax Code § 155.001(15)(E) is unconstitutional—facially and as applied—under

the due process clauses of the state and federal constitutions, which requires laws be reasonably clear.

6. The plain language of Tex. Tax Code § 155.001(15) does not state that Oral Nicotine Products are subject to the Tobacco Products Tax or are "tobacco products."

7. The language "made of tobacco or a tobacco substitute" is not reasonably clear on its face and invites discriminatory and arbitrary government enforcement. As a result, this language is both overbroad and vague.

8. Moreover, under the July 14, 2021, Order, the language "made of tobacco or a tobacco substitute" within Tex. Tax Code § 155.001(15)(E) is unconstitutional as applied, because it violates taxpayers' right to equal and uniform taxation under the law. Defendants have applied the Tobacco Products Tax to some—but not all—products within the class of Oral Nicotine Products.

9. The Court denies Vapor LLC's request for an injunction. Vapor LLC voluntarily sought this legal dispute. Vapor LLC sought an opinion asking the Comptroller to confirm that VELO pouches and lozenges were *not* subject to the Tobacco Products Tax. The Comptroller disagreed. Then Vapor LLC paid a *de minimus* amount of tax in protest and initiated this lawsuit.

10. While Tex. Tax Code § 112.057 requires Vapor LLC to continue making payments under protest during the appeal of this dispute, the Comptroller is not assessing or collecting the Tobacco Products Tax from distributors of oral nicotine products, the class of products at issue in this lawsuit.

Signed this May 11, 2022.

Judge Amy Clark Meachum

DISTRICT COURT OF TRAVIS COUNTY TEXAS

TAB D:
COURT OF APPEALS' OPINION

2023 WL 8631705
Only the Westlaw citation is currently available.

Court of Appeals of Texas, Austin.

RJR VAPOR CO., LLC, Appellant, Glenn Hegar, Comptroller of Public Accounts of the State of Texas; the Office of the Comptroller of Public Accounts of the State of Texas; and Ken Paxton, Attorney General of the State of Texas, Cross-Appellants,

v.

Glenn HEGAR, Comptroller of Public Accounts of the State of Texas; the Office of the Comptroller of Public Accounts of the State of Texas; and Ken Paxton, Attorney General of the State of Texas, Appellees, RJR Vapor Co., LLC, Cross-Appellee

NO. 03-22-00188-CV
|
Filed: December 14, 2023

Synopsis

Background: Taxpayer brought suit against Comptroller of Public Accounts, Office of Comptroller of Public Accounts, and the Attorney General, seeking a refund of tax paid under protest, prospective declaratory and injunctive relief that its oral nicotine products were not taxable, and a declaration that language "made of tobacco or a tobacco substitute" in tax statute defining tobacco products was unconstitutional, both facially and as applied. On cross-motions for partial summary judgment, the 250th District Court, Travis County, Amy Clark Meachum, J., entered summary judgment in favor of taxpayer, and following a bench trial, entered final judgment granting taxpayer a refund, declared that the statute was unconstitutional, but denied taxpayer's request for a permanent injunction. Taxpayer appealed and defendants cross-appealed.

Holdings: The Court of Appeals, Triana, J., held that:

[1] taxpayer's products did not qualify as "tobacco" under tax statute defining tobacco products;

[2] taxpayer's products were not a "tobacco substitute" under tax statute defining tobacco products; but

[3] taxpayer's claims for prospective declaratory and injunctive relief were rendered moot.

Affirmed in part and vacated in part.

Procedural Posture(s): On Appeal; Motion for Declaratory Judgment; Motion for Permanent Injunction; Motion for Summary Judgment.

West Headnotes (28)

[1] Summary Judgment

When both parties move for summary judgment on same issue, Court of Appeals considers summary-judgment evidence presented by both parties, determines all questions presented, and renders judgment that trial court should have rendered if Court concludes that trial court erred.

[2] Taxation

Taxpayer bears burden of proving entitlement to tax refund.

[3] Appeal and Error

When material facts are undisputed for summary judgment purposes, Court of Appeals interprets statute de novo.

[4] Statutes

To ascertain and give effect to the Legislature's intent when interpreting a statute, court enforces the plain meaning of statutory text, unless a different meaning is supplied by statutory definition, is apparent from the context, or the plain meaning would lead to an absurd or nonsensical result.

[5] Statutes

Court considers statutes as a whole, not their isolated provisions.

[6] **Statutes**

Courts presume that the Legislature selects the language in a statute with care and that it includes each word for a purpose and purposefully omits words not included.

[7] **Statutes**

Words that in isolation are amenable to two textually permissible interpretations are often not ambiguous in context.

[8] **Statutes**

If an undefined term in a statute has multiple common meanings, it is not necessarily ambiguous; rather, the court will apply the definition most consistent with the context of the statutory scheme.

[9] **Statutes**

When interpreting a statute, the court's inquiry is not whether the statute has an ambiguous scope, but whether the language itself is ambiguous.

[10] **Taxation**

If the language of a tax statute proves ambiguous, the court applies the ancient presumption in favor of the taxpayer: the reach of an ambiguous tax statute must be construed strictly against the taxing authority and liberally for the taxpayer.

[11] **Taxation**

Agency deference does not displace strict construction of a tax statute when the dispute is not over how much tax is due but, more fundamentally, whether the tax applies at all.

[12] **Statutes**

Although when construing statutes courts normally give an undefined term its ordinary meaning, the meaning must be in harmony and consistent with other statutory terms and if a different, more limited, or precise definition is apparent from the term's use in the context of the statute, courts apply that meaning.

[13] **Taxation**

Definition of "tobacco" that is most consistent with the statutory scheme for taxation of tobacco products is the leaves of cultivated tobacco plants that are prepared for use in smoking or chewing or as snuff. Tex. Tax Code Ann. §§ 155.001(15)(E), 161.081.

[14] **Taxation**

Nicotine isolate in taxpayer's oral nicotine products did not qualify as "tobacco," and thus was not a taxable tobacco product under tax statute defining tobacco products, which was defined as an article or product that is made of tobacco or a tobacco substitute; although nicotine isolate was a chemical that was found in and manufactured from tobacco plants, no tobacco leaves or other parts of the plant remained by the end of the manufacturing process that separated nicotine isolate from the plant and discarded tobacco waste, and process resulted in nicotine that had a purity of greater than 99%. Tex. Tax Code Ann. § 155.001(15)(E).

[15] **Statutes**

Courts take statutes as they find them and refrain from rewriting text chosen by the Legislature.

[16] **Statutes**

When the language of a statute is clear, it is not the judicial prerogative to go behind or around that language through the guise of construing it

to reach what the parties or courts might believe is a better result.

[17] **Taxation**

Nicotine isolate in taxpayer's oral nicotine products was not a "tobacco substitute," and thus was not a taxable tobacco product under tax statute defining tobacco products, which was defined as an article or product that is made of tobacco or a tobacco substitute; "tobacco substitute" meant something to take the place or function of tobacco leaves, and nicotine isolate could not replace tobacco leaves in a product because it did not have the same qualities as tobacco leaves. Tex. Tax Code Ann. § 155.001(15)(E).

[18] **Statutes**

In interpreting a statute, when a term unknown to law has particular or technical meaning as applied to some art, science or trade, court will look to particular craft in order to ascertain its proper significance. Tex. Gov't Code Ann. § 311.011(b).

[19] **Appeal and Error**

The Court of Appeals reviews de novo the application of the mootness doctrine.

[20] **Action**

The mootness doctrine applies to cases in which a justiciable controversy exists between the parties at the time the case arose, but the live controversy ceases because of subsequent events.

[21] **Appeal and Error**

A case can become moot at any time, including on appeal.

[22] **Taxation**

Taxpayer's claims for prospective declaratory and injunctive relief, which was based on its claims that its oral nicotine products were not "tobacco products" and thus not subject to taxation, and its facial and as-applied constitutional challenges to tax statute defining "tobacco products" as an article or product that is made of tobacco or a tobacco substitute, were rendered moot, and thus Court of Appeals lacked jurisdiction over taxpayer's claims; Court of Appeals held that the phrase "tobacco or a tobacco substitute" did not apply to taxpayer's oral nicotine products, and because taxpayer's products were not subject to taxation, it no longer suffered any actual or threatened restriction under the statute, and therefore, had no standing to pursue its constitutional claims. Tex. Tax Code Ann. § 155.001(15)(E).

[23] **Action**

When a case becomes moot, the court loses jurisdiction and cannot hear the case because any decision would constitute an advisory opinion.

[24] **Appeal and Error**

A case is not rendered moot simply because some of the issues become moot during the appellate process.

[25] **Action**

If only some claims or issues become moot, the case remains "live," at least as to other claims or issues that are not moot.

[26] **Action**

Standing is a prerequisite to subject-matter jurisdiction, and subject-matter jurisdiction is essential to a court's power to decide a case.

[27] **Constitutional Law**

To challenge constitutionality of statute, in addition to suffering some actual or threatened restriction under that statute, plaintiff must contend that statute unconstitutionally restricts plaintiff's rights, not somebody else's.

[28] Constitutional Law

A request for a declaratory judgment regarding the constitutional validity of an agency action is distinct from, and therefore not redundant to, a challenge to the correctness of the agency's action.

West Codenotes

Negative Treatment Vacated

Tex. Tax Code Ann. § 155.001(15)(E)

FROM THE 250TH DISTRICT COURT OF TRAVIS COUNTY, NO. D-1-GN-20-004023, THE HONORABLE AMY CLARK MEACHUM, JUDGE PRESIDING

Attorneys and Law Firms

Thales Smith, Alison Andrews, for Appellees.

Joshua Veith, Doug Sigel, for Appellant.

Before Justices Baker, Triana, and Kelly

OPINION

Gisela D. Triana, Justice

***1** The statutory-construction dispute in this tax-refund case requires us to determine the meaning of the words "tobacco" and "tobacco substitute" and to resolve a dispute over the difference between "made of" and "made from." The Tax Code defines "tobacco product" as, among other things, "an article or product that is made of tobacco or a tobacco substitute and that is not a cigarette or an e-cigarette as defined by Section 161.081, Health and Safety Code." Tex. Tax Code § 155.001(15)(E). The parties join issue over whether oral nicotine products that contain nicotine isolate manufactured from tobacco are "tobacco products" as defined by the statute.

Appellant and cross-appellee RJR Vapor Co., LLC sells oral nicotine products in the form of nicotine pouches and nicotine lozenges under the brand name VELO throughout Texas. When RJR Vapor introduced the products to Texas, it had concluded that the VELO products are not subject to the Cigars and Tobacco Products Tax. *See generally id.* §§ 155.001-.2415 (Cigars and Tobacco Products Tax). RJR Vapor believed this conclusion was supported by guidance on the Comptroller's website stating "[e]ven though nicotine is a component of tobacco, it does not meet the definition of tobacco." However, RJR Vapor later received guidance in a general information letter from the Comptroller that the VELO products are "tobacco products" under Section 155.001(15) because they contain "nicotine, which is an extract from the tobacco leaf." RJR Vapor then began paying the Cigars and Tobacco Products Tax under protest.

Soon thereafter, RJR Vapor sued appellees and cross-appellants Glenn Hegar, Comptroller of Public Accounts of the State of Texas; the Office of the Comptroller of Public Accounts of the State of Texas; and Ken Paxton, Attorney General of the State of Texas (collectively, "Comptroller") to recover the payments that it made under protest. *See id.* §§ 112.051-.060. In its suit, RJR Vapor also sought (1) a declaration that the language "made of tobacco or a tobacco substitute" within Texas Tax Code Section 155.001(15)(E) was unconstitutional and (2) a permanent injunction prohibiting the Comptroller from relying on that language to assess or collect the Cigars and Tobacco Products Tax.

On cross-motions for summary judgment, the trial court held that the products at issue are not "tobacco products" as defined by Tax Code Section 155.001(15). The trial court subsequently conducted a bench trial to resolve the refund amount owed to RJR Vapor and whether RJR Vapor was entitled to declaratory or injunctive relief. The trial court rendered judgment granting RJR Vapor a refund in the amount of $16,071.68. The trial court also declared in its judgment that the phrase "made of tobacco or a tobacco substitute" is unconstitutional both facially and as applied, but it denied RJR Vapor's request for a permanent injunction.

For the reasons discussed below, we affirm in part and vacate in part the trial court's judgment and dismiss RJR Vapor's declaratory and injunctive claims for lack of jurisdiction.

BACKGROUND

Statute and Products at Issue

***2** Texas imposes the Cigars and Tobacco Products Tax on tobacco products. The tax rates on cigars are different from the tax rates on other tobacco products. *Compare* Tex. Tax Code § 155.021 (tax imposed on cigars), *with id.* § 155.0211 (tax imposed on tobacco products other than cigars). The tax on tobacco products other than cigars is imposed "when a permit holder receives tobacco products other than cigars, for the purpose of making a first sale in this state." [1] *Id.* § 155.0211(a). As defined by the Tax Code,

> "[t]obacco product" means:
>
> (A) a cigar;
>
> (B) smoking tobacco, including granulated, plug-cut, crimp-cut, ready-rubbed, and any form of tobacco suitable for smoking in a pipe or as a cigarette;
>
> (C) chewing tobacco, including Cavendish, Twist, plug, scrap, and any kind of tobacco suitable for chewing;
>
> (D) snuff or other preparations of pulverized tobacco; or
>
> (E) an article or product that is **made of tobacco or a tobacco substitute** and that is not a cigarette or an e-cigarette as defined by Section 161.081, Health and Safety Code. [2]

Id. § 155.001(15) (emphasis added). At issue here is whether the VELO oral nicotine pouches and lozenges distributed by RJR Vapor in Texas are taxable "tobacco products" under Section 155.001(15).

RJR Vapor presented evidence with its summary-judgment motion that the VELO pouches and lozenges contain many ingredients, including nicotine isolate. [3] The pouches use porous fleece material to portion the powdered mixture of water, nicotine isolate, sucralose, citric acid, and flavoring ingredients. They are available in mint or citrus flavors containing two different amounts of nicotine isolate (2 mg or 4 mg). The lozenges come in hard or soft form, and their ingredients include isomalt, water, nicotine isolate, flavoring, and sodium chloride. They are available in four flavors (crema, berry, dark mint, and mint), and all contain a nicotine isolate content of approximately 1.7 mg. Product users place the products in their mouths and orally absorb the nicotine isolate and flavors over time (one to two hours for pouches; 15 minutes for lozenges).

***3** According to the affidavit of Dr. Charles Garner, an RJR Vapor employee and expert, "[t]he manufacturer of [the VELO products] purchases nicotine isolate (which is derived from tobacco) from third party vendors." [4] Garner attested that neither RJR Vapor nor the manufacturer of the VELO products "processes tobacco to make the nicotine isolate incorporated into [the VELO products]." [5] He attested that RJR Vapor "does not purchase, process, or handle tobacco at any point in the distribution" of the VELO products.

Garner attested that the general process employed by RJR Vapor's vendors to create nicotine isolate is as follows:

a. A tobacco mixture is extracted with water in a batch process. The raw water extract is subsequently extracted with an organic solvent. The resulting organic phase containing nicotine is separated and diluted, and sulfuric acid is added. The nicotine partitions in the water phase forming a 40% nicotine sulfate solution. The tobacco waste mixture is disposed of, most often given to farmers free of charge to be used as a soil enhancer. The nicotine sulfate solution is sold to another vendor for processing to make nicotine isolate.

b. Purchased nicotine sulfate solution is acidified with sulfuric acid. Some water is distilled off from the resulting solution and the residue is filtered. The filtrate is extracted with cyclohexane. The aqueous product layer, *i.e.*, aqueous nicotine sulfate solution, is treated with a sodium hydroxide solution under heating. The mixture is again extracted with cyclohexane. The aqueous layer is then discarded. From the organic layer, cyclohexane is distilled off. The remaining product is distilled under vacuum, then filtered producing nicotine isolate (with a purity of greater than 99%). The nicotine isolate is placed in drums or other containers for shipment to [RJR] Vapor LLC.

RJR Vapor's other two experts confirmed that after the process for making nicotine isolate is complete, the final product contains no part or traces of the tobacco leaf. Steve Terrell, the director of product development at Swedish Match, an RJR Vapor competitor, similarly described the steps of the chemical process used to extract nicotine isolate from tobacco. He attested, "[o]nce the chemical is extracted from

the tobacco, the final product (nicotine isolate) contains no traces or matter from the tobacco leaf except for the purified nicotine." Mark Triplett, partner and founder since 1986 of a tobacco-products consulting firm "that advises tobacco industry and government leaders on how to establish viable strategies for uniform application of state tobacco laws," who has assisted state legislatures in drafting tobacco-products taxation laws, attested that "[o]nce the nicotine is extracted from tobacco, the final product contains no tobacco leaf." Triplett further attested, "Nicotine is not 'tobacco'—nicotine is merely a chemical that can be found in tobacco."

The Comptroller's Guidance

***4** When RJR Vapor introduced the VELO products to Texas in 2015, its representatives researched whether the products would be subject to the Cigars and Tobacco Products Tax and concluded that the products should not be subject to the tax. However, to confirm that the products were not subject to the tax, RJR Vapor requested a General Information Letter from the Comptroller in 2018. In January 2019, the Comptroller sent RJR Vapor a General Information Letter stating that because the products contain nicotine, "which is an extract from the tobacco leaf," they meet the statutory definition of a tobacco product. RJR Vapor representatives subsequently met with the Comptroller's representatives to explain the novel products and RJR Vapor's position that they are not tobacco products as defined by the statute. At that meeting, the Comptroller's representatives indicated that the Comptroller's position remained the same—the products are taxable.

Procedural History

In August 2020, RJR Vapor filed its suit against the Comptroller in the trial court, seeking a refund of the tax paid under protest; declaratory judgment that the VELO products are not "tobacco products" and thus are not subject to the Cigars and Tobacco Products Tax; declaratory judgment that the statutory language "made of tobacco or a tobacco substitute" is unconstitutional, both facially and as applied; and permanent injunctive relief based on its constitutional claims.[6] Both sides moved for partial summary judgment on the issue of whether the VELO products are "tobacco products" as defined by Tax Code Section 155.001(15). The trial court ruled that the products are not "tobacco products."

The trial court subsequently conducted a trial to resolve the refund due to RJR Vapor, the constitutionality of the phrase "made of tobacco or a tobacco substitute" contained in Section 155.001(15), and RJR Vapor's right to permanent injunctive relief. At trial, the parties stipulated to the amount of refund due to RJR Vapor. After hearing testimony from three witnesses presented by RJR Vapor, the trial court rendered its final judgment granting RJR Vapor a refund in the amount of $16,071.68. In the (corrected) final judgment signed on April 4, 2022, the trial court ruled that the phrase "made of tobacco or a tobacco substitute" is unconstitutional both facially and as applied, but it denied RJR Vapor's request for a permanent injunction. The trial court later issued findings of fact and conclusions of law. This appeal and cross-appeal followed.

ANALYSIS

We turn first to the issues raised by the Comptroller in the cross-appeal, because our disposition of those issues will determine whether we need to reach the sole issue raised by RJR Vapor—whether the trial court erred by denying RJR Vapor's request for permanent injunctive relief after determining that the challenged phrase in Section 155.001(15)(E) is unconstitutional. In the cross-appeal, the Comptroller requests that we reverse the trial court's summary judgment and render judgment that the VELO pouches and lozenges are taxable "tobacco products," as defined in Section 155.001(15)(E). The Comptroller further requests that we reverse the trial court's constitutional declarations and render judgment that Section 155.001(15)(E) is constitutional on its face, as applied to VELO pouches and lozenges, and as enforced by the Comptroller. Alternatively, to the extent RJR Vapor's claim under the Equal and Uniform Clause is not a challenge to the validity of a statute, the Comptroller asks this Court to dismiss the claim for lack of jurisdiction.

If, however, we affirm the partial summary judgment that the VELO products are not taxable "tobacco products," the Comptroller asks that we render judgment that RJR Vapor's constitutional claims are moot and vacate the trial court's judgment on those claims.

I. Are the VELO products taxable products as defined by Section 155.001(15)(E)?

***5** We begin our analysis with the question at the heart of this appeal: Are the VELO nicotine pouches and lozenges "tobacco products"—that is, are they "made of tobacco or a tobacco substitute"? The Comptroller contends that the VELO products are "made of tobacco or a tobacco substitute" because they contain nicotine isolate, which the Comptroller asserts is processed tobacco or a product of tobacco, and thus, the products are "made of tobacco." Alternatively, the Comptroller asserts that the VELO products are "made of ... a tobacco substitute" because nicotine isolate is used in place of tobacco, as evidenced by RJR Vapor's promotion of the products as a cleaner alternative to other tobacco products such as snuff and chewing tobacco, which also contain nicotine. In response, RJR Vapor argues that the nicotine isolate in its VELO products is not "tobacco" within the plain meaning of that word because the nicotine isolate (and therefore the VELO products) contains no tobacco leaf, and thus the products are not "made of tobacco." RJR Vapor also contends that its products are not "made of a tobacco substitute" either under the plain meaning of the words "tobacco substitute" or as that phrase is used as a term of art within the tobacco industry.

A. Standard of review

[1] We review summary judgments de novo. *Barbara Techs. Corp. v. State Farm Lloyds*, 589 S.W.3d 806, 811 (Tex. 2019). When both parties move for summary judgment on the same issue, we consider the summary-judgment evidence presented by both parties, determine all questions presented, and render the judgment that the trial court should have rendered if we conclude that the trial court erred. *Id.* (citing *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005)). Here, the parties sought partial summary judgment on the issue of whether the VELO products are "tobacco products" as defined by Tax Code Section 155.001(15). Based on the trial court's holding that the VELO products are not "tobacco products" under the Tax Code, the trial court further held that RJR Vapor is entitled to a refund of the Cigars and Tobacco Products Tax paid.

[2] **[3]** The taxpayer bears the burden of proving entitlement to a tax refund. *Hegar v. Health Care Serv. Corp.*, 652 S.W.3d 39, 43 (Tex. 2022). When the material facts are undisputed, we interpret the statute de novo. *Id.*

[4] **[5]** **[6]** "As in any statutory interpretation case, '[o]ur objective is to ascertain and give effect to the Legislature's intent.' " *Id.* (quoting *In re D.S.*, 602 S.W.3d 504, 514 (Tex. 2020)). To do so, we enforce the plain meaning of statutory text, "unless a different meaning is supplied by statutory definition, is apparent from the context, or the plain meaning would lead to an absurd or nonsensical result." *Beeman v. Livingston*, 468 S.W.3d 534, 538 (Tex. 2015); *see also Texas Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004) ("If the statutory language is unambiguous, we must interpret it according to its terms, giving meaning to the language consistent with other provisions in the statute."). We consider statutes as a whole, not their isolated provisions. *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011). Words and phrases must be "read in context and construed according to the rules of grammar and common usage." Tex. Gov't Code § 311.011(a). We presume that the Legislature selects the language in a statute with care and that it includes each word for a purpose and purposefully omits words not included. *TGS-NOPEC*, 340 S.W.3d at 439.

[7] **[8]** **[9]** **[10]** **[11]** "Words that in isolation are amenable to two textually permissible interpretations are often not ambiguous in context." *Health Care Serv. Corp.*, 652 S.W.3d at 43. "If an undefined term has multiple common meanings, it is not necessarily ambiguous; rather, we will apply the definition most consistent with the context of the statutory scheme." *Southwest Royalties, Inc. v. Hegar*, 500 S.W.3d 400, 405-06 (Tex. 2016). "[O]ur inquiry is not whether the statute has an ambiguous scope, but whether the language itself is ambiguous." *Health Care Serv. Corp.*, 652 S.W.3d at 43. If the language of the statute proves ambiguous, however, we apply the ancient presumption in favor of the taxpayer: "The reach of an ambiguous tax statute must be construed 'strictly against the taxing authority and liberally for the taxpayer.' " *TracFone Wireless, Inc. v. Commission on State Emergency Commc'ns*, 397 S.W.3d 173, 182 (Tex. 2013) (quoting *Morris v. Houston Indep. Sch. Dist.*, 388 S.W.3d 310, 313 (Tex. 2012) (per curiam)); *see also Health Care Serv. Corp.*, 652 S.W.3d at 43. "[A]gency deference does not displace strict construction when the dispute is not over how much tax is due but, more fundamentally, whether the tax applies at all." *TracFone Wireless*, 397 S.W.3d at 182-83.

B. Are the VELO products "made of tobacco"?

***6** As an initial matter, we consider the plain meaning of the word "tobacco." The Legislature did not define "tobacco." The Comptroller argues that the statute differentiates between "raw tobacco" and processed tobacco by defining raw tobacco as "any part of the tobacco plant, including the tobacco leaf or stem, that is harvested from the ground and is not a tobacco product as the term is defined in this chapter." Tex. Tax Code § 155.001(13-a). Thus, the Comptroller argues, the tobacco in a taxable "tobacco product" refers to processed tobacco as opposed to raw tobacco, and moreover, the processing of the tobacco is implicit in the concept of a "tobacco product." The Comptroller contends that the nicotine isolate in the VELO products is "tobacco" because it is tobacco "that has been processed to concentrate its native nicotine."

RJR Vapor, on the other hand, urges that the plain meaning of the word "tobacco" is the leaf of the tobacco plant, relying on several dictionary definitions that include descriptions of the leaf of the tobacco plant as one of the meanings of "tobacco." For example, it cites *Merriam-Webster*, which includes "the leaves of cultivated tobacco prepared for use in smoking or chewing or as snuff" and "manufactured products of tobacco (such as cigars or cigarettes)" as definitions, and the *Compact Oxford English Dictionary*, which includes "the dried nicotine-rich leaves of an American plant, used for smoking or chewing" as a definition. *Tobacco*, MERRIAM-WEBSTER.COM, last visited December 4, 2023; *Tobacco*, COMPACT OXFORD ENGLISH DICTIONARY (3rd ed. 2008). Accordingly, RJR Vapor contends that these definitions demonstrate that the plain meaning of the word "tobacco" is the leaf of the tobacco plant. RJR Vapor argues that the VELO products therefore do not contain tobacco because while the powdered form of nicotine isolate in the VELO products is manufactured from tobacco, it could theoretically be manufactured from any plant in the nightshade family, and as its experts attested, the VELO products contain no tobacco leaves or any other portion of the tobacco plant.

[12] The Comptroller contends that the nicotine isolate in the VELO products is "tobacco" under the Tax Code because it is manufactured from tobacco, while RJR Vapor contends that it is not because no part of the tobacco plant remains in the nicotine isolate once the manufacturing process for separating the nicotine isolate from the tobacco plant is complete. Although when construing statutes we normally give an undefined term, like "tobacco" is here, its ordinary meaning, "the meaning must be in harmony and consistent with other statutory terms and '[i]f a different, more limited, or precise definition is apparent from the term's use in the context of the statute, we apply that meaning.' " *Southwest Royalties*, 500 S.W.3d at 405 (quoting *State v. $1,760.00 in U.S. Currency*, 406 S.W.3d 177, 180 (Tex. 2013)). In this situation, we must examine the context of the Cigars and Tobacco Products Tax to determine what definition of "tobacco" is most consistent with the statutory scheme and whether nicotine isolate qualifies as "tobacco." *See id.*

[13] The other tobacco products covered by the Cigars and Tobacco Products Tax all contain "the leaves of cultivated tobacco prepared for use in smoking or chewing or as snuff." *Tobacco*, MERRIAM-WEBSTER.COM, last visited December 4, 2023; *see* Tex. Tax Code § 155.001(15)(A)-(D) (establishing cigars, smoking tobacco, chewing tobacco, and "snuff or other preparations of pulverized tobacco" as "tobacco products"). Although the Comptroller is correct that the statute distinguishes between "raw tobacco" and "tobacco products" and that the concept of "tobacco products" necessarily incorporates "tobacco" that has been prepared or processed in some way, that does not resolve either the question of how "tobacco" should be defined or the question of whether nicotine isolate is "tobacco." Reading Section 155.001(15)(E) in context with the other tobacco products described in Section 155.001(15), we conclude that the definition of "tobacco" that is most consistent with the statutory scheme is the leaves of cultivated tobacco plants that are prepared for use in smoking or chewing or as snuff.

***7** **[14]** Under this definition, the nicotine isolate in the VELO products does not qualify as "tobacco." While the nicotine isolate in the products is extracted from tobacco, no tobacco leaves or other parts of the tobacco plant remain as part of the nicotine isolate by the end of the manufacturing process. [7] RJR Vapor submitted evidence, and the parties agree, that this process results in nicotine isolate that has a purity greater than 99%. While the Comptroller contends that the nicotine isolate is "tobacco" "because it is tobacco that has been processed to concentrate its native nicotine," and "[t]his processed tobacco is an ingredient in VELO products," the evidence reflects that the VELO products do not contain "tobacco" as that term is used in the statute, i.e., tobacco leaves prepared for oral use. Instead, they contain nicotine isolate, which is extracted from tobacco by a process that separates it from the tobacco plant and in which the tobacco waste is discarded. To put it simply, "tobacco" and "nicotine" are not synonymous. Nicotine is a chemical found in tobacco,

but no part of the tobacco plant remains in nicotine isolate after the extraction process is complete.

The Comptroller also contends, based on this processing of tobacco to extract the nicotine isolate from the plant, that the VELO products are "made of" tobacco. The Comptroller asserts that the nicotine isolate is "tobacco" because the tobacco "has been processed to concentrate its native nicotine."[8] RJR Vapor argued on summary judgment and continues to urge on appeal that even though the nicotine isolate in the VELO products comes from tobacco plants, the VELO products are not "made of" tobacco. Instead, RJR Vapor contends, at best, the nicotine isolate in the products suggests only that the products are "made from" tobacco.

Courts must construe statutes according to the rules of grammar and common usage. *See* Tex. Gov't Code § 311.011(a). According to these rules, the phrases "made of" and "made from" convey different meanings. As the *Cambridge Dictionary* explains, "We use *made of* when we talk about the basic material or qualities of something. It has a meaning similar to "composed of ...."[9] And "[w]e often use *made from* when we talk about how something is manufactured."[10] RJR Vapor cites a number of print and online usage experts who concur with this explanation and further describe the distinction between "made of" and "made from." To expand on the *Cambridge Dictionary* usage explanation, when an object is "made of" a substance, that substance stays fundamentally the same when the object is made. To give a few examples, books are *made of* paper, a jacket is *made of* leather, and a shirt is *made of* polyester. Alternatively, when an object is "made from" a substance, that substance is changed, typically through some sort of chemical or mechanical process, to make the object. Thus, paper is *made from* trees, leather is *made from* cows' hides, and polyester is *made from* oil.

[15] **[16]** We presume that the Legislature purposefully used "made of" instead of "made from" in its definition of "tobacco product" and that it purposefully omitted "nicotine" from its definition. *See TGS-NOPEC*, 340 S.W.3d at 439. The Legislature could choose to define "tobacco product" more similarly to the federal government's definition, but it has not. *See* 21 U.S.C.A. § 321(rr)(1) (West) (defining "tobacco product" as "any product *made or derived from tobacco, or containing nicotine from any source*, that is intended for human consumption, including any component, part, or accessory of a tobacco product (except for raw materials other than tobacco used in manufacturing a component, part, or accessory of a tobacco product)" (emphasis added)). Likewise, the Legislature has demonstrated in its definition of "hemp" that it knows how to outline the parameters of products derived from a plant and to make the definition expansive when it wants to. *See* Tex. Agric. Code § 121.001 (defining "hemp" as "the plant Cannabis sativa L. and any part of that plant, including the seeds of the plant and *all derivatives*, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis" (emphasis added)). We take statutes as we find them and refrain from rewriting text chosen by the Legislature. *Pedernal Energy, LLC v. Bruington Eng'g, Ltd.*, 536 S.W.3d 487, 492 (Tex. 2017). "[W]hen the language of a statute is clear, it is not the judicial prerogative to go behind or around that language through the guise of construing it to reach what the parties or we might believe is a better result."[11] *Texas Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 640 (Tex. 2010).

***8** We conclude that the VELO products are not "made of tobacco." The nicotine isolate in the products is neither "tobacco" under the plain meaning of the word nor "made of" tobacco because even when it is derived from tobacco, no part of the tobacco plant remains in the isolate—the isolate is a chemically pure substance that has been separated from the plant parts, and the plant waste has been discarded.

C. Are the VELO products "made of ... a tobacco substitute"?

[17] Again, we begin by examining the plain and common meaning of the phrase "tobacco substitute." We have already determined that the word "tobacco" as used in the Cigars and Tobacco Products Tax is "the leaves of cultivated tobacco prepared for use in smoking or chewing or as snuff." *Tobacco*, MERRIAM-WEBSTER.COM, last visited December 4, 2023. A "substitute" is defined as "a person or thing that takes the place or function of another." *Substitute*, MERRIAM-WEBSTER.COM, last visited December 4, 2023. Thus, a "tobacco substitute" must be something that takes the place or function of "tobacco"; that is, the leaves of cultivated tobacco prepared for use in smoking or chewing or as snuff.

The Comptroller asserts that the nicotine isolate in the VELO products is a substitute for tobacco "because it replaces more traditional forms of tobacco as a source of nicotine." The thrust of the Comptroller's argument is that because nicotine

is addictive, a tobacco user seeking a substitute product will seek out only products containing nicotine, and thus, the nicotine isolate in the VELO products acts as a substitute for tobacco. The Comptroller contends that RJR Vapor itself promotes the VELO products as an alternative to tobacco and submitted RJR Vapor's marketing materials promoting the brand in this way as summary-judgment evidence. Those materials show that RJR Vapor markets the products as "tobacco-leaf free" and as similar to tobacco products like dip, snuff, or chewing tobacco but less obtrusive to others around the product user. The Comptroller points in particular to a chart in RJR Vapor's marketing materials comparing three different product options: VELO, snus (a smokeless moist powder tobacco pouch), and dip (also known as snuff; a shredded, moistened smokeless tobacco product). The chart shows that the only similarities between the three products are that they are all smoke-free and contain nicotine. While this chart shows that consumers have different choices available to them for the consumption of smoke-free *nicotine*, it does not establish that nicotine isolate is a substitute for *tobacco*, especially as that term is used within the larger context of the Cigars and Tobacco Products Tax.

As we explained in our discussion of "tobacco" above, the other tobacco products taxed under the statute all contain "the leaves of cultivated tobacco prepared for use in smoking or chewing or as snuff." *Tobacco*, MERRIAM-WEBSTER.COM, last visited December 4, 2023; *see* Tex. Tax Code § 155.001(15)(A)-(D) (establishing cigars, smoking tobacco, chewing tobacco, and "snuff or other preparations of pulverized tobacco" as "tobacco products"). Considering the context of the other products covered by the tax, and based on the plain meaning of the text, we cannot conclude that the Legislature's intent is to tax products that do not contain a substitute for tobacco leaves. *See Sunstate Equip. Co. v. Hegar*, 601 S.W.3d 685, 690 (Tex. 2020) ("Unless the statute provides a separate definition, we presume that the Legislature meant to use the ordinary meaning of a word, with each term 'interpreted consistently in every part of [the] act.' " (quoting *Texas Dep't of Transp. v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002) (citation omitted)). The process of making nicotine isolate removes all parts of the tobacco leaf, leaving only the concentrated chemical compound of nicotine. The Comptroller's argument that nicotine isolate is a substitute for tobacco leaves requires us to assume that nicotine is the *only* reason consumers use tobacco products. The number and variety of tobacco products on the market disproves that assumption. If consumers cared only about obtaining nicotine, then the source would not matter. [12] Moreover, we presume that the Legislature purposefully omitted any words not included in the statute, and as previously noted, the Legislature omitted any reference to nicotine in the Cigars and Tobacco Products Tax. *See TGS-NOPEC*, 340 S.W.3d at 439.

***9** We conclude that nicotine isolate cannot replace tobacco leaves in a product because nicotine isolate does not have the same qualities as tobacco leaves. This conclusion is further supported by RJR Vapor's summary-judgment evidence introduced through its experts that the industry defines a "tobacco substitute" as follows:

> formed of *readily available materials* ... which is low in tars and *relatively free of nicotine*; which is low in poly-cyclics and carbonyls and is thus *characterized by good taste and aroma*; *which can be mixed in wide proportions with cured tobacco without noticeable change in the smoking characteristics of the resulting products*; which has strength, feel and mass integrity characteristics of conventionally cured tobacco *to enable processing* with conventional equipment and conventional materials *in the manufacture of cigars and cigarettes*; and *in which there is little if any deviation in the smoking characteristics, taste, and aroma from conventional cured tobacco.* [13]

(Emphases added.) Both Garner and Triplett attested that the tobacco industry began using the term "tobacco substitute" in the 1960s to describe materials that could be used as a replacement for tobacco leaves in cigarettes. [14] RJR Vapor also relies on evidence of the health organization Physicians for a Smoke-Free Canada's definition of "tobacco substitute," which similarly describes a variety of nontobacco cigarette filler materials that have been used to replace tobacco leaves in cigarettes. [15] Triplett attested that there are a variety of other plants that have been used as a "tobacco substitute" for

smoking, including hemp cigarettes, clove cigarettes, herbal cigarettes, and lettuce cigarettes.

[18] When "[w]ords and phrases ... have acquired a technical or particular meaning, whether by legislative definition or otherwise," we must construe them according to that meaning. Tex. Gov't Code § 311.011(b). "[W]hen a term unknown to the law has a particular or technical meaning as applied to some art, science or trade, the court will look to the particular craft in order to ascertain its proper significance." *E.g., Texas Health Harris Methodist Hosp. Fort Worth v. Featherly*, 648 S.W.3d 556, 567 (Tex. App.—Fort Worth 2022, pet. denied) (quoting *State v. Kaiser*, 822 S.W.2d 697, 700 (Tex. App.—Fort Worth 1991, pet. ref'd)); *Lloyd A. Fry Roofing Co. v. State*, 541 S.W.2d 639, 642 (Tex. App.—Dallas 1976, writ ref'd n.r.e.) (noting that when "a technical term is not defined in the statute, courts have interpreted the statutes in the light of the testimony of expert witnesses familiar with the particular art, science, or trade").

***10** In this case, under both the plain meaning and the technical meaning advocated by RJR Vapor, we construe "tobacco substitute" to mean something to take the place or function of tobacco leaves and conclude that nicotine isolate is not a "tobacco substitute." Accordingly, we conclude that the VELO products are not "made of ... a tobacco substitute." [16]

Having concluded that the VELO products are neither made of tobacco or a tobacco substitute, we hold that they are not taxable tobacco products as defined by Section 155.001(15) and affirm the trial court's ruling on partial summary judgment that was incorporated in the final judgment. We overrule the Comptroller's first issue on cross-appeal.

II. Are RJR Vapor's constitutional challenges to the statute moot because Section 155.001(15)(E) does not apply to the VELO products?

[19] **[20]** **[21]** **[22]** We turn next to the Comptroller's fifth issue on cross-appeal and consider whether our holding that the VELO products are not subject to the Cigars and Tobacco Products Tax renders RJR Vapor's constitutional claims moot. [17] We review de novo the application of the mootness doctrine. *Heckman v. Williamson County*, 369 S.W.3d 137, 149-50 (Tex. 2012). "The mootness doctrine applies to cases in which a justiciable controversy exists between the parties at the time the case arose, but the live controversy ceases because of subsequent events." *Matthews v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416, 418 (Tex. 2016). A case can become moot at any time, including on appeal. *See* *Heckman*, 369 S.W.3d at 166-67.

[23] **[24]** **[25]** When a case becomes moot, the court loses jurisdiction and cannot hear the case because any decision would constitute an advisory opinion. *State ex rel. Best v. Harper*, 562 S.W.3d 1, 6 (Tex. 2018). However, "[a] case is not rendered moot simply because some of the issues become moot during the appellate process." *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 737 (Tex. 2005) (orig. proceeding). "If only some claims or issues become moot, the case remains 'live,' at least as to other claims or issues that are not moot." *State ex rel. Best*, 562 S.W.3d at 6. Thus, we may consider whether our holding on one issue has rendered other issues moot on appeal.

***11** **[26]** In essence, the Comptroller argues that because we have determined that the VELO products are not subject to the Cigars and Tobacco Products Tax, RJR Vapor no longer suffers an actual or threatened restriction under the statute, and thus it no longer has standing to maintain its constitutional challenges to Section 155.001(15)(E) or request injunctive relief from application of the tax, rendering those claims moot. *See* *Texas Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 517-18 (Tex. 1995) (explaining that standing, "a necessary component of subject matter jurisdiction, requires a) a real controversy between the parties, which b) will be actually determined by the judicial declaration sought" (citing *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993))). We are duty-bound to determine whether RJR Vapor has standing to maintain these claims on appeal because "standing is a 'prerequisite to subject-matter jurisdiction, and subject-matter jurisdiction is essential to a court's power to decide a case.' " *Garcia v. City of Willis*, 593 S.W.3d 201, 206 (Tex. 2019) (quoting *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553-54 (Tex. 2000)). Otherwise, we risk issuing an advisory opinion, which would violate both separation-of-powers principles and the open-courts provision of our Texas Constitution. *Id.*

[27] To challenge the constitutionality of a statute, in addition to suffering some actual or threatened restriction under that statute, "the plaintiff must contend that the statute

unconstitutionally restricts the *plaintiff's* rights, not somebody else's." *Garcia*, 893 S.W.2d at 518. In this case, RJR Vapor has asserted both a facial challenge and an as-applied challenge to the statue. Under its facial challenge, it "contends that the statute, by its terms, always operates unconstitutionally," and thus, it is necessarily contending that the statute operates unconstitutionally as to it. *Id.* Under its as-applied challenge, RJR Vapor argues that even if the statute is generally constitutional, it operates unconstitutionally as to RJR Vapor's VELO products. *See id.* at 518 n.16. Under both types of challenges, because RJR Vapor is contending that Section 155.001(15)(E) operates unconstitutionally as to it, it must demonstrate that it is suffering some actual or threatened restriction under the challenged statute to establish its standing to seek declaratory and injunctive relief. *See id.* at 518; *see also City of Willis*, 593 S.W.3d at 206 ("A plaintiff has standing to seek prospective relief only if he pleads facts establishing an injury that is 'concrete and particularized, actual or imminent, not hypothetical.' " (quoting *Heckman*, 369 S.W.3d at 155)). The Comptroller contends that RJR Vapor cannot show a concrete, actual or imminent injury now that we have determined that the VELO products are not taxable tobacco products under Section 155.001(15).

[28] In response, RJR Vapor asserts that its constitutional claims are not moot even if the VELO products are not taxable tobacco products because the UDJA provides prospective relief rather than the retrospective relief available under Chapter 112 of the Tax Code and thus its UDJA claims do not seek a redundant remedy. However, this argument does not address RJR Vapor's lack of standing to maintain its constitutional claims. While it is well settled that "[a] request for a declaratory judgment regarding the constitutional validity of an agency action is distinct from, and therefore not redundant to, a challenge to the correctness of the agency's action," in light of our decision that the statute does not apply to the VELO products, RJR Vapor cannot establish that it is suffering any actual or threatened injury from application of the Cigars and Tobacco Products Tax. *Austin Eng'g Co. v. Combs*, No. 03-10-00323-CV, 2011 WL 3371557, at *9 (Tex. App.—Austin Aug. 5, 2011, no pet.) (mem. op.) (declining to address Austin Engineering's constitutional claims "as those claims may subsequently be rendered moot by proceedings in the trial court" because court was remanding to trial court for determination of fact question on issue of whether tax exemption applied to Austin Engineering). To the extent that RJR Vapor argues that it has a "concrete interest" in obtaining prospective relief because Chapter 112 of the Tax Code only provides retrospective relief, we conclude it cannot show a need for prospective relief when we have held that the Cigars and Tobacco Products Tax does not apply to the VELO products.

***12** RJR Vapor further argues that its constitutional claims cannot be moot because the Comptroller likely will appeal any decision granting RJR Vapor a refund. In support, it cites the Texas Supreme Court's statement in *Matthews* that a party's "stance is a significant factor in the mootness analysis, and one which prevents its mootness argument from carrying much weight." 484 S.W.3d at 419. However, the facts in *Matthews* differ from the facts before us in this case. In *Matthews*, the Texas Supreme Court analyzed whether a school district's voluntary cessation of the challenged conduct rendered the challenging parties' claims for prospective declaratory and injunctive relief moot. *Id.* at 417-20. The court held that the school district's voluntary abandonment of its challenged policy provided no assurance that the district would not reinstate its policy in the future, and thus it had not carried its burden of persuading the court that the challenged conduct could not reasonably be expected to recur in the future. *Id.* at 418-20.

In this case, the Comptroller has not voluntarily abandoned its interpretation of Section 155.001(15)(E) and its application of the Cigars and Tobacco Products Tax to the VELO products. Instead, we have ruled as a matter of law that the statute does not apply to the VELO products. Therefore, going forward, the Comptroller's application of the Cigars and Tobacco Products Tax will be constrained by this Court's interpretation of the statute.[18] *See, e.g., Houston Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 163 (Tex. 2016) ("[A]s a general rule, 'a public officer has no discretion or authority to misinterpret the law.' " (quoting *In re Smith*, 333 S.W.3d 582, 585 (Tex. 2011) (orig. proceeding))).

We conclude that because we have held that the VELO products are not subject to the Cigars and Tobacco Products Tax, RJR Vapor is no longer suffering any actual or threatened restriction under the statute, and therefore, it has no standing

to pursue its constitutional claims. Accordingly, we hold that RJR Vapor's claims for prospective declaratory and injunctive relief based on its constitutional challenges to the phrase "made of tobacco or a tobacco substitute" have been rendered moot by our holding that the phrase does not apply to the VELO products and thus they are not taxable tobacco products. We sustain the Comptroller's fifth issue presented on cross-appeal. We vacate the trial court's judgment on the moot issues and dismiss RJR Vapor's claims for declaratory and injunctive relief for lack of jurisdiction. *See* *Heckman*, 369 S.W.3d at 162.

Having determined that RJR Vapor's claims for prospective relief have been rendered moot by our holding that Section 155.001(15)(E) does not apply to the VELO products, and that we therefore lack jurisdiction over those claims, we also lack jurisdiction to consider the Comptroller's three issues challenging the trial court's ruling that the language "made of tobacco or a tobacco substitute" is unconstitutional or RJR Vapor's sole appellate issue that the trial court erred by denying its request for permanent injunctive relief.

CONCLUSION

***13** We affirm that portion of the trial court's judgment concluding that the phrase "made of tobacco or a tobacco substitute" within Tax Code Section 155.001(15)(E) does not apply to the VELO products and thus they are not taxable tobacco products. We also affirm that portion of the trial court's judgment requiring the Comptroller to issue a refund with interest to RJR Vapor. We vacate the portions of the trial court's judgment declaring the phrase "made of tobacco or a tobacco substitute" unconstitutional within Tax Code Section 155.001(15)(E) and denying RJR Vapor's request for a permanent injunction. We dismiss RJR Vapor's claims for declaratory and injunctive relief for want of jurisdiction.

All Citations

--- S.W.3d ----, 2023 WL 8631705

Footnotes

1 The Tax Code establishes that "[a] person may not engage in business as a distributor, wholesaler, bonded agent, interstate warehouse, manufacturer, export warehouse, importer, or retailer [of or for tobacco products] unless the person has applied for and received the applicable permit from the comptroller." *See* Tex. Tax Code § 155.041(a); *see also id.* § 155.001(1), (6), (7), (9), (9-a), (10), (14), (16) (defining "bonded agent," "distributor," "export warehouse," "importer," "interstate warehouse," "manufacturer," "retailer," "wholesaler" for purposes of Cigars and Tobacco Products Tax).

2 A "cigarette" is defined as "a roll for smoking: (A) that is made of tobacco or tobacco mixed with another ingredient and wrapped or covered with a material other than tobacco; and (B) that is not a cigar." Tex. Health & Safety Code § 161.081(1) (employing same definition found in Texas Tax Code Section 154.001(2)). "Cigarettes" are taxed under the Cigarette Tax established in Chapter 154 of the Tax Code. Under the Health & Safety Code, "e-cigarette" means electronic cigarettes or other devices "that simulate[ ] smoking by using a mechanical heating element, battery, or electronic circuit to deliver nicotine or other substances to the individual inhaling from the device" or "a consumable liquid solution or other material aerosolized or vaporized during the use of an electronic cigarette or other device described by this subdivision." *Id.* § 161.081(1-a)(A). E-cigarettes are not currently taxed under either the Cigarette Tax or the Cigars and Tobacco Products Tax.

3 Among other evidence, RJR Vapor submitted affidavit evidence from three tobacco-industry experts.

4 Garner is "an expert in toxicology, tobacco product, [oral nicotine product,] and [nicotine replacement therapy] design and modification, and tobacco product, [oral nicotine product,] and [nicotine replacement therapy] testing and evaluation." He has a B.S. in biology, an M.S. in occupational and environmental health with a focus in toxicology and industrial hygiene, and a Ph.D. in pharmaceutical sciences with a focus in toxicology and pharmacology; he has worked in the tobacco industry for over 25 years.

5 Garner explained that while "[n]icotine is a naturally occurring constituent of tobacco," it is also found in "other members of the nightshade (*Solanaceae*) family of plants, which includes eggplants, tomatoes, potatoes and peppers." He further attested that "[o]n a commercial scale, tobacco plants are the preferred plant for obtaining nicotine isolate due to the relatively high concentrations of nicotine in tobacco plants."

6 Based on the January 2019 General Information Letter and the guidance from the Comptroller's representatives, RJR Vapor began paying the Cigars and Tobacco Products Tax under protest beginning in June 2020.

7 Moreover, RJR Vapor presented evidence that nicotine isolate could also be manufactured from other plants containing nicotine, like eggplants and tomatoes. In its isolate form, no part of the plant from which the nicotine came remains. A consumer cannot identify the plant source of the nicotine in the VELO products because no plant parts are in the products.

8 We note that RJR Vapor presented summary-judgment evidence that the Comptroller took a contrary position on the Comptroller's website when providing guidance about whether e-cigarettes were tobacco products (before the Legislature specifically excepted them out of the "tobacco product" definition in 2019). The website stated, "E-cigarettes containing nicotine are not subject to the tobacco tax. *Even though nicotine is a component of tobacco, it does not meet the definition of tobacco.*" (Emphasis added.)

9 Grammar entry for *made from, made of, made out of, made with*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/grammar/british-grammar/made-from-made-of-made-out-of-made-with (last visited December 4, 2023).

10 *Id.*

11 We acknowledge the Comptroller's concern that a decision that nicotine isolate is not a "tobacco product" within the meaning of Section 155.001(15) may cause oral nicotine products like the VELO products not to be regulated under the Health and Safety Code, which incorporates the Tax Code's definition of "tobacco product" for regulatory purposes. However, in the absence of some indication in either code that the Legislature intended "tobacco" to mean "nicotine," we are obliged to construe the word according to its plain meaning. *See* *Texas Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 637 (Tex. 2010) ("Courts are not responsible for omissions in legislation, but we are responsible for a true and fair interpretation of the law as it is written.... [We] are not empowered to 'fix' the mistake by disregarding direct and clear statutory language that does not create an absurdity." (citations omitted)).

We likewise note that bills have been introduced in the Legislature to tax "nicotine products," but in the absence of passage of those bills, we decline to speculate on whether they are intended to codify or clarify existing law or to create new law. *See* *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 443 (Tex. 2009) (Generally, "we attach no controlling significance to the Legislature's failure to enact [legislation]." (alteration in original) (quoting *Texas Emp. Comm'n v. Holberg*, 440 S.W.2d 38, 42 (Tex. 1969))).

12 By way of analogy, caffeine is another addictive substance that consumers seek out in many different forms. Coffee, tea, sodas, and energy drinks are all products containing caffeine, each with its devoted fans but

each with different flavor profiles and effects. The analogy is not a perfect one because the caffeine in those products comes from different sources, but it illustrates the idea that something more goes into a consumer's choice of product than the desire for the concentrated chemical it contains.

13 MARSHALL SITTIG, *Tobacco Substitutes, in* CHEMICAL TECH. REV. No. 67 1, 1-2 (1976).

14 Garner attested as follows:

> The primary purpose of tobacco substitutes is to replace some of the tobacco in cigarettes with the objective of reducing the yield of toxic compounds that are inherently produced when tobacco is burned, while maintaining the taste and sensory aspects of tobacco smoke. The most significant efforts to develop tobacco substitutes were undertaken by cigarette manufacturers, private industry, government and the public health community between the 1960s and 1980s. Scientists within the tobacco industry investigated hundreds of plants including vegetables, grains, and carbonaceous materials, in search of tobacco substitutes.

15 *Tobacco substitute, Nontobacco smoking material*, DICTIONARY OF TOBACCO TERMS, Physicians for a Smoke-Free Canada (1999).

16 To the extent that the Comptroller argues that the VELO products are a "product that is ... a tobacco substitute," as opposed to a "product that is made of ... a tobacco substitute," we disagree with that reading of the statutory language. Tex. Tax Code § 155.001(15)(E). "When there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series," a principle known as the series-qualifier canon. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012). In this case, "made of" applies to both "tobacco" and "a tobacco substitute." In addition, as discussed above, because the VELO products do not contain tobacco leaves or any substance that takes the place or function of tobacco leaves, they cannot be a tobacco substitute under Section 155.001(15)(E).

17 The Comptroller contended in its amended second plea to the jurisdiction that the trial court's summary-judgment ruling that the VELO products are not "tobacco products" under the statute had rendered RJR Vapor's constitutional claims moot and not justiciable. It further argued that the UDJA did not authorize RJR Vapor's requested declaratory relief because that statute authorizes only those "whose rights, status, or other legal relations are affected by a statute" to seek a determination of the construction or validity of that statute. Tex. Civ. Prac. & Rem. Code § 37.004(a). The trial court denied the Comptroller's plea to the jurisdiction.

18 While RJR Vapor is correct that the Comptroller may seek review of our opinion at the Texas Supreme Court, we nevertheless may not issue an advisory opinion on RJR Vapor's claims for prospective relief. *See Garcia v. City of Willis*, 593 S.W.3d 201, 206-08 (Tex. 2019).

TAB E:
COURT OF APPEALS' JUDGMENT

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

JUDGMENT RENDERED DECEMBER 14, 2023

NO. 03-22-00188-CV

Appellant, RJR Vapor Co., LLC// Cross-Appellants, Glenn Hegar, Comptroller of Public Accounts of the State of Texas; the Office of the Comptroller of Public Accounts of the State of Texas; and Ken Paxton, Attorney General of the State of Texas

v.

Appellees, Glenn Hegar, Comptroller of Public Accounts of the State of Texas; the Office of the Comptroller of Public Accounts of the State of Texas; and Ken Paxton, Attorney General of the State of Texas// Cross-Appellee, RJR Vapor Co., LLC

APPEAL FROM THE 250TH DISTRICT COURT OF TRAVIS COUNTY
BEFORE JUSTICES BAKER, TRIANA AND KELLY
AFFIRMED IN PART, VACATED IN PART, DISMISSED IN PART –
OPINION BY JUSTICE TRIANA

This is an appeal from the judgment signed by the trial court on April 4, 2022. Having reviewed the record and the parties' arguments, the Court holds that there was error in the trial court's judgment. Therefore, the Court affirms in part, vacates in part, and dismisses for want of jurisdiction in part the trial court's judgment. The Court affirms that portion of the trial court's judgment concluding that the phrase "made of tobacco or a tobacco substitute" within Texas Tax Code Section 155.001(15)(E) does not apply to the VELO products and thus they are not taxable tobacco products. The Court also affirms that portion of the trial court's judgment requiring the Comptroller to issue a refund with interest to RJR Vapor. The Court vacates the portions of the

trial court's judgment declaring the phrase "made of tobacco or a tobacco substitute" unconstitutional within Tax Code Section 155.001(15)(E) and denying RJR Vapor's request for a permanent injunction. The Court dismisses RJR Vapor's claims for declaratory and injunctive relief for want of jurisdiction. Each party shall bear its own costs relating to this appeal, both in this Court and in the court below.

TAB F:
TEXAS TAX CODE § 155.001

Texas Tax Code § 155.001.

In this chapter:

. . .

(15) "Tobacco product" means:

(A) a cigar;

(B) smoking tobacco, including granulated, plug-cut, crimp-cut, ready-rubbed, and any form of tobacco suitable for smoking in a pipe or as a cigarette;

(C) chewing tobacco, including Cavendish, Twist, plug, scrap, and any kind of tobacco suitable for chewing;

(D) snuff or other preparations of pulverized tobacco; or

(E) an article or product that is made of tobacco or a tobacco substitute and that is not a cigarette or an e-cigarette as defined by Section 161.081, Health and Safety Code.

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