STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA HIGH LIFT,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 88-5236
	)	
DEPARTMENT OF REVENUE,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, K. N. Ayers, held a public hearing in the above styled case on February 21, 1989 at Tampa, Florida

APPEARANCES

For Petitioner: Richard C. Ballak, Esquire
101 North Monroe Street
Tallahassee, Florida 32301

For Respondent: Lee R. Rohe, Esquire and
Lealand L. McCharen, Esquire
The Capitol
Tallahassee, Florida 32399-1050

ISSUES

By letter dated September 27, 1988, Florida Hi-Lift, Petitioner, requested an administrative hearing to contest the decision by the Department of Revenue that Florida Hi-Lift owes sales taxes in excess of $15,000 plus penalties and interest on amount collected by Florida Hi-Lift from customers as charges for transporting equipment leased by Florida Hi-Lift to these customers.

At the commencement of the hearing, the parties stipulated to the first four findings of fact below.

Thereafter Petitioner called one witness, Respondent called one witness and nine exhibits were admitted into evidence. Since there is no dispute regarding the factual issues in this case, proposed findings of both parties are accepted.

FINDINGS OF FACT

1. Florida Hi-Lift, Petitioner, is in the business of selling, leasing, repairing and transporting aerial lift equipment.

2. Petitioner enters into rental agreements with customers who rent specific equipment F.O.B. Petitioner's location.

3. The lease agreement sets a fixed price for the rental of the equipment and allows the customer to pick up the equipment with the customer's own conveyance, hire a carrier to pick up the equipment, or request the equipment be picked up and delivered by Petitioner's conveyance. The customer pays for the transportation of the equipment by whichever method of transportation is selected. The rental charge is unaffected by the mode of transportation selected by the lessee.

4. Petitioner charged the customer sales tax on the rental of the equipment but not on the charges for transporting the equipment with Petitioner's conveyances.

5. The audit here involved covers the period February 1, 1984, through January 31, 1987, and assesses a total tax, penalty and interest through September 11, 1987 of $23,727.59 with interest at $5.29 per day until paid (Exhibit 2). The major portion of this tax and the only part contested herein is assessed on Petitioner's charges to its lessees for transportation of the equipment.

6. The equipment rental contract/invoice (Exhibit 9) under charges lists options, Damage Waiver nine per cent, Fuel, Delivery Pickup, and Other, with tax which Petitioner computed only on the rental charge for the equipment.

7. The Damage Waiver charge of nine percent was based on the rental price but no evidence was submitted regarding the basis for this charge. Regardless, no sales tax was added to this charge and a sales tax on this charge is not an issue.

8. Petitioner's sole witness, the auditor who initially assessed the sales tax on the transportation charge, testified that his decision to assess sales tax for this charge was influenced by the fact that charges for leasing and transportation were included on the same invoice.

9. Petitioner has a separate liability policy to cover equipment being transported on Petitioner's vehicles apart from the coverage of the equipment while not in transit.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings.

11. Section 212.05, Florida Statutes (1985), provides in pertinent part:

> It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, or who rents or furnishes any of the things or services taxable under this Chapter, or who stores for use or consumption in this state any item of tangible personal property as defined herein and who leases or rents such property within the state.
> (1) For the exercise of such privilege, a

tax is levied on each transaction or incident, which tax is due and payable as follows:

* * *

(d) At the rate of 5 per cent of the lease or rental price paid by a lessee or rentee or contracted or agreed to be paid by a lessee or rentee, to the owner of the tangible personal property.

12. Section 212.02(4) Florida Statutes (1985), defines sales price as:

> . . . the total amount paid for tangible personal property, including any services that are part of the sale, valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the purchaser by the seller, without any deduction therefrom on account of the cost of property sold, the cost of materials used, labor or service cost, interest charged, losses or any other expense whatsoever. "Sales price" also includes the consideration for a transaction which requires both labor and material to alter, remodel, maintain, adjust or repair tangible, personal property.

13. Rule 12A-1.045, Florida Administrative Code, (formerly 12A-1.45) provides Respondent's interpretation of Chapter 212 as it relates to transportation charges. This rules provides:

> (1) In those instances where the seller contracts to deliver tangible personal property to some designated place or is obligated under the contract to pay transportation charges to some designated place the transportation services are rendered to the seller and the taxable selling price of the tangible personal property so transported must include the amount of the transportation charge.
> (2) If the seller contracts to sell tangible personal property f.o.b. origin, the title to the property passes to the buyer and the buyer pays the transportation charges, the transportation services are rendered to the buyer and are not a part of the taxable selling price. However, where the transportation charges are billed by the seller but documentation is inadequate to establish the point at which the title passes to the buyer, such charges shall be considered a part of the taxable selling price.
> (3) When the purchaser of tangible personal property pays delivery or transportation charges thereon direct to the carrier and does not deduct same from the

amount due the seller, such delivery or transportation charges are exempt.

14. Respondent contends that since there was no sale, title never passed to the buyer but rather there was transfer of possession only; and the "documentation is inadequate" to establish the point at which title passes to the buyer because title does not actually transfer.

15. This somewhat ingenious approach seems to take the position that although the lease provided possession by lessee was taken at lessor's premises, if the lessor subsequently transported the equipment under contract to the lessee, then the lessor did not transfer possession until the equipment reached the lessee's premises or job site and was unloaded from the lessor's conveyance.

16. In this connection, it is perhaps significant that the Uniform Commercial Code in Section 672.319, Florida Statutes, (1985) provides:

> (1) Unless otherwise agreed the term "F.O.B." (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which:
> (a) When the term is "F.O.B. the place of shipment," the seller must at that place ship the goods in the manner provided in this Chapter (s. 672.504) and bear the risk and expense of putting them into the possession of the carrier;
> (b) When the term is "F.O.B. the place of destination," the seller must at his own expense and risk transfer the goods to that place and there tender delivery of them in the manner provided in this Chapter (s. 672.503)

17. Here there is no dispute that the terms of the lease provide that the lease is f.o.b lessor's premises and, therefore, possession is transferred at lessor's place of business. When the lessee contracts with the Petitioner to transport the leased equipment to lessee's job site, Petitioner is performing the service as a contract carrier employed by the lessee who at this point in time is the shipper.

18. The fact that the Petitioner is performing two roles tends to muddy the waters unless these roles are kept separate. As lessor he transfers possession of the equipment at lessor's place of business to the lessee who then contracts with Petitioner to transport the equipment to lessee's job site. During this transportation period the lessee has responsibility for the safety of the equipment vis a vis the lessor and the carrier has responsibility for the safety of the equipment until it reaches its destination vis a vis the shipper. (lessee).

19. Petitioner maintains a separate insurance policy to protect itself from liability for damages to the equipment it is transporting in its role of carrier.

20. From the evidence presented it is concluded that possession of the equipment being leased is transferred to the lessee when the equipment is loaded

on the carrier's vehicle at the premises of the lessor whether the carrier is Petitioner, some other carrier or the lessee. As carrier Petitioner, contracts with the lessee to transport the equipment from the premises of the lessor to the site selected by the lessee. Since this transpotation charge is separate and apart from the lease charges and legal possession of the property is in the lessee the minute it is loaded on the carrier's vehicle, the charges for the transportation are not subject to sales tax. This is exactly what Rule 12A-1.045(2), Florida Administrative Code, above quoted states. Respondent must honor its own rules until they are amended or abrogated. Gadsden State Bank v. Lewis, 348 So.2d 343 (Fla 1 DCA 1977).

21. The mere fact that Petitioner charged the lessee both rental fees and transportation fees on the same invoice is not determinative of the propriety of assessing a sales tax on the transportation charges, although this appears to have been a major factor insofar as the auditor was concerned.

22. From the foregoing, it is concluded that the transportation charges here involved are not a part of the lease price, that Petitioner transports the equipment for the lessee in Petitioner's role as carrier and this transportation charge is not subject to a sales tax. It is

RECOMMENDED that the assessment for sales taxes on transportation services provided by Florida Hi-Lift to its lessees during the period February 1, 1984, through January 31, 1987, in the amount of $15,705.24 plus penalty and interest be withdrawn.

DONE and ENTERED this 7th day of April, 1989, in Tallahassee, Leon County, Florida.

K. N. AYERS
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

FILED with the Clerk of the
Division of Administrative Hearings
this 7th day of April, 1989

COPIES FURNISHED:

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AGENCY FINAL ORDER

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STATE OF FLORIDA, DEPARTMENT OF REVENUE
TALLAHASSEE, FLORIDA

FLORIDA HI-LIFT,

Petitioner,

vs. CASE NO. 88-5236

DEPARTMENT OF REVENUE,

Respondent.
_____/

FINAL ORDER

This case came before me for entry of a final order following entry of a recommended order by the Division of Administrative Hearings. A hearing was held on June 8, 1989 to consider the entry of a final order at which both parties appeared and submitted oral argument.

APPEARANCES

The following appearances were entered:

For Petitioner: Richard C. Bellak, Esquire
Fowler, White & Gillen
Attorneys at Law
101 N. Monroe Street
Tallahassee, Florida 32301

For Respondent: Lee R. Rohe, Esquire
Lealand L. McCharen, Esquire
Assistant Attorneys General
Department of Legal Affairs
The Capitol, Tax Section
Tallahassee, Florida 32399-1050

ISSUE

The issue in this case is whether Petitioner was properly assessed tax on the delivery fee of rental equipment as part of the "gross proceeds" of the rental operation.

FINDINGS OF FACT

1 through 9. Findings of Fact numbers 1 through 9 set forth in the Recommended Order are adopted and incorporated by reference in this Final Order as if fully set forth.

CONCLUSIONS OF LAW

1. Conclusions of Law numbers 1 through 3, 5, 10, and 12 set forth in the Recommended Order are adopted and incorporated by reference in this Final Order as if fully set forth.

2. Conclusion of Law number 4 set forth in the Recommended Order is modified so that the first sentence reads as follows.

> Rule 12A-1.045 Florida Administrative Code (formerly 12A-1.45) provides the Department's interpretation of chapter 212 as it relates to transportation charges where a sale of tangible personal property is involved.

In all other respects, Conclusion of Law number 4 is adopted and incorporated by reference in this Final Order as if fully set forth.

3. Conclusions of Law numbers 6 through 9, 11, and 13 set forth in the Recommended Order are rejected and the following Conclusions of Law are set forth in their place.

4. Section 212.02(2), Florida Statutes (1985), defines "sale" as:

> Any transfer of title or possession, or both, exchange, barter, license, lease, or rental, conditioned or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration [Emphasis added.]

5. This case does not involve the transfer of title to the equipment; therefore, the provisions of the Uniform Commercial Code, "Sales, do not apply. Section 672.106, Florida Statutes provides:

> A "sale" consists in the passing of title from the seller to the buyer for a price.

This statute indicates that in this case the Uniform Commercial Code's provisions relating to sales do not control over the provisions of the Sales and Use Tax Law, Chapter 212, particularly where the latter contains specific provisions defining a sale to include the transfer of possession in section

212.02(2), Florida Statutes. The Uniform Commercial Code contains no such provision.

6. This construction of the UCC is supported by the case law. See Sellers v. Frank Griffin AMC Jeep, Inc., 526 So.2d 147 (Fla. 1st DCA 1989). In that case the court stated that a closed end lease of a vehicle is not a "transaction in goods" for purposes of the UCC where there was no provision for the passage of title.

7. Section 212.02(21), Florida Statutes (1987) provides the definition of "sales price" to mean

> the total amount paid for tangible personal property ... including any services that are part of the sale ..

This definition is also in Rule 12A-1.016(2), F.A.C.

8. Section 212.05, Florida Statutes declares the legislative intent that anyone who engages in the business of renting things is "exercising a taxable privilege".

9. Section 212.05(1)(c) and (d), Florida Statutes states:

> For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable as follows:
> (c) At the rate of 5 percent of the gross proceeds derived from the lease or rental of tangible personal property
> (d) At the rate of 5 percent of the lease or rental price paid by a lessee or rentee, or contracted or agreed to be paid by a lessee or rentee, to the owner of the tangible personal property.

10. No exemptions for the above statutory provisions, as applied to Petitioner, can be found within section 212.08, Florida Statutes.

11. Rule 12A-1.071(1)(a), F.A.C., defines "lease" to include:

> any rental or license to use tangible personal property, unless a different meaning is clearly indicated by the context in which it is used. The term refers to all transactions that are not bailments in which there is a transfer of possession of tangible personal property, without regard to limitations upon the use, for a consideration, without a transfer of title to the property. It is not essential for a transfer of possession of tangible personal property to include the right to move the tangible personal property. It includes a transaction

> under which a person secures for a consideration the temporary use of tangible personal property which although not on his premises, is operated by or under the direction or control of the person or his employees. All leases of tangible personal property other than capital leases, sales-type leases, or direct financing leases are operating leases. Whether a transaction is a "sale" or a "rental, lease, or license to use" shall be determined in accordance with the provisions of the agreement.
>
> (b) Transfer of possession with respect to an operating lease means that one of the following attributes of tangible personal property ownership has been transferred:
> 1. Custody or possession of the property, actual or constructive;
> 2. The right to custody or possession of the property; or,
> 3. The right to use and control or direct the use of the property.
>
> (c) For am operating lease, tax applies to the gross proceeds derived from the lease of tangible personal property for the entire term of the lease when the lessor of such property is an established business, part of an established business, or leasing tangible personal property is incidental or germane to the lessor's business. Gross proceeds for purposes of this section include any interest charges whether or not separately stated, unless the interest charges are clearly imposed for late or other defaults under the lease.

12. Rule 12A-1.071(10)(b), F.A.C., further delineates what constitutes a rental:

> (b) When the operator of the equipment is on the payroll of the lessee, the contract constitutes a rental of tangible personal property and is subject to the tax.

On the other hand, a service transaction is distinguished from rental transaction by Rule 12A-1.071(10)(d):

> When the owner of equipment furnishes the operator and all operating supplies, and contracts for their use to perform certain work under his direction and

> according to his customer's specifications, and the customer does not take possession or have any direction or control over the physical operation, the contract constitutes a service transaction and not the rental of tangible personal property, and no tax is due on the transaction.

13. Generally, the Florida Legislature has declared its intent to make a rental a taxable transaction. Section 212.05, Florida Statutes. Case law has been to this effect for quite some time. Kirk v. Western Contracting Corporation, 216 So.2d 503 (Fla. 1st DCA 1968)("Anyone engaging in business of renting tangible personal property...") See also; Crane Rental of Orlando v. Hausman, 518 So.2d 395, 396 (Fla. 5th DCA 1987).

14. No specific or express exemption exists for Petitioner under Chapter 212, Florida Statutes. Even were one to be found, it would be strictly construed against the party claiming such exemption. Adams Const. Equipment Co. v. Hausman, 472 So.2d 467 (Fla. 5th DCA 1985).

15. The issue in this case involves the taxability of the pickup and delivery charges alone. (The fee for equipment rental has been taxed, the taxes having been collected by Petitioner.) The Department considers the pickup and delivery charges to be part of the "gross proceeds" of Petitioner's rental income from rental contracts through application of section 212.05(1)(c) and (d), Florida Statutes, and Rule 12A-1.071, F.A.C.

16. The mere fact that Petitioner charged the lessee both rental and pickup and delivery fees on the same invoice is not determinative that the delivery charges were for services separately rendered to the lessee by the lessor. Nor is the fact that the pickup and delivery is separately or additionally insured. Pickup and delivery charges were considered by the Department to be part of the "total consideration that the lessee or buyer is obligated to pay."

17. Petitioner has failed to identify any exemption or clearly demonstrate why pickup and delivery charges for a rental operation are not part of the "gross proceeds" derived from the business of renting tangible personal property. The pickup and delivery charges are part of the contract with the lessee and the possession of the equipment does not transfer until the equipment is delivered. Nor has Petitioner demonstrated that the Department's interpretation of the statute and rule "is clearly erroneous or unauthorized." A mere difference of opinion, standing alone without more, over interpretation of the applicable statute and rule will not suffice. See Humhosco, Inc. v. Department of H & R Services, 476 So.2d 258 (Fla. 1st DCA 1985).

18. It is noted that Petitioner focused upon Rule 12A-1.045 for its legal basis. This rule does not apply because it concerns itself with delivery of items in a sales transaction and the associated transportation charges. Rule 12A-1.071, not Rule 12A-1.045, applies to rental transactions. It is Rule 12A-1.071 which the Department applied to the rental contracts, including pickup and delivery charges.

19. Without more from the Petitioner, the rule in Austin v. Austin, 350 So.2d 102 (Fla. 1st DCA 1977) applies:

> The law is well settled that long-standing statutory interpretations made by officials charged with the administration of the statutes are given great weight by the Court. Id. at 104.

CONCLUSION

On the basis of the foregoing, it is hereby ordered that the assessment in this case is upheld.

DONE AND ORDERED this 6th day of July, 1989 in Tallahassee Florida.

_____

KATIE TUCKER
Executive Director
Department of Revenue
Rm. 102, Carlton Building
Tallahassee, Florida 32399-1550

APPEAL RIGHTS

Any Party to this Order has the right to seek judicial review of the Order pursuant to Section 120.68, F.S., by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, Post Office Box 6668, Tallahassee, Florida 32314-6668 and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Order is filed with the Agency Clerk of the Department.

_____

Filed with the Clerks the
Department of Revenue, State of
Florida, this 6th day of
July, 1989.

COPIES FURNISHED:

Mr. Richard Bellak, Esquire
Lee Rohe & Lealand McCharen, Esquires
William D. Moore, Esquire
K. N. Ayers, Hearing Officer

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DISTRICT COURT OPINION

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

FLORIDA HI-LIFT,

Appellant,

vs.

DEPARTMENT OF REVENUE,

Appellee.
_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 89-1947
DOAH CASE NO. 88-5236

Opinion filed December 10, 1990.

An Appeal from an Order of the Depart.ment of Revenue.

Richard C. Bellak and Hala Mary Ayoub of Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Lealand L. McCharen and Lee R. Roche, Assistant Attorneys General, Tallahassee, for Appellee.

Benjamin K. Phipps, Tallahassee, for Heede Southeast, Inc., Amious Curiae.

BOOTH, J.

This cause is before us on appeal from an order of the Department of Revenue (DOR) upholding the assessment of tax on pickup and delivery charges on rental equipment.

The facts, as found by the hearing officer and adopted by DOR, are as follows:

> Florida Hi-Lift, Petitioner, is in the business of selling, leasing, repairing and transporting aerial lift equipment. Petitioner enters into rental agreements with customers who rent specific equipment F.O.B. Petitioner's location. The lease agreement sets a fixed price for the rental of the equipment and allows the customer to pick up the equipment with the customer's own conveyance, hire a carrier to pick up the equipment, or request the equipment be picked up and delivered by Petitioner's conveyance. The customer pays for the transportation of the

> equipment by whichever method of transportation is selected. The rental charge is unaffected by the mode of transportation selected by the lessee. Petitioner charged the customer sales tax on the rental of the equipment but not on the charges for transporting the equipment with Petitioner's conveyances.
>
> The audit here involved covers the period February 1, 1984 through January 31, 1987 and assesses a total tax, penalty and interest through September 11, 1987 of $23,727.59 with interest at $5.29 per day until paid (Exhibit 2). The major portion of this tax and the only part contested herein is assessed on Petitioner's charges to its lessees for transportation of the equipment.
>
> The equipment rental contract/invoice (Exhibit 9) under charges lists Options, Damage Waiver nine per cent, Fuel, Delivery Pickup, and Other, with tax which Petitioner computed only on the rental charge for the equipment.
>
> The Damage Waiver charge of nine percent was based on the rental price but no evidence was submitted regarding the basis for this charge. Regardless, no sales tax was added to this charge and a sales tax on this charge is not an issue.
>
> Petitioner's sole witness, the auditor who initially assessed the sales tax on the transportation charge, testified that his decision to assess sales tax for this charge was influenced by the fact that charges for leasing and transportation were included on the same invoice. Petitioner has a separate liability policy to cover equipment being transported on Petitioner's vehicles apart from the coverage of the equipment while not in transit.

The hearing officer recommended that the sales tax assessment on transportation services provided by Florida Hi-Lift to its lessees during the period of February 1, 1984, through January 31, 1987, be withdrawn. The recommended order quotes Section 212.05, Florida Statutes (1985), 1/ which provides for a five-percent tax on the lease or rental price paid by a lessee or rentee to the owner of the tangible property, and cites Rule 12A- 1.045(2) and (3), Florida Administrative Code, which provides:

> (2) If the seller contracts to sell tangible personal property F. O. B. origin, the title to the property passes to the buyer and the buyer pays the transportation charges, the transportation services are rendered to the buyer and are not a part of the taxable selling price. However, where the transportation charges are billed by the seller but documentation is inadequate to establish the point at which title passed to the buyer, such charges shall be considered a part of the taxable selling price.
>
> (3) When the purchaser of taxable tangible personal property pays delivery or transportation

> charges thereon direct to the carrier and does not deduct same from the amount due the seller, such delivery or transportation charges are exempt.

In his conclusions of law, the hearing officer held:

> Here there is no dispute that the terms of the lease provide that the lease is f.o.b. lessor's premises and, therefore, possession is transferred to lessor's place of business. When the lessee contracts with the Petitioner to transport the leased equipment to lessee's job site, Petitioner is performing the service as a contract carrier employed by the lessee who at this point in time is the shipper.
> The fact that the Petitioner is performing two roles tends to muddy the waters unless these roles are kept separate. As lessor he transfers possession of the equipment at lessor's place of business to the lessee who then contracts with Petitioner to transport the equipment to lessee's job site. During this transportation period the lessee has responsibility for the safety of the equipment vis a vis the lessor and the carrier has responsibility for the safety of the equipment until it reaches it destination vis a vis the shipper. (lessee).
> Petitioner maintains a separate insurance policy to protect itself from liability for damages to the equipment it is transporting in its role of carrier.
> From the evidence presented it is concluded that possession of the equipment being leased is transferred to the lessee when the equipment is loaded on the carrier's vehicle at the premises of the lessor whether the carrier is Petitioner, some other carrier or the lessee. As carrier Petitioner contracts with the lessee to transport the equipment from the premises of the lessor to the site selected by the lessee. Since this transporting charge is separate and apart from the lease charges and legal possession of the property is in the lessee the minute it is loaded on the carrier's vehicle, the charges for the transportation are not subject to sales tax. This is exactly what Rule 12A-1.045(2) Florida Administrative Code above quoted states.
> Respondent must honor its own rules until they are amended or abrogated. Gadsden State Bank v. Lewis 348 So.2d 343 (Fla. 1 DCA 1977).
> The mere fact that Petitioner charged the lessee both rental fees and transportation fees on the same invoice is not determinative of the propriety of assessing a sales tax on the transportation charges, although this appears to have been a major factor insofar as the auditor was concerned.

DOR accepted the hearing officer's findings of fact but rejected his reasoning and conclusions. DOR ruled that appellant's pickup and delivery charges were part of the "gross proceeds" of a rental transaction and were therefore taxable pursuant to Rule 12A-1.071, Florida Administrative Code, 2/ and Sections 212.05(1)(c) and (d), Florida Statutes. 3/ DOR also ruled that Rule 12A-1l.045, entitled "Transportation Charges," was inapplicable. The final order holds, in part, as follows:

> The issue in this case involves the taxability of the pickup and delivery charges alone. (The fee for equipment rental has been taxed, the taxes having been collected by Petitioner.) The Department considers the pickup and delivery charges to be part of the "gross proceeds" of Petitioner's rental income from rental contracts through application of section 212.05(1)(c) and (d), Florida Statutes, and Rule 12A-1.071, F.A.C.
> The mere fact that Petitioner charged the lessee both rental and pickup and delivery fees on the same invoice is not determinative that delivery charges were for services separately rendered to the lessee by the lessor. Nor is the fact that the pickup and delivery is separately or additionally insured. Pickup and delivery charges were considered by the Department to be part of the "total consideration that the lessee or buyer is obligated to pay."
> Petitioner has failed to identify any exemption or clearly demonstrate why pickup and delivery charges for a rental operation are not part of the "gross proceeds" derived from the business of renting tangible personal property. The pickup and delivery charges are part of the contract with the lessee and the possession of the equipment does not transfer until the equipment is delivered. Nor has Petitioner demonstrated that the Department's interpretation of the statute and rule "is clearly erroneous or unauthorized."
> It is noted that Petitioner focused upon Rule 12A-1.045 for its legal basis. This rule does not apply because it concerns itself with delivery of items In a sales transaction and the associated transportation charges. Rule 12A-1.071, not Rule 12A-1.045, applies to rental transactions. It is Rule 12A-1.071 which the Department applied to the rental contracts, including pickup and delivery charges.

We hold that the transportation charges in question were incident to a "sale," defined under Section 212.02(2) (a), Florida Statutes (1983) 4/ , as "any transfer of title or possession or both, exchange, barter, license, lease or rental, conditional or otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration." The foregoing provision was interpreted in Richard Bertram & Co. V. Green, 132 So.2d 24, 26 (Fla. 3d DCA

1961), cert. denied, 135 So.2d 743 (Fla. 1961), appeal dismissed, 136 So.2d 343 (Fla. 1961), wherein the court held:

> It is apparent from a reading of the definition of "sale" that a lease of tangible personal property is, in fact, a sale. When a statute contains a definition of a word or phrase, that meaning must be ascribed to the word or phrase whenever repeated in the same statute unless a contrary intent clearly appears.... The language of the sections involved being clear and the legislative intent determinable from the definitions given in the statute, the comptroller has no power to go outside the statutory definitions and give a different meaning to the words used in the statute, even though the comptroller's construction, in his mind, would increase the revenue of the State of Florida. [footnotes omitted]

In the instant case, the terms of the lease provide that the lease is f.o.b. lessor's premises, and therefore, possession is transferred at lessor's place of business. The customer selects the means of transportation, is responsible for the transportation charges, separate and apart from the rental price, and those charges are not deducted from the rental amount. Therefore, pursuant to Section 212.02(2) (a), Florida Statutes, and Rules 12A-1.045 and 12A-1.016, Florida Administrative Code,
the transportation charges are not taxable.

We find no statutory authority for DOR's imposition of sales tax on transportation charges as part of the gross proceeds of these rental transactions. The case is not, as contended by DOR, one of the taxpayer seeking an exemption from a lawful tax, but is rather a challenge to the validity of the tax. The rule governing here requires strict construction of taxing statutes against the taxing authority. Any ambiguity in the provisions of the tax statute must be resolved in favor of the taxpayer. Mikos v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc., 497 So.2d 630, 632 (Fla. 1986); Harbor Ventures, Inc., v. Hutches, 366 So.2d 1173, 1174 (Fla. 1979); Florida S & L Services, Inc. v. Department of Revenue, 443 So.2d 120, 122 (Fla. 1st DCA 1983); Indian River Orange Groves, Inc. v. Dickinson, 238 So.2d 125, 127 (Fla. 1st DCA 1970).

Accordingly, DOR's order assessing tax on appellant's transportation charges is reversed.

MINER AND ALLEN, JJ., CONCUR.

ENDNOTES

1/ Section 212.05, Florida Statutes, was amended in 1986 1987, but remains unchanged as to the issue before us.

2/ Rule 12A-1.071, Florida Administrative Code, defines "lease" to include:

> (1)(a)... [A]ny rental or license to use tangible personal property, unless a different meaning is

clearly indicated by the context in which it is used. The term refers to all transactions that are not bailments in which there is a transfer of possession of tangible personal property, without regard to limitations upon the use, for a consideration, without a transfer of title to the property....
(c) For an operating lease, tax applies to the gross proceeds derived from the lease of tangible personal property for the entire term of the lease when the lessor of such property is an established business, part of an established business, or leasing tangible personal property is incidental or germane to the lessor's business....

3/ Section 212.05, Florida Statutes, states:
(1) For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable as follows:
(c) At the rate of 5 percent of the gross proceeds derived from the lease or rental of tangible personal property
(d) At the rate of 5 percent of the lease or rental price paid by a lessee or rentee, or contracted or agreed to be paid by a lessee or rentee, to the owner of the tangible personal property.